

Nepalese Juvenile Justice System: An Overview

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General Introduction:

Juvenile justice is a wide concept. It covers many different realities. Juvenile justice refers to the dealing of children in conflict with laws. It relates to the rules governing the situation of alleged minor delinquents as well as convicted juveniles. It also refers to 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. It has multi-facet dimension.

The prime goal of the modern juvenile justice system is the protection of the best interests of the children in conflict with laws. Traditionally, Juvenile justice system has been taken as an essential and integral part of the criminal justice system. The modern concept views it from a different perspective. It has been widely believed that the juvenile justice system cannot be taken as a branch of the criminal justice system where the punitive approach is considered one of the important and indispensable elements. A child is thought to be incapable of committing crimes and deserve no punishment. A child might have conflicted with the laws, but he/she, as he/she has no intention to criminally harm anyone is simply considered to have negatively confronted with laws. Therefore, the purpose of the administration of juvenile justice needs to look from different perspectives.

Application of the criminal law and criminal procedures as such to deal with children in conflict with law is disastrous to the child and also to the society. In fact, it is not the wrong committed, but the punishment imposed renders the child a “delinquent”. Psychologically, child is destroyed by the punishment that result following a tedious procedural formalism under the criminal justice system. . It is primarily understood that the procedures

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applicable in the criminal justice system are designed to “fairly and impartially” deal with the adult offenders, but not necessarily for the children. The treatment and punishment make them a deviant to the values of the society. The studies conducted throughout the world unanimously conclude that the penal system has negatively contributed to the development of the children in conflict with laws.

The main pillar of juvenile justice is that the justice system should focus on rehabilitation, restoration and reintegration rather than mere punitive repression. Helping the child to understand the consequence of the act he/she has committed is a

'Fundamental object' of the modern juvenile justice system .The education, rehabilitation and family or social reintegration are the desired and zealously protected goals. The notion of juvenile justice calls for responsible and psychologically sensible institutions, procedures and outcomes. A child is, thus, not investigated, prosecuted and adjudicated in the same way as an adult. The diversion in treatment of children in relation to matters of justice is an urgent need where children in conflict with laws are subjected to hardship of the criminal justice process. Furthermore, the children in conflict with laws should be offered a chance to make a fresh start in the society without permanent stigmatization. The basic principle of juvenile justice is that the child should not be considered as a criminal, but as a person who need special care, love, protection and treatment for resolution of his \ her problem.

The right-based approach in the treatment of juvenile matters is another important aspect of juvenile justice. Children are treated in a restorative way not only because they need special protection, their best interests are protected because they deserve it. Every child has right to be protected from the family, society and also from the state. All the state machineries responsible for child welfare require performing their duties toward protecting the best interests of the child from the right based approach. However, the activities toward the protection of the rights of the child have to comply with due process.

Legal Framework:

The legal framework on juvenile justice can be divided into two parts: i.e. international and national level. These national and international legal frameworks constitute modern juvenile justice system. Some of the basic provision of such instruments may be noted as follow:

International Legal Framework:

1. The International Covenant on Civil and Political Rights (ICCPR) 1966:

The ICCPR, adopted by the international community in 1966 and ratified by Nepal on August 14, 1991, deals with provisions relating to juvenile justice. Some of the provision relevant to juvenile justice may be noted as follow:

- Article 9(i) recognizes the right to liberty and security of persons. It prohibits arbitrary arrest and detention. It also confers rights regarding criminal justice and insists on the principle of judicial intervention. The said article clearly states, “ It shall not be the general rule that a person awaiting for trial shall be detained in custody.” The ICCPR also provides provisions for compensation against unlawful arrest and detention.
- Article 10.2(b) reads: “Accused juvenile persons shall be separated from adults and brought to as speedily as possible for adjudication.”
- Article 10.3 reads: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.”
- Article 14(i) reads: “ any judgment rendered in a criminal case or in suit at law shall be made public except where the interest of the juvenile persons otherwise requires...”
- Article 14(4) reads: “ In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”

