

M.Phil. Thesis

Title: Administration of Juvenile Justice in Bangladesh



A thesis submitted in the partial fulfilment of the requirements of the University of Dhaka for the Degree of Master of Philosophy (M.Phil.)

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DECLARATION

I declare that the work contained in this thesis is my own and that it has not been submitted for assessment in another programme at this or any other institution at postgraduate or undergraduate level. I also confirm that this work fully acknowledges the opinions, ideas and contributions from the work of others.

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CERTIFICATION FROM THE SUPERVISOR

I certify that the thesis entitled “Administration of Juvenile Justice in Bangladesh” submitted for the degree of Master of Philosophy (M.Phil.) by Mr. Ahmed Ehsanul Kabir is the record of research work carried out by him bearing Reg. No. 113/2009-2010 under my guidance and supervision and that this work has not formed the basis for the award of any Degree, Diploma or any other academic award anywhere before.

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Abstract

Bangladesh is a densely populated small country where the rate of juvenile delinquency always remains high due to the socio-economic reasons. So, the effective administration of juvenile justice here may act as instrumental in preventing delinquency of children and ensuring their wellbeing as they are the future generation of the country. This research aims to unveil the real picture of the administration of juvenile justice system with historical setting from British period to present legal regime of Bangladesh. In addition, this research examines the existing legal framework in order to identify whether the framework is sufficient for establishing juvenile justice system duly or it requires reforms in line with international standards as introduced by the treaty law. This is a qualitative research based on primary and secondary resources. The study has immense value for the academics and the policy-makers. The relevant aspects of the current state of administration of juvenile justice with due criticism and recommendations might as act a thought-provoking element for the policy-makers to bring necessary reforms in the existing system. Moreover, this study explores many new aspects and dimensions of juvenile justice providing the scope of the further in-depth research. During the analysis of the juvenile justice system of Bangladesh, the legal framework has been discussed giving due attention to the substantive and procedural laws relating to the children in conflict with law. In addition, the establishment and the role of the Children Court under the Children Act 2013 have minutely explained referring the prevailing practices and procedures. In addition, an attempt has been taken to identify how far the best interests of the children have been protected in all the stages i.e. pre-trial, during trial and post-trial stages of the formal court proceedings. In this connection, the decisions of the Supreme court protecting and safeguarding the rights of the children in compliance with the UNCRC have also been mentioned. Then, it has tried to focus on the main aim of the juvenile justice system is that not to punish the children in conflict with law rather to reform and rehabilitate them in the society. So, the existing framework of juvenile justice in Bangladesh is still away from being fully compliant with international standards and the impediments to establish a child-centered justice system in Bangladesh are not well-articulated. Finally, recommendations have been given with a view to establish a comprehensive juvenile justice system in Bangladesh to uphold the best interests of the children.

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List of Abbreviations

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

List of International Instruments

Universal Declaration on Human Rights, 1948

Standard Minimum Rules for the Treatment of Prisoners, 1955

Declaration on the Rights of the Child, 1959

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention against Torture and other Cruel, Inhuman or Degrading Treatment, 1984

United Nations Standard Minimum Rules on the Administration of Juvenile Justice (The Beijing Rules), 1985

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, 1986.

Convention on the Rights of the Child, 1989

Basic Principles for the Treatment of Prisoners, 1990

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), 1990

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990

United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana/JDL Rules), 1990

Guidelines for Action on Children in the Criminal Justice System, 1997

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

UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 2000

Optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000

Optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000

UN General Assembly Resolution, No. A/HRC/ 11L.13 of 15 June, 2009, Guidelines for the Alternative Care for Children, 2009.

Committee on the Rights of the Child, Decision on the Administration of Juvenile Justice, 1999

Committee on the Rights of the Child, Decision on Children without Parental Care, 2004

General Comments 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), CRC/GC/2003/5 (2003)

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

Committee on the Rights of the Child, General Comment No.12, Right of the Child to be Heard, CRC/C/GC/12, 2009 Concluding Observations

Committee on the Rights of the Child, Concluding Observations on the initial report (CRC/C/3/Add.38) and the supplementary report (CRC/C/3/Add.49) of Bangladesh, CRC A/53/41, 1998

Committee on the Rights of the Child, Concluding Observations on the second periodic report of Bangladesh (CRC/C/65/Add.22) of Bangladesh, CRC CRC/C/133, 2003

Committee on the Rights of the Child, Concluding Observations on The Committee considered the combined third and fourth periodic report of the People's Republic of Bangladesh (CRC/C/BGD/4), CRC/C/BGD/CO/4, 2009

Chapter 1

Introduction

1.1 Introduction

Juvenile justice denotes justice must be accessible for all the children. A proper function of juvenile justice system ensures protection of child who has violated the law. So, juvenile justice system (JJS) is applicable for those children against whom the complaints of violating the criminal laws of the country have been brought.¹ Thus, juvenile justice system is regarded as the process for juveniles to have the support of the Government, community and the family members and in achieving their entitlements of protection.²

The notion that children shall not be treated as the smaller edition of the adult but must be treated considering their needs, emotions and development which actually underpinning the establishment of the new model for dealing with them, when they have committed the offences.³ The origin of the JJS can be traced from the American legal system by the opening of juvenile court in 1899 in Chicago. Before that in France in 1889, the legal protection was guaranteed for the abused and abandoned juveniles. Subsequently, in 1912 a specialized jurisdiction was instituted for juveniles that allowed children to obtain both supervision and educative assistance with the court system of France. In this way, French law began to create probation with regard to juvenile offender.⁴ Two factors stimulated to the creation of juvenile courts, first, the identification that children are different from adults in many respects and second that jails turned children into more violent criminals as such jails were not a place for children. Over the course of time, the most of the countries of the world have developed their own juvenile justice systems.

¹ Sumaiya Khair, 'Juvenile Justice Administration and Correctional Services in Bangladesh: A Critical Review' (2005) Journal of the Faculty of Law, the Dhaka University Studies Part – F, Vol. 16, No. 2, University of Dhaka, 1

² McShane Marilyn D. and Williams Frank P., (eds.), Encyclopedia of Juvenile Justice, (Sage Publication 2003) 216.

³ Shahdeen Malik, *The Children Act – A Critical Commentary*, (Save the Children UK 2004) 25

⁴ Catherine Blatter, 'Juvenile Justice in France: The Evolution of Sentencing for Children and Minor Delinquents', 39 (1999) British Journal of Criminology, 240, 241

There had been some laws and provisions for juvenile justice in British India and Pakistan period. These laws have little impact in the present development of the skeleton of the juvenile justice in Bangladesh. However, the actual beginning point of the juvenile justice administration in Bangladesh can be identified with the enactment of the CA, 1974 and the Children Rules, 1976. After repealing the Act of 1974 in 2013, new Children Act was enacted.

1.2 Statement of the Problem

The administration of JJS in Bangladesh has been governed by the Children Act (CA), 2013. After the enactment of the CA, 2013 up to eighteen all are treated as children. Up to nine years of age there shall be no criminal responsibility but from nine to twelve years there is limited criminal responsibility. So, from nine to eighteen years of age a child who has violated the law shall be brought before the children court. In many instances, it has been shown that children are considered as adult and tried with adult in the ordinary court without transferring the case to the Children Court. Before the enactment of the CA, 2013, a good number of cases decided by the apex Court of Bangladesh on the issue of pertinent date for the evaluation of the age of a child. But this issue has been settled by sec. 20 of the CA, 2013 that the relevant date for assessing the age of a child shall be the date of committing of the offence. Unfortunately, many trial courts are not aware of the recent legal development. In a number of cases, the Supreme Court held that the age of the child is relevant at the date of committing the offence not at the date of charge framing. In addition, for the purpose of determining the age of the child, the trial court earlier considered the size, facial appearance and height of the child which actually created incoherence in assessing the child's age. The law provides to assess the disputed age of the child on the basis of the birth certificate but the trial courts are erroneously giving emphasis on the appearance of the child.

At the time of arresting the children who have violated the law, the police officers are not complying with the provisions of the CA, 2013. Moreover, they treated the child like an adult. The law imposes responsibility to appoint child affairs police officer (CAPO) in every police station to deal with the children who will have better knowledge about the rights of the children who have violated the law. But, most of the police stations have not been equipped with the child rights' sensitized police officers. The common practice in the criminal justice system in Bangladesh is that to extract the

confessional statement from the accused persons after arresting them. The same thing happens with the children who have violated the law that they are forced in the police station to make confessional statement but such statement has no evidential value in the eye of law. After arresting a child without undertaking the formal trial procedure, he/she can be sent to the diversion. The diversion can be initiated at any level of the proceedings. Before taking the decision about diversion, family conference will be arranged under the auspices of the probation officer. In all steps, it has to be remembered that the child's best interest must be ensured. But in practice such pre-trial steps have not complied with by the law enforcing agencies. If the child has not been given the bail by the police officer, he/she must be presented in the court within twenty-four hours exempting the traveling time to the court. But in many instances, it is evident that the police station is making unusual delay to transfer the child to the court.

When the case has been filed in the police station against a child, the case is considered as general register (GR) case and in that situation the cognizance court will receive the case and send it for trial to the children court. But in practice, the cognizance courts are trying the children without sending them to the children court. The police officer who will conduct the investigation and submit the charge-sheet must bear in mind that there shall be separate charge-sheet for a child and the joint charge-sheet with adult is not admissible. Because of the lack of knowledge on the part of the police officer, they are submitting the joint charge-sheet to the court. The children court will have the sole jurisdiction to try a child who has violated the law. At the time of trial, children court shall remember that a combined trial of an adult with a child is absolutely forbidden. But the common scenario is that children are frequently tried with the adult. During the trial procedure, the children shall have the entitlement to participate in the presence and guidance of the appropriate guardian but in reality, they are attending the courtroom alone. At the time of trial, children must be kept in the safe custody and under no circumstances, children shall be sent to the jail custody. Due to the lack of sufficient number of safe custody in every district, children are kept in the jail violating the mandates of law. The children court shall give due importance to the social inquiry report submitted by the probation officer, unfortunately non-compliance becomes regular in this regard. The entire proceeding of the children court must remain confidential, publication of the identity, address and name of a child is strictly forbidden which is not followed by the journalists in most of the cases.

The court will pronounce the judgement and impose sentences, when the case has been proved on the basis of criminal standard of proof. At the time of passing sentence, the court must keep in mind that, the motive of the parliamentarians by passing the CA is to treat the child offender differently and to give them the chance to be rehabilitated and re-integrated in the society. The children court has the obligation to complete the trial within the stipulated timeframe. The decisions of the children courts can be reviewed after certain times and the court can release the children without imposing any condition. In children court, the helpless and distressed children will receive free legal representation and assistance under the Legal Aid Act, 2000. In case of inadequate legal representation and misconduct on the part of the lawyer, the court can discharge the lawyer from the professional engagement and give direction to the Legal Aid Committee of the concerned district or the Bar Council and the Bar Association of the concerned district to take legal action which is appropriate against such lawyer. It is very rare that the bench is active enough to take disciplinary step against the negligent lawyer. If a child has any resentments about the outcome of the children court, he/she can file an appeal to the High Court Division. Due to the complexity in the appeal process, most of the children are not preferred the right of appeal and consequently, unable to enforce their legal rights.

The Ministry of Social Welfare has been empowered to play the key role in maintenance of the supporting infrastructure of the juvenile justice. The government of Bangladesh established three National Correctional Institutions at Tongi, Jessore and Konabari which were renamed as Kishor Unnayan Kendra (Juvenile Development Centre) under the Social Services Department (SSD) in 2006. Under the CA, 2013 child development centers can be opened at the initiatives of the private levels which have not seen the daylight yet.

In 1990, Bangladesh became the signatory country to the United Nations Convention on the Rights of the Child (UNCRC) and it is the responsibility of the Bangladesh to implement the obligations of the UNCRC at national level. With a view to apply the mandates of the UNCRC, the CA, 2013 was enacted. But to some extent this law is incompatible with or lag behind the standards as set out in the UNCRC and other international conventions. A series of cases have been held by the apex Court of

Bangladesh upholding the best interest of the children. But, no comprehensive reform about the administration of JJS has not been materialized. In addition, the responses of the other Asian states have also taken into consideration. Thus, a child-focused administration of JJS is much needed for the children's best interest in Bangladesh.

1.3 Background of the Research

Historically, the JJS of Bangladesh has remained deliberately under-addressed.⁵ Because of non-implementation of the children Act and non-enforcement of children policy make the JJS inactive. Therefore, children who have violated the law facing many difficulties and the objective of the system has been failed. Recently, the Government has paid more attention to the juvenile justice system. Therefore, during the recent years, lots of developments have been taken place in the JJS. New laws policies, action plans, civil society role and judicial activism can be noticed relating to the JJS. After the enactment of the CA, 2013, new provisions have been enshrined to safeguard the interests of the children. But all these provisions are not fully complied with the UNCRC and the international standards. Moreover, the courts are not fully aware about the new provisions which actually causes hindrances to conduct of the trial following the CA, 2013. The apex court has played the role of a correctional body as trial courts are frequently misconceived the inherent features and objectives of the CA. It is highly essential to identify the common mistakes in the implementation process of the Act and also to provide necessary recommendations to overcome these impediments. In such background, this research has been conducted to evaluate all the improvements made and advancement achieved so far, which will give a transparent idea about the prevailing system and to locate the impediments in the path of establishing a child-focused juvenile justice system in Bangladesh.

1.4 Literature review

The creation of social setup and corrective criminal justice for the protection and development of children free from anti-social behaviours and criminal acts has become one of many socio-criminal issues confronting modern state-centric societies today. As

⁵ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, (Save the Children UK 2008) 1

a result, the administration of a reformist juvenile justice system has assumed and will continue to assume daunting challenge for good governance. Bangladesh which is densely populated small country where the rate of juvenile delinquency always remains high due to the plenty of socio-economic reasons; the proper administration of juvenile justice here may act as instrumental in preventing delinquency of children and ensuring their wellbeing as the future generation of the country. Several prominent researchers like Professor Dr. Mizanur Rahman, Professor Dr. Borhan Uddin Khan, Professor Dr. Muhammad Mahbubur Rahman, Professor Dr. Sumaiya Khair, Professor Dr. Nahid Ferdousi, Dr. Shahdeen Malik and Justice M Imman Ali have worked on the juvenile justice system of Bangladesh.

Justice Imman Ali J., in his book “Towards a Justice Delivery System for Children in Bangladesh, A Guide and Case law on Children in Conflict with Law”⁶ stated that Bangladesh is one of the first signatories to the UNCRC and is bound to take steps for implementing the provisions thereof. But in reality, there is not any mechanism in the legal system of Bangladesh. Juvenile justice system comprises of multiple inter-connected justice systems. These include police officers, prosecutors, courts, lawyers, social case workers, probation officers, detention facilities, rehabilitation, prevention and diversion programme. In practice the personnel of concerned agencies do not maintain proper communication with each other. There is no systematic and child-centered approach among these agencies.

