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The establishment of children's courts in Bangladesh: from principle to practice

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ABSTRACT

Reform of the Bangladeshi juvenile justice system started when the Children Act was passed in 2013. The 2013 Act has been adopted with provisions for child-friendly Children's Courts and various other child-oriented practices in a number of settings, such as providing for child help-desks in police stations, establishment of a national child welfare board, probation officers, and alternative preventive measures on the basis of CRC which would ensure separate justice for children. Separate Children's Courts with child-friendly mechanisms are now established in the country which introduced rights based principles that empower children to enforce their rights and encourage the government, courts, and law enforcement officials to develop policies that address the precarious situation of children. As the replacement for the long outdated Children Act 1974, the 2013 Act is an attempt to put in place a modern system for diversion and rehabilitation, including greater use of community-based interventions, and the promotion of initiatives to deal with children and juvenile offenders. This study assesses legal reforms in relation to the establishment of Children's Courts in Bangladesh as measures against international guidelines for child-friendly justice.

A. Introduction

As time has passed, juvenile justice systems throughout the world have changed. The Convention on the Rights of the Child (CRC) 1989, and other international instruments, provide a comprehensive legal framework to protect the rights of children within the justice delivery mechanism. As a State party to the CRC, Bangladesh is under a legal obligation to follow and maintain international principles to promote a child rights based justice system. The Bangladeshi juvenile justice system, a derivative of British colonialism, is still in the process of development.¹ In this perspective, the Government has enacted the Children Act 2013² (the 2013 Act) on the basis of the

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¹Borhan Uddin Khan and Muhammad Mahbur Rahman, *Protection of Children in Conflict with the Law in Bangladesh* (Save the Children UK 2008) 3.

²Children Act 2013.

CRC, which replaced the Children Act 1974.³ The main purpose of the 2013 Act is to protect children (defined as those under 18 years)⁴ through various measures including diversions, restorative justice, the guarantees of a fair trial, support for social reintegration and the development of a child-friendly Children's Court in the country.⁵ The 2013 Act, in conformity with various international instruments provides that the child has the right to participate in person at all stages of the trial.

In Asian countries, India is far ahead of Bangladesh in enacting comprehensive juvenile legislation and in establishing a Children's Court and juvenile justice board for child welfare.⁶ Malaysia adopted the CRC in 1995 and began making its justice system more child-friendly with the introduction of the Child Act 2001 and the establishment of the court for children.⁷ Indonesia also adopted a special law on juvenile justice in 1997, which provides for separate court proceedings and some additional post-adjudication steps for accused children.⁸ Vietnam was the first country in Asia, and the second in the world, to ratify the CRC in 1990. Since then, it has made remarkable achievements in promoting children's development in line with the CRC.⁹

Despite the ratification of the CRC in 1990, the Government of Bangladesh did not undertake any comprehensive review of its legislation regarding children until 2012. Hence, the Committee on the Rights of the Child in its 1993, 2003 and 2009 Concluding Observations¹⁰ on the Initial¹¹ and Periodic State Reports¹² of Bangladesh expressed its concern about 'the unclear status of the CRC in the domestic legal framework and the insufficient steps to bring

³Children Act 1974.

⁴Children Act 2013, s 4.

⁵The Convention on the Rights of the Child 1989, art 40(1). The Children Act 2013 provides that, for the purpose of the Act and for the trial of offences thereunder, at least one court is to be established in every district headquarter and in every metropolitan area which shall be called 'Children's Court'.

⁶NV Paranjape, *Criminology and Penology* (Central Law Publication 2001) 530. Further, India has ratified the CRC in December 1992 and therefore, it became expedient to re-enact the Juvenile Justice Act 1986 to meet the requirements of the standard prescribed by the CRC and all other international instruments. Finally, India has enacted the Juvenile Justice (Care and Protection of Children) Act 2000. This Act has been amended in 2006, and the amended Act has provisions on powers to make Rules, establish Juvenile Justice Boards, establish institutions, set up Special Juvenile Police Units, and develop rehabilitation and social reintegration programs.

⁷Ministry of Women, Family and Community Development, 'Child Protection and Child Welfare Services in Malaysia, Beijing High Level Meeting, November 4–6 2010' 2 (UNICEF) <www.unicef.org/eapro/Malaysia_Beijing_paper_26_Oct_2010_FINAL.pdf> accessed 9 November 2015. For details on the background of this Children's Court, see Farah NiniDusuki, 'Perkembangan Mahkamahbagi Kanak-Kanak' in Farid Sufian Shuaib (ed), *PerkembanganPerundangan Malaysia: Artikel Terpilih* (Jilid 2 2007) 125.

⁸Thi Thanh Nga Pham, 'The Establishment of Children Courts and the Fulfilment of Vietnam's Obligations under the Convention on the Rights of the Child' (2013) 14 *Australian Journal of Asian Law* 1, 4.

⁹ibid.

¹⁰Committee on the Rights of Child (Fifty-first session) 'Concluding Observations' (12 June 2009) CRC/C/BGD/CO/4 (Concluding Observations). See also CRC A/53/41 (1998) and CRC/C/15/Add.221 (2003).

¹¹Initial Report of State Parties due in 1992: Bangladesh (07 December 1995) CRC/C/3/Add.38.

¹²Periodic State Reports 1997, 2001. Recently, Bangladesh submitted its combined third and fourth report (2007).

existing legislation into full conformity with the CRC'.¹³ It recommended that Bangladesh must 'take all effective measures to harmonize its domestic legislation fully with the provisions and principles of the CRC'.¹⁴

A study by UNICEF¹⁵ revealed that implementation of special juvenile protection system in South Asia, especially in Bangladesh, fell far below the required standard. In general, insufficient as well as inappropriate emphasis has been placed on diversions, both in legislation and in practice, on introducing appropriate alternatives in the existing justice system and also on changing the fundamentally custodial nature of the juvenile justice system as a whole. As a result, most children who come into conflict with the law or are accused of criminal offences are deprived of their liberty and end up in police lock-ups, prisons or in children's rehabilitation centres.

Against this backdrop, the aim of this study is to assess the present legal reforms and practices of the Bangladeshi juvenile justice system in dealing with child offenders. In particular, this paper considers whether the juvenile justice system in Bangladesh meets international standards, and to what extent the 2013 Act is successful in establishing a child-friendly justice system to protect the best interests of children in Bangladesh.

B. The Children's Court: International Principles and Trends

This section will briefly analyse the international legal framework governing the Children's Court system. In particular, it will examine the practices and principles of the CRC, General Comment No 10 of the Committee on the Rights of the Child on Juvenile Justice, and regional guidelines, especially the European guidelines on child-friendly justice.

In Bangladesh there was no separate juvenile justice law before 2013. The Children Act 1974 and the Children Rules 1976¹⁶ were the main pieces of legislation addressing the subject.¹⁷ Since they pre-dated the CRC,¹⁸ these only supportive the best interests of the child to a limited extent, and did not incorporate concepts and practices which existed in other developed countries, such as principles determining the minimum age of criminal

¹³Concluding Observations (1998) [12].

¹⁴Concluding Observations (2003) [13].

¹⁵UNICEF, 'Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law' (UNICEF 2006) 39–52 <www.unicef.org/rosa/Juvenile_Justice_in_South_Asia.pdf> accessed 9 November 2015.

