



Graduate School of Development Studies

**THE JUVENILE JUSTICE SYSTEM IN NEPAL  
AN AGENDA FOR REFORM**

A Research Paper Presented by:  
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In partial fulfilment of the requirements for obtaining the degree of  
MASTERS OF ARTS IN DEVELOPMENT STUDIES

Specialisation:  
**Human Rights, Development and Social Justice  
(HDS)**

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The Hague, the Netherlands  
November 2008



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## Dedication

*To all Children in conflict with the law who are  
facing neglect, violence and denial of rights*



## ***Acknowledgements***

This paper is a result of collective inputs of several individuals. I am indebted to the children in conflict with the law who became ready for interviews and the key informants for taking time out to share their expertise and thoughts with me, without which this work was not possible.

I would like to extend a deep sense of gratitude to my Supervisor: Dr. Karin Arts for her continuous support, guidance and intellectual inputs during the research work. My sincere thanks go to my Second Reader: Mr. Jeff Handmaker for his comments and suggestions to frame and develop ideas. I am grateful to Prof. S. P. Subedi for his constructive comments and suggestions in this paper.

I would like to thank my colleagues Anupama, Archana, Hemang, Rajan, Bharat, Loknath, Shirley, Jackline, Maja and Tamar for their help. I am indebted to PPR Nepal for nominating me for this course and arranging field visits during this research.

Last but not the least; I am particularly obliged to my mother, Malika Devi and my wife, Riju for their continuous encouragement to pursue further studies and for allowing me to be away from home.

Rajendra Ghimire

12 November 2008



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### ***List of Acronyms***

|        |  |
|--------|--|
| ABA    | American Bar Association   |
| ADR    | Alternative Dispute Resolution   |
| AIHRC  | Afghanistan Independent Human Rights Commission  |
| CA     | Constitutional Assembly  |
| CAT    | The United Nations Convention against Torture and Other Cruel,<br>Inhuman or Degrading Treatment or Punishment |
| CCWB   | Central Child Welfare Board  |
| CeLRRD | Centre for Legal Research and Resource Development   |
| CPA    | Comprehensive Peace Agreement  |
| CPN, M | Communist Party of Nepal, Maoist   |
| CRBA   | Child Rights Based Approach  |
| CRC    | United Nations Convention on the Rights of the Child 1989  |
| CVICT  | Centre for Victims of Torture, Nepal   |
| CWIN   | Child Workers in Nepal Concerned Center  |
| CWISH  | Children-Women in Social Service and Human Rights  |
| CYPF   | Children Young Persons and their Families  |
| DAO    | District Administrative Office   |
| DCI    | Defense for Children International   |
| DSP    | Deputy Superintendent of Police  |
| FGC    | Family Group Conference  |
| FGD    | Focus Group Discussion   |
| HMG    | His Majesty's Government/Nepal   |
| HRW    | Human Rights Watch   |
| I/NGO  | International/Non-governmental Organisation  |
| ICCPR  | International Covenant on Civil and Political Rights   |
| IGD    | Institute for Good Governance and Development  |
| INSEC  | Informal Sector Service Centre   |
| JDL    | UN Rules for the Protection of the Juveniles Deprived of their<br>Liberty 1990                                 |
| KSL    | Kathmandu School of Law  |
| MACR   | Minimum Age of Criminal Responsibility   |
| MSD    | Ministry of Social Development (New Zealand)   |
| NEFIN  | Nepal Federation of Indigenous Nationalities   |



|            |   |
|------------|---|
| OJJDP      | Office of Juvenile Justice and Delinquency Prevention |
| PPR Nepal  | Forum for Protection of People's Rights Nepal         |
| Pro Public | Forum for Protection of Public Interest               |
| SC         | Save the Children                                     |
| SC-UK      | Save the Children United Kingdom                      |
| TDR        | Traditional Dispute Resolution                        |
| UN         | United Nations  |
| UNICEF     | United Nations Children's Fund                        |
| US         | United States   |



## ***Abstract***

This paper attempts to analyse the compliance of Nepalese juvenile justice system against the international standards set by 'hard' or 'soft' law or juvenile justice 'specific' or 'general' international human rights instruments. The analysis is based on the Child Rights-Based Approaches (CRBAs), general principles of the UN Convention on the Rights of the Child 1989 (CRC) in general and principle of 'the best interests of the child' in particular and the principle of 'state obligation' have been used throughout the paper. Primary as well relevant secondary data have been used for the purpose of analysis. The paper concludes 'Nepal has taken some good initiatives to establish a separate juvenile justice system to handle cases of the children in conflict with the law but it needs significant reforms to establish a comprehensive juvenile justice system in comply with the international standard and make to serve the best interest of the child '. Finally, recommendations have been made to strengthen the juvenile justice system in Nepal.

## ***Relevance to Development Studies***

Most of the children who come into conflict with the law are victims of neglect, exploitation, and social and economic hardship. They need special care, guidance, protection, education, training and the opportunity of rehabilitation and reintegration. If we want to see a better world for all issues of these children need to be addressed properly. Thus, juvenile justice is conceived as an integral part of national development process to ensure social justice for all children. Therefore, this paper, built on framework of child rights based approach, best interests of the child and state obligation, is highly relevant to development studies.

## ***Key Words***

Juvenile justice system, children in conflict with the law, child rights, child rights based approaches (CRBAs), the best interest of the children, state obligation, diversion, rehabilitation and reintegration.



# CHAPTER1: INTRODUCTION

## 1.1 Background

Children who come into conflict with the law are considered as victims of social hardship, neglect, violence and deprivation. Thus, they require special attention, treatment, care and protection (Sangroula 2004: 1). Children are not supposed to be held accountable for the violation of criminal law as adults are. Their cases should be handled by a separate system from the criminal justice system that is designed for adults. The rationale behind this is that children require protection; they are malleable and are more likely to be rehabilitated than adults.

In practice many children in conflict with the law are detained for long periods of time. Many are subjected to torture, abuse, cruel, inhuman and degrading treatment. In many situations children in detention are also frequently denied adequate food, medical and mental health care, education, and access to basic sanitary facilities (HRW 2006: 1).

The United Nations Convention on the Rights of the Child 1989 (CRC), the International Covenant on Civil and Political Rights (ICCPR) 1966 and the Convention Against Torture (CAT) 1984 are the main international conventions relating to the administration of juvenile justice. The CRC is the most important international instrument for the promotion and protection of the rights of the child and sets criteria for juvenile justice at the international level. It provides standards for a range of legal, civil, political, economic, social and cultural rights of children and for a Child Rights Based Approach (CRBA) and contains elaborate juvenile justice provisions (Arts. 40 and 37). ICCPR Article 10(2b) provides that 'Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.' Likewise, CAT article 2 prohibits torture, cruel and inhuman or degrading treatment in any circumstances.

There are some other non-binding international instruments which provide international juvenile justice standards. These are the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules), the UN Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines), the UN Rules for the Protection of the Juveniles Deprived of their Liberty 1990 (JDL), and the UN Standard Minimum Rules for Alternative Penal Measures 1990 (Tokyo Rules) (Jensen and Jepsen 2006: 5).

Nepal is a state party to the CRC, ICCPR and CAT<sup>1</sup>. As a state party to these international human rights instruments Nepal is under the obligation to

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<sup>1</sup> Nepal became a state party to the CRC, ICCPR and CAT respectively on 14 September 1990, 14 May 1991 and 14 May 1991.



implement the juvenile justice provisions. After ratifying the CRC Nepal promulgated the Children's Act 1992 in order to domesticate the provisions of the Convention. The Act covers a wide range of areas and provides a national framework for the rights of the child and includes some provisions on juvenile justice. According to its preamble, the Act was enacted 'to make legal provisions in order to protect the rights and interests of the children for their physical, mental and intellectual development'. The Act provides children various rights such as the right to a name and determination of birth date (section 3), the right to maintenance, upbringing, education and health care (section 4), non-discrimination (section 5), the right not to be tortured or treated cruelly (section 7), and the right to family contact (section 8). Even though, the Act introduced a concept of juvenile justice as a separate branch of the justice system in Nepal (Khatriwada 2005: 150), the juvenile justice system is still not treated as a separate and independent system. Children in conflict with the law are still being handled mostly as per adult criminal justice procedures (Sangroula 2005: 4). In addition to the Children's Act, the government of Nepal has promulgated the Juvenile Justice Procedure Rules 2007.

Section 9(2) of the Nepal Treaty Act 1990 provides that any law inconsistent with the international treaties or conventions ratified by Nepal will be void to the extent of the inconsistency. In such circumstances the provision of the treaty or convention prevails. Through these provisions, Nepal's internationally declared commitments to children have been directly incorporated into the Nepalese legal system and are considered as a part of national law. But the reality is different. In its second annual report the Committee on Social Justice criticized the lack of effective implementation of the Children's Act passed by the Parliament, and recommended that legal provisions on children be strictly implemented (INSEC 2002: 86 cited in Sangroula 2004: 7).

After the success of the people's uprising in 2006, the Interim Constitution of Nepal 2007 was promulgated. The Constitution has guaranteed child rights as fundamental rights in its chapter 3. Article 22 of the Constitution provides the right to a name and identity (article 22(1)), the right to get nurtured, to get basic health and social security (article 22(2)), the right not to be exploited (article 22(3)), special protection of helpless, orphan, mentally retarded, conflict victims, displaced, vulnerable and street children (article 22(4)) and the prohibition to employ children in factories, mines and other hazardous work (article 22(5)).

In spite of all the efforts, the Nepalese juvenile justice system has encountered a lot of shortcomings in the law, in policy and in its implementation. The minimum age of criminal responsibility (MACR) is extremely low; the juvenile justice system is still considered as a part of the adult criminal justice system; arrest, detention and investigation often do not serve the best interest of the child.

The government of Nepal has no plan of action for establishing a juvenile justice system which would be in compliance with the international juvenile



justice standards and would serve the best interests of the child. At present, even after the Children's Act, no special child courts have been established (Sangroula 2004: 5-6, Khatiwada 2005: 198). The process of investigation, prosecution and trial of children is still almost same as adult criminal justice system. One of the objectives of a juvenile justice system is to ensure 'child friendliness' during the handling of the cases of children. However, research has established that about 92 percent of the children surveyed were kept in detention with adult detainees, 78 percent of the children said they faced incidents of torture in detention and 76 percent of the cases were not decided within the time period prescribed by law (PPR Nepal 2007: 38-68).

Pointing out the problems and gaps in the Nepalese juvenile justice system, the UN Committee on the Rights of the Child in its concluding observations on the state report by Nepal observed that:

*"The legislation and policies of the State party are not in conformity with international juvenile justice standards ... the minimum age of criminal responsibility is set as young as 10, and that there is no official system of age verification in place. The Committee is also concerned about conditions of detention, and that persons under 18 are in most cases not separated from adults while in detention due to lack of juvenile detention facilities. The Committee is also alarmed that children are often brought to trial "without any proper investigation" and that a large proportion of juvenile cases are dealt with by District Administration Offices which are quasi-judicial."*(CRC 2005: 24):

The weak juvenile justice system in Nepal has contributed to the non-realization of the rights of the child and the government is unable to fulfill its obligations under the various international instruments including the CRC.

## **1.2 Context of the Research**

On 18 May 2006 the Parliament of Nepal passed a historic bill which for the first time in history placed a tax on the royal family and its assets, ended the Raj Parishad – a royal advisory council, and declared Nepal a secular country and no longer a Hindu Kingdom. The bill also scrapped the king's position as the Supreme Commander of the Army. The interim government formed included the then rebel Communist Party of Nepal, Maoist (CPN, M) and Constitutional Assembly (CA) elections were held on 10 April 2008. According to article 64 of the Interim Constitution, the major duty of this Assembly is to make a democratic Constitution within two years from its first meeting. The first CA meeting on 28 May 2008 passed a resolution which ended the monarchy and paved the way for the establishment of a federal republic in Nepal.

Nepal is currently passing through a big socio-political transition in its history. Soon a new Constitution will be promulgated. All national law and policy will also have to be reviewed and where needed changed in accordance with the new political system framed by the forthcoming Constitution. In this context, this research paper hopes to make a contribution to formulating policy and law regarding the juvenile justice system.



### 1.3 Relevance and Justification

The National Plan of Action (2004/5-2014/15) for children, prepared by the government of Nepal has as a target to ‘ensure a juvenile friendly justice system’ (although the document has not defined what ‘juvenile friendly’ means). It has proposed to establish a children’s court in each district, reform the legal and justice systems, to sensitize and to strengthen the program for children in conflict with the law. It has also proposed the establishment of rehabilitation homes for needy children that have come in conflict with the law (CCWB 2004: 82).

Recent research on the rehabilitation and reintegration of juvenile delinquents in Nepal has identified some weaknesses of the present juvenile justice system in the country which has recommended reform of the juvenile justice system by implementation of national and international standards and respect for the rights of child (PPR Nepal 2007: 61-65).

After having considered the second periodic report submitted by the government of Nepal and civil society in 2005, the UN Committee on the Rights of the Child recommended that Nepal should:

*“review its legislation and policies in order to ensure the full implementation of juvenile justice standards as per the CRC as well as the Beijing Rules) (General Assembly resolution 40/33) and the Riyadh Guidelines (General Assembly resolution 45/112), and in the light of the Committee’s general discussion on the administration of juvenile justice administration and human rights” (CRC 2005: 25).*

As mentioned above, Nepal is currently in a historic phase of political, social and legal transition. This creates opportunities and unique chances for juvenile justice reforms in Nepal and makes it especially relevant now to undertake research that can support the initiation of such reforms and help develop their contents.

Finally, I personally and the organization with which I am associated, Forum for the Protection of the People’s Rights Nepal (PPR Nepal), have been involved in issues relating to access to justice and reform of the juvenile justice system in Nepal. This research is highly relevant for me and my organization’s work.

### 1.4 Research Objectives and Questions

#### 1.4.1 Research Objectives

- To identify the gaps (from the perspectives of international standards) in the present juvenile justice system in Nepal,
- To identify measures to be taken to reform the juvenile justice system in Nepal so as to make it in compliance with the international standards of juvenile justice and serving the best interests of the child.



### **1.4.2 Main Research Question**

- How can the Nepalese juvenile justice system be reformed to make it more in compliance with the international standards and serving the best interests of the child?

### **1.4.3 Sub Research Questions**

- What is the state of the juvenile justice system in Nepal?
- What do the relevant international standards prescribe in terms of juvenile justice standards?
- What are the gaps in the juvenile justice system in Nepal?
- What possible measures can be taken to make the Nepalese juvenile justice system more in compliance with international standards and serving the best interest of child?