2. The Convention on the Rights of the Child (CRC) 1989

The CRC is the cornerstone international instrument covering the issue of child rights. The CRC was ratified by Nepal on sept.14, 1990. Most of the provision of the Convention is relevant to juvenile justice in the sense that if it is properly implemented, it provides the framework that helps to keep children away from becoming delinquent. In particular, article 37,39 and 40 deal with the issue of juvenile justice. Those Articles may be noted as follow:

Article 37:

States parties shall ensure that:

- (a) No children shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by person below eighteen years of age;
- (b) No child shall be deprived of his\ her liberty unlawfully or arbitrarily. The arrest detention or imprisonment of a child shall be in conformity with the law and shall be used and only as a measure of last resort and for shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner, which takes into account the need of person of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his\ her liberty before a court or other competent independent and impartial authority, and to a prompt decision on any such action.

Article 39:

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

Article 40:

1. States parties recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of

dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, states parties shall, in particular, ensure that:
 - No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - To be presumed innocent until proven guilty according to law;
 - To be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense;
 - To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age situation, his\ her parents or legal guardians;
 - Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - If considered to have infringed the penal law, to have the decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - To have the free assistance of an interpreter if the child can't understand or speak the language used;
 - To have his or her privacy fully respected at all stages of the proceedings.

3. States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and in particular:
 - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings; providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The Committee Principles :

Under articles 43 of the CRC a special committee on the rights of the child is established within the UN system for the purpose of examining programmes made by States Parties in achieving the realization of the obligation undertaken in the CRC. The committee has identified a number of principles regarding juvenile justice. A few important principles are as follow:

a. The Principle of humanity:

This principle requires total humanitarian treatment with the children in every sphere of life including justice process. No children can be ill treated, whatsoever the situation may be. Measures of privation of personal liberty can be used as a last resort and only for the shortest period of time possible. Every Child has right to enjoy privileges provided by the international humanitarian law.

b. The principle of Privacy:

Privacy should be respected at all stage of the judicial proceedings affecting the child. Such privacy right includes private part of the body, counseling with lawyer and confidentiality of other private information.

c. The Principle of the essential role of the family:

The international child rights instruments have recognized the essential role of the family as an instrumentality of juvenile justice process. The

family role principle include frequent contact between the child deprived of liberty and his/her family, the rights of the parents to be informed of the charges against their child, and also the role of the family in the judgment execution process.

d. The Principle of inviolability of the defense:

This principle emphasizes that adequate legal and other appropriate assistance is ensured to the child when they are put in the justice process. Also fair trial need to be ensured.

e. The Principle of judicial intervention:

The court has to play a pivotal role to ensure the child rights. It should determine the legality of the deprivation of liberty, ensure fair and child-friendly trial process, and promote the best interests of the child.

f. The Principle of Celerity:

Every juvenile accused are entitled to a prompt and easy access to justice and other appropriate assistance. It also includes speedy and fair trial.

B. The Soft Law:

The United Nations General Assembly has adopted some declarations and resolutions that are only Guidelines for the international community. These documents are not treaty or covenants as such and has not undergone through ratification process. They are called soft law for practical convenience. They are:

1. The Beijing Rules:

The UN standard Minimum Rules for the Administration of Juvenile Justice adopted by general assembly resolution 40/33 of 29 Nov. 1985 (The Beijing Rules) is the first international instrument to ensure specifically the protection of children's rights in interaction with the legal system. This set of rules aims at establishing a progressive justice system for young persons in conflict with the laws, reflecting the particular needs of children. The Beijing Rules are directed towards the protection of the best interest of the children, looked at juvenile justice system as an independent and separate branch of justice system and attempted to lessen the disastrous result of punitive sanction. The basic formulations of the Beijing Rules are as follow:

- Sufficient attention shall be given to positive measures..... for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law (art. 1.3).
- Juvenile Justice shall be conceived as an integral part of the national development process (art. 1.4).
- Juvenile justice services shall be systematically developed and coordinated with a view to improving and sustaining the competence of personnel involved in the services, including their methods, approaches and attitudes (art. 1.6).
- The juvenile justice system shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence (art 5). This principle of proportionality is well known as an instrument for curbing punitive sanctions.
- Efforts shall be made to ensure sufficient accountability in the exercise of discretion (art. 6).
- Article 7 and 8 provide rights of juveniles, and protection of privacy respectively.
- Upon the apprehension of a juvenile, his or her parents or guardian shall be immediately notified of such apprehension. And, a judge or other competent official or body shall, without delay, consider the issue of release (art. 10).
- Wherever appropriate, juvenile offenders should be dealt without resorting formal trial, i.e. diversion (art.11).
- Detention shall be used only as a measure of last resort and for the shortest possible period of time.
- The case of juvenile shall be dealt with according to the principles of a fair and just trial (art. 14).
- The proceedings shall be conducive of the best interests of the child (art. 14.2).
- The presence of legal counsel, parents and guardians throughout the proceeding shall be guaranteed (art. 15).

2. The Tokyo Rules:

UN Standard minimum Rules for Non-custodial Measures, adopted by General Assembly resolution 45/110 of 14 December 1990 (The Tokyo Rules) has laid down a number of rules applicable to the children. These rules are of general nature applicable to adults as well as minors whatever the case may be. The rules provide some special provision particularly applicable to the minor. Article 5 runs.

"For minor case the prosecutor may impose suitable non-custodial measures, as appropriate."

The appropriateness can be judged keeping in view of the rules & principles regarding juvenile justice. The Tokyo Rules puts obligation on the part of the judicial authority to avail social inquiry reports if the possibility exists and apply judicial direction accordingly. The rules have adopted some norms applicable in different stages of the legal & judicial proceedings and post sentencing stages.

3. UN Rules for The Protection of Juveniles Deprived of Their Liberty (The JDLs Rules):

These Rules were adopted by General Assembly resolution 45/113 of 14 December 1990. The rules have set out an internationally accepted framework to regulate the deprivation of liberty of the children. The JDLs rules also set out principles which define the specific circumstances under which young person can be deprived of their liberty and regulate the conditions of detention who are imprisoned. The rules also focuses on the need for the prison personal to be properly trained to deal with juvenile detainees. The JDLs rules has clearly mentioned that the juveniles should only be deprived of their liberty in accordance with the principles and procedures set-forth in these rules & in the Beijing Rules. The Rules are intended to establish minimum standards consistent with human rights and fundamental freedoms and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society. The fundamental principles of the JDLs Rules may be noted as:

- Imprisonment should be used as a last resort, for the minimum period and limited to exceptional cases.
- Internationally accepted rules and principles must be followed.
- Respect the human rights of the liberty-deprived juveniles.
- Apply meaningful measures so as to promote and sustain health and self-respect, to foster their sense of responsibility.

- The JDLs Rules, in particular, set out provisions on the management of juvenile facilities. The areas of management include:
 - Records
 - Admission, Registration, movement and transfer
 - Classification and placement
 - Physical environment and accommodation
 - Education, vocational training and work
 - Recreation
 - Medical Care
 - Notification of illness, injury and death
 - Limitation of physical restraint and the use of force
 - Disciplinary procedures
 - Inspection and complaints
 - Return to the Community
 - Provisions on personnel management, their categories and basic duties.

4. The Riyadh Guidelines:

UN Guidelines for the prevention of Juvenile Delinquency adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990 aims at complementing the Beijing Rules and are often referred as one of the most advanced instruments in the area of prevention of juvenile delinquency. It covers a large spectrum of issues and deal with almost every social area: family, School, community, mass media, social policy, legislation and juvenile justice administration. Focusing on prevention rather than repression, the Guidelines privilege an **ex-ante** approach and provide economic and social strategies to counter juvenile delinquency. The Guidelines has placed emphasis on preventive policies facilitating the successful socialization and integration of all children and young persons, in particular, through the family, the community, peer groups, schools, through voluntary organizations. Sufficient measures should be adopted by the state so as to prevent the victimization, stigmatization, criminalization, and exploitation under the provisions mentioned in the Riyadh Guidelines.