¹⁶The Children Act 1974 and the Children Rules 1976 contained the seeds of the juvenile justice system in Bangladesh. But these laws provide a wide scope for custody, protection and treatment of juvenile delinquents under the age of 16 years which was inconsistent with the CRC.

¹⁷Nahid Ferdousi, 'Legislation on Juvenile Delinquency in Bangladesh: A Study to Ward Off Evils' (2011) 34 *Journal of the Institute of Bangladesh Studies* 21.

¹⁸The Children Act 1974 was enacted about 41 years ago. Before this Act, many international conventions and instruments on children's rights had already come into existence. So, it should have been in conformity with the CRC and the other UN rules and guidelines.

responsibility, restorative justice, diversion, and alternative measures for the rehabilitation of child offenders.¹⁹ Apart from this, a few provisions were incorporated in other legislations²⁰ to deal with juvenile delinquents in Bangladesh. These provisions were spread across various laws and this created confusion. As a result, juveniles were treated like adults during and after trial.²¹ However, the Children Act 2013²² would start to protect the best interests of the children in the juvenile justice system. Though there are some challenges that still remain, the child-friendly juvenile justice framework aims to achieve juvenile justice in Bangladesh through transparent use of resources, CRC based policies and the collaboration of all stakeholders.

1. The children's court: special jurisdiction

The Children's Court is a tribunal with special authority to pass judgments for the alleged crimes committed by children i.e. persons who have not attained the age of majority. In most modern legal systems, accused children and minors are treated differently from accused adults. In accordance with the provisions of the Children Act 1974, the first Children's Court was established along with a Child Development Centre (CDC) at Tongi in 1978 for male children in Bangladesh. Thereafter, in 1995 the second Children's Court for male children at Jessore and in 2002 the third and only one for female children at Konabari were established. So, at present, there are only three special Children's Courts for the whole country. This is inadequate. Until 1995, there was only one Children's Court for male children in the country. Similarly, until 2002, there were no such courts for female children in Bangladesh.²³ Except for the three Children's Courts, there are no Children's Courts which could ensure that child offenders are treated differently from adults at all stages of the criminal proceedings. As a result, most of the time, children are tried through ordinary courts and they are detained along with adults for long periods of time.²⁴ Unfortunately, national data is lacking with respect to the number of children who were prosecuted as adults.

¹⁹M 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) 17–23 <www.unicef.org/bangladesh/Justice_for_Children_2010.pdf> accessed 9 November 2015.

²⁰These include the Special Powers Act 1974, the Anti-Terrorism Act 1992, the Arms Act 1878, the Explosive Substances Act 1908, the Women and Children Repression Prevention Act 2000, the Code of Criminal Procedure 1898 and the Metropolitan Police Ordinances, all of which are non-child-friendly in nature.

²¹KM Subhan, 'Juvenile Justice Administration in Bangladesh: Laws and their Implementation' in Waliur Rahman and Mohammad Shahabuddin (eds), *Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference* (Bangladesh Institute of Law and International Affairs 2005) 215.

²²Children Act 2013.

²³Khan and Rahman (n 1) 66–67.

²⁴Hameeda Hossain and Sara Hossain, 'Rights of Children' in Hameeda Hossain and Sara Hossain (eds), *Human Rights in Bangladesh 2006* (Ain O Salish Kendra 2007) 195.

Additionally, as per section 4 of the Children Act 1974, the High Court Division of the Supreme Court, Courts of Sessions Judges, Additional and Assistant Sessions Judges, Chief Judicial Magistrate and a Metropolitan Magistrate²⁵ have been given the power to act as judges in Children's Courts to deal with the offences committed by juveniles.²⁶ Instances where the ordinary courts have exercised the power to act as a Children's Court are very rare, though it is possible for each of the courts that are mentioned in section 4 of the Children Act 1974 to act as a Children's Court in appropriate cases.²⁷ It is worth noting that the Government has decided to set up a Children's Court in every district across the country in compliance with the Children Act 2013.²⁸ However, before 2014, many districts in the country did not have a Children's Court.²⁹ It was difficult for the police to send a child offender from a remote village to the divisional headquarters. This increased the possibility of children's lengthy contact with the police and the consequent possibility of violence against children in custody. Hence, the Judicial Magistrates with the concurrent jurisdiction to act as Children's Court and Judges of ordinary courts are, to a large extent, responsible for the failure to establish a comprehensive juvenile justice system.³⁰

As regards the scope of the Children's Court powers, it provides services including humane care, proper guidance, understanding and control which are relevant to the correction and welfare of children. However, there is no data on how many of the released delinquents were reintegrated into the society in this country. According to section 5(3) of the Children Act 1974, the Children's Court could not take into consideration, cases of children who are convicted of serious offences. But the child rights-oriented court system identifies the duty of police, judges, and public prosecutors and broadly the governments by allocating resources and providing trained actors (judges, police etc) to create an informal court environment that secures the participation of the children and secondly, promotes the establishment of laws and procedure in line with article 40(3) of the CRC. Thus, the Children's Court should be aware and conscious about how it should

²⁵In 2007, after the separation of judiciary from executive an amendment was made to the effect that a Chief Judicial Magistrate and a Metropolitan Magistrate was empowered to exercise powers of a Children's Court instead of a Sub-Divisional Magistrate and a Magistrate of the First Class by Gazette Notification (vide No-justice-4/5C-1/2005/1242 dated 20 November 2007) of the Ministry of Law, Justice and Parliamentary Affairs.

²⁶Children Act 1974, s 4.

²⁷Mizanur Rahman, *Tracing the Missing Cord: A Study on the Children Act 1974* (Save the Children UK 2003) 14.

²⁸'Govt to Set Up Children Court in Every District: Ministry' *The Bangladesh Chronicle* (Dhaka, 24 April 2014) <<http://www.bdchronicle.com/detail/news/32/6352#sthash.trhltDTR.dpuf>> accessed 31 March 2016.

²⁹The 2013 Act provides that at least one 'Children's Court' is to be established in every district headquarters and in every metropolitan area.

³⁰Sumaiya Khair, 'Juvenile Justice Administration and Correctional Services in Bangladesh: A Critical Review' (2005) 16 *Journal of the Faculty of Law* 10.

differ from an adult court and what measures should be taken to ensure the fair trial of children.

The Children Act 2013 provides that for the trial of offences under this Act, at least one Children's Court is to be established in every district. In pursuance to section 16(1), the Department of Law and Justice in consultation with the Supreme Court is mandated to declare, by notification in the official Gazette, one or more court of Additional Sessions Judge in a district or metropolitan area, as the case may be, as the Children's Court. If there is no Additional Sessions Judge in any district then the District and Sessions Judge shall discharge the responsibilities of a Children's Court in addition to his own responsibilities. Section 17 of the Act provides that in any case involving a child in conflict with the law or a child in contact with the law, is tried under any law whatsoever, the Children's Court shall have the exclusive jurisdiction to try that case.³¹

Thereafter, Children's Courts have been formed in each district across the country following the 2013 Act.³² An additional Sessions Judge of the district judiciary will be the head of the court. In case of absence of the additional session judge, the district judge will take charge as an additional responsibility. Although comprehensive child-sensitive judicial rules have not been introduced yet, the legislation does include some provisions to reduce the formality and intimidation of the courtroom.