## **1.5 Methodology**

This research used largely qualitative methods and depends on primary as well as secondary data. Primary data consist of the findings of seven interviews with children in conflict with the law which were conducted in Kathmandu as well as in one western district (Lamjung) between 20 August and 17 September 2008. An exploratory semi-structured as well as in-depth interview method has been used. Each interview lasted between 40 and 60 minutes. A focus group discussion and in depth interviews with key informants, including an Appeal Court Judge, a District Court Judge, a court official, a Government Attorney, two Lawyers, two Police Officers and a Psychosocial Counselor, were also conducted. The focus group discussion was conducted on 27 August 2008 from 1 to 5 PM in Kathmandu. The discussion was attended by seven key informants and facilitated by the author. The discussion was recorded electronically and notes were taken by colleagues from PPR Nepal.

The key informants and the participants in the Focus Group Discussion (FGD) were selected on the basis of their involvement in the promotion and protection of child rights and juvenile justice issues. PPR Nepal, an NGO working in the field of protection and promotion of human rights, access to justice and reform of the juvenile justice system in Nepal, helped to find the interviewees and to conduct the interviews. PPR Nepal<sup>2</sup> is an NGO established in 2002 by a group of Lawyers, Health Professionals, Sociologists and Journalists as non-governmental and non-profit organization. PPR Nepal has recently conducted a research on the situation of reintegration and rehabilitation of juvenile delinquents in Nepal and published a report 'Rehabilitation and Reintegration Denied? A Critical Analysis of the Juvenile Justice System in Nepal'.

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<sup>2</sup> For details visit [www.pprnepal.org.np](http://www.pprnepal.org.np)



Relevant international human rights instruments and Rules and Guidelines of juvenile justice are used throughout the paper. The following primary as well as secondary data have been used for the research:

- Data collected and reports published by child rights I/NGOs, including CWIN, PPR Nepal, CWISH etc,
- Materials published by the Central Child Welfare Board, Government of Nepal,
- United Nations documents, including concluding observations of UN treaty bodies, recommendations, communications and state reports such as the 1st and 2nd CRC periodic reports submitted by Nepal, materials prepared by UNICEF, DCI and other organizations,
- Relevant academic literature in the field of juvenile justice.

## **1.6 Problems/Limitations in Carrying Out the Research**

While the research focuses on juvenile justice across Nepal, it would not be possible to reach every child in conflict with the law and all the courts and police stations who handle the cases of children. For the interviews and focus group discussion Kathmandu, Baglung, and Lamjung were chosen. Kathmandu was chosen as one of the locations for the study because it is the capital city of Nepal and most of the central government offices such as the Supreme Court, Police Headquarters, the Central Child Welfare Board and national and international NGOs working in the field of juvenile justice are located there. The western districts Baglung and Lamjung were selected for field data collection because PPR Nepal arranged my field visit to these districts, which allowed me to conduct interviews for this research.

My experience and background in the field has helped me to identify the issues and the stakeholders in the field for the purpose of this research. To ensure objectivity and critical analysis, a good variety of reports, articles and data collected by many organizations and written by many experts in the field have been used.

## **1.7 Structure of the Paper**

The paper is divided into five chapters. The first chapter has provided an overall introduction to the paper, the context of the research, its relevancy, justification and objectives, and the methodology employed. The second chapter provides an introduction to ‘juvenile justice’, its evolution and rationale, and to the theoretical/analytical framework for the research. The third chapter deals with the international standards of juvenile justice on the MACR, conditions of arrest and detention, juvenile courts and trial procedures, specialized institutions for juvenile justice, diversion and alternative sentences, re-integration and rehabilitation policy and the principle of the best interests of the child. Chapter four provides an overview of the Nepalese juvenile justice system, Nepalese law and policy regarding juvenile justice and their implementation status. The chapter specifically analyses the MACR, court proceedings, situation of arrest and detention and its compliance with the



international standards of juvenile justice. It analyses whether the Nepalese juvenile justice system serves the best interests of the child. The fifth chapter offers some final conclusions arguing that, while the government of Nepal has taken some steps to establish a juvenile justice system it still needs a lot of sincere efforts to make the Nepalese juvenile justice system comply with the international standards and serving the best interests of the child. Some recommendations are made for concrete action in this regard.



## **CHAPTER 2: INTRODUCTION AND DEVELOPMENT OF THE CONCEPT OF THE JUVENILE JUSTICE SYSTEM**

### **2.1 Introduction to ‘Juvenile Justice’**

The term ‘juvenile justice’ implies different meanings and systems in different countries. The reasons for intervention, the ages taken into consideration, the institutions involved, the reaction, the objectives of intervention and the structural organization can all vary between systems (Capelaere et al. 2004: 10). A juvenile justice system is a set of rules, norms and institutions which are devised for children who come into contact with the justice system as a result of being suspected or accused of violating law. It starts with the arrest of a child and ends after a decision is made, within or outside the formal justice system. It looks at the implications of sentencing options, with particular attention to those subjected to deprivation of liberty (UNICEF 2004: 2). One of the leading child rights NGOs, Defense for Children International (DCI), defines juvenile justice as follows:

*“The term “juvenile justice” refers to legislation, norms and standards, procedures, mechanisms and provisions, institutions and bodies specifically applicable to juvenile offenders..... It also includes efforts to address the root causes of offending behavior and implement measures to prevent such behavior...” (DCI 2008: 1)*

Government systems for handling the issue of children in conflict with the law vary in name and approach according to the context of a particular country. Children may be dealt with through the formal justice system, the welfare system, or, for minor offences, by an administrative system. Wherever the system contains a degree of specialization for children - whether the system is based on courts, the welfare system or an administrative system - it is known as a juvenile justice system (UNICEF 2006a: 1).

### **2.2 Evolution and Rationale of Juvenile Justice Systems**

Historically speaking, initially the concept of a juvenile justice system was mainly developed in the US and Europe in the nineteenth and twentieth centuries. At the time the system was mostly aimed at protecting children in conflict with the law by separating them from adult offenders. (ABA 2007: 4). However, the second international Penitentiary Congress (Stockholm, 1878) resolved that delinquent children should not be punished but educated so as to enable them to “gain an honest livelihood and to become of use to society instead of an injury to it” (Weijers 1999: 329).

Juvenile courts really emerged at the turn of the twentieth century. In the beginning they were based on the legal doctrine of *parens patriae*<sup>3</sup> (ABA 2007:

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<sup>3</sup> A Latin term that means the state as parents.



5). The British doctrine '*parens patriae*' was the basis for the right of the state to intervene in a manner different from the way it intervenes in the lives of adult. The doctrine was interpreted to mean that, because children were not of full legal capacity, the state had power and responsibility to provide protection for children whose parents were not providing appropriate care or protection (OJJDP 1999: 2).

Most of the traditional juvenile justice systems were based on a welfare approach. Recently, trends in juvenile justice have tended to shift towards a justice oriented approach, emphasizing fair trial rights and punishment proportionate to the acts committed and the extent to which a child is responsible for them. The minimum age of criminal responsibility in a justice-based system is usually lower than that of welfare-based systems and represents the age at which children are assumed to have necessary attributes to bear moral and criminal responsibility (Malby 2008: 118-119).

The US Supreme Court in the *Roper v. Simmons case* (543 U.S. 2005: 551) identified the following three general differences between juveniles under 18 and adults offenders:

*"First, juveniles show a lack of maturity and an underdeveloped sense of responsibility in comparison to adults. Second, juveniles are more susceptible to negative influences and peer pressure and have a reduced sense of control over their environment. Third, a juvenile's character is not yet fixed (ABA 2007: 12).*

The juvenile justice system and the criminal justice system differ in many ways but also have some common ground. Juvenile justice, as opposed to criminal justice, recognizes children who come into conflict with the law as victims. It takes into account the fact that children lack the maturity of adults (morally and cognitively, physically and emotionally). It recognizes that most of the children who come into conflict with the law are victims of neglect, exploitation, and social and economic hardship. These children need special care, guidance, protection, education, training and the opportunity of rehabilitation and reintegration. (UNICEF & AIHRC 2007: 4).

Not only the US and Europe, but other parts of the world also practiced alternatives to the formal mechanisms for dealing with cases of children. For example, in Asia, the Government of Laos in 1997 formulated in a national policy that every village should have a Village Mediation Unit. According to this policy, the cases of children in conflict with the law are heard at village level by a Juvenile Mediation Unit. The policy has prescribed many diversion measures, applicable at various stages during the process of handling children's case such as cautions, mediation programs, victim-offender dialogue, family group conferences (FGCs) and pre-trial community service (SC UK 2004: 55-56).

New Zealand promulgated the Children, Young Persons and Their Families Act in 1989 (CYPF Act 1989) which introduced an innovative system for responding to the child in conflict with the law. The system emphasizes diversion from courts and custody, and, while holding children accountable, facilitates the construction of responses that aim to provide for the



rehabilitation and reintegration of them, support for their families, and that take into account the needs of victims (MSD 2007: 1). The provisions of FGCs are the most important aspect of New Zealand's juvenile justice system. The CYPF Act 1989 section 260 provides that FGCs are to make such decisions, recommendations and plans as are thought to be "necessary or desirable in relation to the child or young person in respect of whom the conference was convened."

In recent years, the issue of children in conflict with the law has become an increasing concern for South Asian countries and reform initiatives are going on in many countries. All the countries in the region have some differentiated procedures for children's case but no country in the region has fully functioning comprehensive and separate juvenile justice system (UNICEF 2006a: I). In the South Asian region, India promulgated the Juvenile Justice (Care and Protection of Children) Act in 2000. The Act deals with children in conflict with the law and children in need of protection. The Act aims to create a separate system of justice for children at every stage, distinct from adult criminal justice system. Bhutan does not have separate juvenile justice legislation, nor a separate juvenile justice system. In the late 1990s a bill was drafted in Bhutan in order to introduce systematic and specialized legal framework for juvenile justice system (UNICEF 2006a: 53-63). The Government of Bangladesh promulgated the Children Act 1974 to deal with the justice system both for children in conflict with the law and children in need of protection. In spite of promulgation of the Act almost 30 years back, Bangladesh has yet to establish a comprehensive and separate juvenile justice system (UNICEF 2006a: 39).

In Nepal, 59 indigenous nationalities<sup>4</sup> have been identified (NEFIN 2008: 1-3). Most of the indigenous nationalities have been practicing their own Traditional Dispute Resolution (TDR) systems from long ago. For example, *Sir Uthanne* is an example of TDR systems operating in the eastern hilly region. It functions mainly in the Rai community. In this system community selects a *Jimmuwal* (dispute solver) and gives him (generally a man) a role as mediator and decision-maker (Massage et al. 2008: 4). Likewise, the *Badghar* system is a very well established system of TDR in the Tharu community, practiced across the Tarai from west to east. The *Pancheti* system is widespread in almost all Madhesi communities in the Tarai Districts. *Sammaj Basne* – where disputes are settled by *majhi badaam* (dispute solver) - is a well established TDR system in the Satar community in the Tarai. In all these TDR systems most of the petty cases and children's cases are being finalized at local level without any involvement of formal judicial settings (ibid 9).

The Government of Nepal has promulgated the Children's Act 1992 and the Juvenile Justice Procedure Rules 2007 which provide for special treatment

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4 Nationalities mean the communities who have their own mother tongue and traditional culture and do not fall under the conventional Hindu hierarchical caste structure.



of the child in conflict with the law and separating the juvenile justice system from the adult criminal justice system. Section 55 of the Children's Act provides that cases of children should be tried by juvenile court or by juvenile bench.

### **2.3 Theoretical /Analytical Framework**

This paper builds on notions of Child Rights Based Approaches (CRBAs). Child rights are the international human rights applicable to children set out specifically in the CRC but also in general human rights instruments (SC 2005: 24). A CRBA is a frame work that integrates the norms, standards and goals of child rights while formulating and implementing any plan or program relating to children. The CRC provides a solid basis for addressing the rights and needs of children. The fundamental thing is that it prescribes general principles for all action relating to children in all parts of the world. The CRC has as its overall objective to ensure the 'survival and development' of all the children and young persons in the world. To achieve this objective the CRC has prescribed three general principles: the best interests of the child, non-discrimination and participation (Arts 2006: 10).

As the CRC provides major elements of a rights-based framework (Arts 2006: 10) concrete interventions can be designed in accordance with it for improving all aspects of children's lives, including the juvenile justice system.

The CRC establishes the 'best interests' principle as a guiding principle. Article 3(1) of the CRC states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The CRC specifically refers to the concept of best interests of children in particular situations, i.e. in relation to separation from parents (article 9(1), parental responsibilities for their children (article 18(1)), deprivation of family environment (article 20), adoption (article 21), restriction of liberty and separate from adults in detention (37(c)) and the juvenile justice system (article 40(2) (b) (iii)). The wording of Article 3(1) of the CRC is very broad, covering not only the state but also the private sphere and all actions concerning children (UNICEF 2002: 42).

The 'best interests' principle emphasizes a holistic approach to children and their development and applies to every aspect of a child's life in all decision- making affecting them. In every decision and intervention the action should be directed towards the realization of their rights and serious account should be taken of their views (SC 2005: 30). For, the United Nations Committee on the Rights of the Child has stressed that the Convention should be considered as a whole and has emphasized the relationship between the articles that it has elevated to the status of general principles (articles 2, 3, 6, 12). Thus, the principles of non-discrimination, maximum survival and development, and respect for the views of the child are all relevant to determining what the best interests of children are. The list of factors competing for the core of best interest is almost endless and will depend on each particular situation. These include the opinions of the child and members



of the child's family, the child's sense of time, the need for continuity, the risk of harm, and the needs of child (Bueren 1995: 47). In practice, it is difficult in a particular situation to determine what is exactly in the best interests of an individual child in question under the given circumstances. To do this we need to analyze and weigh all interests and circumstances of the particular case (Arts 2006: 12). Goonesekere (1998: 115) is of the opinion that the paramount consideration of the best interests may lead to an exclusively child-centered approach which is being criticized of ignoring other important factors such as parental claims, gender, equity, community interest etc.

Not only the CRC and other human rights instruments, but also many states have included the best interests principle in their constitution, law and/or policy in various forms. For example, the Children Statute, 1996 of Uganda states that the principle of the "child's welfare shall be of paramount consideration" while deciding matters relating to children (Section 4, First Schedule). The Children, Young Persons and Their Families Act 1989 of the New Zealand provides that "In all matters relating to the administration or application of this Act ..., the welfare and interests of the child or young persons shall be the first and paramount consideration ...". The Interim Constitution of Nepal 2007 has important provisions to safeguard 'the best interests of the child' such as Article 13(3) which enables the government to formulate law and policy for affirmative discrimination of children, and Article 22 which recognizes child rights as fundamental rights which are enforceable through legal procedures in court. The Preamble of the Nepalese Children's Act 1992 states that the Act was promulgated to protect the rights and interests of the children.