International Umbrella Principles:

The understanding of **international umbrella principles, adopted verbatim by the United Nations**, would enable to better deal with the emerging practical problems inherent in the administration of juvenile justice. They are:

- Juvenile justice legislation should apply to all those under the age of 18 as the age of childhood;
- However, section 2 (a) of the Nepalese Children Act reads, “Child’ means every human being below the age of 16 years”.
- Juvenile justice is a part of national development process of state and as such should receive sufficient resources to enable juvenile justice to be organized in accordance with international principles;
- The principle of non-discrimination and equality is applicable to juvenile justice, and this includes a prohibition on discrimination on account of the child and child’s family;
- The guiding principle for any policy or action covering juvenile justice is that the best interests of the child is a paramount consideration;
- Delay in deciding matters relating to a child is prejudicial to the best interests of the child;
- Every child shall be treated with humanity and with respect for the inherent dignity of the human person, taking into account the age of the child;
- At all stages, children should be treated in a manner that facilitates their re-integration into society, and their assuming a constructive role in society;
- Children are entitled to express their views freely in relation to criminal justice and the views of the child should be given due weight in accordance with both the age and the maturity of the child;
- Children have the right to seek, receive and impart information concerning the juvenile justice system in a form that is accessible and appropriate to children;
- Juvenile justice should be organized in a manner consistent with children’s rights and privacy, home and correspondence;
- If children are deprived of their family environment they are entitled to special protection and assistance;

- No child shall be subject to torture or other cruel, inhuman, degrading or harsh treatment or punishment;
- At any stage of the juvenile justice process, children should not be unlawfully or arbitrarily deprived of their liberty;
- The arrest, imprisonment or detention of children should only be used as a measure of last resort and for the shortest appropriate period of time; and
- Parents (or guardians) are to be notified of any arrest, detention, transfer, sickness, injury or death of their child.

Legal status of the International Instruments:

The CRC and ICCPR are legally binding and state party most comply with the provisions of these instruments. The Treaty Act, 1990 section 9 says that any law inconsistent with the international treaties or conventions ratified by Nepal would be void to the extent it is inconsistent and in such circumstances the provision of treaty or convention would prevail. The monism approach of the legislation has created bending force to comply with these international instruments. However, other instruments; such as the Beijing Rules, the Tokyo Rules, The JDLs Rules and the Riyadh Guidelines are called soft law and not legally binding. Nevertheless, those soft laws carry the legitimacy of the international community.

All these international instruments strongly advocate for the creation of separate justice system for the children in each legal system. It has been well recognized by the international instruments that the children are subject of and entitled to fundamental rights and freedoms and the ultimate goal of the juvenile justice system is to project the best interests of the children.

Domestic Instruments:

A. The Constitution 1990:

Article 11 of the Constitution of the Kingdom of Nepal 1990(“The constitution”) provides special protection and promotional provisions in the best interests of the children. Legislation providing special protection measures to the children cannot be held as discriminatory by virtue of article 11(3) of the Constitution. The Directive Principles of the State Policies has

seriously called for the state attention to the welfare and development of the children. Article 26(8) of the Constitution introduces the rights and interests of the children as an integral part of the state policies. Furthermore, Articles 84 empowers to the court to dispense justice according to the recognized principles of justice and art. 88 confers power to the Supreme Court to issue appropriate write orders to impart full justice. All these constitutional provisions provide ground norm mechanism to establish a functional, just and value oriented separate justice system for the children. However, there is a serious lacking in the programmes directed to that end.