2. Operation of the children's court

The Children Act 2013 has also demonstrated a sensitive response towards other international instruments to promote the establishment of measures for dealing with child offenders without resorting to judicial proceedings. It provides that the human rights and legal safeguards³³ are fully respected throughout all stages of the proceedings. In addition, Article 6 of the European Convention on Human Rights (ECHR) contains few rights specific to children in criminal proceedings which guarantees the right to a fair trial.³⁴ Unfortunately, in most Asian countries, child offenders have to go through the regular criminal trial proceedings.

³¹According to section 2(4) of the Act, a child in contact with the law includes a child who is a victim of or a witness to an offence under any existing law, and all cases involving such a child will be tried in the Children's Court.

³²Mohosinul Karim, 'Children Court Formed in Each District' *Dhaka Tribune* (Dhaka, 24 April 2014) <www.dhakatribune.com/bangladesh/2014/apr/24/children-court-formed-each-district> accessed 13 November 2015.

³³Convention on the Rights of Child 1990 (CRC), art 40(2)(b)(vii). See also United Nations Standard Minimum Rules for the Administration of Juvenile Justice, UNGA A/RES/40/33 (29 November 1985) rule 7 <<http://www.un.org/documents/ga/res/40/a40r033.htm>> accessed 13 November 2015 (Beijing Rules).

³⁴See generally, Ursula Kilkelly, 'Youth Courts and Children's Rights: The Irish Experience' (2008) 8 Youth Justice 39.

In Bangladesh, the higher court declared that the child must be tried separately in both Children's Court and ordinary court. A child offender below 16 years of age was supposed to be tried by Children's Court under the Children Act 1974, and not by the ordinary courts.³⁵ At present, as per the Children Act 2013, where a child is involved in any offence along with an adult, on the basis of the separate charge sheet as provided under section 15, evidence will be taken in the case of the child separately from the evidence taken in the case of the adult, in a separate session on the same day and such taking of evidence will continue uninterruptedly on the following day(s) until the examinations are closed.³⁶ The Children's Court will hear both the case of the adult and the case of the child but at separate sittings on the same day and on every day thereafter until the trial is concluded. The Children's Court shall conduct its sessions in such place, day and manner as may be specified by Rules. Provided that until such Rules are framed, the judge of the Children's Court shall commence and conclude the sittings according to the section 17(2) upon determining the date, time and place of the trial. The sittings of the Children's Court shall be in a building or room separate from the one where trials of adults take place and on a day and time other than the sittings of the regular court. Further, the sittings when the trial of a child takes place will be in an ordinary room without witness box and without the podium covered by red cloth.³⁷

While passing any order under this Act the Children's Court shall consider a number of factors. These include, the child's age and gender, physical and mental condition, qualification and level of education, social, cultural and ethnic background, family's financial condition, lifestyle of the child and his or her family, reasons for commission of the offence, information regarding gang formation and overall background and surrounding circumstances, the child's opinion, social enquiry report and other ancillary factors that are expedient or are required to be taken into consideration in the best interest of the child and his or her correction.³⁸

The Children's Court has the responsibility to assess and determine the age of the child. If it appears to the court that he is not a child, his age is to be determined upon an enquiry and a hearing. However, as per the 2013 Act, the Children's Court shall complete the trial within 360 days from the day of the child's first appearance before the court. If, for any acceptable or practical reason the trial cannot be concluded within this period, the Children's Court shall classify reasons and thus extend the deadline by another 60

³⁵See *Shiplu v The State* [1997] 49 DLR 53 (High Court Division, Supreme Court of Bangladesh (HCD)); *Bimal Das v The State* [1997] 46 DLR 460 (HCD); *Md Nasir Ahmed v The State* [1990] 42 DLR 89 (HCD); *Kadu v The State* [1991] 43 DLR 163 (HCD); *Kawsarun Nessa v The State* [1996] 48 DLR 196 (HCD); *Baktiar Hossain v The State* [1995] 47 DLR 542 (HCD).

³⁶Children Act 2013, s 17(2).

³⁷*ibid* s 17(4).

³⁸*ibid* s 16.

days. From the commencement of the trial in the Children's Court and until its conclusion the proceeding shall continue every day without any break. If the trial cannot be concluded within the time specified or the extended time, the child shall be discharged if the allegation is of a minor offence and does not involve murder, rape, robbery, dacoity, drug-dealing or any other heinous or serious offence. But, where an adult is jointly involved with the child, the trial of the adult shall continue.³⁹ Under the 2013 Act, keeping the child in safe custody during the pendency of any trial shall be considered as the last resort and should only be done for the shortest period of time possible. Further, any child kept in safe custody shall be dealt with in the way of diversion within the shortest possible time.⁴⁰

3. The physical environment of the children's court

Except in three Children's Courts, the informal atmosphere as described in the Children Rules 1976 was still absent.⁴¹ In ordinary courts, cases involving children are not recorded under the specific headings but are classified together with all other cases because of the lack of understanding of child-oriented justice, and the higher priority given to the alleged offence over the offender's age.⁴² The procedure followed in the ordinary courts is so rigid and elaborate that it cannot afford close observation to the best interests of the child. Thus, Children ultimately go through the regular criminal proceedings, in framing charge, examination, and cross-examination proceedings in the trial of juvenile delinquents. Correction and rehabilitation are also not smooth and complete.⁴³ There is no facility for in camera trial for the juveniles and the court room remains overcrowded as it usually is. The environment of the ordinary courts are also not child-friendly. The trial of juveniles is usually conducted along with adults and the Code of Criminal Procedure 1898⁴⁴ is followed. Consequently, juvenile offenders wait for their hearing and judgment for a long period of time.⁴⁵

As per the 2013 Act, the sittings of Children's Courts shall be arranged in a building or room separate from one where trials of adults take place and on a day and time other than the sittings of the ordinary court. The sittings when the trial of a child takes place will be in an ordinary room without witness

³⁹ibid s 32.

⁴⁰ibid s 26.

⁴¹M Enamul Hoqueet al, 'Under-Aged Prison Inmates in Bangladesh: A sample situation of youthful offenders in greater Dhaka' (Action Aid Bangladesh and Retired Police Officers Welfare Association Bangladesh 2008) 11 <www.chandpur.gov.bd/sites/default/files/www.chandpur.gov.bd/6001.pdf> accessed 13 November 2015.

⁴²Ruby Ghuznavi et al, *Child Rights: Reality and Challenges* (Shishu Adhikar Sangjog 2001) 129.

⁴³Nahid Ferdousi, 'Trends and Factors of Juvenile Delinquency in Bangladesh: Some Observations' (2011) 11 Bangladesh Journal of Law 32.

⁴⁴The Code of Criminal Procedure 1898 (as amended in 2006).

⁴⁵Hossian and Hossain (n 24) 195.

boxes and without podiums surrounded by red cloth.⁴⁶ The court shall arrange for appropriate seating arrangements for the child and in the case of a differently-abled child, where necessary, provide special seating arrangements. While the trial of a child is continuing, the lawyer, police or any other official present in court shall not wear any professional or official uniform.⁴⁷

Considering the best interests of the child, the Children's Court under the 2013 Act may pass orders to ensure the safety and confidentiality of the child and to maintain the secrecy of all information regarding the child so that the child's identity may not be disclosed. Notably, the court may not use terms such as 'offender', 'convicted', or 'sentenced' in relation to children while passing an order. Instead, terms like 'a person found guilty of an offence', 'a finding of guilt', or 'an order made upon such findings', or such other terms as the court deems appropriate may be used.