The principle of non-discrimination is also a general principle of fundamental importance for the implementation of the whole CRC (UNICEF 2002: 19). Article 2 of the CRC has obliged state parties to respect and ensure the rights provided by the CRC without any kind of discrimination on the basis of the child's or his/her parent's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Likewise, the same article obliges state parties to take appropriate measures to protect children against all forms of discrimination. (UNICEF 2002: 19).

The principle of 'participation' provides children and young persons with the right to have their say in all matters affecting them. The UN Committee on the Rights of the Child has recognized Article 12 of the CRC as "a general principle of fundamental importance relevant to all aspects of implementation of the CRC and to the interpretation of all other articles" (UNICEF 2002: 159). Article 12(1) of the CRC provides that any child who is capable of forming his/her views has the right to express views freely in all matters affecting the child and his/her views being given due weight as per the child's age and maturity. Clause 2 of the same article provides the child with the right to be heard in any judicial and administrative proceedings affecting him/her. This principle recognizes the agency of children.



The Beijing Rules provide that if a case has not been diverted or disposed out of court then the case should be dealt with by the competent authority (court, council, board etc.) and in any case the principles of fair and just trial should be followed. Such proceedings should be conducive to the best interests of the child and should be conducted in an atmosphere where the child can freely participate and express himself/herself freely in the process (rule 14). Likewise, Rule 15 of the Beijing Rules states that the court proceedings must be conducive to the best interests of the child and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate fully and to express her or himself.

Article 26 of the Vienna Convention on the Law of Treaties 1969<sup>5</sup> provides the principle of “*Pacta sunt servanda*”. It is one of the basic principles of international law and means that every treaty in force is binding on the state parties and those obligations and duties conferred by the treaty must be performed by the state parties fully and in good faith. As a state party to the CRC, Nepal is obliged to perform the obligations and duties provided by the Convention fully and in good faith.

Defining the obligations imposed by human rights treaties on state parties, Henry Shue proposed the “tripartite typology” of obligations “to respect”, “to protect” and to “fulfill”. The obligation to respect requires “The state to refrain from any measure that may deprive individuals of the enjoyment of their rights or of the ability to satisfy those rights by their own efforts.” (Sepulveda et al. 2004: 16). The obligation to protect requires “the state to prevent violation of human rights by a third party” and the obligation to fulfill requires “the state to take measures to ensure for persons an opportunity to obtain satisfaction of the basic needs as recognized in human rights instruments, which cannot be secured by personnel efforts” (ibid). States that have ratified the CRC are legally bound by it and have made a commitment to taking the necessary legal, budgetary, administrative and other measures in order to implement it, including maximum resources. States are the main legal (or primary) duty bearers in the CRC. The state has the responsibility to create the legislation and policy framework and to provide resources so that children’s rights can be realized (SC 2005: 18). Nepal is under the obligation mentioned above as a state party to the CRC.

International instruments, ‘hard’ or ‘soft’ law, juvenile justice ‘specific’ or ‘general’ human rights instruments have provided a framework and guiding principles for the juvenile justice system. The guiding theoretical principles relevant to minimum age of criminal responsibility, conditions for arrest and detention, juvenile courts and trial procedures, specialized institutions for juvenile justice systems, diversion and alternative sentencing, re-integration and rehabilitation policy, the overarching principles ‘the best interests of the child’,

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<sup>5</sup> United Nations, Treaty Series, vol. 1155, p. 331. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980.



non-discrimination and participation are being used throughout the paper. Likewise, CRBA and the principle of state obligations for human rights are also used.



## **CHAPTER 3: INTERNATIONAL JUVENILE JUSTICE STANDARDS**

### **3.1 Background**

The CRC and other relevant human rights and juvenile justice instruments have set standards for juvenile justice systems. United Nations bodies such as the Economic and Social Council, the Committee on the Rights of the Child, the Human Rights Committee and UNICEF have contributed to the process of global standard setting for juvenile justice. Governmental and non-governmental organizations working on the rights of the child, fair trial and justice have also contributed, on the national as well as the international level.

International instruments can be divided into ‘hard’ law and ‘soft’ law for practical convenience. Treaties are hard law as they are binding on the states parties after they have undergone the ratification process. Declarations, resolutions, guidelines and the likes are usually soft law. These instruments have not undergone the process of ratification and they are not strictly binding on states. Although soft law does not create any direct obligation on states, it does carry the legitimacy of the international community. It is therefore highly useful and important for the development of juvenile justice jurisprudence at the national and international level (Khatriwada 2005: 16). The CRC, ICCPR and CAT are hard laws on juvenile justice and declarations and resolutions such as the Beijing Rules, the Riyadh Guidelines and the JDLs are soft laws. In this paper both the ‘hard’ and ‘soft’ laws have been taken as relevant international instruments of juvenile justice.

The international instruments on juvenile justice can also be divided into ‘juvenile justice specific’ and ‘general human rights’ instruments. As per this division, the CRC, the Beijing Rules, the Riyadh Guidelines and the JDLs are juvenile justice specific instruments and the ICCPR and CAT are general human rights instruments. For any analysis of juvenile justice standards both the specific juvenile justice instruments and general human rights instruments are relevant.

### **3.2 International Standards on Juvenile Justice System**

The Juvenile justice system is not and should not be a part of the regular adult criminal justice system. Nevertheless there may be some similarities in procedures and due process guarantees. Measures for special care, special protection and special procedures are required to protect and promote the best interests of the child in cases of children. Binding and non-binding, juvenile justice specific and general human rights international instruments provide the framework for the proper administration of juvenile justice and mechanisms for enforcing them.

The CRC requires states parties to develop and implement a comprehensive juvenile justice policy. The Committee on the Rights of the



Child has stated that “the comprehensive approach should not be limited to the implementation of specific provisions contained in Article 37 and 40 of the CRC, but should also take into account the general principles enshrined in article 2, 3, 6 and 12 and all other relevant articles of the CRC” (CRC 2007: 3). Rule 1(4) of the Beijing Rules states that “juvenile justice shall be conceived as an integral part of the national development process of each country within a comprehensive frame work of social justice for all juveniles.” Juvenile justice systems should also be developed systematically and in a coordinated way so as “to improve and sustain the competence of personnel involved in the system, including their methods, approaches and attitudes” (The Beijing Rules, rule 1(6)). The next sections highlight the most important aspects of establishing and proper functioning of comprehensive and separate juvenile justice systems, seen from a CRBA and directed at serving the best interests of the child.

### ***3.2.1 Minimum Age of Criminal Responsibility (MACR)***

CRC Article 40(3) obliges states parties to set a MACR below which children shall be presumed not to have the capacity to infringe the penal law, but it does not mention a specific minimum age in this regard. Rule 2(2a) of the Beijing Rules defines a juvenile as “a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”. Rule 4(1) recommends that states parties not set a too low MACR and that the “emotional, mental and intellectual maturity” of the juveniles should be considered when determining the age of criminal responsibility. The CRC and the Beijing Rules do not set a MACR directly, but they lay some basis for it. In accordance with the basis set by the CRC and the Beijing rules the Committee on the Rights of the Child has set 12 years as the MARC and stated that:

*“... The states should not set the MACR below the age of 12 and the Committee encourages to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher level.... that MACR below the age of 12 years is considered by the Committee not to be internationally acceptable” (CRC 2007: 11).*

### ***3.2.2 Conditions for Arrest and Detention***

CRC Article 37(a) provides that children shall not be subjected to torture or other cruel, inhuman or degrading treatment or punishment and that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time (article 37(b)) and special protection shall be provided to children who are deprived of a family environment (articles 19, 20). Article 9 concerns family contact in cases where children are separated from their families. CRC Article 37 provides basic principles to be followed at the time of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions regarding the treatment and conditions once deprived of their liberty. The leading principles are spelled out in CRC article 37(b): the “arrest,



detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”, and “no child shall be deprived of his or her liberty unlawfully or arbitrarily”.

Article 40 of the CRC asserts that children in conflict with the law should be treated “in a manner consistent with the child’s sense of dignity and worth... and which takes into account the child’s age and the desirability of promoting the child’s reintegration.”

The JDL has also laid down important guiding principles regarding arrest and detention of the child in conflict with the law such as that deprivation of liberty should be a last resort and for a minimum period and that it should be limited to exceptional cases (rules 1, 2). Juveniles should only be deprived of their liberty in accordance with the principles and the procedures of international law, deprivation of liberty should only be in facilities which guarantee the health, self-respect, and sense of responsibility of juveniles and these facilities should also foster their skills, access to the family members should be allowed, and all juveniles deprived of their liberty should be helped to understand their rights and obligations during detention (rules 2, 17, 18 of JDL).

Beijing Rule 10(1) provides that when a juvenile is arrested or detained, his or her parents must be notified immediately, or within the shortest possible period of time. Any contacts between law enforcement agencies and a juvenile must be managed in such a way as to respect the legal status of the juvenile to promote his or her well being and avoid harm to the juvenile (rule 10(3), the Beijing Rules). Especially, the police must not use harsh, abusive or obscene language or physical violence in their dealings with children (rule 12, the Beijing Rules). Rule 13 of the Beijing Rules provides that, whenever possible, alternatives to the deprivation of liberty such as close supervision, placement with a family or in an educational or home setting should be used.

Rule 26(4) of the Beijing Rules provides that juveniles in the institutions should be kept separate from adults and that young female offenders should be provided with special attention as per their personnel needs and problems. They should by no means receive less care, protection, assistance, treatment and training than young male offenders.

The ICCPR contains provisions which stipulate that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status (article 10). Its Article 14 states that procedures against juvenile persons should take account of the age and the desirability of promoting rehabilitation. In addition, the CAT states that States should take effective legislative, administrative, judicial or other measures to prevent acts of torture and that no one shall be subjected to torture or to inhuman or degrading treatment (article 2).



### ***3.2.3 Juvenile Courts and Trial Procedures***

CRC Article 37(d) states that children in conflict with the law have the right to have the matter determined without delay by a competent, independent and impartial authority in a fair hearing. Throughout the proceedings, children have the right to have a parent or guardian present, and to have appropriate legal or other assistance (UNICEF 2006: 7, 8). The CRC contains an important list of rights and guarantees that are all meant to ensure that every child (accused of) having infringed the penal law receives fair treatment and trial (article 12, 16, 37 and 40(2)). These rights include rights against retroactive juvenile justice, the presumption of innocence, the right to be heard, the right to effective participation in the proceedings, the right not to get the death penalty, prompt and direct information of the charges, the right to get legal and other necessary assistance, decisions without delay and with involvement of parents, freedom from compulsory self incrimination, the right to presence and examination of witnesses, the right to appeal, the right to get free assistance of an interpreter, and the right to privacy.

### ***3.2.4 Specialized Institutions for Juvenile Justice***

As stated in CRC article 40(3), states parties should “seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable” to children in conflict with the penal law. The UN Committee on the Rights of the Child has observed that:

*“A comprehensive juvenile justice system further requires the establishment of specialized units within the Police, the judiciary, the court system, the prosecutor’s office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child”*(CRC 2007: 24).

Beijing Rule 12 recognizes the need for special instruction and training for the police involved in juvenile justice system. Beijing Rule 22 emphasizes the need for professional education, in-service training, refresher courses and other appropriate modes of instruction to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.

### ***3.2.5 Diversion and Alternative Sentencing***

Diversion is a process of removing children in conflict with the law from the formal criminal justice processes. Usually this means that “the traditional justice process is suspended or terminated, provided that the juvenile adheres to specific conditions and/or alternative services, similar to conditions for court-ordered probation” (Jensen 1996: 101).

CRC Article 40(3) obliges the states parties:

*“To promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable.”*



Beijing Rule 11(1) provides further guidance on diversion stating that “consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority”. Rule 11(2) further provides that “the agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the legal system and also in accordance with the principles contained in these Rules”.

According to the UN Committee on the Rights of the Child, state authorities can generally use two kinds of interventions for dealing with children: measures without resorting to formal judicial proceedings and measures resorting to formal judicial proceedings (CRC 2007: 8). The Committee further emphasized the need of measures for dealing with the child in conflict with the law other than judicial proceedings and ensuring that the rights of the child will be fully respected and protected (CRC 2007: 9).

As explained above, the CRC provides that deprivation of liberty should be used only as a measure of last resort for the shortest appropriate period (article 37(b)). After a fair and just trial a decision is made regarding the measures which should be imposed on the child found guilty of the alleged offence. The laws must provide the competent authority, with a wide variety of possible alternatives to institutional care and deprivation of liberty (CRC 2007: 20). Article 40(4) of the CRC obliges state parties to make available a variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. Beijing Rule 18(1) recommends making available a large variety of disposition measures which include care, guidance and supervision orders, probation, community service orders, financial penalties, compensation and restitution, intermediate treatment and other treatment orders, orders to participate in group counseling and similar activities.

### ***3.2.6 Re-integration and Rehabilitation Policy***

One of the most important goals of the CRC is to promote the full and harmonious development of the child’s personality, talents and mental and physical abilities (preamble, articles 6 and 29). CRC Article 40(1) provides that the state parties should treat the child in conflict with the law:

*“...in a manner consistent with the promotion of the dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society. ”*

Beijing Rule 24 emphasizes the need of providing juveniles, at all stages of the proceedings, with necessary assistance such as lodging, educational or vocational training, employment or any other assistance, helpful and practical,



in order to facilitate the rehabilitative process. The objectives of the training and treatment of juveniles in the institutions should be to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society. The juveniles in the institution should be provided with care, protection and all necessary assistance - social, educational, vocational, psychological medical and physical that they may require because of their age, sex, and personality and in the interest of their wholesome development. In order to properly reintegrate juveniles in their society, efforts shall be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centers and other such appropriate arrangements (Beijing Rules 26(1) and (3), 29(1)).



## CHAPTER 4: THE JUVENILE JUSTICE SYSTEM IN NEPAL AND ITS COMPLIANCE WITH INTERNATIONAL STANDARDS

### 4.1 Historical Context of the Legal System in Nepal

The administration of justice in Nepal has had a close relation with the religious belief and realities of the Hindu civilization. Hindu philosophy provides importance to the principles of justice and morality. “The basic concept of Hindu theology, commonly known as dharma, is a combination of law, justice, morality and rational principles” (Khanal 2000: 1). The promulgation of the legal code was a common practice of law-making in Nepal. The promulgation of the Civil Code (*Muluki Ain*) in 1853 was one of the landmarks in the Nepalese legal system. The *Muluki Ain* was a codification of all the laws in the country: civil, criminal, religious, customary and it also had provisions dealing with succession to the throne, state affairs and the armed forces (Regmi 1979: 2).