B. The Children Act, 1992:

The Children Act is an outcome of the ratification of CRC entirely dedicated to children's rights. The Act has introduced a concept of juvenile justice as a separate branch of justice system. The main aims and objectives and provisions relating to formal juvenile justice may be summarized as follow:

- (i) The Act aims at the physical, mental and intellectual development of the children.
- (ii) The objective of the Act is to protect the rights and interests of the children.
- (iii) The Act lay down a number of provisions with regard to juvenile justice. They are:
 - Non-discrimination guarantee.
 - Criminal Liability fixed on the basis of age.
 - Disqualifications or recidivism not to be applicable.
 - Prohibition on imposing rigorous punishment.
 - Children's case not to be entertained or heard in the absence of legal practitioner.
 - Remedial right guaranteed.
 - Only particular person can attend in the case relating to the children.
 - Particulars of the incident relating to the children's case can't be published in any paper without permission; thus confidentiality maintained.
 - Orders may be issued to handover the child to the custody of his or her father, mother, relatives or guardian, or any social organization

involved in protecting the rights and interests of the child, or the children rehabilitation home on the condition to present him as and when required and carry on investigation or proceeding of the case, if it is appropriate. The same procedure can be applied even in the case of convicted children.

- Punishment may be suspended where the case is appropriate.
- Father, mother, guardian may file a suit, complaint or defend the case on behalf of the child. The case relating to any offence punishable under the children Act, 1992 can be initiated on the complaint of any person or His Majesty's Government.
- The statistics of the child apprehended on the charge of any offence should be kept confidential and even for the purpose of research or any other study; the name, surname and address of the child are not permitted to disclosure.
- The Children Act has mentioned provisions for separate juvenile court to hear and decide the case of first instance. Until the juvenile court is constituted, the Juvenile Bench of the District Court has jurisdiction over the juvenile matters.
- The Act also envisages special procedure to be prescribed for juvenile case. Until such procedure is prescribed, the Summary Procedure Act has to be followed.

C. Other Legislations:

There are a number of Acts and Rules dealing with juvenile matters. In particular, "*Muluki Ain*" the general law of the land, Evidence Act 1974, Human Trafficking Control Act, 1971, Police Act, 1956, Prison Act, 1962, State Cases Act, 1993 Social Welfare Act 1991 and a number of "Rules" including Court Rules have prescribed provisions that constitute Nepalese juvenile justice system. The law has made situational provisions and other basic framework regarding juvenile justice. However, there is a challenge to translate the aims and objectives set forth by the legislations into practical life.

Supreme Court judgments on juvenile issues:

After completion of almost seven years of the enactment of the Children Act, writ petitions involving juvenile issues started to come before the

Supreme Court and the court pronounced its judgments having far-reaching importance. In **Bablu Godia vs. Banke District Court and others** (writ no. 3390 of 2000) the supreme court issued order of habeas corpus and directed to keep the petitioner Bablu Godia , a 14 years old child, in the juvenile reform home as referred in section 42 (3) of the Children Act. In this case the court held that a juvenile would not be kept in prison for remand purpose. The Supreme Court invoked article 10(3) of ICCPR and article 37(a) of CRC in the case of **Keshav Khadka vs. Dhankutta District Court and others** (writ no. 3685 of 2000) and observed that it is not appropriate to keep a minor in custody or prison together with the adult prisoners. The court issued writ of Mandamus requiring keeping the convicted juvenile Keshav Khadka in Juvenile Reform Home.

In, **Ashish Adhikari vs. His Majesty's Government and others** (writ no. 3391 of 2000) , the Supreme Court observed that the Government is under obligation and responsible to establish juvenile reform home and juvenile welfare home, and issued a directive order in the name of the Cabinet Secretariat to make necessary arrangements towards establishment and operation of juvenile welfare institutions like orphanage and mentally retard children centre, juvenile welfare home and juvenile reform home.

The case of **Pode Tamang vs. Sindhupalchowk District Court and others** (writ no. 4022 of 2001) is another example where the apex court came step- forward to protect the best interests of the child. The court observed that the non-establishment of the juvenile reform home even passage of a long time after the enforcement of the Children Act, which is mandatory provision in the Act, **it can not be said that His Majesty's Government has given proper attention toward the rights and interests of the children.** The apex court also took note that the reform homes to be established under section 42(1) of the Children Act have not been established even after issuance of a writ order of mandamus by the Supreme Court to that effect. Therefore, the court issued an order of Habeas corpus to release 15 years old Pode Tamang from the prison saying that his detention in common prison was contrary to section 42(a) of the Children Act and also against child rights and interests. Also, the court issued writ of mandamus in the name of the Government to establish reform home, to keep Pode Tamang in the juvenile reform home for awaiting trial and to provide information thereof to the court.