4. Principles of Penalties

As per the CRC Committee, the State party may bring the system of juvenile justice fully in line with the Convention—in particular articles 37, 39 and 40—and with other relevant standards. In this regard, the CRC Committee recommends that the State party shall inter alia: a) ensure with immediate effect that neither the death penalty nor life sentence are imposed for offences committed by persons under 18 years of age; and b) raise the minimum age of criminal responsibility to at least 12 with a view to raising it further as recommended in the CRC Committee's general comment No 10 (2007) on the rights of the child in juvenile justice.⁴⁸ As per the Beijing Rules, before imposing a sentence on a juvenile, the background and circumstances within which the juvenile lives and the conditions under which the crime has been committed must be properly investigated.⁴⁹ Similarly, the Tokyo Rules⁵⁰ provide for a set of basic principles to promote the use of non-custodial measures. Among the Asian countries, Malaysia and India provide for the broadest range of non-custodial sentencing options but in Bangladesh, the Children Act 1974 provided for limited scope for non-custodial dispositions. In practice the courts tend to impose custodial sentences, even for minor offences, since this is the easiest option.⁵¹

⁴⁶Children Act 2013, s 17(4).

⁴⁷*ibid* s 19(4).

⁴⁸United Nations Committee On the Rights of the Child, 'General Comment No 10' (UN Office of the High Commissioner for Human Rights, 25 April 2007) <www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> accessed 13 November 2015.

⁴⁹Beijing Rules (n 33) rule 5.1.

⁵⁰United Nations General Assembly, 'United Nations Standard Minimum Rules for Non-Custodial Measures, UNGA Res 45/110' (UN Office of the High Commissioner for Human Rights) <<http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>> accessed 13 November 2015 (Tokyo Rules).

⁵¹M Imman Ali (n 19) 26.

Before the Children Act 2013, the Children Act 1974 prohibited imprisonment for children under the age of sixteen. Section 51 stated, '(1) notwithstanding anything to the contrary contained in any law, no child shall be sentenced to death, transportation or imprisonment (...)'.

However, the Act allowed imprisonment of such children in certain cases, in the following manner:

[W]hen a child is found to have committed an offence of so serious a nature that the Court is of the opinion that no punishment, which under the provisions of this Act it is authorised to inflict, is sufficient or when the Court is satisfied that the child is of so unruly or of so depraved character that he cannot be committed to a certified institute and that none of the other methods in which the case may legally be dealt with is suitable.⁵²

The section stated that the period of detention must not '(...) exceed the maximum period of punishment to which the child could have been sentenced for the offence committed'.⁵³

However, the High Court Division of the Supreme Court of Bangladesh passed significant judgments against imposing the death sentence on a child. In the case of *Munna v State*,⁵⁴ which was a criminal appeal, the provisions of the Children Act 1974 including sections 51 and 52 were considered. Thereafter, Bangladesh was examined under the Universal Periodic Review process in 2009 and a recommendation was made to prohibit all corporal punishment of children.⁵⁵

Since the Children Act 2013 came into force, the death penalty and life imprisonment for children have been explicitly prohibited. At a meeting of the South Asia Forum in July 2006, following on from the regional consultation in 2005 of the UN Secretary General's Study on Violence against Children, the Government of Bangladesh made a commitment to prohibition of corporal punishment in all settings. Prior to the amendments introduced by the Children Act 2013, there had been a number of High Court rulings related to juvenile justice. In 1995 a child under 16 was sentenced to imprisonment for life. The sentence was overturned by the High Court.⁵⁶ In 2005 the High Court issued *Suo Moto Order No 248*, addressing the situation of children in jail.⁵⁷

The 2006 High Court judgment, *State v Md Roushan Mondal*,⁵⁸ considered the international human rights standards for juvenile justice and stated: 'as a

⁵²Children Act 1974, s 52.

⁵³*ibid* s 53.

⁵⁴[2002] 7 BLC 409 (HCD).

⁵⁵UN General Assembly, 'Report of the Working Group on the Universal Periodic Review: Bangladesh' 6th Session A/HRC/11/18 (UN General Assembly) <daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/162/52/PDF/G0916252.pdf?OpenElement> accessed 14 November 2015.

⁵⁶*Bangladesh Legal Aid and Services Trust v Bangladesh* 22 BLD (2002) 206 (HCD).

⁵⁷See *Bangladesh Legal Aid and Services Trust v Bangladesh* [2005] 57 DLR 11 (HCD); Khan and Rahman (n 1) 21.

⁵⁸[2007] 59 DLR 72 (HCD).

signatory to the Convention [on the Rights of the Child], Bangladesh is duty bound to reflect Article 40 as well as other articles in CRC in our national laws. The Committee on the Rights of the Child (2009) reiterates its concern regarding capital punishment for children and its retroactive application for persons who had committed offences when they were children between the ages of 16 to 18 years old which contradicts article 37(a) of the Convention, namely: 'The Committee recommends that the State party take immediate steps to halt the imposition of death penalty for crimes committed by persons under 18 and abolish the death penalty'.⁵⁹ Bangladesh was examined under the Universal Periodic Review process in 2009. A recommendation was made to prohibit all corporal punishment of children.⁶⁰ The Government accepted the recommendation.⁶¹ Recommendations were also made to abolish the death penalty. Hence, the 2013 Act introduced extensive reforms to the juvenile justice system in Bangladesh, including prohibiting life imprisonment and the death penalty. The Act provides that no child shall be sentenced to death, imprisonment for life or imprisonment. But the period of sentence may not exceed the maximum period to which the child could have been sentenced. He may be ordered to be detained in a certified institute instead of prison until he reaches the age of 18. When a child is sentenced, he or she shall not be allowed to associate with any adult in the prison.⁶² Where a child is found guilty of an offence punishable with death or imprisonment for life, the Children's Court may order the child to be detained in a CDC for a period of not less than three years but not more than ten years. However, if a child is found guilty of an offence not punishable with death or imprisonment for life, he or she may be ordered to be detained in a CDC for up to three years.⁶³

C. The Legal Reforms and Their Conformity with International Standards

This part will consider the conformity of the legal reforms with the international standards for a child-friendly justice system. In the modern world, trends in juvenile justice system have tended to shift towards a child-friendly justice system by establishing separate Children's Courts and other units to assist the child in accessing justice and obtaining required remedies. Child-friendly juvenile justice rests on the CRC principles of non-discrimination,

⁵⁹Concluding Observations (n 10) [47].

⁶⁰Report of the Working Group on the Universal Periodic Review Bangladesh A/HRC/11/18 (5 October 2009) 94(16).

⁶¹Report of the Working Group on the Universal Periodic Review: Bangladesh, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review A/HRC/11/18/Add.1 (9 June 2009) 3.

⁶²Children Act 2013, s 33.