Prior to 1951, Nepal’s legal system was close to an ‘inquisitorial system’ which meant that the court exercised the role of both an investigator and an adjudicator. The courts had power to discover evidence and to conduct judicial inquiry before the sentence was passed. After the popular movement in 1951, an independent judiciary was established and an adversarial system of justice was introduced. The Constitution of the Kingdom of Nepal 1969 accepted the ‘adversarial approach’ meaning that the investigating power of the court was taken away. Only the power of adjudication was vested with the judiciary. The promulgation of the State Cases Act 1961 was a significant development towards practicing the adversarial justice system in Nepal. This Act separated the investigation and prosecution from the adjudicating power vested in the judiciary. The courts remained as independent case-hearing authorities and investigation and prosecution power was vested in the Police and Government Attorney (CeLRRd 2001: 11).

The Constitution of the Kingdom of Nepal 1990 adopted the concept of an independent and competent system of justice, together with the concept of the rule of law a democratic system was established (Preamble of the Constitution 1990). As explained earlier, after the popular movement in 2006 a Comprehensive Peace Agreement (CPA) was signed between the government of Nepal and Maoist rebels. Then the Interim Constitution 2007 was promulgated. Article 24 of the interim Constitution provides the following relevant fundamental rights:

**“Article 24. Rights Regarding Justice:** (1) No person who is arrested shall be detained in custody without being informed of the ground for such arrest.  
(2) The person who is arrested shall have the right to consult a legal practitioner of his/ her choice at the time of the arrest. The consultation made by such a person with the legal



*practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner.*

*(3) Every person who is arrested shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such a person shall be detained in custody beyond the said period except on the order of such authority. Nothing in clauses (2) and (3) shall apply to preventive detention or to a citizen of an enemy state.*

*(4) No person shall be punished for an act which was not punishable by law when the act was committed, nor shall any person be subjected to a punishment greater than that prescribed by the law in force at the time of the commission of the offence.*

*(5) No person accused of any offence shall be assumed as an offender until proved guilty.*

*(6) No person shall be prosecuted or punished for the same offence in a court of law more than once.*

*(7) No person accused of any offence shall be compelled to be a witness against oneself.*

*(8) Every person shall have the right to be informed about the proceedings of the trial conducted against him/her.*

*(9) Every person shall be entitled to a fair trial by a competent court or judicial authority.*

*(10) The indigent person shall have the right to free legal aid in accordance with law.”*

Article 100 of the Interim Constitution provides all the powers relating to justice to the courts and the courts use this power as per the Constitution, laws and recognized principles of justice. Article 101 of the Constitution established three tiers of courts namely the Supreme Court, the Appellate Court and the District Courts in the country.

## **4.2 The Juvenile Justice System in Nepal: General Background**

As a state party to the CRC Nepal has the obligation to formulate laws and policies for the implementation of the CRC. For the purpose of making legal arrangements to “protect the rights and interests of the children”, aiming at ensuring their physical, mental and intellectual development, the Children Act 1992 was formulated (preamble of the Act).

The Children’s Act 1992 is a special Act promulgated with the declared objective of the well-being of children. Before its enactment, there was no separate law dealing with children in conflict with the law. The chapter on punishment (*Danda Sajaya ko Mahal*) of the Civil Code (*Muluki Ain*) only had a provision to lessen the punishment for a child under the age of 16. But, the punishment and court proceedings were similar to those of adult offenders (PPR Nepal 2007: 24).

For the first time in Nepal, the Interim Constitution of Nepal 2007 recognized the rights of the child as fundamental rights. Article 22 of the Interim Constitution provides:

**“Article 22.Right of the Child:** *(1) Every child shall have the right to his/her own identity and name.*

*(2) Every child shall have the right to get nurtured, basic health and social security.*



(3) *Every child shall have the right against physical, mental or any other form of exploitation. Any such an act of exploitation shall be punishable by law and the child so treated shall be compensated in a manner as determined by law.*

(4) *Helpless, orphan, mentally retarded, conflict victims, displaced, vulnerable and street children shall have the right to get special privileges from the State to their secured future.*

(5) *No minor shall be employed in factories, mines or in any other such hazardous work or shall be used in army, police or in conflicts.*

There is still no separate Act regarding juvenile justice in Nepal. The State Cases Act, 1992 and the Children's Act 1992 thus provide the national framework for the juvenile justice system. The Juvenile Justice Procedures Rules 2007 provides detailed procedures for the handling of the cases of the child. The Children's Act provides for constitution of a Central 'Children Welfare Board' (CCWB) (section 32). The CCWB has the overall responsibility to ensure realization of the rights of the children of Nepal by the state collaborating with civil society as well as national and international development organizations. It works towards protection of children's rights as per the CRC standard. The CCWB has overall responsibility to look after children's issues<sup>6</sup>.

The CCWB has 21 members in its Board. The Chair of the Board is Minister of Women, Children and Social Welfare. Other members of the Board are Secretaries of various government ministries and representatives from the Teacher's Union, NGOs, Pediatrician, Teachers, Child Rights Activists and other reputed personalities (section 32, the Children's Act). In 2007 government of Nepal promulgated Juvenile Justice Procedure Rules to provide special court procedures for the cases of children in conflict with the law.

The Nepalese Judiciary has played a significant role for the protection of the rights of children in conflict with the law. The Supreme Court of Nepal has issued an order of *habeas corpus* and directed the government authorities to keep the petitioner (a 14 year old child) in the juvenile reform home instead of putting him in prison for remand purposes (*Bablu Godia vs. Banke District Court*, writ no. 3390 of 2000). The Supreme Court, citing ICCPR article 10(3) and CRC article 37(a), issued an order in the name of prison authorities not to keep a minor in custody or prison together with adult prisoners and to shift the petitioner (a convicted child) who was kept in a prison with adults to the Juvenile Reform Home (*Keshav Khadka vs. Dhankuta District Court*, writ no. 3685 of 2000). In another case the SC directed the Prison authority to release the petitioner (a child) as she was not put into a reform home. (*Sarita Tamang vs. Illam District Court*, writ no. 21 of 2001). In 2005 the SC issued a Directive Order to the Nepalese Government to establish a juvenile bench in each of the 75 districts to hear the cases of children (*Santosh Kumar Mahato vs. the Cabinet*, writ no 2004). (Khatiwada, 2005: 155, PPR Nepal 2007: 35-36, Sangroula 2004:

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<sup>6</sup> For detail see <http://www.ccwb.gov.np>.



8). The above mentioned decisions show that the court has had a positive attitude towards the reform of the juvenile justice system in Nepal.

In the following Section, the Nepalese juvenile justice system – consisting of law, policy and practices – is assessed against the key requirements of the CRC, other UN guidelines and the principle of the best interests of the child.

#### ***4.2.1 Minimum Age of Criminal Responsibility (MACR)***

Article 1 of the CRC defines children as ‘human being below the age of eighteen years’ but the Children’s Act 1992 defines a minor as a child that has not yet reached the age of 16 (section 2(a)) meaning that the age of majority is 16 years old. The CRC and the Act stipulate special procedures and protections for children in conflict with the law. Due to the Children’s Act definition, children between the ages 16 and 18 are not considered as minors but as adults. Accordingly, the regular adult criminal justice procedures apply to them. The Nepalese definition of children falls under the exception clause of article 1 of the CRC. Though legally valid, it deprives children between 16 to 18 years from the rights protection provided for under the CRC and most other international rules, guidelines and national laws.

The Children’s Act provides that the MACR in Nepal is 10 years (section 11). Section 11(1) of the Children’s Act provides that if a child who is below the age of 10 years commits an offence (s)he shall not be liable to any punishment. If a child above 10 years but below 14 years commits an offence which is punishable with a fine (s)he shall be admonished and convinced. If the offence according to law is punishable with an imprisonment, the child between the age 10 to 14 years shall be punished with no longer than 6 months imprisonment, depending on the offence committed (section 11(2)). The Children’s Act further provides that if a child above 14 years and below 16 years commits a crime (s)he shall be punished with half of the punishment that an offender of the age of majority gets for the same offence (section 11(3)).

The UN Committee on the Rights of the Child has repeatedly expressed concern that the MACR set by Nepal is too low and has recommended raising it to comply with the international standards (CRC 1996: para.38, CRC 2005: 24). Even after the repeated concerns of the Committee, the Government of Nepal has not taken any step to raise the MACR as per international standards.

Among the key informants, the Appellate Court Judge, Court Official Mr. Shrestha and Advocate Mr. Sharma criticized the government of Nepal for having set too low a MACR. They also recommended to raise it as per the international standards and norms.

The above discussion shows that due to weaknesses in defining ‘child’ and too low a MACR, many children between the ages of 16 to 18 are not able to enjoy the rights, privileges and protection of national and international child rights instruments including the CRC. While Setting a MACR of 10 years is not illegal per se, it goes against the spirit of the CRC, the views expressed by the



Committee on the Rights of the Child (CRC 2007) and the principle of the best interests of the child.

#### **4.2.2 Conditions for Arrest and Detention**

According to the State Cases Act 1992, the Police have the power to investigate a case along with government prosecutors and to file a charge sheet to the concerned case-hearing authority. If someone knows that a criminal act has been committed or might possibly be committed, (s)he should report to the nearest police office (section 7(1)). The State Cases Act 1992 also provides broad powers to the Police to arrest crime suspects, including children, in many criminal cases. The police are responsible for the collection and preservation of evidence at the place of the crime and investigate the case (CeLRRD 2001: 41).

The Children's Act provides some important safeguards for children who have been subjected to arrest. Section 7 prohibits torture or cruel treatment of the child and the Police may not use handcuffs and fetters while arresting a child. A child should not be kept together with adults in prison and in solitary confinement (section 15). Rule 4 of the Juvenile Justice Procedure Rules 2007 provides the following as regards arrest and detention of a child:

- While investigating children's case the Police should wear plain clothes, not a uniform,
- Before arresting a child the police should show their identity card and mention the cause of arrest,
- At the time of arrest the child should be informed about his/her constitutional and legal rights,
- If possible, both the parents of the child and, if not possible at least one of them or his/her guardian, should be informed about the alleged offence of the child,
- The physical and mental health of the child should be checked immediately in a nearby government hospital or by a doctor, and
- While conducting a *Sarjamin*<sup>7</sup> if possible both the parents, or if not possible one of them or his/her guardian, should be present,

Section 42 of the Children's Act 1992 provides that a child who is detained during investigations prior to trial and during case proceedings must be kept in the Juvenile Reform Home. Section 50 of the Act provides discretionary power to the court to allow for the accused child to be placed in the custody of

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<sup>7</sup> *Sarjamin* is a Nepali term which denotes the process of finding facts and evidence of a case from where the crime was committed. Generally, the police go to the place of incident and ask people who were at or around the place of the incident for information about the incident.



parents, relatives, guardian or any social organization engaged in the protection of the rights and interests of the child. This is to ensure appropriate action to meet the special needs of the child, but always subject to the condition that these persons will make sure that the juvenile will be presented before the court on the date of hearing.

In practice, the safeguards provided by the laws and rules are not fully respected, and the investigation system is not child friendly. It was reported that in Rukum district, a 13-year-old boy was arrested on the charge of being a Maoist rebel and then was held for 6 months with 54 adults in a cell having the capacity of 15 persons (Sangroula 2004: 4, 5). In Sindhupalchok district school students including Durga Sapkota of 9 years, Uddhav of 10 years, Khil Nepal of 11 years, Samunder of 15 years, Gopal of 9 years and Bir Bahadur of 13 years old children were arrested and detained by the Police along with adults in a case of murder of a Policeman. During their detention they were tortured and inhumanely treated in police custody (Pradhan 2005: 6).

The interviews held with children showed that, out of seven children, six did not get an arrest warrant during arrest. In Nepal not only for children but also for adults an arrest warrant should be handed before his/her arrest.

**Table 1: Situation of Arrest Warrant during Arrest**

| Status                     | Number   | Percent    |
|----------------------------|----------|------------|
| Did not get arrest warrant | 6        | 86         |
| Did get arrest warrant     | 1        | 14         |
| <b>Total</b>               | <b>7</b> | <b>100</b> |

**Source of all tables in this chapter: Interviews with children in conflict with the law in Nepal, 2008**

In all seven cases the children were arrested by the police wearing their uniform against the legal provision that children should be arrested in plain clothes.

**Table 2: Situation of Police Attire upon Arrest**

| Status                           | Number   | Percent    |
|----------------------------------|----------|------------|
| Arrested by uniformed police     | 7        | 100        |
| Arrested by plain clothes police | 0        | 0          |
| <b>Total</b>                     | <b>7</b> | <b>100</b> |

Out of seven children, five were handcuffed against the legal provision that they should not be handcuffed.



**Table 3: Use of Handcuffs**

| Status                | Number   | Percent    |
|-----------------------|----------|------------|
| Used handcuffs        | 5        | 71         |
| Did not use handcuffs | 2        | 29         |
| <b>Total</b>          | <b>7</b> | <b>100</b> |

Among seven interviewed children, six were detained with adults.

**Table 4: Detained Separately or with Adults**

| Status               | Number   | Percent    |
|----------------------|----------|------------|
| Detained with adults | 6        | 86         |
| Detained separately  | 1        | 14         |
| <b>Total</b>         | <b>7</b> | <b>100</b> |

Among the seven interviewees two were treated normally while the remaining five faced misbehaviour and verbal abuse. One was beaten during arrest while three were tortured (random beating, *falanga*<sup>8</sup> and mental torture). One child was kept in a congested room and another child was coerced to accept the alleged crime after arrest. Out of the seven children, six said that they were tortured by the Police and only one child said he did not get any torture in police custody.

**Table 5: Infliction of Torture**

| Status                     | Number   | Percent    |
|----------------------------|----------|------------|
| Torture inflicted          | 6        | 86         |
| Did not experience torture | 1        | 14         |
| <b>Total</b>               | <b>7</b> | <b>100</b> |

Among the key informants, the Appellate Court Judge accepted that “due to lack of trained human resources the police are not able to handle properly the cases of children in conflict with the law” and that “due to the lack of infrastructure in police detention centres it is difficult to separate children and adults there”. This statement is substantiated by Table 4 which shows that 86 percent of the children interviewed were found detained with adults. Advocate

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<sup>8</sup> A form of torture whereby the human feet are beaten.