Children in conflict with law are entitled to receive the special protection under certain other laws such as the Penal Code, 1860, the Code of Criminal Procedure, 1898, the Special Powers Act, 1974 and the Suppression of Oppression against Women and Children Act, 2000 etc. Provisions regarding juvenile justice are scattered in various laws and most of these laws are not child-friendly. Dr. Malik argued in his book “the Children Act 1974: A Critical Review”⁷ that there is no comprehensive law and separate juvenile justice policy for prevention and protection of juveniles in which positive legislation having opportunities for physical, moral and intellectual development of children is addressed.

⁶ M Imman Ali, *Towards a Justice Delivery System for Children in Bangladesh, A Guide and Case Law on Children with the Law* (UNICEF 2010) 10

⁷ Shahdeen Malik, *The Children Act, 1974: A Critical Commentary* (Save the Children UK 2004) 15

Professor Dr. Borhan Uddin Khan and Professor Dr. Muhammad Mahbubur Rahman in their book on “Protection of Children in Conflict with the Law in Bangladesh”⁸ identified that the global approach to prevention of juvenile delinquency and the protection of young offenders through the administration of justice has undergone vast transformations under the auspices of the United Nations. In 1948 the General Assembly of the United Nations approved a slightly expanded version of the Declaration of Geneva and went on to adopt a new instrument named Declaration of the Rights of the Child. The UNCRC obliges the State Parties to “undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized” therein.⁹ Unfortunately, Bangladesh has not fully complied with the provisions of the UNCRC.

Since children are tried in ordinary court along with the adult offenders, the inability to provide a separate trial system for juveniles is another procedural flaw identified by Professor Mizanur Rahman in his book “Tracing the Missing Cord: A Study on the Children Act, 1974.”¹⁰ Most of the court officials do not have proper training and knowledge about the code of conduct for juvenile and the environment of the courts is not child-friendly.

From the literature review it becomes clear that Bangladesh should create a child-focused juvenile justice system identifying the basic judicial guarantees in every sphere of the proceedings. The children’s best interest must be regarded as the pole star for the Juvenile Justice System. Children are the neglected groups of the society and they must be treated by the stakeholders of the juvenile justice system accordingly. The separate trial, separate court and separate safe home for the children will help them to rehabilitate in the society and they will not bear any trauma relating to the formal justice process. The sentencing policy should develop in a way to reform the child not to punish them. The age determination process must be conducted before the court in a uniform manner. Above all, the obligations under the UNCRC must be implemented in every sphere of the Juvenile Justice System in Bangladesh.

⁸ Khan and Rahman, *supra*, p. 5

⁹ Article 4, Convention on the Rights of the Child [1989]

¹⁰ Mizanur Rahman, *Tracing the Missing Cord: A Study on the Children Act, 1974* (Save the Children UK 2003) 34

1.5 Research Questions

The primary question is whether the administration of juvenile justice in Bangladesh is upholding and protecting the rights of the children in conflict with law? Then the secondary questions are:

1. What are the basic challenges to establish a JJS in compliance with the international obligations set out by the UNCRC and other international legal instruments?
2. How far the Children Act, 2013 has been implemented to ensure a child-focused JJS in Bangladesh?

1.6 Objectives of the Research

The general objective of the research is to analyse critically the legal framework, court procedure and alternative methods of the JJS and to establish an effective JJS in Bangladesh.

The specific objectives in this regard are:

- a) To identify the chronological development of the juvenile justice system in Bangladesh;
- b) To examine the gap and compliance between the international legal instruments with the domestic legislations;
- c) To identify the basic challenges to establish a child-focused juvenile justice system in Bangladesh;
- d) To evaluate how far the legal framework under the Children Act, 2013 has been implemented to protect the rights of the children in conflict with law.
- e) To make recommendations for the establishment of the comprehensive JJS in Bangladesh to uphold the best interest of the children.

1.7 Research Methodology

This research work is based on both primary and secondary sources. Primary sources of this research include the text of the Children Act, 2013, relevant case laws of the High Court Division and Appellate Division of the Supreme Court of Bangladesh as published in the various law reports in Bangladesh, mainly 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. Besides, other relevant laws relating to children including the Code of Criminal Procedure, 1898, the Penal Code, 1860, the Majority Act, 1875, Nari-O-Shishu Nirjatan Daman Ain, 2000 etc. In addition, international child rights standards in particular the UNCRC as a binding instrument on Bangladesh as well as other available soft-law standards. For critical review and analysis of the relevant policies, laws, rules, data, books, reports and other forms of written materials, the method of content analysis has been used. The descriptive method has been employed in the study to describe systematically the present status of juvenile justice.

The secondary sources include official documents of the government and Non-Government organisations, research reports, books, articles, journals, newspapers, publications and websites. The secondary data were collected through document analysis of relevant official documents of concerned ministries, correctional centres, police departments, annual reports, books, journals and other forms of written materials. The collected data and information from the secondary sources have been carefully reviewed, edited and scrutinized on the basis of research objectives. A literature review of relevant studies, reports and other publications has been undertaken and the information and findings contained therein have been described, analyzed and evaluated. Logical arguments have been raised to make points and clarify the confusions. Emphasis has been given on qualitative analysis.

1.8 Scope and Limitations of the Research

In this research, the legal and regulatory frameworks of the administration of juvenile justice system in Bangladesh have been discussed. In the legal framework, an initiative has been taken to identify the both substantive law and procedural law relating to the children who have violated the law. In regulatory framework, the stakeholders which are integral to the administration of justice such as police, probation, child development centers, certified institutes and their roles have been analyzed. So, the policy makers and academicians can initiate further in-depth research on juvenile justice system. The research has some limitations. The juvenile justice system in Bangladesh contemplates the legal response to two types of children, namely those who have violated the law and becomes the victim or witness of the offences. The research has not focused on juvenile delinquents, but how they will be treated in the JJS of Bangladesh is the main concern.

For being time bounded and lack of resources, the limitations could not entirely be surmounted.

1.9 Framework of the Research

The research work has been divided into six chapters.

Chapter one encloses introduction, background of the study, research question, objectives of the research, scope and limitations of the research and methodology of the research.

Chapter two focuses on the brief historical development of the JJS. This includes the legal history of the JJS during the British and Pakistan era and the improvements taken place in the Bangladesh regime. While dealing with the legal developments, this chapter highlights on the different laws and provisions regarding protection of juveniles in different periods.

Chapter three examines the UNCRC and other relevant human rights and juvenile justice instruments that have fixed the standards for the juvenile justice systems. In addition, there are three more international instruments which have a direct bearing on the JJS which have also been examined. This chapter reviews of the particular provisions of CA, 2013 concerning JJS, to determine what extent these laws are compatible with or lag behind the standards system set under article 40 of the UNCRC. Along with the analysis of compatibility and gap with the UNCRC this chapter also focuses on the challenges that apparently contain relating to the administration of juvenile justice under the CA 2013. In addition, the responses of other States in respect of the international standards relating to the JJS have been analyzed.

Chapter four analyses the trial process, court environment and jurisdictions of the children court under the CA, 2013. This chapter has dealt with both the legal and regulatory frameworks of the JJS in Bangladesh. Under the legal framework, the provisions of the CA, 2013 have been explained. In pre-trial stage of the JJS, the determination of a child, minimum age of criminal responsibility (MACR), arrest, investigation, bail and diversion have been discussed. The trial stage will cover the powers and jurisdiction of the Children Court, the mode of trial before the children

court and legal representation and assistance in the Children Court. The post-trial stage deals with the sentencing by the children court and process of appeal and revision. The analysis of the decisions of the apex court has been undertaken to highlight the level of awareness and pattern of response of the judiciary in Bangladesh relating to the JJS.

Chapter five makes an endeavor to conduct a comparative study with the JJS of Nepal and takes lessons from the experiences of the JJS of Nepal.

Chapter six provides the recommendations to improve and establish a comprehensive JJS to uphold the best interest of the children in Bangladesh.

1.10 Conclusion

Children are the neglected groups of the society. They are not born as delinquents. They are being exploited by their surroundings and environment. Although juvenile delinquency has been considered as one of the major social problems in the context of Bangladesh, but the JJS has not yet been developed adequately. The existing legal system does not ensure proper justice for them and their reintegration in the society. There are insufficient number of correctional centers and the law enforcing agencies are not responsible. Most of the concerned agencies are unaware about the children laws and justice system for the children. There is no systematic and child-friendly approach among the concerned agencies. The research found that the present JJS is not upholding the children's best interests in Bangladesh. Thus, for effective functioning of the JJS, the children court must be sensitized about the interests and rights of the children.

Chapter 2

Historical Development of the Juvenile Justice System in Bangladesh

2.1 Introduction

Every nation has the judicial mechanism to try the juvenile delinquents. Bangladesh also has a rich history of promulgating laws, regulations and policies for the juveniles which has been devolved from the British rule in the territory of the Indian sub-continent. The historical development of the JJS in Bangladesh has been classified into three eras with references to policies and laws on juvenile justice. These are as follows: British Period from 1773 to 1946; Pakistan Period from 1947 to 1970; Bangladesh Period from 1971 to till to-date. In this chapter, the evolution process of the JJS in Bangladesh has been discussed pointing out the key developments taken places in different era.

2.2 The British Period

In this period, there was no comprehensive approach to ensure the interests of the children in British India. Juvenile offenders were tried in the criminal justice system in the same way as adult offenders.¹¹ The East India Company dominated a large part of India from 1773 to 1849, which began as a business enterprise in 1608. After the failure of the company, the Crown took over the rules, through the Governor-General. The suppression and oppression of the colonial rulers destructed the agricultural economy and forced the unemployed citizens to move into the city which actually resulted into the increasing of the child offenders. For that reason, separate law was promulgated for the treatment of the children. In 1834, the first law commission was appointed and which performed a vital role in the evolution of the special laws relating to the children. Therefore, the Apprentices Act, 1850, the Whipping Act, 1864 and the Reformatory School Act were enacted. The legislations adopted earlier i.e. the Apprentices Act, 1850, the Reformatory Schools Act, 1897, the Borstal Act, 1929, the Children Acts, 1920 recognized the need to protect children but failed to address the real support and care for the children.

¹¹ Borhan Uddin Khan and Muhammad Mahbubur Rahman, 'Local Government Level Restorative Adjudication: An Alternative Model of Justice for Children in Bangladesh' [2009] Commonwealth Journal of Local Governance, Issue 4, 27

2.2.1 The Apprentices Act 1850

During the colonial regime, in 1843, Lord Cornwallis established the first center for children addressed as the “Ragged School”. The aim was to correct the child delinquent who had been arrested, by engaging them into the training programme which provided the basis for passing of the Apprentices Act 1850¹². The foundation of juvenile justice legislation in British India can be identified to the promulgation of the Apprentices Act of 1850 (the 1850 Act). The 1850 Act was passed almost three years after its British counterpart, the Children’s Act of 1847, which provided different modes of trial for adults and children. The motive of the 1850 Act was to maintain the relationship between employers and employees. However, the legislation imposed punitive terms for juveniles from the ages of 10 to 12 who had committed offences petty in nature. The 1850 Act was the first in a series of laws that gave special legal recognition to juveniles as a distinct legal category capable of being held criminally responsible.

2.2.2 The Whipping Act, 1864

During the British reign this Act was enacted to treat the children through whipping and give them a good lesson so that they will not repeat the same offence. As per sec. 5 of the Act, all persons under the age of sixteen years were treated as children for the purpose of the Act and there was an option to conduct the enquiry about the assessment of the age of the offender. The finding of the court regarding the age of the child was considered as final.

2.2.3 The Reformatory School Act, 1897

Under this Act the reformatory schools may be established and the young offenders who committed the crimes as per the direction of the courts were sent to the reformatory schools. The Act empowered the local government to establish the reformatory school, which provided that the boys below the aged 15 years who imprisoned or transported should be placed in the reformatories. The detention period of juveniles in reformatory school varied from two to seven years, but after they reached to the age of eighteen years, the court would not keep them in such school. However, once they can manage gainful employment they will be released from the school.

¹² The Apprentices Act 1850

2.2.4 The Jail Committee of India, 1919-1920

The Jail Committee of India was established in 1919¹³ under the British rule and placed a report on the establishment of separate institutions and separate trials for juveniles. The committee discouraged the practice of transferring the juveniles to ordinary court and recommended that children courts should be established for trying the cases which were involving the young offenders and children. Following the recommendation made by the Jail Committee of India, the various Indian States had adopted their own Children Acts. The first Act relating to children in Madras was enacted in 1920, closely imitating by the Bengal and Bombay in 1922 and 1924. The above-mentioned Acts were closely connected to the Children Act, 1908 of England. Apart from the Madras, Bengal and Bombay, other provinces of India had not enacted any special legislation for trying the children who have violated the law.

2.2.5 The Bengal Children Act, 1922

For the Bengal province, in 1922, the Bengal CA was passed. This Act was significant in that it provided for the first time the establishment in any district or any other area of one or more special courts for hearing of charges against juvenile delinquents and for separate sitting of courts. This Act established the juvenile courts for the trial of child who was below the age of fourteen years.¹⁴ It was fairly a comprehensive legislation.

2.2.6 The Bengal Borstal School Act, 1928

The Jail Committee of India in 1919 – 1920 initiated the detailed survey on the conditions of the prisoners and children with a view to reform them by giving necessary education and training. The report recommended to establish the Borstal Schools and the Act was passed in 1928. One of the important features of the Act was to keep the children outside the prison. Under this Act, the children were given necessary training so that they can re-integrate in the society after their release.¹⁵

¹³ The Indian Jail Committee, 1919-1920

¹⁴ The Bengal Children Act 1922

¹⁵ Kiran Modi, Aneesha Wadhwa, Leena Prasad, 'The development of leaving care law, policy, and practice in India' [2021] Child & Family Social Work 231

2.3 The Pakistan Period

During Pakistan period four major laws had been enacted for trying the child who violated the law, i.e. the Probation of Offenders Ordinance 1960, the Punjab Borstal Act 1926, the Sindh Children Act 1955, and the Reformatory Schools Act 1897. The laws were there, but no effective implementation was taken place in the Pakistan era. Besides these laws, sec. 399 of Criminal Code of Pakistan 1898 enshrined the provision of confinement of a child offender who has been punished to imprisonment under the age of fifteen years of age will be send to the reformatory school established by the concerned Governments of the provinces.