⁶³*ibid* s 34.

best interests and participation of the child together with articles 37 and 40 of the CRC. In General Comment No 10 on children's rights in juvenile justice, the CRC Committee in a like manner, emphasised that rehabilitation and restorative justice are the objectives of a child rights oriented juvenile justice system. Furthermore, regional human rights systems have also established conventions and guidelines that are relevant to a child-friendly justice system. Of particular note are instruments from the European and African systems. The Committee of ministers of the Council of Europe has developed Guidelines on Child-friendly Justice Systems.⁶⁴ The Council of Europe approved Guidelines on Child-Friendly Justice to direct European governments in their efforts to enhance children's access to justice. The Guidelines address children's place and role in legal proceedings, as well as their views, rights and needs. The document provides the following useful definition:

'Child-friendly-justice' refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights of due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

Similar to the CRC, the African Charter offers a comprehensive set of children's rights and obligations. States that have ratified the Charter agree that the best interests of the child is the primary consideration in all actions concerning children, and that children must be given an opportunity to express their views in any proceedings that concern them.⁶⁵

However, in discussing child-friendly justice relating to child offenders, a number of additional points should be considered. The fundamental issues as recognised by the Council of Europe (Committee of Ministers) are: keeping children in conflict with law out of the justice system, introduction of a special juvenile justice system and establishment of a comprehensive child centred restorative juvenile justice system.⁶⁶ The juvenile justice system should ensure that any reaction to juvenile offenders should be proportionate to the gravity of the offence and personal circumstances of the

⁶⁴Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice' (Council of Europe, 17 November 2010) <[wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec\(2010\)1098/10.2abc&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](http://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec(2010)1098/10.2abc&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)> accessed 13 November 2015.

⁶⁵Patrick Geary, 'Child-Friendly Justice and Children's Rights, Child Rights International Network (CRIN)' (United Kingdom 2011) 10 <https://www.crin.org/en/docs/FileManager/Child-Friendly_Justice_and_Childrens_Rights_Revised.pdf> accessed 22 March 2016.

⁶⁶Council of Europe, 'Recommendation Rec (2000) 20 on the Role of Early Psychosocial Intervention in the Prevention of Criminality' (Council of Europe, 6 October 2000) <[www.coe.int/t/dghl/standardsetting/prisons/PCCP%20documents%202013/Rec\(2000\)20_E.pdf](http://www.coe.int/t/dghl/standardsetting/prisons/PCCP%20documents%202013/Rec(2000)20_E.pdf)> accessed 14 November 2015.

offender.⁶⁷ The age of criminal responsibility for juveniles should not be fixed at too low a level, bearing in mind the facts of emotional, mental and intellectual maturity. There should be a close relationship between the notion of criminal responsibility and other social rights and responsibilities.⁶⁸

Despite having almost 25 years in which to put the CRC into effect, Bangladesh appears to have failed to recognise the centrality of such issues as distinctive needs, dignity, humane treatment and so on, as being core to the realisation of children's rights. In addition, there are so many examples of the rights of child offenders being ignored by the modern states that nobody—whether policy makers, media, elected politicians, practitioners or citizens—can simply stand by with indifference.⁶⁹

1. *Introducing the International Standards*

As a child-friendly justice system aims to govern children's rights, status, and role in legal proceedings, how the courts interpret relevant CRC provisions is particularly important. The preamble to the Children Act 2013 states that it has been enacted for the purpose of implementing the CRC, and the new provisions reflect the provisions of that Convention.

A number of vital safeguards for child rights have been introduced with the Children Act 2013. This Act recognises some organisations and members and lays out their responsibilities for the protection of the best interests of the children.⁷⁰ The definition of a child was not uniform in the laws of Bangladesh until 2013. Different legislations provided different age limits for delinquents, but all of them were within 12 to 18 years of age. Due to the differences in age limit of children, they were deprived of fair justice. This discrepancy has been addressed in the 2013 Act. In the Act, the age of the child has been increased from 16 to 18 years within which a delinquent will be treated as a child.

The Children Act 1974 did not contain any special provisions limiting the use of physical force, restraints or handcuffs in the arrest of a child.⁷¹ Often juveniles are picked up by police officers from the street as suspects in various cases.⁷² To establish a child-friendly justice system, the 2013 Act specifies the responsibilities of the designated police officer and gives the

⁶⁷Beijing Rules (n 33) rule 5.1.

⁶⁸ibid rule 4.

⁶⁹John Muncie, 'The United Nations, Children's Rights and Juvenile Justice' in Wayne Taylor, Rod Earl and Richard Hester (eds), *Youth Justice Handbook: Theory, Policy and Practice* (Willan 2009) 20–21.

⁷⁰Nahid Ferdousi, 'The Children Act, 2013: A Milestone of Child Protection in Bangladesh' *The Daily Star* (24 September 2013) <archive.thedailystar.net/beta2/news/the-children-act-2013-a-milestone-of-child-protection/> accessed 14 November 2015.

⁷¹Ruby Ghuznavi (n 42) 130.

⁷²The majority of children are arrested under special laws such as the Special Powers Act 1974, the Arms Act 1887, the Drugs Act 1992, section 54 of the Code of Criminal Procedure 1898 and provisions of Metropolitan Police Ordinances. The Code and Metropolitan Police Ordinance allow police officer to arrest any person on 'reasonable suspicion' without a warrant.

Ministry of Home Affairs the responsibility for the establishment of a Child Affairs Desk⁷³ headed by a Child Affairs Police Officer (CAPO).⁷⁴ The Act specifically provides that no child below the age of nine years can be arrested under any circumstance.⁷⁵ If a child above nine is being arrested, law enforcers cannot apply handcuffs around the wrist and rope around the waist of the child. The 2013 Act states that a single charge sheet⁷⁶ consisting of adults and children cannot be submitted.

In addition, the 2013 Act provides for probation officers⁷⁷ with the appointment, responsibilities and duties of probation officers more elaborately stated. The Act provides that the Government shall appoint at least one or more probation officers in every district, sub-district or metropolitan area. In any case where child offenders are sent to a Child Development Centre (CDC) or any certified institute, it is the duty of the probation officer to prepare and preserve a separate file for each child, and to follow the procedure for alternative care.⁷⁸ The number of probation officers was very limited in Bangladesh. In most of the districts, social welfare officers had to perform the job of probation officers. Moreover, in each CDC, there are two or three probation officers and social case workers for counseling and motivating for behavioural correction, psycho-social and human development, socialisation and re-integration of the inmates. This is insufficient. Hence, the appointment of adequate number of probation officers is a significant step in the 2013 Act for establishing a child-oriented justice system. Within 21 days of production of the child before the Children's Court, the probation officer is mandated to submit to the court, a social enquiry report in the manner prescribed by Rules and a copy of the same shall be submitted to the nearest board and Department of Social Service (DSS).⁷⁹

The 2013 Act provides that no child shall be sentenced to death or imprisonment for life. When a child is sentenced to imprisonment, she or he shall not be allowed to associate with any adult in the prison.⁸⁰ Rather, the concept of restorative justice has been introduced by the new law which provides for compensation to a child who is a victim of crimes. According to section 38 of the 2013 Act, the court may order any person found guilty of an offence committed against a child victim to pay compensation to the child on an application by the child or the child's parents or, in their absence, foster carer or

⁷³Children Act 2013, s 13.

⁷⁴*ibid* s 14.

⁷⁵*ibid* s 44(1).

⁷⁶The charge sheet is a report to be submitted in court, on the completion of an investigation, by the investigating officer, when the charges against the accused are found proved and the investigating officer proposes to proceed against the accused. It is contained in a government prescribed form.

⁷⁷Children Act 2013, s 5.

⁷⁸*ibid* s 84.

⁷⁹*ibid* s 31.