Sarita Tamang vs Illam District Court and others (writ no. 21 of 2001) may be cited as another example, where the apex court issued writ order to release Sarita Tamang from the prison and to keep her in a juvenile reform home. The Supreme Court considered little different issue in the case of Raj

Kumar Rai vs. Kathmandu District Court and others (writ no. 25 of 2001). Raj Kumar Rai, who was below 14 years of age and co- accused of a murder case charged under section 17(2) of Murder Chapter, Muluki Ain, was asked a deposit of Rs. 15000 for bailment purpose and was sent to prison upon his failure to provide the deposit. The apex court held that the order of the court asking for deposit and keeping in prison was erroneous and contrary to the section 11 and 42 of the Children Act, and thus, an order of Certiorari was issued for the annulment of the detention order of the said court.

The illustrated judgments reveal the fact that the apex court is sensitive enough to protect the best interests of the children and cause to comply with binding legal provisions mentioned in the Act. Whereas, other stakeholders of the juvenile justice system including judicial personnel are in need to be sufficiently sensitized so as to translate the philosophy of juvenile justice into practical life.

The problem areas:

Absence of specific procedure:

The juveniles accused of having breached the penal law have to go through the procedures designed for adult criminals. There is no specific and comprehensive legal procedure to deal with juveniles in conflict with law. The procedure applied at the pre -trial phase through which a minor has to go is almost same as for the alleged adult offenders. It gives a negative impression that the juvenile justice system is not a separate system rather it is only a part of criminal justice system. This traditional notion of integration has posed a threat to the development of modern juvenile justice system in the country.

Denial on exercise of constitutional rights:

Children are not exception to exercise rights regarding criminal justice guaranteed by the constitution. However, there are instances of denial for providing such rights at the pre -trial stages. It is said that the juveniles are in most vulnerable situation in the immediate phase after their arrest. They are put into a hostile environment and are ill-treated. There is no specific cell for minors in police station, in some cases; police officers falsify the date of arrest of the minor accused. A report made by CWIN in 1996 shows that 81% of young offenders were detained in police custody and

subsequently mistreated. Among them 36% were beaten during interrogation, 11% were forced into labour, 7% were threatened and abused, 3% were kept starving, 21% were deported to the city boarder, and 3% were sent to adult prison. One may differ on the accuracy of figures as it is shown by the CWIN. But it is an unanimously accepted fact by the researchers that a large number of juveniles are mistreated at the time of arrest and while they were in police custody.

Random Prosecution:

Weaknesses are also seen on the part of the prosecution. One of the serious criticisms labeled against the prosecution is that the random prosecution has become a common phenomenon. Special trainings on the subject of juvenile justice are almost lacking, and also there are no awareness programmes on the specific rights of the children among the prosecution service. Prosecutors are not sensitive enough to deal with the juvenile matters. Furthermore, there are no specific rules and guidelines to the prosecutors so as to deal with the juvenile matter in a progressive, restorative and child-friendly manner.

Falsification of age:

It is learnt that only for practical convenience of investigation and prosecution, instances of age falsification have been reported. If, while recording the statements in the court, a juvenile claims his age to be different (below) from that as mentioned in the charge-sheet, the court has to ascertain the actual age. But medical facilities are not available in most of the districts. Consequently, children are compelled to suffer from the fault made by others. Serious steps need to be taken in this regard.

No separate Juvenile Court or Bench constituted:

The establishment of a separate Juvenile Court as per section 55(1) of the Children Act has become only a pious wish of the Legislature. In 2000, the Government adopted a temporary measure and decided to create Juvenile Benches, composed of one judge, one psychologist, and one social worker. It was first commitment of the Government toward the establishment of independent juvenile courts. However, neither psychologist, nor social worker has been appointed for Juvenile Benches. There is a serious confusion as to the procedure of appointment and condition of service of such specialist or psychologist and social worker. No guidelines have been

issued to this effect. As a result, juvenile cases are unfolded in the common judicial system that obviously does not have as the same focus on child welfare and rehabilitation, as a separate system of courts would have. There is an urgent need of governmental action toward the realization of the provisions as it is mentioned in section 55(5) of the Children Act.