Mr. Sharma observed that “the law prohibits handcuffing of a child but the provision is often being violated as in many cases the police does not issue an arrest warrant and torture, cruel and inhuman treatment is wide-spread in practice.” Mr. Sharma’s statement is supported by Tables 3 and 5 which provide respectively that 71 percent of children interviewed were handcuffed and 86 percent were subjected to physical or mental torture or misbehaviour by the Police in detention.

However, the Deputy Superintendent of Police (DSP) Ms. Singh said that in most of the cases they follow the rules. Another DSP, Mr. Kharel, stated that “Police personnel are overburdened with their work and it is always difficult to follow the rules literally”. DSP Mr. Kharel said that he was aware of the rule that children and adults should not be detained in one room but that they are compelled to do so because of the lack of separate rooms for detention. These DSP statements show implicit agreement on the fact that the Police are not always able to follow the rules.

The above discussion has shown that there is a big gap between Nepal’s international obligations and commitments regarding juvenile justice and the national policy, law and their implementation in the arrest and detention phase in Nepal.

#### ***4.2.3. Juvenile Courts and Trial Procedures***

Section 55 of the Children’s Act requires that a juvenile be tried in a juvenile court or by a juvenile bench and that the court proceedings protect the privacy of the juvenile by only allowing the presence of the legal representative, the parents and relatives of the juvenile or the legal guardian as well as any other social representative, considering the best interests of the child.

Since a juvenile court has not yet been formed in Nepal, some of the cases of children are being dealt with by the juvenile benches. The majority of cases are being dealt with by the regular courts. Section 55(5) of the Children’s Act provides for the incorporation of social workers, child specialists or child psychologists along with the district judge in a juvenile bench. Similarly, the presence of a legal practitioner to defend the juvenile is required during case proceedings. The government shall appoint a lawyer if the juvenile is not represented (section 19, Children’s Act). The court hearing starts after the Government Attorney decides that the case should proceed and files the charge sheet in the court. The court then decides whether to grant bail or to send the child to a Juvenile Reform Home during the court proceedings on the factual basis of the case and the judge should verify the age of the child if the charge sheet differs from the statement of the child (KSL 2003: 12).

According to section 42 of the Children’s Act, juveniles who are imprisoned for investigation or adjudication or imprisoned as a punishment should be detained in a Juvenile Reform Home instead of normal custody or prison. However, section 50 also provides for other dispositions such as suspending the sentence of imprisonment and placing the juvenile under the



custody of family, a guardian or social organization. If during this period the juvenile commits further offences, the judge can add further punishment and enact the previous punishment. If the juvenile refrains from crime, the suspension period will amount to the completion of the punishment.

In regard to cases of children in conflict with the law, the District Court Regulation 1996 provides that they shall always be conducted by closed hearings (rule 46(1)). For a closed hearing, legal professionals, a government lawyer, child specialists, the suspect, victims, the guardians of the juvenile and police, if permitted by court, as well as court personnel may be present (rule 46(b 2)). The documents of closed hearings shall not be disclosed to anyone, except the plaintiff, the defendant and the victim(s). Facts of the closed hearing shall not be published in any news media (rule 46(b 3 and 4)).

The Government of Nepal has promulgated Juvenile Justice (procedure) Rules 2007 (the 2007 Rules) under the power conferred by section 58 of the Children's Act. The tasks of adjudication, disposition and determining punishment are performed by the same legal body, the juvenile court. Special procedures are required in cases where juveniles are either plaintiffs or defendants. Any case involving juveniles shall get priority for hearing and deciding. The 2007 Rules provide for a separate police unit or police personnel to conduct the investigation of a case of a child in conflict with the law (rule 3). In each district a juvenile bench shall be formed including a District Judge, a social worker and a child specialist or a child psychologist (rule 6). The court should provide a copy of the charge sheet and other related documents to the parents or guardian of the juvenile immediately. If they refuse to take the document it can be handed to the lawyer of the child (rule 7). The 2007 Rules provide that the following procedures should be followed in the hearing of the cases of children:

- The hearing in the juvenile court or juvenile bench should be conducted in a child friendly environment (rule 12(1)).
- The language used in the hearing should be clear and understandable for the child, taking into consideration his or her age, physical and mental state (rule 12(2)).
- The examination process may take place in a separate room *in camera* for the protection of the juvenile (rule 12(3)).
- While examining the child, his/her parents, guardian or lawyer can stay with the child (rule 12(5)).
- The juvenile bench or juvenile court should decide the case within 120 days from the date of filing of the case (rule 16).
- In the decision on the child's case the court should include a summary of the charge sheet, the evidence, proof of the offence, the opinion of the child expert, and arguments of the lawyer. Also, the reasoning of the decision as well as an estimation of the causes and the measures of reformation of the juvenile must be included (rule 17).
- A copy of the decision shall be provided to the juvenile without any cost (rule 19).



Determining the age of the child is crucial but complicated in many cases in Nepal. Since the age determines whether the suspect is a child or an adult, which in turn determines the criminal responsibility of the suspect and the nature of procedures to be followed, the suspect may try to forge or decrease his or her actual age in order to get privileges and protection as a child. On the other hand, the other side will often intend to establish the age of the suspect as highly as possible to follow the normal process in the proceedings (PPR Nepal 2007: 34).

Section 3(2) of Children's Act 1992 states that the age of the suspect shall be determined by a registered medical doctor. The 2007 Rules provide that the age of the child shall be determined through the date of birth established according to the birth certificate issued at a hospital (rule 15(a)). In case the certificate is not available, the date of birth may be established according to the certificate issued by the office of the local registrar. In case such a certificate is also not available, the date of birth may be established by the character certificate issued by the school of attendance. In case such certificate is not available either, the age shall be certified by a government hospital (rule 15(b, c and d)). The Committee on the Rights of Child has repeatedly raised its concern about the "lack of a proper official system of age verification in place" in Nepal (CRC 2005: 24).

The Public Offence and Punishment Act 1970 provides for the District Administration Office (DAO), a quasi-judicial body, with the power to conduct investigation of a case, try it and impose sanctions including imprisonment in relation to the offence under the Act. Basically, DAO is an administrative body and it looks after the administration and maintenance of peace in a district. A baseline survey conducted by Kathmandu School of Law revealed that during five years period (1998 to 2002), 1522 cases involving children were recorded in Kathmandu. Out of these 1522 cases, 1276 cases were tried by the DAO and the remaining ones went to court (KSL 2003: p 13). The DAO is basically a government administration body. It does not have formal justice delivery settings. Therefore, the decisions are taken without following the principles due process of law and the recognised principles of justice (UNICEF 2006a: 86). The Committee on the Rights of Child has also raised this issue and stated that it 'is alarmed that children are often brought to trial without any proper investigation' and that a large proportion of juvenile cases are dealt with by the District Administration Offices which are quasi-judicial (CRC 2005: 24).

Section 55(2) of the Children's Act provides that the Juvenile Court shall not have jurisdiction to hear and decide the case of a child in conflict with the law when the child has been involved in the case along with a person who has attained the age of majority. In my opinion, this provision curtails the rights of a child enshrined in international and national instruments including the CRC and the Children's Act which provide special care, protection and privileges such as, the children in conflict with the law to be heard with special protection in Juvenile Courts. Even if a minor has allegedly committed a crime with adults (s)he is still a child with equal rights as other children and should be treated as



a child. Just an allegation or even conviction with an adult cannot be a valid reason for treating him/her as an adult. Thus this provision is discriminatory against the minor and against the principle of the best interests of the child.

Among the key informants, the Appellate Court Judge pointed at “the poor implementation of the laws and rules”. He particularly mentioned that “the Children’s Act provides for a ‘juvenile court’ in each district but there is no single juvenile court in the country, even 16 years after the promulgation of such law”. He raised the concern “that the government has established juvenile benches only in 12 districts”. He further observed that “the law prescribes that the cases of children should be decided with 120 days of the filing of such cases, but in practice in most of the cases this provision is not being implemented”. The Myagdi District Judge accepted that there is no juvenile court or bench in Myagdi district. Psychosocial Counsellor Ms. Bohora observed that “in most of the cases the psychosocial status of a child is not taken into consideration upon and after arrest, in interrogation and in the court proceedings”. She further said that she did not notice any consideration of this being taken by judges, lawyers and police while handling the cases of children. Court Official Mr. Shrestha pointed out the need to establish juvenile special courts, juvenile police cells and juvenile prosecutors.

Among the children interviewed, contrary to the legal provision of compulsory legal assistance during the proceedings of the case, 56 percent of them did not get any lawyer’s assistance. Half of those who didn’t get lawyer’s assistance even didn’t have any idea about their legal right to have lawyer to assist them.

**Table 6: Assistance by a Lawyer**

| Status                       | Number   | Percent    |
|------------------------------|----------|------------|
| Got lawyer’s service         | 3        | 43         |
| No idea about lawyer         | 3        | 43         |
| Did not get lawyer’s service | 1        | 14         |
| <b>Total</b>                 | <b>7</b> | <b>100</b> |

The interviews with the children in conflict with the law showed that the majority of the judges were felt to be indifferent towards the child. Generally the children felt that the judges’ attitude was not friendly towards them.



**Table 7: Attitude of Judges**

| Judges Attitude | Number   | Percentage |
|-----------------|----------|------------|
| Indifferent     | 4        | 57         |
| Not friendly    | 3        | 43         |
| Friendly        | 0        | 0          |
| <b>Total</b>    | <b>7</b> | <b>100</b> |

From the above discussion it is clear that Nepal has still a long way to go in order to fill the gaps with its international obligations in the implementation of a comprehensive juvenile justice system.

#### ***4.2.4 Specialized Institutions for Juvenile Justice***

As stated above, a positive step has been taken towards establishing specialized institutions (Juvenile Bench, Juvenile Reform Home) for the juvenile justice system. The Children's Act provides for the establishment of specialized juvenile courts but this has not yet happened, even 16 years after the promulgation of the Act.

Section 55(3) of the Children's Act provides that the concerned district court shall have powers to hear and decide the case of a child in conflict with the law until a juvenile court is established. Section 55(4) of the Act provides that there shall be a children's bench in each District Court for the purpose of section 55(3) of the Act. Section 55(5) of the Children's Act provides that while constituting the Children's bench, a Judge, a social worker, a child specialist or a child psychologist should be included in order to try cases of children in conflict with the law. As per this provision, the government of Nepal has established 12 Juvenile Benches, in 12 District Courts. There are no Juvenile Benches in another 63 districts. In districts where there is no Juvenile Bench, the cases of children are heard by the District Courts as per Section 55(3) of the Children's Act. Among the key informants, the Appeal Court Judge, the Myagdi District Court Judge and Court Official Mr. Shrestha stressed the need of establishing juvenile courts or benches as per the Children's Act. The Appeal Court Judge praised the provision of inclusion of a psychosocial counselor or a child psychologist in a Juvenile Bench and he pointed out that there are no trained psychosocial counselors or psychologists in the districts to work in the Juvenile Benches which causes problems in the handling of cases of children.

Rule 3 of the Juvenile Justice Procedure Rules 2007 provides that:

*"In order to investigate the cases of children in every police station a Juvenile Unit shall be established comprising qualified police personnel. Police Headquarters can appoint police officers for the purpose before establishing such Units."*



But the provision is yet to be implemented. As DSP Ms. Singh and Mr. Kharel stated, there is not any special Police Unit to handle the cases of children in conflict with the law in Nepal. Mr. Kharel expressed the need of establishing specialized Juvenile Units in each Police Office and providing them special training for handling the cases of children.

Very few lawyers are specialized in cases of children. Neither the law colleges nor the Nepal Bar Association has any specialized course on juvenile justice. Advocates Mr. Sharma and Mr. Paudel both stressed the need of special training for lawyers to ensure the best interests of the child in juvenile cases. Likewise, there is no special formal education for Government Attorneys and there is no juvenile section in the Government Attorney's Office for handling the cases of children. Government Attorney Mr. Adhikari accepted that he had no training and formal education on juvenile justice and that his office is often handling cases of children as cases of adults.

#### ***4.2.5 Diversion and Alternative Sentencing***

In Nepal there is no clear law for diversion but in practice many petty cases are being handled locally without involvement of the government and judicial system (UNICEF 2006a: 88). Most of the cases of children in conflict with the law are either unreported or resolved in community level. Some of the community practices for the resolution of local cases are appropriate but some of these practices violate the rights of the child (Pradhan 2005: 5). For example, in an incident which this author saw in his childhood, about twenty years back in a small village in western Nepal, a 13 years boy (a domestic servant of weak economic background) was accused of theft of two cocks from a house close to him. He denied the charge of theft. Then a *Pancheti*<sup>9</sup> was organised and the boy was asked to accept the charge but he denied it. Then his hand and legs were tied and randomly beaten more than 3 hours by villagers and he was compelled to accept the charge. Then the village elite called *Mukhiya* announced that the boy should pay Nepali Rupees 500 to the person who lost the cocks. When I remember this event I immediately remember the cry of the boy while his legs and hands were tied and beaten by the villagers. Clearly, this was a violation of child rights and cruel, inhuman and degrading behavior against the child.

Some NGOs such as CVICT Nepal, Pro Public, CeLRRD, and IGD are conducting community mediation program in various parts of country on which disputes at the local level are being solved by local people through mediation. The local people solve cases of adults as well as the offences committed by children. (CVICT 2004: 22-25).

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<sup>9</sup> Pancheti is a Nepali term which refers to a traditional form of Alternative Dispute Resolution at local level. All villagers gather in a common place to discuss and resolve a dispute locally. It is still widely used in villages in Nepal to settle petty cases.



Section 50 of the Children's Act provides a limited space to the Judge while detaining and sentencing the child. If the Judge thinks that it is not appropriate to detain a child for trial by considering his/her physical condition, age, circumstances under which the offence was committed or the condition of the detention place, the Judge may order to hand over the child to his/her parents, relatives or guardian or any social organization working in the field of protection of the rights and interests of children or a Juvenile Reform Home, on the condition of presenting the child to the court as and when required (Section 50 (1)).

Likewise, Section 50 (2) of the Children's Act provides that if the judge thinks that it is not appropriate to send a child to prison after conviction, considering the child's physical condition, age, circumstances under which the offence was committed and times of commission of offences by the child, the judge may suspend the sentence for the time being, or prescribe keeping the child in a Child Rehabilitation Home or in the guardianship of a person or organization. If the child is again convicted for the same or another offence the Judge may order to imprison the child adding the earlier sentence of imprisonment.