2.4 The Bangladesh Period

2.4.1 The Children Act, 1974

Bangabandhu Sheikh Mujibur Rahman - the founder of the nation had taken many endeavours to ensure the improvements of the children. Under the leadership of Bangabandhu, some of the legislations were enacted for the safeguard of the children among them Children Act, 1974 was remarkable. When this law was enacted, there was no such law in the maximum countries of the world. After fifteen years of the promulgation of this law, in 1989, the UN adopted the UNCRC. The Bangladesh constitution has also emphasized to enshrine the articles for the advancement of the children. Art. 28(4) provides that the State can take special measures for the development of the children and women and for the improvement of any under-developed segment of the society. It was held in the *State vs. Md Raushan Mondal @ Hashem* that the CA, 1974 was enacted upholding the spirit of art. 28(4) of the Constitution.

The CA,1974 states the safeguard of the children who have violated the law or who becomes the victim or witness of the offences. This Act created the Juvenile courts for the children who violated the law. The roles of the Juvenile courts can be performed by the HCD, the Court of Sessions, Additional Session Judge, Assistant Session Judge. The manner of trial of youthful offenders were also specified in this Act. Part V of the Act dealt with the protection and care of the neglected and destitute children. Part VI of the Act dealt with offences for committing cruelty to children, for engaging the children in begging, for becoming drunk at the time of having the duty to deal with the

children, for handing over any liquor or drugs in dangerous nature to the child, for allowing child to enter and remain in place where drugs and liquor are permitted to sale, for accepting child in the brothel, for making child victim of seduction and for exploitation of child employees, for abetting escape of child. Part VII of this Act dealt with youthful offenders. Part VIII determined the provisions of detention and part IX provided for maintenances and the process of dealing with the convicted children¹⁶.

2.4.2 The Children Act, 2013

The novelty of ideas has been developed in the administration of the JJS from the inception of the concept of best interest. As a signatory country to the UNCRC, Bangladesh is under the obligations to follow the UNCRC. In this circumstance, the Honourable Prime Minister Sheikh Hasina has taken the initiative to promulgate the CA in 2013 by repealing the Act of 1974. The chief objective of the 2013 Act is to secure the protection of the children those are below the age of eighteen years by providing the options of alternative care, diversion, right of fair trial, rehabilitation in the society and the creation of the court which is child-focused in nature.

The foresightedness of Bangabandhu Sheikh Mujibur Rahman propelled the parliament to adopt the CA, 1974. This legislation which helped to develop not only the child-focused JJS but also ensures their interests when the children violated the law. Now-a-days, the CA, 2013, is the main law in JJS which has been adopted to follow the international standards as far as possible¹⁷. To make the JJS effective, institutional set up must be developed side by side. In order to establish a better society, the justice system must be child-sensitized. So, all the stakeholders such as researchers, academics, judges, police, probation services must give the full efforts to secure the ultimate interest of the children.

2.5 Conclusion

There are various laws in Bangladesh relating to juveniles but most of them are inherited from the British and Pakistan regimes. The historical analysis of legal

¹⁶ The Children Act 1974

¹⁷ The Children Act 2013

framework in the British and Pakistan period proved its most unsystematic approach towards juvenile justice. The laws were not enough to fulfill the children's best interests. There were no adequate plans and policies in the British and Pakistan periods. Thus, the administration of JJS was not integrated in the Bangladesh and still it requires modification and upgradation.

Chapter 3

Development of International Legal Framework of Juvenile Justice

3.1 Introduction

The UNCRC, 1989 and other relevant human rights¹⁸ and juvenile justice instruments are providing the standards for the functioning of the JJS. The main UN bodies such as ECOSOC, UNICEF and the Child Rights Committee (CRC) are showing the path globally to the development of the JJS. The UNCRC, International Covenant on Civil and Political Rights (ICCPR), 1966 and Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), 1984¹⁹ are considered as binding laws on juvenile justice and on the other hand, declarations and guidelines such as the Beijing Rules²⁰, the Riyadh Guidelines²¹ and the JDLs²² are considered as guiding rules. There are four international instruments which have a direct bearing on the juvenile justice system. These are the UNCRC, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Guidelines for the Prevention of Juvenile Delinquency, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

3.2 International Legal Instruments

International legal standards with regard to juvenile justice are framed through the four major instruments.

¹⁸ The International Convention on the Elimination of All Forms of Racial Discrimination [1965]; the International Covenant on Economic, Social and Cultural Rights [1966]; the International Covenant on Civil and Political Rights [1966]; the Convention on the Elimination of All Forms of Discrimination against Women [1979] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984]

¹⁹ <<https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>, > accessed 25 July 2020.

²⁰ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (often referred to as the 'Beijing Rules') [1985]

²¹ The United Nations Guidelines on the Prevention of Delinquency (often referred to as the 'Riyadh Guidelines') [1990]

²² The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (often referred to as the 'JDL Rules' or the 'Havana Rules') [1990]

3.2.1 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985

In 1985, the UNGA adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’). These rules contain the guidelines for the creation of the separate JJS which will protect the rights of the children. In 1980, the international community asked for adopting a new convention in the 6th UN Congress on the Prevention of Crime and the Treatment of Offenders. The main aim of the rule is to create a total framework for the JJS at national level.²³

3.2.2 The United Nations Guidelines on the Prevention of Delinquency, 1990

The UNGA adopted rules to prevent the delinquency which is known as the United Nations Guidelines on the Prevention of Delinquency (the ‘Riyadh Guidelines’) in 1990. This guidelines emphasis on the adoption of the diversion and restorative system which will focus to prevent the juvenile delinquency and will ensure the development and re-integration of the juvenile delinquent in the society. In addition, these guidelines provide for the development of the institutional framework to treat the delinquent children but should be used as a last resort. Under these guidelines it becomes the responsibility of the State party to abolish the degrading and humiliating punishment for the children in the schools and correctional institutes.²⁴

3.2.3 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990

In 1990, the UN General Assembly adopted the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the ‘JDL Rules’ or the ‘Havana Rules’). These rules contain provisions relating to non-deprivation of the liberty of the children, safeguarding the human rights of the children in detention, complying with the norms established by the international treaties and conventions, the safeguard of the rights of the children in the procedural and substantive law.²⁵

²³ <<https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile>> accessed 25 July 2022

²⁴ <<https://humanrights.gov.au/sites/default/files/Annexure%20F%20-%20Riyadh%20Guidelines.pdf>> accessed 25 July 2022

²⁵ <<https://juvenilejusticecentre.org/resources/united-nations-rules-for-the-protection-of-juveniles-deprived-of-their-liberty/>> accessed 25 July 2022

3.2.4 The United Nations Convention on the Rights of the Child (UNCRC), 1989

The UNCRC is the most widely recognised human rights treaty having fifty-four articles that include all the aspects of the life of a child and set out social, political, cultural, civil and economic rights of the children.²⁶ In 1990, Bangladesh became a signatory country to this convention and as a result, it is the duty of the government of Bangladesh to apply the UNCRC at the national level. The children are entitled to get the protection from the provisions of the UNCRC irrespective of any discrimination on the basis of background or status. The four basic principles of the UNCRC have been recognised by the Child Rights Committee for the effective implementation of the UNCRC at national layer such as principle of best interest, principle of non-discrimination, life, development and survival right and right to express views freely. Art. 3 of the UNCRC expects that all the State parties will treat the child's best interest as an embryonic consideration.²⁷ Though the definition of best interest cannot be found in the UNCRC but it indicates to a child's well-being which considers a number of issues, such as the child's views, the necessity of safe environment, family and identity.²⁸ Baroness Hale affirmed in *ZH (Tanzania) v Secretary of State for Home Department (SSHD)* that the best interests principle is a compulsory international obligation.²⁹ However, the principle of best interest is not only the procedural rule but also the rights of substantive nature.³⁰

The principle of dualism has been followed by the Bangladesh which means that upon ratification, any international convention does not become effective automatically and not applicable in the domestic court directly unless a new law has been enacted or existing law be amended in light with the ratified convention.³¹ However, the Act of 1974 was promulgated before the UNCRC, so it failed to address many obligations of

²⁶ <<http://www.unicef.org.uk/what-we-do/un-convention-child-rights/>> accessed 14 March 2017

²⁷ Jane Fortin, 'Are Children's Best Interests Really Best' – *ZH (Tanzania) (FC) v Secretary of State for the Home Department* (2011) 74 Mod L Rev 947

²⁸ UNHCR, *Guidelines on Determining the Best Interests of the Child*, <<http://www.refworld.org/docid/4848c342.html>> accessed 20 April 2020, 14

²⁹ Judith Ferby, 'A Legal Analysis of Child-sensitive Asylum Procedures', *Journal of Immigration, Asylum and Nationality Law* (2014) 28 IANL 255

³⁰ UN Committee on the Rights of the Child General Comment No 4, para 74 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1) CRC/C/GC/14.

³¹ M Imman Ali, *Towards a Justice Delivery System for Children in Bangladesh, A Guide and Case law on Children in Conflict with the Law* (UNICEF 2010) 29

the convention. In this regard, the HCD of the apex Court of Bangladesh stated in *The State vs. Metropolitan Police Commissioner*,³² that as a state party Bangladesh is under obligation to apply the mandates of the UNCRC at national level. Subsequently, the CA 2013 was enacted by repealing the CA, 1974 with a view to apply the provisions of the UNCRC. More recently a draft Children Rules has been drafted with detailed procedures to be followed and with a view to implement the same. In these circumstances, it becomes relevant to review of the particular provisions of CA 2013 concerning juvenile justice system, to determine what extent these laws are compatible with or lag behind the standards under art. 40 of the UNCRC.

3.2.5 The Guidelines for the Alternative Care of Children, 2009

In 2009, the UN General Assembly (UNGA) adopted the Guidelines for the Alternative Care of Children to promote the implementation of the UNCRC and the guiding principles of other international materials relevant to the safeguard of the children who are not getting the parental care. The foundation of the guidelines based upon two basic principles such as the principle of necessity and the principle of suitability. The core point of the principle of necessity is that children must not be put into the alternative care unless it is necessary. On the other hand, the suitability principle provides that the children will receive the alternative care after considering the circumstances, needs and best interests.³³

3.3 Obligation under article 40 of the United Nations Convention on the Rights of the Child

Article 40 of the UNCRC covers the rights of all children who are alleged to violate the laws of the country and also provides how they will be treated in every level of the juvenile justice system such as the lodging of allegation in the police station, the investigation process, the mode of arrest, the trial process, the imposition of sentences and sending them to the correctional or rehabilitation centers. This article emphasizes to open a separate justice system for the children and not to send them to the punitive or retributive system rather initiatives to be taken to re-integrate and rehabilitate them

³² 60 DLR 660

³³ Jennifer C. Davidson, Ian Milligan, Neil Quinn, Nigel Cantwell & Susan Elsley, 'Developing family-based care: complexities in implementing the UN Guidelines for the Alternative Care of Children, *European Journal of Social Work*' (2017) 20:5, 675

in the society. When the children are tried in the juvenile court, they must be treated respectfully and there shall be no such event in the justice process which will undermine their sense of dignity and act as an obstacle in the future re-integration process.

With a view to achieve the objectives embodied in article 40(1), State parties must ensure the minimum judicial guarantees when an allegation has been brought against a child that he/she has violated the laws. Such guarantees include presumption of innocence, the MACR, right to have legal representation, right to be informed about the charge, the matter to be determined by an independent, impartial and competent judicial authority in presence of legal representative, to take into account the age and situation, not to compel to give confessional statement, to examine the witnesses under conditions of equality, right to have the support or assistance of the interpreter free of cost, right to appeal and to have privacy in all steps of the trial.³⁴ Article 40 (3) further confers the responsibility on the State party to enact laws, set up procedure and establish institutions and authorities for the children who have violated the law. In lieu of the institution-based care such as supervision order and guidance, foster care, probation, educational facilities and vocational training programmes shall be made available for the children to ensure their wellbeing.³⁵

3.4 Responses of Bangladesh to International Standards

The requisites of Art. 40 of the UNCRC such as the obligation to create a justice-focused system for the children have been followed in the CA 2013. However, there are some areas which have not been covered by the CA 2013. So, initiatives have been taken to find out the gaps and compliances between article 40 of the UNCRC and the pertinent provisions of the CA 2013 under the following headings:

3.4.1 Presumption of Innocence

Article 40(2)(b)(i) of the UNCRC provides that the child who violated the law shall enjoy the benefits of the fundamental principles of the criminal law such as presumption

³⁴ Convention on the Rights of the Child [1989] art 40(2)

³⁵ *ibid*, art 40(4)

of innocence. The principle has also been reiterated in the Beijing Rules and treated as basic procedural safeguard. The similar provisions have been traced in the UDHR, 1948 and also in ICCPR, 1966. There is no section in the CA, 2013 relating to the presumption of innocence but as a general provision it can be found in the Constitution and in the rules of criminal law.

3.4.2 Duty to inform the charges to children and guardians

Article 40(2)(b)(ii) provides the child who has violated the law must be informed instantly about such violation and the charges which have been brought against him/her. The same thing to be informed to their parents or legal guardians so that they can take necessary legal preparation. Section 45 of the CA 2013 incorporated the similar provision that after being arrested by the police officer, it becomes the duty of the concerned officer to communicate with the parents, legal guardian of the children or member of the remote family, the children board as well as the probation officer without delay about such arrest.³⁶

3.4.3 To have legal representation and assistance

Article 40(2)(b)(iii) provides a child who has violated the law must be brought before the juvenile court which must be capable, free and neutral judicial authority to deal with the children fairly. At the time of trial, all the basic judicial guarantees such as legal representation, presence of the children personally and their parents or lawful guardians must be ensured. The court must take the decisions considering the age, situation and the children's best interest.

In line with the obligations of the UNCRC, the CA 2013 has ensured the legal assistance for the child who violates the law and who becomes the victim or witness. Sec. 55 of the CA 2013 provides, in a Children Court, a case can be tried in presence of a lawyer who will look after the interests of the child in judicial proceedings. If the parents failed to appoint a lawyer because of financial inability then a lawyer will appoint from the panel of the District Legal Aid Committee as per the provisions of Legal Aid Act, 2000.