⁸⁰*ibid* s 33.

guardian or members of his or her extended family, probation officer or the lawyer or public prosecutor in order to restore the child to his or her previous position. Also, the court may issue a suo moto order for such compensation to be paid by the convict. The court may order the compensation to be paid at once or by instalment to the court, and may direct that the money be used for the welfare of the child.⁸¹

The 2013 Act also introduces a provision for the settlement of disputes where any child has committed any offence of lesser gravity. In such a case the court may direct the probation officer to take steps in order to settle the dispute between the victim and the child who has committed the offence. The probation officer, with the participation of appropriate persons from society shall determine the method of dealing with the matter according to the terms and conditions specified by the Children's Court.⁸²

One of the most important issues is the nature of alternative measures which has been introduced under the 2013 Act. Under section 48 of the 2013 Act, it is the duty of the CAPO, upon consultation with the probation officer regarding the allegation brought against the child, to take diversionary measures and assess the possibility of bail, to send a report to the Police Head Quarters containing all information concerning the case relating to the child and also to send a similar report to the probation officer and the District Legal Aid Committee. Instead of proceeding against a child under the formal justice system, diversionary measures may be applied for a child offender at any time after his arrest and during any stage of the trial upon consideration of his familial, social, cultural, financial, ethnic, psychological and educational background. The process and procedure of diversion would be prescribed by Rules. The Social Welfare Department is mandated to adopt programmes for the implementation of diversionary measures.⁸³

Where diversionary measures are initiated, the probation officer may take steps to arrange a family conference in order to resolve the dispute on a priority basis. The family conference shall be considered confidential and any discussion therein shall not be used as evidence in any legal proceeding in any court.⁸⁴ Diversion must be initiated and completed within the time fixed by the Children's Court or the CAPO. Thus, the 2013 Act covers a wide range of areas including special judicial mechanisms and the introduction of alternative care and diversions for the protection of child offenders but there is no guideline or rule regarding how the methods would be applied or how alternative interventions would be conducted at the ground-level. Thus, protecting the rights of children who are offenders remains a major challenge in Bangladesh.

⁸¹ *ibid* s 38.

⁸² *ibid* s 37.

⁸³ *ibid* s 48.

⁸⁴ *ibid* s 49.

D. Protection of Child-Rights by the Higher Judiciary

Initially, the judiciary in Bangladesh had no significant role in protecting child-rights. Although the first Children Act was enacted in 1974, no judgment of the High Court Division of the Supreme Court of Bangladesh under that Act was reported until 1990.⁸⁵ After signing the CRC in 1990, the issue of juvenile justice was focussed on by government organisations as well as NGOs. From 2001 the higher court passed many significant judgments and issued some suo moto orders for the better treatment of children. Often juvenile cases were tried under the special criminal law. The higher court strictly instructed the subordinate judiciary (Session Judge Courts, Tribunals, Magistrate Courts) to follow the Children Act 1974 for juvenile cases. From 2001 to 2010, the higher court gave full attention to the improvement of the juvenile justice system including the practices of international principles to ensure that children could enjoy their basic human rights.

In this regard, the first reported case is *State v Deputy Commissioner, Satkhira and others*.⁸⁶ After ten years, in 2003, the High Court Division of the Supreme Court of Bangladesh, issued a suo moto order on the case with some directions to the Government to take specific steps for system-wide improvement as mandated by the Children Act 1974. The High Court Division confirmed the legal principle as follows:⁸⁷

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

Thereafter in 2005, in *Legal Aid and Services Trust v Bangladesh and others*,⁸⁸ the High Court Division gave further directions obligating the judges to determine jurisdiction over the accused child. It held as follows:⁸⁹

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

From 2006 it has issued significant judgments aligned with the CRC and the protection of children. It is only in the case of *State v Md Roushan Mondal*⁹⁰

⁸⁵The Children Act was first enacted in 1974 and was enforced in 1976 only for the Dhaka District. For other districts of Bangladesh, it was enforced from 1980 onwards. Hence, juvenile justice did not attract significant legal attention until the early 1980s. From 1980 to 1990, the public and concerned persons were not adequately aware as there was no implementation of the said Act in judiciary of Bangladesh.

⁸⁶[1993] 45 DLR 643 (HCD).

⁸⁷*ibid* [26].

⁸⁸[2005] 57 DLR 11 (HCD).

⁸⁹*ibid* [10]

⁹⁰[2007] 59 DLR 72 (HCD).

that juvenile justice and the role of the Children's Court have been clearly demarcated. The case also reflects the view of the Court:

Thus the thrust of the International Declarations, Rules, Covenants and other instruments is towards reformation and rehabilitation of youthful offenders and for establishment of facilities for proper education and upbringing of youths so that they are prevented from coming into conflict with the law. In the event that a child or juvenile does come into conflict with the law, then the aim is to provide a system of justice which is 'child-friendly' and which does not leave any psychological scar or stigma on the child, and, on the contrary, prepares him for a fruitful future.⁹¹

In this case, the High Court Division specified some directives for the juvenile justice system. Laxity of procedure and informality of the setting must be followed by the Children's Courts. These should not be allowed to be frittered away.⁹² This judgment seems to be the first one in which a number of international conventions and instruments have been elaborately discussed. This is also the first major case discussing international human rights law in Bangladesh.⁹³

The applicability of the CRC when dealing with cases in the courts was considered in the decision of *The State v Metropolitan Police Commissioner*,⁹⁴ which recognised that

Bangladesh was one of the first signatories to the Convention and is bound to take steps for implementing the provisions thereof. Being signatory we cannot ignore, rather we should, so far as possible, implement the aims and goals of the UNCRC.

In 2008, in the case of *State v The Metropolitan Police Commissioner, Khulna*⁹⁵ the High Court Division issued an important suo moto rule⁹⁶ with some directions.⁹⁷ Afterwards, in the suo moto order, the authorities concerned were directed to take appropriate steps for training their officials on compliance with the legal provisions relating to children. The police authorities may further consider setting up special units in every police station with proper training and sensitised police personnel to deal with child offenders.⁹⁸ In this case it was also observed as follows:

The underlying theme of international Covenants and instruments relating to children is that they are to be enlarged on bail and to be detained only as a last resort.⁹⁹

⁹¹ *ibid* [46].

⁹² M Imman Ali, 'Are Judges Experts in Determining Age?' (2006) 61 Dhaka Law Review 34.

⁹³ M Imman Ali (n 19) 142.

⁹⁴ [2008] 60 DLR 660 (HCD).

⁹⁵ *ibid*.

⁹⁶ Suo Moto Rule No 04 of 2008.

⁹⁷ Hameeda Hossain and Sara Hossain (n 24) 231.

⁹⁸ 60 DLR 2009 (HCD).

⁹⁹ *ibid* [25]

The facts, figures and analysis of the cases decided by the higher courts relating to the juvenile justice system show that a wide range of issues were raised relating to the applicability of the Children Act 1974. The prime focus of these cases was to ensure the protection of juveniles by passing the most appropriate order in each case in accordance with the facts.¹⁰⁰ In addition, courts have also considered the development of laws relating to children, international treaties, covenants and conventions and have explained how and why Bangladesh should express its subordination towards international treaties and conventions.