There are some examples of cases where judges have invoked the provision of suspending the sentence. In HMG vs. Mahesh Wagle, Nawalparashi District Court, a three months sentence was suspended. In HMG vs. Govinda Prasad Pageni, the Nawalparashi District Court suspended three months imprisonment in a murder case. In HMG vs. Siva Lal Choudhary, Kailali District Court suspended three years imprisonment. However, in none of these cases was it clear from the judgments which facts were considered for suspending the sentences (Khatiwada 2005: 162).

In a survey conducted by Mr. Ishwor Khatiwada, it was found that all the 22 judges who participated in the survey did not see any possibility of diversion in the existing situation, mainly due to the lack of legal provisions and knowledge. And, the majority of the police officers in the survey were not in favor of diversion (Khatiwada 2005: 180).

Among the key informants of this study, the Appeal Court Judge stated that "It is time to use informal mechanisms such as community mediation, community conferencing and victim offender dialogue to handle the petty cases of children." He further stated that "The cases of children in conflict with the law should be diverted as soon as they come to the formal forums. Diversion mechanisms from the police, or court, in any state of the hearing should be introduced by law." Government Attorney Mr. Adhikari stated that bringing the child into the formal justice system is not a good practice thus alternative provisions are needed for them. Likewise, Court official Mr. Shrestha expressed the need of introducing diversionary programs in Nepalese juvenile justice system. Advocate Mr. Sharma (a mediation expert) is of the opinion that:

*"(In Nepal) almost all the cases of children are being dealt with by the formal justice mechanisms (Courts and DAO). Sending children to detention is normal practice. We*



*should change the system and introduce informal ways of dealing with the cases of children and detention of the children should be a last resort. Informal system such as, victim offender dialogue, mediation, community conference should be introduced to handle the case of children in conflict with the law.”*

Advocate Mr. Paudel also expressed his views in favor of introducing diversionary mechanisms. He observed that “In the Nepalese juvenile justice system there are no diversionary programs in practice. To serve the best interests of the child diversionary programs e.g. victim offender dialogue, community conferencing, mediation should be introduced.”

As per the above discussion it is clear that there is no legal provision for the diversion of cases of children but most of the stakeholders think that diversionary programs should be introduced in the Nepalese juvenile justice system. We can see that Nepal, as a state party to the CRC, has to take initiatives to fulfill the obligation under Article 40(3) which requires the state party to establish “appropriate and desirable measures for dealing with such children without resorting to judicial proceedings....”

#### ***4.2.6 Re-integration and Rehabilitation Policy***

There is neither specific legal provision nor policy in Nepal regarding the re-integration and rehabilitation of children in conflict with the law. Section 42(1) of the Children’s Act provides that the government should establish Juvenile Reform Homes as required. As per the Children’s Act, children under investigation or awaiting decision and children convicted by a case hearing authority should be kept in the Reform Homes (section 42(2)). In the present system the Reform Home for children is considered as an alternative procedure under the formal criminal justice administration rather than a rehabilitation home for children (PPR Nepal 2007: 30).

Presently, there is only one Juvenile Reform home in the country which is located in Kathmandu. There are 73 children are staying in the Juvenile Reform Home. Among them five are girls. Out of these 73 children 26 face charges of rape, 15 of murder, and 11 of robbery and the remaining children are involved in different cases (Kantipur 2008: 2).

In Nepal no government body is working on the rehabilitation and reintegration of children who have been in conflict with the law. Some NGOs, such as CWIN and CWISH, which are mainly working for the promotion and protection of child rights in general, have some programs for the rehabilitation and reintegration of these children. For example, for more than 10 years CWIN is running child development and socialization and rehabilitation programs and it has established child socialization centers in Kathmandu and Pokhara (Pradhan 2005: 11-12).

A research about the situation of rehabilitation and reintegration of children in conflict with the law has shown that, among the respondents, 68% of the children in conflict with the law who had been released from the



Juvenile Reform Home have not reintegrated into their previous social environment; 60% of them said that they have not engaged in meaningful work; 72% of these children expressed the view that they have felt discrimination from society on the ground that they have committed a crime; 76% of them have felt that they are not invited to social and religious functions because of their past life (PPR Nepal 2007: 63-64).

Among the key informants, Advocates Mr. Sharma and Mr. Paudel pointed out the need for rehabilitation and reintegration policy for children in conflict with the law in order to prevent them repeating the same mistake. Likewise, Psychosocial Counselor Ms. Bohora stressed the need for providing proper psychosocial services to the child in conflict with the law in order to enable him/her to come into normal life again, as other children. Stressing the need for rehabilitation and reintegration policy, Government Attorney Mr. Adhikari observed that:

*“I have seen many children during my work who came into conflict with law who were not able to return to normal social life. They discontinued their education, some of them ran away from home and most of them repeatedly come into conflict with the law. Children are the future of our country therefore the state should take immediate action to formulate and implement an effective rehabilitation and reintegration policy and plan for the child in conflict with the law”.*

In my view, Mr. Adhikari’s comment well represents the situation of rehabilitation and reintegration of the child in conflict with the law in Nepal.

#### **4.3 The Principle of the Best Interests of the Child in the Nepalese Juvenile Justice System**

In Hindu philosophy a child is considered as a god and children are regarded as a “gift of god” (Pradhan 2005: 4). Therefore, the status of children in the society is good. Nevertheless there was not a single specific legal provision protecting the rights and interests of the child in Nepal before the enactment of the Children’s Act 1992. The Act is referred to as “relating to protecting the rights and interests of children”. According to the Preamble of the Act: “It is expedient to make timely legal provisions in order to protect the rights and interests of children for the physical, mental and intellectual development of children”. This shows that one of the overall goals of promulgating the Children’s Act was to protect the ‘interests’ of children.

As a state party to the CRC Nepal is under the obligation of protecting, fulfilling and respecting the rights of the child. This extends to the overarching principle of the best interests of the child in every action, including juvenile justice. As per Section 9(2) of the Nepal Treaty Act, the CRC overrides contradicting national law. Neither the Children’s Act nor the Juvenile Justice Procedure Rules 2007 use the term “the best interests of the child” but in essence we can find provisions which serve the purpose of the best interests of the child including the provisions of the Children’s Act on torture and cruel treatment (section 7), up to the 16 years of age lessened criminal responsibility (section 11), ban on rigorous punishment (section 15),



compulsory lawyer's representation (section 19), establishment of juvenile reform homes (section 42), closed hearing of children's cases (section 49), pending punishment and proceedings of the case can be done without detaining a child on the discretion of a judge (section 50), and on special courts or benches for hearing children's case (section 55).

Likewise, the Juvenile Justice Procedure Rules 2007 provide special provisions for the handling of cases of juveniles to serve the best interests of the child (though this is not literally expressed) such as establishment of juvenile cells in the Police station (rule 3), special procedures for investigation of children's case (rule 4), special proceedings for case hearing (rule 12), and that children's cases should be decided within 120 days of filing (rule 16).

These are the legal provisions only. The question arises whether these provisions are adequate to serve the best interests of the child. The importance of the laws and policies lies in their implementation and the question arises whether these legal provisions are implemented properly. As we have discussed earlier (mainly in chapter 4.2), there are many gaps in the Nepalese juvenile justice law and policy. These include: too low a MACR, as currently a child is defined as a minor below the age of 16 rather than not below the age of 18 as the spirit of the CRC would require; lack of a special juvenile justice system in the country but children's cases still considered as part of the general criminal justice system; lack of a comprehensive juvenile justice policy in the country; lack of a diversionary system and alternative sentencing etc. The Government of Nepal has clearly not provided adequate attention to these issues.

As regards implementation of national law and policies there are also many weaknesses. For example, even 16 years after the promulgation of the Children's Act there is not any Juvenile Court, most of the children are detained with adults, often handcuffed, tortured or abused during or after arrest (see chapter 4.2 and PPR Nepal 2007: 38-68). There is no Juvenile Police, actors of the juvenile justice system are either not or inadequately trained (see Annex 5 most of the key informants have mentioned the problem of lack of formal education and training). There are no adequate Juvenile Reform Homes and most of the children in conflict with the law are not rehabilitated and re integrated in the society.

From the above discussion we can see that the gaps between international standards and the Nepalese system are big. The gaps between Nepali law and policy and their implementation are also big. If we compare the international standards with the current practice in Nepal, then the gap becomes 'very big'. In conclusion, the Government of Nepal has taken some steps in promulgating law and rules to make the juvenile justice system serve the best interests of the child, but it needs to do much more in order to achieve proper implementation of these laws and rules. More steps have to be taken to make the Nepalese juvenile justice system serve the best interests of the child.



## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

The CRC and the UN Resolutions and Declarations such as the Beijing Rules, the Riyadh Guidelines and the JDLs provide for an international framework and standards for the juvenile justice system. Nepal has ratified the CRC and shown commitment to these instruments therefore, it is under the ‘obligation’ of establishing a comprehensive and separate juvenile justice system to serve ‘child rights’ and ‘the best interests of the child’.

In Nepal the juvenile justice system was long considered as part of the criminal justice system. Reforms of the juvenile justice system started after the restoration of multiparty democracy in 1990. The concept of a separate juvenile justice system was further developed by the promulgation of the Children’s Act 1992. Likewise, the promulgation of the Juvenile Justice Procedures Rules 2007 further strengthened the juvenile justice system in Nepal. Even after these developments the juvenile justice system in Nepal is not a fully implemented, separate and distinct juvenile justice system which embraces the direction provided by the CRC and ensures that children in conflict with the law are treated substantially different than adults at all stages of the proceedings and thus ensures the best interests of the child (UNICEF 2006a: 83).

Currently, most of the children who come into conflict with the law in Nepal end up deprived of their liberty either in police lock-ups, prisons, or Juvenile Reform Homes since there is no provision of diversion and alternative sentences in practice. At all stages of handling cases of children the formal justice mechanism is used. But the actors of the formal juvenile mechanisms (Police, Judges, Government Attorneys, defense Lawyer) are not trained at all or inadequately trained. The key informants have also pointed out the lack of trained human resources. Therefore, the handling of cases of children is often not as per their best interests and not as per the letter and spirit of the international binding and non-binding instruments to which Nepal has shown its commitment. The Nepalese juvenile justice system is more punitive and retributive than restorative, which is much in contrast with the purpose of a juvenile justice system (PPR Nepal 2007: 70). The Nepalese juvenile justice system is suffering from many gaps such as, the non-existence of a national action plan for juvenile justice, diversionary and alternative sentencing provisions, a delinquency prevention and reintegration program of the child. Likewise, the MACR is too low, the definition of children is not as per the spirit of the CRC and lack of diversion and alternative sentencing are some other gaps.

In the last 20 years Nepal has made good efforts to establish a separate juvenile justice system. These efforts include ratification of the CRC, promulgation of the Children’s Act containing provisions regarding juvenile justice, promulgation of the Juvenile Justice Procedures Rule 2007, establishment of a Juvenile Reform Home and Juvenile Benches in 12 districts.



Awareness about the need for a separate, well implemented juvenile justice system has been raised among the stakeholders (as the FGD and interviews have shown). On the other hand, we can see the lack of strong political will (Appellate Court Judge Hon. Mr. Khatiwada, Advocates Mr. Sharma and Mr. Paudel stressed this aspect in the FGD, see Annex - 5) to establish a comprehensive and separate juvenile justice system as per Nepal's international commitment.

There is a lack of specialized agencies for handling cases of children in conflict with the law. No Juvenile Court has been established in the country as required by Section 55 of the Children's Act. There is only one Juvenile Reform Home in Kathmandu to cover the whole of Nepal. No separate Police or Government Attorney Units have been established. The Nepalese juvenile justice system is at present not fully separated from the adult criminal justice system and most of the proceedings are identical. Misbehavior, abuse, torture, cruel and inhuman behavior is widespread and children are often handcuffed and detained with adults. Almost all children in conflict with the law feel that the attitude of judges is not friendly. Most of the children who go through the process of juvenile justice are not able to become a 'normal' child again and rehabilitate in their society. There are some provisions for the protection of the best interests of the child, the implementation of those provisions are very weak (PPR Nepal 2007: 70-72, FGD report, Annex 5).

In conclusion, the research revealed that in spite of some good efforts taken by the government of Nepal the Nepalese juvenile justice system needs significant reforms in order to comply with the CRC framework and other international human rights instruments. The reforms are necessary to make the Nepalese juvenile justice system in compliance with the international standards and to serve the best interests of the child in conflict with the law.

## **Recommendations**

As per the findings of the research I would like to make the following recommendations to strengthen the Nepalese juvenile justice system:

- Reform in legislation and policy:
  - Define child as per the letter and spirit of the CRC, i.e. set the age limit at 18 years,
  - Reset the MACR which should not be less than 12 years,
  - Immediately formulate a child rights-based comprehensive juvenile justice policy ensure the best interests of the child,
  - Establish a proper official age verification system,
  - Ensure that all the cases of children in conflict with the law be tried by a competent judicial authority (not by an administrative body like DAO)
- Separation of the juvenile justice system from the adult criminal justice system



- Establish specialized institutions for juvenile justice such as Juvenile Courts or Benches, separate units in Police and Government Attorney offices
- Ensure proper implementation of existing provisions such as, prohibition on torture, no use of handcuffs, arrest by plain clothed Police, separation from adult detainees, compulsory legal representation,
- Introduce diversion mechanisms such as victim offender dialogue, community mediation, community conference,
- Pay attention to infrastructure development. Build at least a Juvenile Reform Home in each five regions, provide separate detention places
- Provide special training and education to the actors of the juvenile justice system
- Formulate effective and practical rehabilitation and reintegration policy so that the children in conflict with the law become a good citizen.

(Word Count: 17220)



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## ANNEXES

### *Annex 1: The Children's Act 1992 (Juvenile Justice related provisions)*

**Preamble:** Whereas, for the physical, mental and intellectual development of the children it is expedient to make timely legal provisions in order to protect the rights and interests of the children.

Be it enacted by Parliament in the twenty first of the reign of His Majesty's King Birendra Bir Bikram Shah Dev.

#### CHAPTER – 1 PRELIMINARY

##### **Section 1. Short Title and Commencement:**

**Section 2. Definitions:** Unless the subject or context otherwise requires, in Act-

(a) " Child means every human being below the age of 16 years.

##### **Section 7. Prohibition on torture or cruel treatment:**

No Child shall be subjected to torture or cruel treatment.

Provided that, the act of scolding and minor beating to the Child by his father, mother, member of the family, Guardian or teacher for the interests of the Child himself shall not be deemed to violate the provisions of this Section.