³⁶ The Children Act 2013, s 45

In this way, the safeguard of the child to be legally represented has been guaranteed under section 55 of the CA, 2013. The lawyer who is representing a child at all times remains present during the proceedings of the case. If a lawyer is not able to represent the case, the court will adjourn the case until and unless the next lawyer has been appointed to deal with the case. It is the duty of the District Legal Aid Committee to appoint a new lawyer to represent a child within 30 days.³⁷ A lawyer representing a child in the children court must carry out his professional obligation with utmost importance and sincerity otherwise appropriate legal measures can be drawn against him by the concerned professional bodies.³⁸

3.4.4 To be determined by a competent, independent and impartial tribunal without delay

As mentioned earlier that every child accused has to be dealt with by a free, capable and neutral court without delay is delineated in article 40(2)(b)(iii) of the UNCRC. Art. 35(3) of the Bangladesh constitution provides that all the citizens are entitled to have a prompt and open trial by a free and neutral court created by law. In the pre-CA 2013 case laws, it was held that under no circumstances a child shall be tried or charged combined with an adult in the ordinary court.³⁹ If any verdict of sentence has been passed by the court which is not empowered to try the children then such order will have no legal effect.⁴⁰ Section 17 of the CA, 2013 provides, when a child has violated the law or became the victim or witness, only the children court can try such issues.⁴¹ For this purpose, in very district there shall be a children court to prosecute the matters relating to the children.⁴²

3.4.4.1 The sitting, environment and facilities of the Children Court

The environment of the children court must be informal in nature so that it will not create any detrimental impact on the children. The court will sit in the ordinary room without having witness box or the podium covered by the red clothes. The siting

³⁷ *ibid*, s 56

³⁸ *ibid*, s 57

³⁹ *The State v Deputy Commissioner, Satkhira and others*, 45 DLR 643

⁴⁰ *Shiplu and another v The State*, 49 DLR 53

⁴¹ The Children Act 2013, s 17(1)

⁴² *ibid*, s 16

arrangement must be made in a way that children can sit with their parents or legal guardians or members of the remote family, the probation officer and the lawyer representing the children. The proceedings of the children court must be conducted separately and the testimony of the adults must be recorded separately.⁴³

3.4.4.2 Determination of age by the Children Court

The determination of the age of the children will be conducted by the children court considering the date when the offence was committed.⁴⁴ When the child has brought before the court for violating the law or for giving any evidences and it appears before the court that the age must be determined then the court will initiate the necessary steps to evaluate the child's age.⁴⁵ On the basis of the findings after the investigation and inquiry, the children court will pronounce the age of the child.⁴⁶ When the process of determination of the age of the child is ongoing, the court may consider the documentary evidences and may call upon a person to give testimony in the court.⁴⁷

3.4.4.3 Persons allowed to remain and withdrawal from the Children Court

The child will have the right to remain present throughout the entire proceedings before the children court.⁴⁸ The persons who are entitled to attend the children court during the proceedings are limited. Only the relevant persons such as parents or legal guardian or the care giver, the staffs of the court, the both sides of the case, the police officer assigned for the children, the lawyers and the probation-officer can stay during the trial procedure in the children court.⁴⁹

3.4.4.4 Orders can be given by the Children Court

At the time of giving any verdict by the Children court, there are some factors which must be considered. The court has to consider the child's age, whether male or female, psychological condition, health, how far he/she studied, socio-economic background, ethnic origin, standard of life, causes which influence to commit the offence, any involvement with organized crimes groups, inquiry from the society and above all, the

⁴³ Draft Children Rules 2016, r 18

⁴⁴ The Children Act 2013, s 20

⁴⁵ *ibid*, s 21(1)

⁴⁶ *ibid*, s 21(2)

⁴⁷ *ibid*, s 21(3)

⁴⁸ *ibid*, s 22(1)

⁴⁹ *ibid*, s 23

child's best interest.⁵⁰ When the court has found the children guilty and passed any order in this regard must remember that they shall not refer the term as sentenced or convicted rather refer the terminology such as found guilty or finding guilty etc. It will help the children not to be stigmatized in the formal court procedure and also help them to rehabilitate in the society.⁵¹

3.4.5 Not to compel to give confession

In line with art. 14(3)(g) of the ICCPR, art. 40(2)(iv) of the UNCRC provides that a child who has violated the law shall not be forced to give self-incriminating statement or confessional statement. Art. 35 (4) of the Bangladesh constitution states that no citizen can be forced to give any statement which can incriminate himself. The confessional statement has some evidential value, if it has been taken complying with the provision of the Evidence Act, 1872. In a pre-CA 2013 case, *Bangladesh Legal Aid and Services Trust & Another v Bangladesh & Others*,⁵² it was held that when a child has made a confessional statement, it will not have any legal value. As a result, if the court allows the confessional statement of a child, then they are violating the established norms of law. In *Jaibar Ali Fakir v The State*,⁵³ the HCD held that the law must be changed relating to the admissibility of the self-incriminating statement of the child. But, in the CA, 2013 no provision has been incorporated prohibiting a child to give confessional statement. So, a certain section can be included for the safeguard of the child from giving self-incriminating statement either as a victim or witness of the offences or as an accused of the offences.

3.4.6 To examine the witnesses against or for under conditions of equality

Art. 40(2)(b)(iv) of the UNCRC and Article 14(3)(e) of the ICCPR provides that examination of children must be conducted strictly following the rules of evidence. Sections 135 to 140 of the *Evidence Act, 1872* state the mechanism of examination of witnesses. But in the *Children Act, 2013* no specific provision is available by which it can be ensured that the witness who is calling on behalf of the accused child and against

⁵⁰ *ibid*, s 30

⁵¹ *Ibid*, s 36

⁵² 22 BLD 206

⁵³ 28 BLD 627

him will be treated under conditions of equality. So, particular provision can be added for the safeguard of witnesses in the existing CA, 2013.

3.4.7 Right to appeal

Art. 40(2)(b)(v) provides if a child has violated the law and it has been proved that the child is guilty then the child is entitled to make an appeal against the verdict of the trial court. Sec. 41 of the CA 2013 provides the process of appeal when a child is aggrieved with the decision of the children court. He/she may prefer an appeal to the HCD within sixty days from the date of giving the verdict. The HCD will have also the right to hear the revision against the verdict of the children court.⁵⁴

3.4.8 To have the free assistance of interpreter

Art. 40(2)(b)(vi) of the UNCRC provides the child who has violated the law will get the support of an interpreter at the free of cost. Section 27 of the CA 2013 states that the child will get the full support of interpreter. If he/she is unable to get the language, there shall be an interpreter who will interpret the entire conversations in the children court.⁵⁵ All costs regarding the interpretation and assistance in taking testimony of the child such as sign language, colloquial language or foreign language or any other interpretation will be borne from the Public fund.⁵⁶

3.4.9 To respect the privacy

Art. 40(2)(b)(vii) of the UNCRC states that the child who has violated that law cannot be exposed publicly during the trial procedure, if such exposure is unavoidable then it must be minimum in nature. It was held in *Baktiar Hossain v The State*,⁵⁷ that the main rationale behind the creation of the children court is that children will not come into the contact with the adult offenders and the trial procedure will not create any stigma to them and they shall not get the trauma of any public trial. The pictures or details about the children cannot be reported in the newspaper and media.⁵⁸

⁵⁴ The Children Act 2013, s 41

⁵⁵ *ibid*, s 27

⁵⁶ Draft Children Rules, 2016, r 31

⁵⁷ 47 DLR 542

⁵⁸ *ibid*, s 28

3.4.10 Presumption of Incapacity

Art. 40(3)(a) of the UNCRC provides that the State party to the UNCRC must have responsibility to incorporate provisions relating to the MACR of the children who have violated the law. Sec. 82 of the Penal Code 1860 provides below nine years of age no criminal responsibility and there is limited liability when the age is between nine to twelve years.⁵⁹ In the report of 1997 to the CRC, Bangladesh affirmed the Committee that an agenda has taken to increase this age to twelve.⁶⁰ In 2015, the final remarks on the fifth cycle report of Bangladesh, the CRC has again reminded that the Bangladesh to increase the MACR in compliance with international standard which has not implemented yet.⁶¹

3.4.11 Alternative to judicial proceedings

Art, 40(3)(b) and Article 40(4) of the UNCRC provide the signatory country must take measures so that the children who have violated the law need not resort to the formal juvenile justice system. Rather, they can send to the alternative procedure where children can be corrected and re-integrated in the society. In line with the UNCRC obligation, the CA 2013 incorporated the alternative measures such as diversion and alternative care.

3.4.11.1 Diversion

When a child has been arrested for violating the law, he/she must be sent to the diversionary procedure instead of any formal mechanism. When such decision is taken, the court must consider all the aspects such as socio-economic background, ethnic origins, social standards, family ties, so that the child's best interest can be ensured. The child affairs police officer must take all the initiatives to settle the dispute without resorting to the formal court procedure.

⁵⁹ The age of criminal responsibility was raised from the earlier age of 7 to 9 in 2004

⁶⁰ Summary record of the CRC's 382nd meeting: Bangladesh, 30/05/1997, RC/C/SR.382

⁶¹ Concluding Observations on the Fifth Periodic Report of Bangladesh adopted by the Committee on the Rights of the Child at its Seventieth Session (14 September – 2 October 2015)

3.4.11.2 Alternative care

The alternative care has been incorporated in the CA 2013 to rehabilitate the children without transferring them to the institutional mechanism. To rehabilitate and re-integrate the children in the society is the basic consideration behind this provision. The children's best interests and the overall welfare can be ensured through implementing the alternative procedure.⁶²

3.5 Conclusion

The children who have violated the law are tried in the ordinary court in many instances and are not duly treated in the children court. The chief aim of the JJS is to keep the children away from the formal justice system. So, effective mechanism must be developed to treat the children properly in every stage of the JJS. To ensure the children's best interests the law and the practices must be designed coherently. The laws relating to children must be developed in light with the UNCRC. All the stakeholders relating to the JJS must be properly equipped with knowledge of the children law.

⁶² The Children Act 2013, s 84

Chapter 4

The Legal Framework of Juvenile Justice System in Bangladesh

4.1 Introduction

At present, special treatment for children is well-entrenched all over the world. Bangladesh has obligation to protect the children under both national and international laws. The idea behind the juvenile justice is that children must be dealt with special care. This chapter has dealt with both the legal and regulatory frameworks of the JJS in Bangladesh. Under the legal framework, the provisions of the CA, 2013 have been explained. In pre-trial level of the juvenile justice system, the determination of a child, MACR and arrest, investigation, bail and diversion have been discussed. The trial stage will cover the powers and jurisdiction of the Children Court, the mode of trial and legal representation and assistance in the Children Court. The post-trial stage deals with the sentencing by the children court and process of appeal and revision. The CA, 2013 delineates who is a child and the MACR. In addition, the process of arrest, detention, bail and the option of diversion have also incorporated in the Act of 2013. The main feature of the Act is that it has established a separate court of the children with detailed trial procedure. The children against whom the offences have been proved will be entitled to submit an appeal to the apex court. As a fundamental to the judicial standards, children will enjoy the right of legal representation. The Children who have not violated laws rather became witnesses of the incidents or victims of the offences are entitled to receive safeguards under the CA, 2013. This chapter identifies the judicial process and functioning of the juvenile court and also assesses the landmark decisions of the apex court of Bangladesh upholding the best interest of the children.

4.2 Pre-Trial Stage

In pre-trial stage of the JJS covers the determination of the age of a child, MACR, arrest, investigation, bail and diversion.

4.2.1 Definition of the child

The term 'child' has been defined under section 2(17) of the CA, 2013 as all persons who have not reached to the age of nineteen years must treated as children. A child in

conflict with law is a person who has violated the law or found as guilty after the trial⁶³ and a child in contact with law includes a child who becomes the victim of an offence or becomes the witness of any offence.⁶⁴

4.2.2 Minimum Age of Criminal Responsibility (MACR)

Sec. 82 of the Penal Code 1860 excludes children under the age of nine years from the criminal liability⁶⁵ and section 83 provides the child will have limited criminal liability above nine years and below the age of twelve years. Thus, a child who has not attained the age of nine years will not have any criminal responsibility. The chief aim of the statute is therefore, not to put the child in the punitive and retributive system rather to place them in the restorative format where they will have the opportunity to be rehabilitated and re-integrated in the society.

4.2.3 Relevant date for the determination of the age of a child

When the court will determine the age of a child, the pertinent date shall be the date of the committing of the offence irrespective of the provision of any laws, policies, rules and the decisions of the courts.⁶⁶

4.2.3.1 Presumption and determination of age of the child by the Children Court

When the allegation has been brought against a child, it becomes apparent to the court that he/she is not a child, in that circumstance, the court may initiate an investigation for the purpose of evaluating the age of the child.⁶⁷ After completion of the inquiry, the court shall keep the record of the outcomes and pronounce the child's age.⁶⁸ For the purpose of evaluating the age of the child, the children court will call for the registers, documentary evidence, information from persons or institutions. Moreover, the court will have the right to call a person or officer to adduce any document for proving the child's age. If the children court declares a person as a child, subsequently it can be disproved by adducing undoubted documentary evidence with adequate justification.⁶⁹

⁶³ The Children Act 2013, s 2(3)

⁶⁴ *ibid*, s 2(4)

⁶⁵ The age of criminal responsibility was raised from the earlier age of 7 to 9 in 2004 by Act XXIV of 2004.

⁶⁶ The Children Act 2013, s 20

⁶⁷ *ibid*, s 21(1)

⁶⁸ *ibid*, s 21(2)

⁶⁹ *ibid*, s 21(3)

4.2.3.2 The debate on the date of committing the offence or the date of charge framing

The decided cases of the Supreme Court have shown a debate on the issue to identify the pertinent date for the evaluation of the age of a child. In some cases, the apex court has taken the view that the date of committing the offence shall be considered as the pertinent date for the determination of the age of a child. On the other hand, some cases uphold that the date of charge framing will be considered as pertinent date for the assessment of the age of a child. It has to be noted here that all these cases were decided before the adoption of the Children Act, 2013.

Muhammad Imman Ali, J. in *Mehedi Hasan @ Modern vs State (Criminal)* observed that the occasion on which the age of the child is relevant; whether it should be taken into consideration at the time of committing the offence or at the time of charge framing and opined that this aspect has been wrongly interpreted by the Appellate Division in a series of cases where it has been held that the relevant time to consider the age is as on the date of framing the charge not the date of committing the offence. In support of his opinion, he has referred to the cases of *State vs. Md. Roushan Mondal @ Hashem*⁷⁰, *State vs. Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka*⁷¹, *State vs. Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others*⁷². He also relied upon the cases of *Protap Singh vs. State of Jharkhand and another*⁷³, *Jitendra Singh @ Babloo Singh and another vs. State of U.P.*⁷⁴, *Gopinath vs. State of W.B.*⁷⁵.