The decision in *State v Metropolitan Police Commissioner*¹⁰¹ also reflects the best interests of the children. In that decision, the High Court Division held as follows:¹⁰²

Thus at all times the Court must bear in mind the best interests of the child. In the facts of the instant case it appears that a probation officer has been appointed by the Court, who has duties as detailed in Section 16 and 31 of the Act, 1974 and Rule 21 of the Children Rules 1976 (the Rules, 1976). The trial Court or appellate Court is not in a position to ascertain the physical aspects with regard to the family background, character of the accused and the circumstances in which he or she was brought up. For this reason it is imperative that the Court should rely on a report from the probation officer, who will go to the locality, if necessary, to ascertain all the factual aspects necessary for the Court to come to a decision with regard to the child. He would also speak to the accused as provided by the UNCRC. Article 12 provides as follows:

12.1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

12.2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

However, the Court dealing with the custody of the child would have recourse to the report of the probation officer who in turn would ascertain from the locality as well as from the persons involved in the case and the relatives of Arifa and Arifa herself, and will then decide as to what may be in the best interest of the child. We feel that it is important to point out that Arifa's views on the issue of her custody must be sought and respected, so far as practicable and reasonable keeping in mind her age and mental development. This is in consonance with the international covenants and treaties dealing with children and juveniles. At the end of the day it will be up to

¹⁰⁰Nahid Ferdousi, *Juvenile Justice System in Bangladesh* (Academic Press and Publishers Library 2012) 11–19.

¹⁰¹[2008] 60 DLR 660 (HCD).

¹⁰²ibid [34], [35].

the learned Judge/Magistrate conducting the trial to decide what will be in the best interests of the child, bearing in mind all the circumstances reported to him and brought before him by way of evidence and report, particularly of the probation officer.

However, as is common practice in most legal systems, higher judiciary in Bangladesh has jurisdiction to deal with the issues pertaining to international instruments. Higher courts of Bangladesh had regularly referenced the CRC and other international human rights conventions where relevant to a matter at hand. Specifically, courts have discussed the CRC in cases¹⁰³ involving corporal punishment of delinquent children and also child protection. The *State v Md Roushan Mondal*¹⁰⁴ case is an example of where the CRC and the Children Act 1974 were discussed at length. After seven years of the case of *State v Md Roushan Mondal*,¹⁰⁵ Bangladesh has reflected the principles of the CRC in the Children Act 2013.¹⁰⁶

E. Children's Courts in Practice in Bangladeshi Legal System

The notion that children deserve special attention in the legal and judicial system is not a new one. This idea has motivated various initiatives relating to child-friendly justice for protection of children's best interests in all stages of court proceedings. The Children Act of 2013 provides that, for the purpose of the Act and for the trial of offences thereunder, at least one court is to be established in every district headquarter and in every metropolitan area whatever the case may be. Such court shall be called the 'Children's Court'.¹⁰⁷ Until the establishment of separate Children's Court, the Sessions Courts should strictly follow their additional responsibility of functioning as a Children's Court on a regular basis.

Therefore, in 2014, the Government established a 'Children's Court' under the Sessions Courts in every district across the country.¹⁰⁸ Unfortunately, the established Children's Courts are not located in different buildings away from the criminal courts. Additionally, there are no more special Children's Courts established in CDCs of each district yet.

In practice, among the Sessions Courts, the informal atmosphere as described in the Children Act 2013 is still absent. The surroundings of the ordinary court and also the attitude of the officials are not child-oriented. Often, the provision regarding comprehensive child-friendly services with children age, minimum standard of care as well as homely atmosphere with

¹⁰³*BLAST v Secretary of the Ministry of Education* (2014) 19 BLC 358 (HCD).

¹⁰⁴*Md Roushan Mondal* (n 58).

¹⁰⁵*ibid.*

¹⁰⁶M Imman Ali (n 19) 84.

¹⁰⁷Children Act 2013, s 17(2).

¹⁰⁸*The Bangladesh Chronicle* (n 28).

in camera trial are not maintained properly. Consequently, the views of child protection are not considered by the present Children's Court in Bangladesh.

Furthermore, the police officer or Children's Court cannot take alternative preventive measures during any stages of the formal judicial process under the Session Courts. So, there is an absence of positive impact on the child's behaviour by alternative measures. On the other hand, the number of correctional institutions available is not sufficient for the whole country. In addition, the probation service and offices of probation officers in all police stations, courts and jails is also absent. Further, the probation service is not considered as part of the court structure in the country. Hence, there are some problems related to establishing effective communication between the probation officers and the judges. Although the Children Act 2013 mandates a probation service, probation practice and probation management is not functioning in line with international standards. As a result, many children are harassed in the course of the justice mechanism.

F. Suggestions for Establishing a Child-Friendly Court System

In light of the binding legal obligations that CRC and other international standards impose, there is an absence of comprehensive administrative reform being undertaken by the Government of Bangladesh. Thus, the existing Children's Courts (ordinary courts/session courts) do not fulfil the role of protecting children as required by the 2013 Act. The following suggestions may help establish a child-friendly justice system.

1. The Establishment of a Separate Children's Court

The separate Children's Court should be established in CDCs in each district in Bangladesh. If the Children's Court is to be established in all CDCs, it will be able to meet several of the standards for juvenile justice set forth in the CRC and other international legal instruments. This court should maintain simple procedures, a flexible approach and homely atmosphere with in-camera trials. Effective counsel services should be formulated for each child at every stage of the proceedings in court. It can be said that once a Children's Court is established, responsibilities of other concerned agencies for arrest, investigation, prosecution, charge sheet, probation report, rehabilitation, after-care service, etc, will be child-oriented and one can expect child-friendly approaches from them. At the same time, alternative measures and restorative justice are necessary to prevent children offenders. These call for significant changes in the overall system of justice for children in Bangladesh.

2. Create a Child-friendly Environment in the Ordinary Courts

A child-friendly environment should be created by judges of ordinary courts. The ordinary courts should pay proper attention to children. The judge should not depend only on what the police tell her or him; in addition, he or she should have the patience and time to listen to what the children have to say. The courts should also follow flexible procedures.

3. Child-oriented Approaches in Court Procedure

The operation of Children's Courts will require child-friendly investigation, prosecution and support from probation officers and social caseworkers. Furthermore, after establishing the Children's Court, data on the protection of the rights of children, specially information concerning delinquent children, should be collected comprehensively. When the juvenile justice system operates separately, input and output statistics and other related data would be collected independently, following new and more suitable criteria.¹⁰⁹ In this way, further reforms regarding the law enforcing agencies, correctional institutions and probation system in juvenile justice will be successful.

4. Introduce Probation Service

There should be developed, a set of rules or guidelines with a view to implementing the probation in practice. A separate probation service should be launched for the rehabilitation of child offenders under the 2013 Act. In this regard, an adequate number of probation officers should be appointed at local levels for the betterment of children and to speed up the probation procedure.¹¹⁰ In addition, the probation service should also establish and maintain a continuous liaison with the judiciary to discuss issues relating to the content and the relevance of the pre-sentence report. The post-sentence reports may also be used in order to go back to the court for a change or adjustment to the original probation order and/or sentence.

5. Diversion—Alternatives to Court Proceedings

As the United Nations Committee on the Rights of the Child notes, diversion not only avoids stigmatisation, but also has good outcomes for children and has proven to be cost-effective.¹¹¹ The Children Act 2013 has incorporated

¹⁰⁹Thi Thanh Nga Pham (n 8) 3–14.

¹¹⁰Children Act 2013, s 6 deals with the appointment, and responsibilities and duties of probation officers in greater detail and provides that the government shall appoint one or more probation officers in every district, sub-districts or metropolitan area.