##### **Section 11. Child and Criminal Liability:**

(1) If the Child below the age of 10 years commits an act which is an offence under law, he shall not be liable to any type of punishment.

(2) If the age of the Child is 10 years or above 10 years and below 14 years and he commits an offence which is punishable with fine under law, he shall be warned and explained and if the offence is punishable with imprisonment, he shall be punished with imprisonment for a term which may extend to six months depending on the offence.

(3) If the child who is above 14 years and below 16 years commits an offence he shall be punished with half of the penalty of the offence to be imposed under law on a person who has attained maturity.



**Section 12. Disqualifications or recidivism not to be applicable:**

(1) If a person is to be disqualified to hold any office or enjoy and facility under the law for reason of committing an offence, such disqualification shall not be applicable with regard to a Child committing an offence during his childhood.

(2) For the purpose of determination of recidivism, an offence committed during childhood shall not be included therein.

(3) Even if a Child commits the some offence more than once, he shall not be liable to additional Punishment on the basis of continuation of such offence.

**Section 15. Prohibition on imposing rigorous punishment:**

Not with-standing anything contained in the existing laws, no Child shall be subjected to handcuffs and fetters, solitary confinement or live together in prison with a prisoner who has attained maturity in case a Child is convicted for any offence.

**Section 19. Children's case not to be entertained in the absence of legal practitioner:**

(1) The Court shall not entertain or decide a criminal charge brought against the Child unless there is a legal practitioner to defend the Child.

(2) In circumstances referred to in sub-section (1), the concerned Court shall make available the service of a legal practitioner appointed on behalf of His Majesty's Government or of any other legal practitioner wishing to provide such service.

**Section 42. Establishment and operation of Children's Rehabilitation Home:**

(1) His Majesty's Government shall establish Children's rehabilitation Homes as required.

(2) The following children shall be kept in the Children's Rehabilitation Home established pursuant to sub-section(1):

- (a) Child to be imprisoned pursuant to the existing law for the investigation or proceedings of the case being accused in any crime,
- (b) A Child to be imprisoned being punished pursuant to existing law,
- (c) A Child addicted to narcotic drugs,
- (d) A Child who often runs away from father, mother or the family,
- (e) A Child who has company with the persons involved in immoral or



inexpedient activities of such persons or depends upon their earnings,  
(f) Children of the categories prescribed by His Majesty's Government.

(3) His Majesty's Government may utilise the private Children's Welfare Home, orphanage or centre operated by any person or body in the form of Children's Rehabilitation Home temporarily by obtaining permission of such person or body until the Children's Rehabilitation Home is established pursuant to sub-section (1).

(4) In case the Child mentioned in the clause (d) of sub-section (2) is kept in the Children's Rehabilitation Home with the consent of his father, mother or a member of the family, his father, mother or a member of the family shall have to bear the expenses incurred for his maintenance.

(5) The operation of the Children's Rehabilitation Home and the facilities, training and education to be provided for the children residing therein as well as the terms and conditions to be followed by the children shall be as prescribed.

**Section 49. Only particular persons can attend in the case relating to the Child:**

(1) The legal practitioner or the father, mother, relatives Guardian of the Child and if the officer hearing the case deems it appropriate and permits any person or the representative of the social organisation involved in safeguarding the rights and interests of the Child may attend in the proceedings of any case related with the Child initiated under this Act or existing laws.

(2) The case pursuant to sub-section (1) and the particulars of the incident relating to it cannot be published in any paper without the permission of the investigation officer of the case or the officer hearing the case. Such restriction shall also prevail for the owner of the press, news agents and photo news agents.

**Section 50. Investigation of the case and pending of the punishment:**

(1) In case the officer hearing the case deems that it is not appropriate to keep the Child in prison in consideration to the physical condition age of the accused Child who is to be investigated keeping in prison pursuant to existing law, situation at the time of offence and the place of imprisonment may issue an order to handover the Child to the custody of his father, mother, relatives or Guardian or any social organisation involved in safeguarding the rights and interests of the Child or the Children's Rehabilitation Home on the condition to present him as and when required and to carry on investigation or proceeding of the case.



(2) In case the officer hearing the case deems that it is not appropriate to keep the Child in prison who has got a sentence of imprisonment being proved as an offender in consideration to his physical condition, age, or situation at the time of offence and repetition of offence etc., he may keep the case pending for not to undergo the punishment at once or may prescribe the duration of such prescribed punishment to be passed residing in a Children's Rehabilitation Home or remaining in the guardianship of any person or organisation. The officer hearing the case may issue an order in the case of the Child whose punishment is suspended, if the Child is given a sentence of imprisonment being proved an offender of the same or any other offence during the period of one year, to implement the punishment at one time adding both the sentences of imprisonment.

**Section 52. Statistics relating Child and restriction in its use :**

(1) The police officer shall keep the statistics of the Child apprehended on the charge of any offence in the secret form mentioning his name, address, age, sex, family background, economic conditions, offence committed by him and if any proceeding is initiated on it, its particulars and the copy of such statistics shall be sent to the Police Head Quarter every six months.

(2) In case the statistics maintained pursuant to sub-section (1), are to be published for any study or research work, it can be published or utilised on the basis of age or sex without mentioning the name, surname or address of the Child.

**Section 55. Officer hearing the case and procedures to be followed relating to the case:**

(1) His Majesty's Government shall, by publishing a notification in the Nepal Gazette constitute juvenile court as required. The area and headquarter of such court shall be prescribed in the same notice.

(2) The Juvenile Court constituted pursuant to sub-section (1) shall have the power to hear and decide the case of first instance in which the Child is a plaintiff or defendant except in the situation of Section 20.

Provided that, the Juvenile Court shall not hear and decide the case in which a Child is involved along with a major person.

(3) The concerned District Court shall have the power to hear and decide the case pursuant to sub-section (2) until the Juvenile Court pursuant to sub-section (1) is constituted and after the constitution of the Juvenile Court the case filed in the District Court shall be transferred to the Juvenile Court.



(4) There shall be a Children's Bench in each District Court for hearing and deciding the case to be heard from the District Court pursuant to sub-section (3).

(5) His Majesty's Government shall prescribe the procedure relating to the constitution of the Children's Bench pursuant to sub-section (4) on the advice of the Supreme Court and may include social worker, child specialist or child psychologist besides the judge while prescribing the bench.

(6) The procedures to be followed by the Juvenile Court or District Court for hearing and deciding the cases shall be as prescribed and until such procedure is prescribed those Courts shall follow the procedures of the summary procedure Act, 2028.

**Section 56. Appeal :**

Any person not satisfied with the decision made by the Juvenile Court or District Court pursuant to Section 55 may file an appeal to the Appellate Court within thirty five days of such decision made thereto.

**Section 57. Priority to be given in hearing the cases:**

The case under this Act in which a Child is a plaintiff or defendant shall have to be given priority for hearing and deciding.

**Section 58. Power to frame Rules :**

His Majesty's Government may frame necessary Rules for implementing the objectives of this Act.



## ***Annex 2: Interview Schedule for the Child in Conflict With the Law***

### ***Things to consider before filling this interview schedule***

- The information acquired from this interview schedule will be kept confidential. The information received will be used for the study only and only reported in anonymized form.
- This interview schedule is prepared for the purpose of MA research paper titled ‘The Juvenile Justice System of Nepal : An Agenda for Reform’
- Prior to filling answers, the respondents will be informed about the objectives of this questionnaire.
- Prior permission will be taken from respondents to fill up the schedule.

|   |             |                    |
|---|-------------|--------------------|
| <b><u>Personal Details (optional)</u></b>   |             |                    |
| Name: -   | Age/Sex:-   |                    |
| Address: -  | Education:- |                    |
| <u>Temporary:</u>   |             |                    |
| Zone:   | District:   | Municipality/VDC:  |
| <u>Permanent:</u>   |             |                    |
| Zone  | District:   | Municipality/ VDC: |
| 1) Do you know about the status of your court case?                                 |             |                    |
| a) Yes                      b) No   |             |                    |
| If Yes, can you please tell us some details?  |             |                    |
| 2) Could you explain about the incident why you were arrested?                      |             |                    |
| 3) When were you arrested for what reason?  |             |                    |
| Date: .....   |             |                    |
| Case: .....   |             |                    |
| 4) Were you provided with arrest warrant?   |             |                    |
| a) Yes                      b) No   |             |                    |
| 5) Who arrested you?  |             |                    |
| 6) Were they in their Uniform while arresting you?                                  |             |                    |
| 7) Where did they keep you after arrest? Were there adults in the same room or not? |             |                    |
| 8) Did they use handcuff to you?  |             |                    |
| 9) How did they treat you during arrest?  |             |                    |
| 10) How did they treat you after arrest /in the custody?                            |             |                    |
| 11) Did you experience any humiliating, inhuman or cruel behavior or torture?       |             |                    |



a) Yes

b) No

If 'Yes' how.....

Were you allowed to meet your lawyer in custody?

a) Yes

b) No

c) There was no lawyer

d) Had no idea about lawyer

12) Were you allowed to meet with family members in custody?

a) Yes

b) No

c) They didn't come

d) had no idea about meeting family members

13) After how many days after your arrest was the case registered in the court?

14) How much time was taken to decide the case?

15) To whom you are handover while released from police custody or reform home?

16) Where were you detained and for how many days?

a) Custody (....days)

b) Prison (....days)

c) Reform Home (....days)

d) Others

17) How did Police behave you?

18) How did government attorney behave you?

19) How did court officials behave you?

20) Who heard your case?

21) How did you find the judge's attitude towards you?

a. Friendly b. not friendly c. indifferent

22) Did you face any difficulty during your case?

23) In your opinion what can be done to reform the Juvenile Justice system in Nepal?

24) Do you want to say anything more?

Name of Interviewer: .....

Date: .....

Place:

Time:



### ***Annex 3: Indicative List of Issues Questions for Focus Group***

#### ***Discussion and Interview with Key Informants***

1. Situation of law and policy regarding juvenile justice in Nepal (separate juvenile justice system, comprehensive juvenile justice policy).
2. Is the Nepali juvenile justice system in compliance with international standards? (defining children, Minimum age of criminal responsibility,
3. Strengths and weaknesses of Nepali laws and policy regarding juvenile justice
4. How is the implementation status of current laws and policies?
5. What major changes in law and policy are needed to make child friendly juvenile justice system?
6. Are all the personnel working in Juvenile justice system are adequately educated and trained? If not what kind of training is needed?
7. How is the situation of law and policy regarding juvenile delinquencies prevention?
8. What are the problems due to weak law and policy regarding juvenile justice system?
9. Situation of physical infrastructure
10. Is there special unit (in Police, Government Attorney, lawyers) or bench for handling the case of the child in conflict with the law?
11. Does any institution has up to date data about juvenile justice?
12. What is your opinion about the introduction of diversionary programs in Juvenile Justice System? If it is good what kind of diversionary programs can be introduced?
13. What are the major areas of reform in Nepali Juvenile Justice System?
14. Do you want to say anything more?



***Annex 4: Name list of the Key Informants***

| <b>S.N</b> | <b>Name</b>                | <b>Designation</b>  |
|------------|----------------------------|---|
| 1.         | Hon. Mr. Ishwor Khatiwada  | Judge, Appeal Court, Baglung  |
| 2.         | Hon. Jagat Narayan Pradhan | Judge, District Court, Myagdi   |
| 3.         | Mr. Til Prasad Shrestha    | Joint Registrar, Supreme Court of Nepal                                 |
| 4.         | Mr. Hemang Sharma          | Executive Director, PPR Nepal<br>(Advocate, Expert on Juvenile Justice) |
| 5.         | Ms. Durga Singh            | DSP, Chief, Women Cell, Nepal Police                                    |
| 6.         | Mr. Surya Nath Adhikari    | Government Attorney, Lamjung District                                   |
| 7.         | Mr. Shiva Prasad Paudel    | Advisor, Save the Children Norway<br>(Advocate and child rights expert) |
| 8.         | Mr. Pramod Kharel          | DSP, Lamjung District   |
| 9.         | Ms. Anju Bohora            | Psychosocial Counselor, social worker<br>(Lamjung)                      |



## ***Annex 5: Summary Report of Focus Group Discussion***

**Hon. Mr. Ishwor Khatiwada, Judge Appellate Court , Baglung (27 August 2008)**<sup>10</sup>

Juvenile justice, a wide concept, covers many different realities. It relates to the rules governing the situation of alleged minor delinquents as well as convicted juveniles. It also refers all the interactions that a child may have with the legal system. Juvenile justice system also addresses the deviance causes, be it societal, cultural or economical.

The Children's Act and Rules (Nepal) provide framework for Juvenile Justice in national level. The government has recently promulgated Juvenile Justice Procedure Rules 2007. The CRC and ICCPR provide frame work for juvenile justice in international level. As per Nepal Treaty Act international instruments to which Nepal is a state party is binding in Nepal.

Defining child as a person below 16 years and setting a MACR 10 years are some of the issues to be considered for reform. The UN Committee on the Rights of the Child has repeatedly showed its concern about setting too low MACR in Nepal.

It is positive to promulgate the Children's Act and Juvenile Justice Procedure Rules 2007 but the implementation of these laws, rules are very poor. Children's Act provides for the provision of Juvenile Court but there is no any Juvenile Court in the country even after 16 years of promulgation of such law. This shows that the government does not have strong political will to reform the juvenile justice system. It is the duty of government to implement the law and establish juvenile courts as soon as possible.

Government has established juvenile bench in each 12 district courts. The Act has a provision of including a psychosocial counselor or a social worker in the bench. But due to the lack of trained counselor in the districts the provision has not come into implementation. The 2007 Rules provides that case of a child should be decided within 120 days of filing but the provision is often violated in practice.

Lack of trained human resources in the Judiciary, Government Attorneys, Police and Private Lawyers is one of the major problems faced by Nepalese juvenile justice system. The untrained human resources are unaware about the basic philosophy of juvenile justice and they are not able to handle properly the case of the children in conflict with the law.

Another problem is a lack of infrastructure in police detention centers and child reform home. For example our law provides that a child should not be detained together with adults but in many Police Offices there are no separate

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<sup>10</sup> Date in the bracket shows the date of interview or FGD.



rooms for the children and adults. There is only one Juvenile Reform Home in Kathmandu and it is difficult to bring all the children in this only one reform home located in Kathmandu.

In our system all the cases of children are being handled by formal institutions like police, courts. Now it is time to develop informal mechanisms for children's such as, community mediation, community conferencing, victim offender dialogue. The cases of children should be diverted as soon as it comes to the formal forum. Diversion mechanisms from police, court, in any stage of the hearing should be introduced by law.