Whether the age of the offender should be taken into consideration at the time of committing the offences or at the time of charge framing was examined by Justice Imman Ali. He referred the decision of *State vs Md. Roshal Mondal @ Hashem*⁷⁶ where it has been held that the pertinent date to determine the age of the child would be the date of committing the offence since it is necessary to ascertain that the offender

⁷⁰ 59 DLR 72

⁷¹ 16 MLR 254

⁷² 19 BLT 376

⁷³ [2005] (3) SCC 551

⁷⁴ [2010] 13 SCC 523

⁷⁵ 1984 Supp SCC 228

⁷⁶ 59 DLR 72

understood the outcome of his actions and had the necessary mens rea on that occasion. This is evident from section 83 of the Penal Code, which clearly makes it a requirement for the Court has to be convinced that the accused had the mental capacity of understanding the consequence of his actions on that occasion meaning on the date of committing the offence. Justice Ali also mentioned to the case of *Protap Singh vs. State of Jharkhand*,⁷⁷ in this regard. In *Solaman vs State (Criminal)*⁷⁸, the HCD identified that the date of committing the offence will be considered by the trial court for the assessment of the age of the child. The HCD has referred the cases regarding this issue as decided previously by the HCD as well as the Appellate division in *Saiful Islam Jitu (Md) vs State (Criminal)*⁷⁹. The HCD observed:

“Though HCD in the cases of *Md. Shamim vs State*,⁸⁰ and *Monir Hossain vs State*,⁸¹ held that the trial by the Court in respect of an accused who was below 16 years at the time of commissioning offence is without jurisdiction; but the AD in the cases of *Abdul Monem Chowdhury @ Monem vs State*,⁸² and *Mona alias Zillur Rahman vs State*,⁸³ has not approved the above view of the HCD.”

In support of the statement that the pertinent date for evaluating the age of a child is not the date of the charge framing but the date of committing the offence, two decisions of the Supreme Court of India can be mentioned, such as the case of *Portal Singh vs State of Jharkhand*,⁸⁴ has decided that the pertinent date is the commission of the offence not the date when he/she has been produced before the court. Same view has been taken in the Case of the *Umesh Singh vs State of Bihar*⁸⁵. It was directed by the HCD in *Aslam Ali vs State*⁸⁶, to the Session Judge of the Women and Children Tribunal, Meherpur to conduct the necessary inquiry about the age of the child and if it found the accused as child then must be transfer the case to the children court. In *Rokib vs State*,⁸⁷

⁷⁷ [2005] (3) SCC 551

⁷⁸ [2006] 58 DLR 429

⁷⁹ [2013] 65 DLR 234

⁸⁰ 19 BLD 542

⁸¹ 53 DLR 411

⁸² 47 DLR (AD) 96

⁸³ 23 BLD (AD) 187

⁸⁴ [2005] 3 SCC 551

⁸⁵ [2000] 6 Supreme Court Cases, 89

⁸⁶ [2004] Criminal Appeal 1326

⁸⁷ [2017] Criminal Miscellaneous Case No. 37799

it was noted one of the main differences between the CA, 1974 and the CA, 2013 relates to the age of the person. Under the CA, 1974, a juvenile means who is below the age of sixteen years. In the CA, 2013 the age limit is 18 years. A person above sixteen years in terms of act, 1974, on the date of framing charge, was not a juvenile. In the present case, it appears from the record that the petitioner was minor at the time of committing the offence as per his admit card of Dhakhil examination, Birth Certificate, and National ID card which have been produced by the accused in the trial court. It is seen that the accused was born on 11.10.1991 and offence was committed on 30.08.2002. In fact, he was ten years ten month at the relevant time. The HCD has observed that the juvenile against whom the allegation of the offence has brought and who has not attained the age of eighteen years as on the date of committing such offence must come within the ambit of the CA, 2013.

4.2.3.3 Risk of Assessing Age on the basis of Appearance

It was considered by the AD of the SC in *Mehedi Hasan @ Modern vs State (Criminal)*⁸⁸ that whether the HCD was justified in affirming the finding of the learned Sessions Judge that from the size, the facial appearance and the height, the appellants appeared to him major and were above 18 years of age. To decide the point, the AD has referred the definition of child as given in sec. 2 sub-sec. (f) the CA, 1974. The AD then considered sec. 66 of the Act as pertinent.

After reading sec. 66 of the CA, 1974, the AD identified that the meaning of the term ‘appear’ is very important as used in sec. 66 sub-sec. 1 but the term has not been defined in the definition clause under sec. 2 of the CA, 1974. So, the court has relied on the definition of the term as given in different dictionaries. Though the dictionary meaning is not the authoritative exponents of the meaning of the word used in an Act of Parliament but referring to the rules of the courts of law⁸⁹ that words to be considered in their normal sense, the court consulted with the dictionary meaning of the term ‘appear’. As per the Chambers Dictionary, 10th edition “appear” means “to become visible” to present oneself formally before an authority, court, etc; to act as the legal

⁸⁸ [2014] 66 DLR (AD) 111

⁸⁹ *R v. Peters*, [1886] 16 Q BD 636 (Coleridge L)

representative or counsel for another; to come into view, to come before the public; to perform (on stage or on film); to be published; to be manifest; to seem.

The court also referred the golden rule of construction that all statutes are to be construed according to the plain, literal and grammatical meaning of the words and when words in a statute are transparent that they should be construed according to their tenor and meaning for that reflects the intent and purpose of a legislation; the court to construe a provision of a statute according to the simple meaning of the language used by the legislature as the language so supplied best declares the intention of the legislature and recourse to any other principle of interpretation is unnecessary. The Court further observed that the provisions of a statute cannot be interpreted in such a way that renders any part thereof meaningless or redundant. More so, interpretation of a statute cannot be such that negates the power given to a Court by the legislature and giving such interpretation, amounting to questioning the wisdom of the legislature. There is another cardinal principle of construction that the legislature never uses any word unnecessary or without any meaning or purpose and no word in a statute should be treated as surplus or redundant and a construction which would render any part of the language of a statute without any effect will normally be rejected.

The language applied in sub-sec. 1 of sec. 66 is very plain, simple, clear and unambiguous. Keeping in view the meaning in the dictionary of the term “appear” and from a reading of the words and it has been appeared that he is a child used in subsec. (1) of sec. 66, it prima facie appears to the AD that the legislature has given a plenary jurisdiction or power to the Court to take a first-hand decision by way of presumption of opinion as to the age of a person, whether he has been alleged to commit the offence or not, whenever is taken in the court other than for delivering evidence whether he is a child and then to make an inquiry in that respect as mandated in the section itself. Reading the sub-section in its entirety, it also appears to the AD that to take recourse to the process of investigation as to the age of the person so brought before a court and must record the finding mentioning the age, it is a pre-condition that the Court must first form the opinion that the person so brought before the court is a child.

The CA of 1974 is a special law and various benefits have been given in the Act to a child offender which are not available to an adult offender, so to give those benefits to

a child offender, the Court before whom a person is brought, must presume opinion first as to his/her age and if it appears to it that he/she is a child and then on inquiry as mandated in section 66(1) if it is determined that he is really under the age of 16, then and then only he/she would be given the benefits of the act. There is a good logic behind such scheme by the legislature. The reason is that there may be divergent types of cases which may come before a Court. There may be cases when admittedly in the FIR or in the petition of complaint as the case may be or in the charge-sheet and may be in a confessional statement made by such person, the age has uniformly been written or mentioned under 16, i.e. may be 14 years, 15 years or just under 16 years and such mentioning of age is not disputed by the prosecution or the private party concerned, then no presumption of a first-hand idea as to whether the person is a child or not would be needed or called for.

There may be cases when the age of the person so brought is mentioned in the above mentioned documents as 16 or any other approximate age (but not under 16) or even above, there may be cases where no age is mentioned and the person so brought claims to be a child by filing documents, but the prosecution or the state or the private party concerned opposes the claim of the person to be a child claiming that he/she is adult, i.e. above 16 or high. There may be cases where the age of a person is exaggeratedly mentioned by the complaining party or the law enforcing agencies to show him adult, but in fact, he is under the age of 16, yet there may be a case where only in one document, such as, the confessional statement made by a person under section 164 of the CrPC, the Court first has to form a first-hand idea that the person so brought is a child and, then and then, only it would be obligatory upon it to make an investigation as to the age of the person in the manner as stated in sec. 66(1) of the Act, 1974 and keep the finding recorded mentioning the age of the child.

The AD concluded by saying that a children Court shall be under an obligation to make an investigation as to the age of a child who has taken before the court whether charged with an offence or not, otherwise than for giving evidence as mandated in sec. 66(1) of the Act, 1974, if it appears to it (here the Sessions Judge) that the person so brought is

a child. Same view has been taken by this Division in the cases of *Bimal Das vs. The State*,⁹⁰ and *Abdul Munem Chowdhury @ Momen vs. The State*⁹¹.

4.2.3.4 Judges are not Experts in Assessing Age

Justice Imman Ali has observed that the Judges are not experts in assessing age and has also discarded the idea of evaluating the age on physical outlook and in support of his view, has relied upon the cases of *Mahomed Syedol Ariffin bin Mahomed Ariff vs. Yeah Oai Gark*,⁹² *Hasina Begum vs. State*,⁹³ and *Prafullah Kamal Bhattacharya vs. Ministry of Home Affairs, Government of Bangladesh*⁹⁴. Indeed doctors, some of whom during the course of their studies gain knowledge in age assessment have been denied the status of being experts in age assessment in a Privy Council decision.

In view of Justice Imman Ali, to exclude supporting documentary evidence because the Judge came to the conclusion that the accused has a physical appearance of being over 18 years is abandoning logic altogether. The personal opinion of a Judge cannot override documentary evidence. It is one thing to say that the documentary evidence is not acceptable because it has not been proved in accordance with the Evidence Act or that it has been proved to be false by expert or other evidence, and yet another to say that the document must be false because the Judge was of the firm view that the age of the accused was not as claimed. If the documents had been legally proved to be false or forged then that could lend support to the judge's view that the claimed age is false, but not vice versa. If the certificates relating to age were produced and exhibited without any objection, in which case there was no reason why they should be doubted, particularly since they are official documents issued by the appropriate authority and would have probative value under section 114 of the Evidence act unless and until they are proved to be false or forged. In all fairness, if the Judge had doubts he himself could have taken steps for verifying the veracity of the documents in question.

These days with the improvement of nutrition many boys aged about 14-15 years sport a moustache and beard. Conversely there are some men who never show growth of any

⁹⁰ 14 BLD (AD) 218

⁹¹ 47 DLR (AD) 96

⁹² [1916] AIR Privy Council 242

⁹³ 1 BLC 315

⁹⁴ 28 DLR, 123

beard. To say that a person who has a moustache and beard is ipso facto adult would be an arbitrary exercise of non-existent power and unjust denial of legal rights enshrined in statutes. Justice Imman Ali concluded that it is dangerous to state the age of an accused based only on visual assessment.

4.2.3.5 Consequences of failure to raise the age issue at the inception of trial

In *Mehedi Hasan @ Modern vs State (Criminal)*, another issue addressed by the HCD was with regard to failure of the accused to agitate the aspect of age and hence jurisdiction of the Court at the earliest stage. In this regard, from the verdict of the trial Court in the present case, it appears that opinion was noted about the age at the time of framing charge. Then palpably, it appears that age was an issue at the inception of the trial. Moreover, litigants depend largely on the vagaries and acumen of their counsel. The failure of counsel to take steps in any case should not necessarily take away the rights of the accused which is enshrined in law. There are some examples where the HCD has remanded the case to evaluate the age of the child.⁹⁵ The case decided by the apex Court of India in the case of *Gopinath Ghosh* exemplifies how the failure to claim to be a minor at the earliest stage does not deprive the accused from exerting his right even before the apex Court. The essence of the decision is that if the right existed at that time then the right subsists no matter at what stage it is claimed.

4.2.4 Arrest, Investigation, Bail and Diversion

Chapter VI of the CA, 2013 deals with the provisions relating to arrest, investigation, bail and diversion. The basic principle relating to arrest is that a child under the age of nine year shall not be arrested or detained under any circumstances.⁹⁶ A child shall not be detained or arrested under any law relating to the detention of preventive nature.⁹⁷

4.2.4.1 Procedures of Arrest and Investigation

A child shall not be treated inhumanely during arrest. After arresting a child, it becomes the responsibility of the concerned police officer to communicate the child affairs police officer promptly about the causes, places of arrest and subject matter of the complaint. In addition, the CAPO has to determine the age of the child primarily and must be

⁹⁵ *Monir Hossain (Md.) @ Monir Hossain vs. The State*, 53 DLR 411

⁹⁶ The Children Act 2013, s 44 (1)

⁹⁷ *ibid*, s 44 (2)

recorded in the file.⁹⁸ At the time of primary determination of age by the police officer, he has to verify the age on the basis of birth registration certificate or due to unavailability of the certificate, the school certificate will be considered. But if there is not such documents, if it becomes apparent to the concerned police officer that the said person is a child, then he will be considered as child under the CA.⁹⁹ After arrest before producing the court, a child shall be sent in the safe home and it must be ensured by the police station that he must not be placed with the adults.¹⁰⁰

After arresting a child when he is brought in the police station, the CAPO shall communicate with the parents of the child. If the child has no parents then the caregiver, or the responsible authority who looks after the child shall be informed. The child affairs police officer has further duty to inform the probation officer and the nearest child welfare board about the arrest of the child.¹⁰¹ If it is not possible to inform them as stated above then CAPO must submit a written report to the court on the date of first appearance stating the reasons for non-compliance with this provision.¹⁰²

The testimony of the child must be recorded by a CAPO in the presence of the parents or the legal guardian or the member of the family and the social worker or the probation officer. Taking into consideration the nature of the complaint against the child and the socio-economic condition, the CAPO may free the child after warning either in written form or orally in presence of the above-mentioned persons or can send him/her for diversion.¹⁰³ The investigation against the child shall be conducted as per the mandate of the CrPC.¹⁰⁴

4.2.4.2 Confessional statement of a child and its evidential value

The Confessional statement made by a child who has violated the law will not have any evidential value and not admissible. On the basis of this self-incriminating statement of a child cannot be convicted. There is no provision in the CA 2013 relating to the admissibility of the confessional statement of a child which could have easily incorporated in the legislation but it has been deliberately omitted in the CA to include

⁹⁸ *ibid*, s 44 (3)

⁹⁹ *ibid*, s 44 (4)

¹⁰⁰ *ibid*, s 44 (5)

¹⁰¹ *ibid*, s 45 (1)

¹⁰² *ibid*, 45 (2)

¹⁰³ *ibid*, s 47

¹⁰⁴ *ibid*, s 46

such provision by the legislature. In ratio of *Md. Anis Miah vs The State*,¹⁰⁵ the HCD states that the word in law will have certain meaning and the planned omission will have certain objective.

Prior to the enactment of the CA 2013, even in the CA, 1974, there was no such provision which authorized the recording of a confessional statement of a child under sec. 164 of the CrPC. The preliminary aim or objective of the CA 2013 is to secure the child's best interest in consonance with article 3 of the UNCRC. Because it is the constitutional mandate to respect the norms of international law as enshrined in art. 25 of the Constitution. Moreover, it was reiterated in *Hussain Mohammad Ershad vs Bangladesh and Ors.*¹⁰⁶ by the Supreme Court that it is the obligations of the Bangladesh to comply with the principles of international legal instruments and should incorporate those provisions in the domestic laws.