¹¹¹General Comment No 10 (n 48) [22]–[29]; See also Beijing Rules (n 33) rule 11.

some important alternative measures for child offenders.¹¹² The overwhelming majority of children in conflict with the law should be dealt with and supported through a range of diversion systems¹¹³ and extra judicial measures that recognise the causes of their behaviour and identify strategies at the community level to effectively prevent re-offending. Children who are below the age of criminal responsibility should be diverted to the appropriate social services. It is important to secure the consent of the children (or the parent or guardian) to the recommended diversionary measure. Juveniles should not feel pressured (for example in order to avoid having to appear in court) or be pressured into consenting to diversion programmes.

6. Restorative Justice

The formal justice system in Bangladesh is ineffective at dealing with the special needs and problems of child offenders. Establishing diversion and alternatives as a part of child rights-based restorative justice approaches in Bangladesh can lead to societal sensitivity and collection action in dealing with child offenders. Therefore diversion and alternative programmes, such as the participation of victims and offenders in mediation or family conferencing can contribute positively to collective community actions towards achieving societal bond and peace-building. For example, probation officers can work more directly with victims of crime by coordinating a victim–offender mediation programme. Judges can share decision-making factors with the community by supporting community panels to hear cases. Police officers can collaborate with schools and community members to help to set up positive community service projects that allow offenders to get the opportunity to build valuable competencies. Accordingly, a large number of NGOs, private companies, factories and voluntary organisations should be created to extend comprehensive support for children’s well-being.

7. Supporting the Sentencing Process

Sentencing is a challenging and onerous task and judges should be provided with training in child development, psychology and children’s rights to ensure that they are equipped to undertake this task. In particular, specialists should inform the courts about the sentencing process generally—what types of

¹¹²Children Act 2013, s 48.

¹¹³Diversion should be practised where the offence is of a non-serious nature and where the family, the school or other informal social institutions have already reacted, or are likely to react, in an appropriate and constructive manner. Diversion should also be practised where the merits of individual cases would make diversion appropriate, even when more serious offences have been committed such as where it was the first offence committed or the act was committed under peer pressure.

interventions are effective and why. The requirement that the best interests of the child be taken into account in the sentencing process should be expressly provided for by law and assistance should be provided to the judiciary in implementing this principle. Social service reports should be used to ensure the individualisation of decision-making processes involving children and to facilitate judicious adjudication of the cases concerned by the competent authority. The sentencing process should itself respect their rights. The views of the young person concerned should also be taken into account. Accordingly, measures, including legislative measures, should be taken to ensure that adjudicating bodies secure the participation of the children in the court process and make sure that the sentence is communicated to the children by the judge or magistrate in language that they can understand. A specialist legal tribunal with specialist legal counsel is also essential to ensure that children's rights are adequately protected during trial and sentencing processes.

8. Non-custodial Measures

The importance of non-custodial measures is recognised by the United Nations Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules).¹¹⁴ Non-custodial measures should be designed to ensure that children are equipped to play a more constructive role in society through education, training and employment, enhancing their sense of responsibility towards their family and community. Priority should be given to sanctions and measures that have an educational impact provided that they are proportionate and subject to appeal as well as constituting a restorative response to the offences committed by juveniles.¹¹⁵ Further measures can be taken to place children under the supervision of the probation services in order to address the underlying causes of their offending, to establish education programmes targeting practical learning skills, such as literacy and numeracy courses, and to provide formal education and vocational training courses of specific interest to children, designed to equip them with the skills and expertise needed to earn a living.

9. Detention as a Measure of Last Resort

It is well established that detention must be a measure of last resort,¹¹⁶ meaning that detention pending trial should be replaced with alternative

¹¹⁴Tokyo Rules (n 50).

¹¹⁵Council of Europe, 'Recommendation CM/Rec(2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures' [23.2] <<http://www.refworld.org/docid/4a7058c02.html>> accessed 29 November 2015.

¹¹⁶The Convention on the Rights of Child, art 37.

measures,¹¹⁷ and detention should only be imposed in exceptional cases¹¹⁸ where the child is judged as having committed a serious act involving violence against another person or persists in committing other serious offences and no other appropriate response is available.¹¹⁹ The state should give careful consideration to enshrining in legislation, the principle that imprisonment should be used only as a last resort. For example, Irish legislation provides that a prison sentence should not be imposed unless there is no reasonable alternative.¹²⁰ However, alternatives to detention pending trial and custody should be developed for children perpetrators of crime (diversionary systems, restorative justice, and other alternatives). Where deprivation of liberty is absolutely necessary as a measure of last resort, the condition and regime of detention should take into consideration the specific needs of children. Children should be detained separately from adults, unless this is considered to be against their best interests.¹²¹

10. Professional Training for Concerned Authorities

Children need to be treated with humanity. For the best interests of children, the police officers, probation officers, judges, lawyers and jail officials should change their mindset for the proper enforcement of the Children Act 2013. A reformed law alone is not enough for juvenile justice. There should be mechanisms to train the concerned authorities who deal with children and related issues. In this context, information on the CRC, domestic law relating to children, and citations of Children's Court decisions relating to juvenile justice should be incorporated as a component of training manuals for officials regularly working with children.

G. Conclusion

Reform of the Bangladeshi juvenile justice system has been underway since the Children Act was passed in 2013. Although the 2013 Act has inserted substantive provisions of alternative care, family conferencing and diversions, rules still need to be adopted to regulate how methods such as family conferencing and diversions would be implemented practically. Two years after its

¹¹⁷Beijing Rules (n 33) rule 13.

¹¹⁸United Nations General Assembly, 'United Nations Rules for the Protection of Juveniles Deprived of Their Property, UNGA Res 45/113' (United Nations) rule 1 <<http://www.un.org/documents/ga/res/45/a45r113.htm>> accessed 15 November 2015.

¹¹⁹Beijing Rules (n 33) rule 17.

¹²⁰Kilkelly (n 34).

¹²¹Council of Europe, 'Resolution No 2 on Child-Friendly Justice' (Council of Europe) [13]–[14] <[www.coe.int/t/dghl/standardsetting/minjust/mju28/MJU-28\(2007\)Resol2E.pdf](http://www.coe.int/t/dghl/standardsetting/minjust/mju28/MJU-28(2007)Resol2E.pdf)> accessed 14 November 2015; Council of Europe, 'Recommendation Rec (2003) 20 of the Committee of Ministers to Member States Concerning New Ways of Dealing With Juvenile delinquency and the Role of Juvenile Justice' (Council of Europe) art 15 <wcd.coe.int/ViewDoc.jsp?id=70063> accessed 14 November 2015.

enactment, the following have yet to become available in all designated areas: child's desks in police stations, adequate probation officers, the national welfare board and adequate Children's Courts. With a large number of limitations in place and a resistant mindset of the society at large, one may find the provisions of the Act ambitious. However, rights for children demand the singular attention of all concerned for the establishment of a system conducive to achieving the objectives meditated. The Government should act proactively to bring the Children's Rules and regulations dealing with the child-oriented juvenile justice system in line with the General Comment of the Committee on the Rights of the Child 2007 and the Council of Europe Guidelines. The Government should adopt a rights-based approach, with an emphasis on preventing juvenile crime whilst ensuring accountability of government agencies. Therefore, an ethical approach must be taken by all concerned to ensure that the children of this country may achieve the fulfilment of their rights.