Prevention is better than cure, but in Nepal we do not have any strategy for prevention of juvenile delinquency. The measures like community awareness, inclusion of the subject in the formal and non formal education curricula, awareness raising programs on the schools and colleges are essential. Judges and court officials should be trained to work in the juvenile justice system. Further education or in service training should be arranged for the professionals contributing in juvenile justice system.

**Hon. Mr. Jagat Narayan Pradhan, Judge, District court , Myagdi (27 August 2008)**

I have got only 3 days training on juvenile justice. The topic is interesting but I felt the training is too short. Therefore, I am not in condition to talk about the international mechanisms and compatibility of Nepalese system with the international standards. Judiciary should organise training programs to train the judges and court officials on juvenile justice.

In Myagdi district court there is only one judge and there is no any juvenile bench. The cases of the child as well as adult are being tried by the same judge in the district. I do not think that any of the staff in the district court Myagdi has received any training on juvenile justice. In Myagdi district there is no juvenile reform home. If a case of a child comes we need to send the child to the juvenile reform home in Kathmandu. It is costly and problematic to bring the child in the court in every hearing.

**Mr. Til Prasad Shrestha, joint Registrar, Supreme Court of Nepal (27 August 2008)**

Implementation of CRC and other international standards is important to reform Nepalese juvenile justice system. But Nepalese culture, tradition, socio economic situation should be considered before initiating any reform in the juvenile justice system. Government of Nepal should prepare National policies on Juvenile Justice and should immediately introduce the comprehensive juvenile justice policies in National Action Plan.

Focus should be given on improving the quality of the administration of juvenile justice with the involvement of all stakeholders and in particular the concerned line ministries. Establishment of Juvenile Special Courts, Juvenile



Police cells and Juvenile Government Attorney is important to establish a juvenile justice system as per international standards and values. Practical alternatives to detention to support the diversion of juveniles admitting minor offences away from the formal justice system – at the police level, prosecution level and court level should be introduced. The MACR set in Nepal is too low it needs to be amended as per the international standards. Guidelines for promoting the release of children into parental care pending trial should also be developed.

**Mr. Hemang Sharma, Advocate, Executive Director, PPR Nepal (Expert on Mediation and Juvenile Justice) (27, 29 August 2008)**

Political will is lacking to reform juvenile justice system. State is not ready to invest for the research and reform of juvenile justice system. Now we are in constitution making process and there are many so called ‘big issues’ like state restructuring, setting of federal structure of governance and economic and other development related issues.

Almost all the cases of children in conflict with the law are being dealt by formal mechanisms such as DAO, Police and Courts. We should change the system and introduce informal means such as, victim offender dialogue, mediation, community conference and detention should be used as a last resort.

Proper Implementation of legal provisions is essential and coordination among various stakeholders of juvenile justice system is necessary. Law prohibits handcuffing to a child but the provision is often being violated. In many cases police don’t issue an arrest warrant. Torture, cruel and inhuman treatment is widespread in practice. Even after the repeated concern rose by the UN Committee on the Rights of the Child the MACR is too low which shows the lack of political will to reform juvenile justice system.

Training to the Police, Court Officials, Judges, and Lawyers is necessary to establish a system which serves the best interest of the child. Comprehensive rehabilitation and reintegration policy should be formulated for the prevention of juvenile delinquencies and to stop the children to repeat the past mistakes.

We should develop and promote practical alternatives to detentions and establish at least one child reform home in each five development regions in the country. Formal/non-formal education and vocational training facilities should be made available in the child reform homes.

**Ms. Durga Singh, Deputy Superintendent of Police, Chief Women Cell, Nepal Police (27 August 2008)**

In Nepal we don’t have special Police cell for dealing with the case of children..General police are dealing with the children in conflict with the law.

Generally, we treat respectfully to all the people who come to our contact and we have rules how to arrest people and how to treat them humanely. There may be exception but police do not misbehave, humiliate or torture



people. Some such cases may happen due to lack of proper training and discipline of police personnel.

It is the duty of police to maintain peace and security in the society. The children who commit crime should be arrested and punished as per law otherwise they will be encouraged to commit more crimes. We are aware of the rules that children should not be handcuffed, arrest warrant should be issued and only the police in plain clothes can arrest children. In most of the cases we are following these rules.

**Mr. Surya Nath Adhikari, District Government Attorney, Lamjung (28 August 208)**

Frankly speaking, I am not that much familiar with the concept of the juvenile justice and its international standards. I have not had any chance to attend any formal education or training about juvenile justice. We are handling the cases of child similar way as the cases of adults. We are aware that Nepali law has prescribed less punishment to the child than the adult offender and child below 10 years has no criminal responsibility.

In my opinion bringing a child of young age (10, 12 years) to the formal justice is not practical. We should have some alternative provisions for them to resolve their case out of formal system. I have seen many children during my work who came into conflict with law were not able to return in normal social life, they discontinued their education, some of them ran away from home and most of them repeatedly come into conflict with the law. Children are the future of our country therefore the state should take immediate action to formulate and implement an effective rehabilitation and reintegration policy and plan for the child in conflict with the law.

**Mr. Shiva Prasad Paudel, Advisor, Save the Children Norway (Advocate and Expert on Child Rights) (27 August 2007)**

Reform of juvenile justice system is not in the priority of state though it should be. State does not want to invest resources for the children in conflict with the law. For some people this is 'an unnecessary and unproductive sector' for the state. In my opinion lack of political will and less in priority is the main problem facing Nepalese juvenile justice system.

Nepal is a state party to the CRC but the transformation of these provisions in domestic law is really poor. Nepal does not have comprehensive plan for the development of juvenile justice system. Still juvenile justice is considered as a part of criminal justice system.

Court Officials, Judges, Police, Government Attorneys and Defense Lawyers are not adequately trained on how to handle the case of children. There are very few lawyers who have got short term training on juvenile justice.

Coordination among stakeholders e.g. Ministry of Law and Justice, Ministry of Home Affairs, Nepal Police, Judiciary, Lawyers, NGOs working in



this field is very weak. They are not aware of what others are doing. Lack of up to date and authentic data about the children in conflict law is one of the big problems. Some I/NGOs and UNICEF are conducting training on juvenile justice for Judges, Police, Lawyers but the effort is not coordinated among stakeholders which should be coordinated and consolidated.

There are some good initiatives like promulgation of Children's Act and Juvenile Justice Rules but the implementation of the legal provisions are poor. Many stake holders are not aware of the legal provisions.

In Nepalese juvenile justice system there are no diversionary programs in practice. To serve the best interest of the child diversionary programs e.g. victim offender dialogue, community conferencing, mediation should be introduced. Children should not be detained in general.

**Mr. Pramod Kharel, Deputy Superintendent of Police, District Police Chief, Lamjung (27 August 2008)**

I don't have any formal education or training about the juvenile justice. We have some rules how to arrest a child. We should respect their human rights. I always instruct my subordinates to take care the rights of the child while arresting them.

There are some rules to be followed while arresting or after arrest of children such as, Police personnel should be in casual clothes, handcuffs should not be used, children's parents or guardians should be informed about the arrest and arrest warrant should be provided. But police personnel are overburdened with their work and always it is difficult to follow the rules literally.

I know that the child and adult detainees should not be in one place but sometimes we face problem of separate rooms. For example in Lamjung District we do not have separate detention facility to adult and children. We do not have child reform home in Lamjung.

In my opinion a separate child cell should be established in Nepal Police and training should be provided to the police Personnel who work with children.

We do not have separate data base about the arrest and detention of child. We have only one register for all the arrest and detention whether it is child or adult.

**Ms. Anju Bohara, Psychosocial Counselor, Lamjung (27 August 2008)**

I have got four months training on psychosocial counseling and am working as a Counselor in Lamjung. I got basic knowledge about juvenile justice system during the training provided by CCWB.

In most of the cases the psychosocial status of a child is not taken into consideration while arresting, after arrest, in interrogation and in the court proceedings. I don't see any consideration taken by Judges, Lawyers and Police



while handling the cases of children. Misbehave and torture to a child may cause long term negative effect to his/her remaining life and that hinders smooth growing and development.

In my opinion children are different than adults because of their physical and mental status therefore they need special care and protection while handling their cases.



***Annex 6: Summary of the Interview with Children in Conflict with  
the Law***

| No. | Case   | Details of the incident   | Hand<br>cuffed | Arrest<br>warrant | Torture | Family<br>visit | Judges<br>Attitude |
|-----|--------|---|----------------|-------------------|---------|-----------------|--------------------|
| 1   | Murder | On 18 October 2006 I went to fetch water in public water tap. There was a so called upper caste girl in the tap. When she saw she asked me to remain outside the tap and not to touch her water (since I belong to so called low caste). I refused to stay outside the tap and said it is illegal to behave like this. But she started quarrelling with me and scolded me. I got angry and brought a sickle from home and stuck in her neck. She died on the spot. Her uncle informed police and police came and arrested me and taken to the district police office. After some days they filed a murder case against me in Rautahat District Court.   | yes            | No                | Yes     | No              | Indifferent        |
| 2   | Murder | On 12 of February 2005 at about 10 AM I went to collect firewood in nearby jungle. I was not aware that one of the boys in our village was following me to the jungle. When I reached the jungle the boy came to me and started talking and offered me some candies. Then he proposed me for physical relation with him but I denied it. He came closer to me and started touching sensitive parts of my body. I was too angry and I repeatedly told him not to touch me but he did not listen to me. Then I pushed him with big force and fell down in rock from about 20 meters height. Then he started crying and some other people came and he was taken to the hospital. After some days I heard that he was died due to head injury. After his death police men came to my house and arrested me and filed a murder case in the district court. | yes            | N0                | Yes     | Yes             | Indifferent        |
| 3   | Drugs  | On 20 October 2006 at 6 AM I was travelling by bus to Kathmandu. Suddenly some policeman entered into the bus and started checking our luggage. They checked my luggage as well and found a pack of brown sugar. Then they immediately arrested me and brought to District Police Office Hanuman Dhoka. The next day police personnel started interrogation and they asked me whether I was involved in other drug cases and the name of gang member of drugs trafficking. I rejected that I am a gang member but they coerced me to accept my involvement in many other drugs case. After some days they filed a drug trafficking case against me in the district court  | No             | No                | Yes     | No              | Not friendly       |



|   |       |  |     |     |     |     |              |
|---|-------|--|-----|-----|-----|-----|--------------|
|   |       | Kathmandu.   |     |     |     |     |              |
| 4 | Theft | On 24 of December 2007 I heard that one of the guests in our hotel reported police that he had lost valuables and cash from his room. On the same day at about 4 PM police came to our hotel and arrested me and one of my colleagues on the charge of theft. I tried to explain that I have never done so but they refused to listen to me. They kept me on the police van and started beating by baton, hand and boot on the various part of my body. They brought me to the district police office Morang and interrogated and asked me to sign the paper they prepared. I signed it without knowing the content of the paper. Later they filed a theft case against me in the district court Morang. | Yes | No  | Yes | Yes | Not friendly |
| 5 | theft | On 15 May 2007 at 4 AM I was waiting for bus to go to Banepa in Babarmahal Kathmandu . In front of me some boys were cutting telephone cable from the pole. In the mean time a police van came and stopped there and the boys ran away. Then police started beating me and arrested on the charge of cutting telephone cable for stealing. Many times I tried to explain the truth but they didn't listen to me and brought to Hanuman Dhoka Police office and charged with theft case.  | Yes | No  | Yes | No  | Indifferent  |
| 6 | Rape  | On 7 November 2005 we (5 students) were returning home from school at about 4 P.M. we saw a girl in a jungle collecting fire woods. We went close to her and ask for physical relation but she refused. Then we captured her and compelled her for had sexual intercourse. At first she was crying but later she became unconscious then we scared and left her there. We went to our home as usual and went to school the next day. At about 12 AM police came to our school and arrested us and brought us to the district police office Kaski. They charged me a rape case and the case is still running and I am in the juvenile Reform Home.  | No  | No  | Yes | Yes | Indifferent  |
| 7 | Theft | On 13 August 2006, I was in my sister's house in Udipur Village Development Committee at Lamjung. At about 11 AM three policemen came and arrested me and my sister. We refused to go with the police since we had not done any wrong. When we reached district Police Office Lamjung then they told us that we were arrested on the charge of stealing gold jewelries and cash amounting one hundred thousand Nepali rupees. They compelled us to accept the charges and got our signature in a paper. We were totally unaware of the incident still we are   | Yes | Yes | No  | No  | Not friendly |



|  |  |                     |  |  |  |  |  |
|--|--|---------------------|--|--|--|--|--|
|  |  | facing the charges. |  |  |  |  |  |
|--|--|---------------------|--|--|--|--|--|

- Out of seven children in conflict with the law 6 know about the current status of their case.
- Out of seven children in conflict with the law 3 have charge of theft, 2 murders and one each on rape and narcotic drugs.
- All the children in the survey were arrested by the police but only one of them was provided with arrest warrant before arresting.
- In all the cases police were on their uniform while arresting the children.
- Six of them were detained with adult detainees and only one was kept separate after arrest.
- Out of 7 cases 5 were handcuffed while arresting remaining 2 were not used hand cuff.
- 2 children found normal behavior of police while arresting, one was beaten, and others faced verbal abuse and misbehavior by the police during arrest.
- 2 of them found normal treatment after arrest, one was kept in small congested room, one was coerced to accept the charge and others faced mental physical torture.
- Only one of them did not face any incident of torture during detention other 6 faced mental and/or physical torture. They were verbally abused by the police and physical torture was inflicted by random beating, kicking by boot on the various parts of body and falanga torture.
- Three of them had no idea about hiring lawyer during hearing of the case and one knew about it but did not hire and remaining 3 got service of the lawyer.
- No family members came to visit four of these child and family members of remaining 3 came to visit them while in the custody and child reform home.
- Two of the children found normal police behavior and remaining 4 said they were badly treated by the police.
- Most of the children were not aware of the role of court officials and government attorney and they did not notice them.
- All the cases were heard by the district court judges. Out of seven children four found judges were indifferent towards them and 3 of them found that the judges were not friendly to them.
- Two of them faced problem to find the situation of case on time to time, one of the child faced a problem of discontinuation of his/her



education, one said it was difficult for him/her to leave his/her home town and to go to the juvenile reform home in Kathmandu .

- One of the child preferred case hearing without detention and another one said there should be some mechanism to find true and false so that person like him/her will not suffer without doing any wrong.



## Annex 7: Figures



Sources of all the figures in this Annex is interview with the children in conflict with the law, 2008.