As the main spirit and purpose of the CA 2013 is to uphold the child's best interest, so the provisions of the CA will be explained in a manner coherent with the spirit which is called the rule of purposive interpretation. Due to immaturity and lack of proper understanding, a child can not speculate the consequences of the confessional statement. Children are not in a position to protest the blaming of crime in the formal environment of interrogation. They become nervous and admit the allegation of the commission of offences even though they have not committed such offences. Sometimes, it may happen that they will falsely confess the guilt on the belief that they will get benefit from it.

In the case of *Jaibar Ali Fakir vs The State*,¹⁰⁷ a child was sentenced by the trial court on the basis of his confessional statement. At the time of hearing the Appeal, the HCD reiterates the mental stage or immaturity of a child to realise the legal provision and gravity of the situations. As a result, they cannot understand the outcomes of their activities and they may anticipate that confessing the guilt will help them to gain early release. In this case, the HCD emphasized the importance of presence of the parents or legal guardians or any other member of his remote family and also a probation officer

¹⁰⁵ [2021] 15 SCOB HCD 37

¹⁰⁶ 21 BLD (AD) 69

¹⁰⁷ 28 BLD 627

at the time of recording the statement of the child by a police officer for investigation. The decision of the *Jaibar Ali Fakir's* case has been reflected in the wording of section 47 (1) of the CA 2013.

It is evident from the decision of *Bangladesh Legal Aid and Services Trust and another vs Bangladesh and others*¹⁰⁸ that a child was tutored by the police to give confessional statement before the magistrate and the statement was taken through forcefully and baseless commitment to make him free on giving the confessional statement. Before recording the confessional statement in presence of magistrate, the child was in a remand for two days in the police station from which inference can be drawn that under no circumstances the statement was voluntary. As a result, the HCD declared that the self-incriminating statement made by a child has no legal consequence and as such the conviction on the basis of such conviction must be set aside. The common practice in remand is that worst atrocities are taken place during interrogation in the police station. Because of the serious torture and the application of the third-degree method forced the accused to make a confession which is involuntary in nature. Moreover, the magistrates are regularly granting the application of remands which actually empowers the law enforcing agencies to extract confessions under violence and torture.¹⁰⁹ Art. 35(4) of the Bangladesh constitution guarantees the entitlements of a person not to be self-incriminated. So, the combined effect of the spirit of the CA 2013 and the constitutional mandate makes it clear that a confessional statement of a child recorded under sec. 164 CrPC cannot be applied against him and such statement will not have legal effect.

4.2.4.3 Provision of Diversion

After arresting a child who has violated the law, the process of diversion will be initiated at any level of the procedures in lieu of trial. Before giving diversion the familial ties, societal standard, cultural background, economical status, racial origin, mental condition and academic achievements of the child must be considered. There are two aims of the diversion, one is to ensure the best interest of the child and another to resolve the dispute.¹¹⁰ The CAPO may transfer the matter for diversion to the

¹⁰⁸ 22 BLD 206

¹⁰⁹ M. Rafiqul Islam and S M Solaiman, 'Torture and Police Remand in Bangladesh: A Culture of Impunity for Gross Violation of Human Rights' *Asia-Pacific Journal on Human Rights and the Law*, Vol. 4(2) 44

¹¹⁰ The Children Act 2013, s 48(1)

Probation officer at any stage of the proceedings after arresting the child to settle the dispute in an alternative way.¹¹¹ If diversion is undertaken, it becomes the responsibility of Probation Officer to monitor the conditions of diversion are complying with by the concerned child, parents, or in absence of the parental authority, the care giver, or the supervising authority, or legal guardian, or the extended family members.¹¹² When the conditions of the diversion violates by the above-mentioned persons then, the Probation officer shall immediately notify the issues in written form to the CAPO and the Children Court.¹¹³ The duration of diversion will be determined by the Children court or by the CAPO.¹¹⁴

4.2.4.4 Family conference

When diversion is undertaken it becomes the responsibility of the Probation officer to organise a family level conference to settle the dispute on the basis of priority.¹¹⁵ The decision will be taken in the conference considering the child's best interest and on the consensus basis which must be communicated to the Children court and CAPO. If the concerned child or any designated relatives are fails to comply or violates the decision of such conference, then the Probation officer shall notify in written form to the Children Court and the CAPO. If no decision can be taken in the conference on the basis of consensus, then the matter will be send to the children court or the CAPO for undertaking other type of diversion. The entire process of the family level conference will remain confidential and the statement of any person in such conference cannot be used as an evidence in any legal proceedings.¹¹⁶

4.2.4.5 Bail

After arresting a child if it has not been possible to make him free or transfer him/her to the diversion or to place him/her in the court then the CAPO may have the responsibility to release the child on bail without or with sureties. The child will stay in the custody of the parents. In case of unavailability of the parents, the burden rests on the caregiver, or the supervising authority, or the legal guardian, or the member of the

¹¹¹ The Children Act 2013, s 48 (2)

¹¹² *ibid*, s 48 (3)

¹¹³ *ibid*, s 51

¹¹⁴ *ibid*, s 50

¹¹⁵ *ibid*, s 49 (1)

¹¹⁶ *ibid*, s 49

remote family or the Probation officer. At the time releasing a child on bail, the CAPO will not consider whether the concerned offence is justifying the grounds of bail. When the child has committed any severe or heinous offence or to release him on bail is contrary to the child's best interest then CAPO shall not release the child on bail. If the CAPO has not granted the bail, the child shall be produced in the children court within twenty-four hours and exempting the time of travel. The children court may free the child on bail or give an order to keep the child in the child development centre or safe home.¹¹⁷ If the bail has not granted, the children court has to record the reason of such refusal.¹¹⁸ The *State vs Metropolitan Police Commissioner (MPC)*¹¹⁹ was held in 2008 before the enactment of the CA 2013. In this case, the HCD identified the duties of the police officer after arresting a child who has violated the law. The provisions referred in this case were the sections of the CA, 1974. At that time there was no provision of Child Affairs Police Officer (CAPO) and the duty officer in the police station was dealing with the child who has violated the law.

4.2.4.6 Prohibition on submission of joint charge-sheet against a child with an adult offender

The original provision relating to the proscription on submission of combined charge-sheet against a child in conjunction with an adult offender was enshrined in section 15 of the CA 2013. This provision has been amended and replaced in 2018 and by the same amendment a new provision section 15A has been inserted. Section 15 has been replaced as such:

“To prepare and taking cognizance of the Investigation report or Inquiry report of Enquiry report: (1) Notwithstanding anything contained in the Code of Criminal Procedure or any other law for the time being in force, if a child has involvement in the commission of an offence with an adult, separate police report in GR Case or investigation report in CR case will be prepared and submitted.

(2) when a crime has been committed jointly by an adult and a child, it has to be taken into cognizance separately.”

¹¹⁷ The Children Act 2013, s 52

¹¹⁸ *ibid*, s 29 (3)

¹¹⁹ [2008] 60 DLR 660

Section 15A which is a new section provides as follows:

- “after taking into cognizance to try a case a) it has to be transferred to the children court if child has committed the offence;
- b) when adult person has committed the offence, it has to be sent to the court having jurisdiction
- c) in both situations, the matter has to be informed to the public prosecutor.”

In *Md Hridoy vs State*¹²⁰, three questions were raised and after analyzing the mandate of the CA, 2013 the HCD provided the necessary directions for the concerned magistrate courts and the Children Court. The *first* question was whether the Children and Women Tribunals can use their names, seals and titles when conducting a case under the Children Act, 2013. The *Second* question was whether a Children Court can determine the age and grant a bail before the case has been sent from the cognizance court to the Children Court for trial. The *third question* was how far it was legal to consider the age of a child and grant of a bail by the children court before the case has been taken into cognizance by the Magistrate Court under sec. 15A of the CA, 2013.

When the appeal was made under section 41 of the CA 2013, the HCD dealt with these questions and decided accordingly. It was clearly stated in this case when the Women and Children Tribunal is acting as a Children Court under section 16(2), this court cannot use the name, title and seal of the said the tribunal and permitted to use name, seal and title of the children court.

In response to the second question, the HCD stated that after examining secs. 21, 29 and 52 of the CA 2013, it becomes clear that children court can determine the age, grant bail and give necessary orders before the cognisance of the offence has been taken by the magistrate court or the case has been transferred by the cognizance court to the children court under section 15A of the CA 2013. In this regard, the HCD has given references of similar special laws and their provisions such as sec. 27 of the *Special Powers Act, 1974*, Sec. 27 of the *Suppression of the Oppression against Women and*

¹²⁰ [2021] 15 SCOB HCD 13

Children Act, 2000 and Sec. 48 of the *Digital Security Act, 2018*. Under these special laws, all offences are taken into cognizance by the special courts established under the concerned legislations but in CA 2013 under section 6(3) the offence will be taken into cognizance by the Judicial Magistrate or the Metropolitan Magistrate which is identified by the HCD as not only inconsistent but also contradictory with the objectives of the of the Special Laws. In this context, the HCD recommends to add the name of the children court besides the judicial magistrate or metropolitan magistrate in section 6(3) of the CA 2013 by inserting necessary amendment.

In replying the third question, the HCD confirmed that it is lawful to determine the age of a child and grant of a bail and passing necessary orders before the case has been taken into cognizance by the judicial magistrate court and also before transferring the case and necessary papers from the cognizance court to the children court.

The HCD has observed that a chaotic situation is prevailing in both the HCD and the trial court relating to the application of the CA and to deal with the cases under this Act. To get rid of this chaotic environment and to eradicate inconsistency and contradictions in the CA 2013, urgent amendment is required as recommended by the HCD in *Md. Hridoy vs State*. Until such amendments have been incorporated in the CA 2013, the concerned magistrates and the children court will follow the following procedures at the time of dealing with cases under the CA 2013:

First, the concerned magistrate will only look after the investigation of the case and will give necessary directions concerning the routine work;

Second, the order of remand must be given by the children court. But the statements of the children those in contact with law as victims or witnesses will be recorded by the concerned magistrate;

Third, during investigation stage, the attendance of the children who have violated the law in the fixed date before the concerned magistrate court may be waived;

Fourth, during investigation stage, any interim matters including remand, bail, and age determination will be decided by the children court. In this regard, if any application has been filed in the concerned magistrate court that will be transferred to the children court with files and the children court will decide the matter.

Fifth, before taking into cognizance of the offence, if the Women and Children Tribunal passed any order, in that case the tribunal must use the name and seal of the Children Court;

Sixth, in complaint case, after filing the complaint before the concerned magistrate court, it becomes the responsibility of the concerned magistrate to take into cognizance the case under the children act and send it to the children court for trial;

Seventh, as the CA is a special law, so in all GR cases where children committed the offences, the investigation officer will submit the separate police report on the basis of which the concerned magistrate court will take into cognizance of the offences committed by the children.

4.3 Mode of Trial

The trial stage will cover the powers and jurisdiction of the Children Court, the mode of trial before the children court and legal representation and assistance in the Children Court.

4.3.1 Powers and Jurisdiction of the Children Court

Sec. 16 of the CA 2013 has been amended in 2018. By this amendment in every district the Women and Children Tribunal will be treated as Children Court. If in any district such court is not available then, the District and Session judge court will be considered as Children Court. This provision makes it clear that the jurisdiction to try a children's case can only be exercised by the Women and Children Tribunal or in absence of such court the District and Session Judge in every district.¹²¹

4.3.2 Setting up of the Children Courts

The children court will have the authority to try a child who has violated the law. On the reliance of separate charge sheet, the children court will examine the adult and the child in separate sittings on the same day. The court will have power to determine the place of trial, time and date as per his discretion.¹²²

¹²¹ The Children Act 2013, s 16

¹²² *ibid*, s 17

4.3.3 Jurisdiction and environment of the Children Court

The Children Court shall exercise the powers and jurisdictions of the court of sessions under the CrPC.¹²³ The environment of the children court shall be informal in nature so that it will not create any detrimental impact on the children. The court will sit in the ordinary room without having witness box or the podium covered by the red clothes. The sitting arrangement must be made in way that children can sit with their parents or legal guardians or members of the remote family, the lawyer and the probation officer representing the children. The proceedings of the children court must be conducted separately and the testimony of the adults must be recorded separately.¹²⁴

4.3.4 No Joint Trial of a Child together with an Adult

There can be no combined trial of the child and the adult and as such the child shall not be tried for or charged with an offence in conjunction with an adult. The child who has violated the law must be tried separately in the Children court and not in the other Court. Only the Children Court is competent to take cognizance against the child offender. When the trial of a child offender has been done with adult offender, the trial of the child offender stands vitiated.

In *Rafiqul Islam and others vs State*¹²⁵, after examining the materials on record the HCD found that when the case was filed on 22-8-2008 the age of Rafiqul Islam was shown as 51 years while the age of Akkas Ali as 14 years. The Investigating Officer within short span of time submitted report on 17-9-2008 when he mentioned the age Md Akkas Ali as 13 years only, so on the very date of occurrence Akkas Ali was a juvenile offender that is he was a child offender.

The HCD further pointed out that the trial Court itself should have noticed about the age of the accused Akkas Ali. The record shows that when accused Akkas Ali was forwarded to the Court of Magistrate on 23-8-2008 an application was filed from the prosecution side for sending him to any correction centre through Probationer officer. The Magistrate considering all allowed the application but the HCD was surprised to see that thereafter no appropriate measure was taken for filing separate Police report for the child offender Akkas Ali and when the case was transferred in the Court Special

¹²³ The Children Act 2013, s 18

¹²⁴ *ibid*, s 19

¹²⁵ [2013] Criminal Miscellaneous Case No 1115 decided on 31.07.2018

Tribunal No. 2 and Additional Sessions Judge, Hobiganj the said Court framed charge on 26-2-2009 but at the time of charge framing, the trial Court should have considered all the materials on record including the age of the accused and the case could have been separated for the child offender Akkas Ali from the trial of the accused Rafiqul Islam but the trial Court measurably failed to discharge his solemn duties.

However, from the materials on record the HCD reached the decision that on the date of the occurrence as well as on the date of charge framing accused Akkas Ali was a minor offender of only 14 years. Sec. 8 of the CA, 1974 clearly states the provisions of separate trial of the juvenile offender from the adult offender but neither the learned Magistrate who sent the case record to the Special Tribunal No. 1 and Sessions Judge, Hobiganj nor the Sessions Judge and the trial Judge could have noticed the provision of section 8 of the CA, so far it is related for the juvenile offender Md Akkas Ali, as such, we are of the firm opinion that the trial of the accused Akkas Ali by the trial judge along with adult offender was illegal, so his trial as has been done stands vitiated.

In the case of *Md Nasir alias Nasir alias Nasir Ahmed vs State*,¹²⁶ the HCD also came to a conclusion that when the trial of a child offender is done with adult offender the trial of the child offender stands vitiated. In *Golam Moula Master and others vs State*¹²⁷, regarding the trial of petitioner No. 2 who is claimed to be a minor, the HCD left it to the trial Court to decide her age, in course of the trial, and if she is found below the age of 16, the learned Judge may take step for her separate trial in a juvenile court.

It was held in *Selim-bin-Hakim vs State (Criminal)*¹²⁸ that the child shall not be charged in conjunction with or tried for any offence in conjunction with an adult. The excuse given by the trial Court for the joint trial that the witnesses are same cannot be considered as fair and legal. The fact of the case was two separate charge sheets were submitted by the IO. One for juvenile offenders and another one for the rest accused and two Sessions cases were also registered being the Sessions case No. 39(A) of 1995 for the two juvenile offenders while the Sessions case No. 39 of 1995 for the rest of the accuseds. It is evident that from the impugned order dated 25-11-1998 that though there

¹²⁶ 42 DLR 89

¹²⁷ [1992] Criminal Revision no 1115 decided on 03.02.1994

¹²⁸ [2015] 67 DLR 532

were two separate cases but the trial of the juvenile offenders was held jointly with the adult accused. Sec. 6(1) the CA clearly states that the child shall not be charged with or tried with the adult and pursuant to the said provisions of law. In the case of *BLAST vs Bangladesh*,¹²⁹ and *Kowserurnessa vs State*,¹³⁰ it has been held by the HCD that the child must not be tried for or charged with any offence in conjunction with an adult. Thus, it can safely be concluded that the trial Court in flagrant violation of the specific law conducted the trial of the juvenile offenders with the adult.

In *State Vs. Deputy Commissioner, Satkhira*,¹³¹ the HCD reiterated the provision of the CA, 1974 and stated that section 6 provides that there can be no combined trial of the child and the adult and as such the child shall not be tried for or charged with any offence in conjunction with an adult. The child must be tried separately in the children court and not in the other Court. Only the Children Court is competent to take cognizance against the juvenile offenders. The learned author Judge of the Division Bench his Lordship *M M Ruhul Amin, J* considered both the legal requirement of the said section 6 in relation to the minor and the merit of the case as a whole and acquitted the accused persons including the child. In consideration of the merit of the case it was further held that the retrial of the child would not be proper in the circumstances and facts of the case.

In *Kawsar-un-Nessa and another vs State*¹³² it was held that under Section 6 (1) of the CA, 1974, the child must not be tried for or charged with any offence in conjunction with an adult. In the instant case the trial of the child applicant Kawsarun-nessa in conjunction with adult Bahera Khatun must be held to be illegal. Such a trial is lack of jurisdiction and resultantly, the impugned decision of conviction cannot be sustained.

4.3.5 Trial Procedure before the Children Court

The trial procedure of the Children Court can be visualised from decision of the Supreme Court in *Md. Mahbubur Rahman vs. State*, though the case was held before the adoption of the CA, 2013 and the court decided that the Druto Bichar Tribunal has

¹²⁹ 57 DLR 11

¹³⁰ 48 DLR 196

¹³¹ 45 DLR 643

¹³² [1995] 15 BLD 21

no authority to try a child who has violated the law. The trial procedure must be in line with the provisions of the CA, 2013.

4.3.6 Participation of a child in court proceedings

After being arrested by the police officer, it becomes the duty of the police officer to communicate with the parents, legal guardian of the children or member of the remote family, the children board and the probation officer as soon as possible about such arrest. Section 55 of the CA 2013 provides, in a Children Court, a case can be tried in support of a legal representative who will look after the child's interest in judicial proceedings. If the parents failed to appoint a lawyer because of financial inability then a lawyer will appoint a panel lawyer from the District Legal Aid Committee as per the provisions of Legal Aid Act, 2000. In this way, the right of the child to be legally represented is guaranteed under section 55 of the CA, 2013. The lawyer who is representing a child at all times remains present during the proceedings of the case. If a lawyer is not able to conduct the case, the court will adjourn the case until the next lawyer has been appointed to deal with the case. It is the duty of the District Legal Aid Committee to appoint a new lawyer to represent a child within 30 days.¹³³ A lawyer representing a child in the children court must carry out his professional obligation with utmost importance and sincerity otherwise appropriate legal measures can be drawn against him by the concerned professional bodies.

4.3.7 Persons allowed to remain present at any sitting of Children Courts

The child will have the right to remain present throughout the entire proceedings before the children court.¹³⁴ The persons who are permitted to attend the children court during the proceedings are limited. Only the relevant persons such as parents or legal guardian or the care giver or the member of the remote family, the staffs of the court, the both sides of the case, the CAPO, the lawyers and the probation officer can stay during the trial procedure in the children court.¹³⁵

¹³³ The Children Act 2013, s 56

¹³⁴ *ibid*, s 22 (1)

¹³⁵ *ibid*, s 23

4.3.8 Keeping the child in safe custody during trial

The child who has violated the law should not be kept in the custody and if he/she has been placed in the safe custody it must be very small period of time. It becomes the responsibility of the concerned authority to send the child to the diversion as soon as possible. Until the time to send in the diversion process, the child must be kept in the certified institute. The aim of this provision is to keep the children away from the adults.¹³⁶ It was held in the case of *State vs Secretary, Ministry of Law, Justice & Parliamentary Affairs and others*,¹³⁷ that sufficient numbers of safe homes must be established in every district to keep the children safe. The court further reminded that children shall not be put into the jail during the continuation of the trial. The prima facie responsibility confers upon the department of social services to ensure that children in contact with law have been placed in the safe home during the whole period of the trial.

4.3.9 Confidentiality of proceedings of the Children Court

The picture or details of the child cannot be published in the newspaper and media.¹³⁸ It was held in *Baktiar Hossain v The State*,¹³⁹ that the main rationale behind the creation of the children court is that children will not come into the contact with the adult offenders and the trial procedure will not create any stigma to them and they shall not get the trauma of any public trial. Further, in *Fahima Nasrin vs State*¹⁴⁰, it was held that the photo, the name of the child and the information relating to the details of a child must not be reported in any media and any such reporting would be considered as an offence under the CA.

4.3.10 Factors to be taken into consideration in passing orders by the Children Court

At the time of passing any verdict by the Children court, there are some factors which must be considered. The court has to consider the child's age, whether male or female, psychological condition, health, how far he/she studied, socio-economic background, ethnic origin, standard of life, causes which influence to commit the offence, any involvement with organized crimes groups, inquiry from the society and above all, the

¹³⁶ The Children Act 2013, s 26

¹³⁷ 29 BLD 656

¹³⁸ The Children Act 2013, s 28

¹³⁹ 47 DLR 542

¹⁴⁰ [200] 61 DLR 232

child's best interest.¹⁴¹ When the court has found the children guilty and passed any order in this regard must remember that they shall not apply the term as sentenced or convicted rather use the terminology such as found guilty or finding guilty etc. It will help the children not to be stigmatized in the formal court procedure and also help them to rehabilitate in the society.¹⁴²

4.3.11 Timeframe for concluding trial

The law imposes certain time frame to complete the trial in the children court which is three hundred and sixty days for the date first presence of the child before the court. If the trial has not been finished within the stipulated timeframe then another sixty days can be extended to complete the trial. The proceedings shall continue consecutively without any adjournment so that the trial can be finished within the timeframe.¹⁴³

4.3.12 Inadequate legal representation and misconduct

The child who has violated the law must be legally represented before the children court. If the child has not sufficient fund to appoint a lawyer, the legal aid committee will appoint a lawyer to represent him/her. If such lawyer has not conducted case with due diligence and remained absent in the hearing, then the court can stay of the proceedings. The court can direct the legal aid committee to appoint a new lawyer to deal with the case. In addition, the lawyer who has not provided the services in a timely manner will face legal actions initiated by the concerned authority. The court will direct the district legal aid committee to take action against the lawyer or the Bar Council and Bar Association can be informed to deal with this matter. So, the lawyer who is dealing with the case before the children court must remain sincere in disposal of his/her duties otherwise will face legal consequences.¹⁴⁴

4.4 Post-Trial Stage

The post-trial stage deals with the sentencing by the children court and process of appeal and revision.

¹⁴¹ The Children Act 2013, s 30

¹⁴² *ibid*, s 36

¹⁴³ *ibid*, s 32

¹⁴⁴ *ibid*, s 57

4.4.1 Sentencing by the Children's Court

The main objective of the law is not to punish the children who have violated the law rather to rehabilitate them in the society so that they can contribute positively in the upcoming days. So, the punishment mechanism must be developed in such a way which will help the children to build up their career by learning and getting training during their stay in the correctional centers. The court must consider the backgrounds of the child before taking any decision. If the children have any special needs that must also be given due attention. As the main aim of the sentencing policy for the children is to reform not to punish so, children shall not be sent to imprisonment or any other form of rigorous punishment. The court must consider the child's best interest at the time taking any decision.

4.4.2 Considerations at the time of Sentencing

It was held in *Fahima Nasrin vs State*¹⁴⁵ that the children in contact with law are not only safeguarded by the children Act but also by the provisions of the UNCRC. Art. 37(b) of the UNCRC states that the children shall not be placed in the detention facilities and if they are arrested by the law enforcing agencies that shall be the last option not the first and the detention must be for the small span of time. In this case, the HCD has identified that the trial court failed to realise the proper interpretation of law and wrongly imposed the punishment to the child.

4.4.3 Periodic review and release

The children court shall state the option of periodic review in every order passed by it and on the basis of such review children can be released with or without condition. On the basis of the recommendations of the national child welfare board, the child development center can release any detained child without imposing any condition.¹⁴⁶

4.4.4 Payment of compensation

When the child has been proven guilty after the trial, the children court can impose the payment of compensation. The court can give such order on the request of the child or the parents, the legal guardian, member of the remote family, caregiver, the probation

¹⁴⁵ [2009] 61 DLR 232

¹⁴⁶ The Children Act 2013, s 35

officer or public prosecutor. The compensation will be given to the victim of the offence and the guilty child will be released from the allegation. The payment method can be determined by the court on the request of the parties.¹⁴⁷

4.4.5 Appeal and Revision

The CA 2013 provides the process of appeal when a child is aggrieved with the decision of the children court. He/she may prefer an appeal to the HCD within sixty days from the date of giving the order. The HCD will have also the right to hear the revision against the verdict of the children court.¹⁴⁸

4.5 Conclusion

It can be said that the real improvement of the JJS relies on the effective implementation of the CA, 2013 and the decisions of the Apex court. The children court is the key component of the JJS. But, in reality the children courts are not playing their roles at the desired levels. This is not only a question of quality but also a systematic issue. There are no guidelines for punishment of juvenile offenders for serious cases. Due to the confusion about the age determination of the children, the courts are sometimes sending the children to jail, ignoring the provisions of the CA, 2013 and the UNCRC. The jails are accepting children because they have no authority to challenge the court order. Moreover, the lawyers and the judges are not fully familiar with the JJS and its obligations. Judgements of the different trial courts and tribunals clearly indicate that there is a lack of realising the aims of the CA, 2013. While the apex courts in most cases have promoted the care and safeguard of the children in compliance with the CA, 2013 and the UNCRC to attain a child-focused juvenile justice system in Bangladesh.

¹⁴⁷ The Children Act 2013, s 38

¹⁴⁸ *ibid*, s 41

Chapter 5

Recommendations and Concluding Remarks

5.1 Introduction

This research has been conducted to analyse critically the legal framework, court procedure and alternative methods of the JJS and to establish an effective JJS in Bangladesh. In addition, to identify the chronological development of the juvenile justice system and to examine the gap between the international legal instruments with the domestic legislations are the areas of further exploration with a view to establish a child-focused juvenile justice system in Bangladesh. In this chapter, the findings of the research have been discussed briefly and recommendations have given to ensure a child-centered juvenile justice system.

5.2 Findings of the Research

From chapter two, we have seen that there are various laws in Bangladesh relating to juveniles but most of them are inherited from the British and Pakistan regimes. The historical analysis of legal framework in the British and Pakistan period proved its most unsystematic approach towards juvenile justice. The laws were not enough to fulfill the children's best interests. There were no adequate plans and policies in the British and Pakistan periods. Thus, the administration of JJS was not integrated in the Bangladesh and still it requires modification and upgradation.

Chapter three has pointed out the requisites of Art. 40 of the UNCRC such as the obligation to create a justice-focused system for the children. However, there are some areas which have not been covered by the CA 2013. So, gaps between article 40 of the UNCRC and the provisions of the CA 2013 have been identified, such as: presumption of innocence, duty to inform the charges to the children and guardians, to provide legal representation and assistance, to be tried by an competent, independent and impartial court without delay, not to extract confessions, right to appeal, to have the assistance of free interpreter, to respect the privacy, presumption of incapacity and alternative to judicial proceedings.

Chapter four has identified both the legal and regulatory frameworks of the JJS in Bangladesh. The children court is the key component of the JJS. But, in reality the children courts are not playing their roles at the desired levels. This is not only a question of quality but also a systematic issue. There are no guidelines for punishment of juvenile offenders for serious cases. Due to the confusion about the age determination of the children, the courts are sometimes sending the children to jail, ignoring the provisions of the CA, 2013 and the UNCRC. The jails are accepting children because they have no authority to challenge the court order. Moreover, the lawyers and the judges are not fully familiar with the JJS and its obligations. Judgements of the different trial courts and tribunals clearly indicate that there is a lack of realising the aims of the CA, 2013.

In Bangladesh, it has been shown that children are considered as adult and tried with adult in the ordinary court without sending the case to the Children Court. For the purpose of determining the age of the child, the trial court earlier considered the size, facial appearance and height of the child which actually created incoherence in assessing the age of the child. The law provides to assess the age of the child on the basis of the birth certificate but the trial courts are erroneously giving emphasis on the appearance of the child. At the time of arresting the children who have violated the law, the police officers are not complying with the provisions of the CA, 2013. Moreover, they treated the child like an adult. Most of the police stations have not been equipped with the child rights' sensitized police officers.

The children who have violated the law are forced in the police station to make confessional statements but such statements have no evidential value in the eye of law. After arresting a child without undertaking the formal trial procedure, he/she can be sent to the diversion. The diversion can be initiated at any stage of the proceedings. Before taking the decision about diversion, family conference will be taken place under the auspices of the probation officer. In all steps, it has to be remembered that the child's best interest must be ensured. But in practice such pre-trial steps have not complied with by the law enforcing agencies. If the child has not been granted bail by the police officer, he must be presented before the court within twenty-four hours excluding the

traveling time to the court. But in many instances, it is evident that the police station is making unusual delay to transfer the child to the court. the cognizance courts are trying the children without sending them to the children court.

During trial, children court shall remember that a combined trial of a child with an adult is absolutely forbidden. But the common scenario is that children are frequently tried with the adult. During the trial procedure, the child shall have the right to participate in the presence and guidance of the appropriate guardian but in reality, they are attending the courtroom alone. At the time of trial, children must be kept in the safe custody and under no circumstances, children shall be sent to the jail custody. Due to the lack of sufficient number of safe custody in every district, children are kept in the jail violating the provisions of law. The entire proceeding of the children court must remain confidential, publication of the details of a child is strictly forbidden which is not followed by the journalists in most of the cases.

5.3 Recommendations

The present study shows that the condition of the administration of the juvenile justice system is not child-focused. The existing justice system are to some extent not complying with the international standards. The study suggests that implementation of the effective JJS will improve the conditions of the children who have violated the law. The following suggestions may help to establish the child-focused justice system for children in Bangladesh.

5.3.1 Compliance with the Standards set by the International Legal Instruments

The embodiments of the rights of the children under the CA 2013 are not entirely in consistent with the standards set out in art. 40 of the UNCRC. While Bangladesh has made a commendable progress in enacting CRC-compatible legislations, the country still lags behind to fully comply with the international obligations enshrined in the UNCRC.

5.3.2 Presumption of Innocence Must be Incorporated in the CA, 2013

There is no provision in the existing CA 2013 regarding presumption of innocence for children. So, a specific provision should be included relating to

the presumption of innocence in the current CA, 2013 to follow the art. 40 of the UNCRC.

5.3.3 Provision relating to the prohibition of confessional statement of children must be inserted in the CA, 2013

In the Children Act, 2013 there is no definite provision which forbids to force a child from making self-incriminating statement or to take a self-incriminating statement in the unavailability of the parents, guardian, etc. So, a certain provision can be included for the protection of child from making self-incriminating statement who have violated the law. The Confessional statement made by a child who has violated the law will not have any evidential value and not admissible. On the basis of this self-incriminating statement of a child cannot be convicted. There is no provision in the CA 2013 relating to the admissibility of the confessional statement of a child which could have easily incorporated in the legislation but it has been deliberately omitted in the CA to include such provision by the legislature remand is that worst atrocities are taken place during interrogation in the police station. Because of the serious torture and the application of the third-degree method forced the accused to make a confession which is involuntary in nature. So, it has been recommended that no confessional statement must be recorded from the children and if recorded it will not be admissible in the court of law.

5.3.4 Threshold of the minimum age of criminal responsibility must be increased

The current threshold of the age of criminal responsibility is too low, compared to evolving global standards and practices by other nations. It is recommended that the MACR must be further heightened to fourteen, and that the age of understanding for realising the criminality be increased to sixteen from the present age of twelve (the present age of *doli incapax*).

5.3.5 Children right to privacy must be respected

Children rights to privacy should be extended beyond the trial process as it contains in section 28 in CA 2013 and made it available for children who are presence at the police stations.

5.3.6 The new definition of Children must be disseminated properly

Under the CA, 1974 below sixteen years of age was treated as child but after the enactment of the CA, 2013 now all persons up to eighteen years of age must be considered as children. This change has been taken place in compliance with the UNCRC. It is the responsibility of the government and all agencies to disseminate this information to the public in general.

5.3.7 Statutory Provision to be followed at the time of determining the age of a Child

Now, it has been settled law that the pertinent date for evaluating the age of a child shall be the date of committing of the offence irrespective of the provision of any law or case law. Earlier, in number of cases decided by the apex Court of Bangladesh have shown a debate to identify the relevant date for the evaluation of the age of the child. In some cases, the apex court has taken the view that the date of committing the offence must be the pertinent date for the assessment of the age of a child. On the other hand, some cases uphold that the date of charge framing will be considered as pertinent date for the evaluation of the age of a child. So, it becomes the responsibility of all the Children Courts to follow this law accurately that the pertinent date for assessing the age of child shall be the date of committing of the offence. In addition, the Children Court must be under an obligation to make an inquiry as to the age of a person who is brought before it whether charged with an offence or not, other than for giving evidence, if it appears to it that the person so brought is a child.

5.3.8 Age assessment of the child on the basis of appearance must be avoided

These days with the improvement of nutrition many boys aged about 14-15 years spot a moustache and beard. Conversely there are some men who never show growth of any beard. To say that a person who has a moustache and beard is ipso facto adult would be an arbitrary exercise of non-existent power and unjust denial of legal rights enshrined in the statutes. It is dangerous to state the age of an accused based only on visual assessment. So, it has been recommended that at the time of primary determination of age by the police officer, he has to verify the age on the basis of birth registration certificate or in

when such certificate is not available, the birth date given during school admission or the school certificate will be considered.

5.3.9 Diversion must be undertaken after arrest of the children who violated the law

It is strongly suggested that after arresting a child who has violated the law diversion is strongly suggested at any level of the procedures in lieu of the formal trial procedure. Before giving diversion the family ties, social background, cultural orientation, financial condition, ethnic origin, psychological condition and educational level of the child must be considered. There are two aims of the diversion, one is to secure the child's best interest and another to resolve the dispute. The CAPO may transfer the issue to the Probation officer for undertaking diversion at any level of the proceedings after arresting of the child to solve the dispute in an alternative way.

5.3.10 Separate police report or investigation report must be submitted when children are involved

It is recommended to prepare and to submit separate police report in GR Case or investigation report in CR case, if child is involved in the occurrence of an offence with adult. When a crime has been committed jointly by an adult and a child, it has to be taken into cognizance separately. After taking into cognizance to try a case, it has to be sent to the children court if child has committed the offence and when adult person has involvement with the offence, it has to be transferred to the court having jurisdiction. In both situations, the matter has to be informed to the public prosecutor.

5.3.11 Trial of Children must be taken place only before the Children Court

The order of remand must be given by the children court. But the statements of the children those in contact with law as victims or witnesses will be recorded by the concerned magistrate. During investigation stage, the attendance of the children who have violated the law in the fixed date before the concerned magistrate court may be waived. Any interim matters including remand, bail, and age determination will be decided by the children court. In this regard, if any application has been filed in the concerned magistrate court that will be

transferred to the children court with files and the children court will decide the matter. Before taking into cognizance of the offence, if the Women and Children Tribunal passed any order, in that case the tribunal must use the name and seal of the Children Court. In complaint case, after filing the complaint before the concerned magistrate court, it becomes the responsibility of the concerned magistrate to take into cognizance the case under the CA and send it to the children court. As the CA is a special law, so in all GR cases where children committed the offences, the investigation officer will submit the separate police report on the basis of which the concerned magistrate court will take into cognizance of the offences committed by the children.

5.3.12 Separate Trial for the Children must be Ensured

In every district the Women and Children Tribunal will be treated as Children Court. If in any district such court is not available then, the District and Session judge court will be considered as Children Court. This provision makes it clear that the jurisdiction to try a children's case can only be exercised by the Tribunal or in absence of such court the District and Session Judge in very district. There can be no joint trial of the child and the adult and as such the child shall not be tried for or charged with any offence in conjunction with an adult. The child must be dealt with separately in the children court and not in the set of other court. Only the children Court is competent to take cognizance against the children offenders.

5.3.13 Human Resources and Logistic Support for the Probation Services must be ensured

To extend the services of the probation offices in upazila and district levels, the numbers of employees and other supports must be increases. There shall be a separate budget for them to fulfill their duties properly. The court and other monitoring authorities must look after the activities of the probation services whether they are complying with their responsibilities. There are no rules under the Children Act, 2013 to effectively enforce the mechanism of alternative care and diversion. So, rules addressing these matters to be adopted immediately. The training facilities for the officers and employees of these services must be ensured so that they can be child-sensitized of the rights of the children.

The institutions must have the suitable infrastructure and hygienic ambience, proper nutritional diet, standard healthcare of the children. Moreover, the educational and recreational activities are essential in those institutions for proper rehabilitation of the children. The treatment and behaviour of the staffs of the institutions must be child friendly.¹⁴⁹

5.3.14 Child Sensitive Specifically Trained Police Force

The police officers are the first responders as they are arresting a child who has violated the law. To acquaint with the children law, there shall be special training for the police officer on regular basis. The training can be provided by the Bangladesh police academy and the police training centers and police staff college. They can include the children act into their curriculum so that police officer can come to know the special provisions relating to children. The CA, 2013 provides the provision for child-sensitive police officer who is known as child affairs police officer. The police officer is not only giving charge sheet to the court in addition they have to maintain a liaison with the probation officer, child development centers and the certified institutes. It is the duty of the police to inform the family of the child immediately after the arrest. Every police station must have a dedicated desk for the children which will deal with the children who have violated the law. The police officer must be accountable to the superior authority if they are not complying with the CA. The police officer shall not keep the children with the adult during their stay in the police station. They must be kept in a separate room so that they will not be the victim of any kind of abuse and maltreatment. The law empowers the police officer to make free the children from the police station on bail. They can also transfer the children from the police station to the custody of the probation officer. However, the police officer must remember the basic rule that child must be produced before the court within twenty-four hours exempting the time of travel to the court.

¹⁴⁹ Tapobrata Mukhopadhyay and Vineet Bhalla, 'Case Study on Compliance of Juvenile Justice (Care and Protection of Children) Rules, 2007' (2016) *Juvenile Institutions in Kolkata, Institutionalised Children Explorations and Beyond* Volume 3, Number 1, 29

5.3.15 Reducing Institutionalization by Adopting Alternative Care

The Children Act does not provide any guideline to less use the institutions for the children rather many provisions are there to allow institutionalization. It is the aim of the Act that the Child Welfare Board and probation officers will guarantee the family-based care by considering the children's best interest. By adopting these mechanisms, it would be easy to implement the UN Guidelines on Alternative Care for Children, 2009. In addition, by adopting the rules to implement such care would pave the way to promote the cooperation and coordination.¹⁵⁰

5.3.16 Training of persons dealing with Children who have violated the law

Capacity building initiatives have to be undertaken for all the relevant stakeholders, such as, police officials, probation officers, judges, lawyers, administrative officers to ensure effective implementation of CA 2013. Sector specific trainings should be organized for the new issues introduced by CA 2013 like diversion, alternative care etc.

5.3.17 Role of the Media

The role of media must be child-focused and they will serve to promote the rights of the children who have violated the law. The code of conduct for the journalists must include certain guidelines for reporting on juvenile justice cases.

5.4 Conclusion

Children are the neglected groups of the society. They are not born as delinquents rather the surroundings and environment made them the delinquents. To address the issue of juvenile offending the JJS in Bangladesh must be developed properly. The present juvenile justice system fails to deal with the children who have violated the law focusing on their re-integration and rehabilitation in the society. To accommodate the

¹⁵⁰ Amanda Adamcheck, Kaya Carville, Senem Cilingiroglu, Rachael Clements1, Stacy Ford, Louisa Ingham, Lucy Macris, Yamini Peddada, Hau Pham, Aditya Sarmah, Hanneke Schreur, Katherine Signy, Katie Steval, Lauren Tunstall, Ingram Weber and Andrew Wells, 'The Implementation of the Convention on the Rights of Children in Seven South Asian Countries' (2020) *Institutionalised Children Explorations and Beyond*, 7(1) 37–46

children who have violated the law, we need more certified institutes and CDCs. On the other hands the persons who are responsible to operate those institutes are not properly trained and acquainted with the children law. It becomes the obligations to make all the stakeholders aware about the sensitivity of the JJS. There shall be a systematic and child-friendly approach to entire process of the system so that children have violated the law will get full benefits from the system.

As a legacy from the colonial rulers, the legal system of Bangladesh has inherited lots of legislations promulgated during the time of British era. All these laws are not properly addressing the issues of juvenile justice system. In addition, they failed to uphold the children's best interests. As a result, the legal corpus relating to children enacted during the colonial regimes must be modified and upgraded. The objective of the juvenile justice system is not to punish the children rather to reform and rehabilitate in the society, so that they can contribute substantially in the development of the society.

The present scenario in the JJS is that the children who have violated the law are becoming the victims of harassment and ill-treatment. The important aspect of the JJS is that the children must be kept away from the regular system so that it will not cause any trauma in the young minds of the children but unfortunately the children court are not complying with the provisions of the CA, 2013 relating to this matter. The children court must follow the obligations enshrined in the children Act, 2013 as well as the obligations under the UNCRC.

The improvement of the juvenile justice is possible by making effective application of the CA, 2013 and the decisions of the apex court in this regard. The court is the most important part of the JJS. To achieve the goals, the children court must be fully functional. There are no guidelines for punishment of juvenile offenders for serious cases. Due to the confusion about the age determination of the children, the courts are sometimes sending the children to jail, ignoring the provisions of the CA, 2013 and the UNCRC. The jails are accepting children because they have no authority to challenge the court order. Moreover, the lawyers and the judges are not fully familiar with the JJS and its obligations. Judgements of the different trial courts and tribunals clearly indicate that there is a lack of understanding of the objectives of the CA, 2013. While the Apex

courts in most cases have promoted the safeguards of the children in compliance with the CA, 2013 and the UNCRC to attain a child-focused juvenile justice system in Bangladesh.

Both Bangladesh and Nepal as South-Asian countries are trying to create a child-focused juvenile justice system identifying the basic judicial guarantees in every sphere of the proceedings. The separate trial, separate court and separate safe home for the children will help them to rehabilitate in the society and they will not bear any trauma relating to the formal justice process. The sentencing policy of both the countries should develop in a way to reform the child not to punish them. The age determination process must be conducted before the court in a uniform manner. Above all, the obligations under the UNCRC must be implemented in every sphere of the JJS of both the countries.

The research reveals that the present juvenile justice administration has not been properly organised to ensure the children's best interest. Most of the stakeholders of the juvenile justice administration are not fully aware about the CA, 2013. In addition, they are not sensitized about the needs of the juveniles. The personnel of the concerned agencies are not properly trained and there is a lack of co-ordination among them. The probation services are not actively playing their role to ensure the child's best interest. The large numbers of children are kept in jail not-complying with the provisions of the CA. There is lack of effective monitoring, investigation, and sanctioning of those who are responsible for these violations. The Government agencies are giving less priority to the programmes for juveniles and not providing enough funds and resources for the delivery of services and facilities like educational, housing, and health care including drug related abuse, prevention and treatment in the child development centers. Thus, the existing JJS in Bangladesh has not complied with the international standards fully and indeed requires more reforms to secure the children's best interests. Measures for juveniles should aim at rehabilitation rather than punishment. A dedicated policy for ensuring the wellbeing of the children should be formulated. There is a need for an effective mechanism to enforce the existing policies and laws. The children rules must be framed immediately under the CA, 2013. The whole aim of the administration of juvenile justice should be re-organised in a way that the children who have violated the law will enjoy their basic human rights in a favourable environment and their best

interest must be guaranteed so that they can play constructive roles in all spheres of their lives and can bring positive change in our society and State.

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