Narrow jurisdiction:

The jurisdiction of the Juvenile Bench or Juvenile Court is too narrow. The Children Act limits the jurisdiction only in a case where an adult is not involved. It is not reasonable to limit the jurisdiction on the ground that one of the co-accused is an adult. It requires suitable legislative amendment.

Ambiguous legal provisions:

Ambiguous provision mentioned in the Act has created further problem. The Children Act, section 50(1) says that if a judge hearing the case deems it is not "appropriate" to keep the child in prison, he may issue an order to handover the child to his parents or guardian etc. When the judge does not think appropriate to handover the child to the private parties, should the child remain in ordinary detention? ***A contrario*** conclusion may be deduced. The scope of appropriateness is not defined. However, it is clear from the construction of the provision of the Act that a juvenile delinquent; whatever may be the charges, cannot be subjected to imprisonment in the prison. The propositions also have been confirmed by the Supreme Court's judgments. On the other hand, except Sano Thimi Correction Home located in Kathmandu Valley, no other reform home is established in the country. Thus, a situation of chaos is apparent that the common prisons are not appropriate place to keep the child and reform homes are not established to keep them. The system requires appropriate alternative and strong governmental commitment to establish required number of reform homes in different parts of the country.

No special and comprehensive procedure prescribed:

Juvenile justice process requires special procedures suitable for the child. However, even after the passage of twelve years of the enforcement of the Children Act, the Government has not framed Rules and prescribed special procedures to be followed in the juvenile cases, pursuant to section 55(6) of the said Act. The courts are compelled to follow the common criminal court

procedures. Obviously, it is not in conformity with national and international instruments.

Practice against reformatory approach:

Where a child is sent to a reform home in lieu of punishment, it is not clear as to how long he will stay there after attaining the age of maturity while serving the sentence. In practice, they are sent to prison when the child becomes a major. It is against the reformatory approach. There is a need of unambiguous legal provision for not sending the child to the common prison even after attaining the age of maturity.

Problem in management:

A number of obstacles and difficulties have posed threats with regard to juvenile justice. Availability of physical facilities, creation of child-friendly atmosphere, personnel management and their capacity building, training and sensitization on the juvenile issues are not properly addressed within the system. Prioritization of policies and programmes on juvenile justice is another area to be considered.

Limited legal assistance provided:

The Children Act, section 19 reads that the court shall not entertain or decide a criminal charge brought against the child unless there is a legal practitioner to defend the child. In such circumstances 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. However, there is a dearth of state-sponsored qualitative legal aid service. One Paid Lawyer (**Baitanik Wakil**) appointed in each court is not sensitive enough to provide quality service applying specialized knowledge in the juvenile matters. The Nepal Bar Association is entrusted to provide legal assistance to "indigent, poor, and disadvantaged people". But it is learnt that the juvenile delinquents are not in their mandate, even if in cases where juvenile offenders are "indigent, poor and disadvantaged". A few NGOs are providing legal assistance to the alleged young offenders. The Centre for Legal Research and Resources (CeLRRD) is one of the leading NGOs providing legal assistance to the juveniles. However, legal assistance provided by a few and Capital city centered NGOs cannot be considered as sufficient assistance. The situation urges

for state sponsored and institutionalized effective legal aid service so as to strengthen the juvenile justice system.

Lack of judicial control and supervision in post-trial period:

It is said that the judicial control and supervision on post-conviction period (judgment execution period) is almost forgotten part of the justice system. Once the judgment is rendered and the convicted juvenile is handed-over to the either concerned agency or any private party, the function of the court is supposed to have been completed. This notion of judgment execution has no justification. Lack of explicit legal provisions requiring judicial intervention in judgment execution process and lack of the system of appointing probation officer have created further difficulties.

Lack of victim care and protection system:

The victim care is one of the forgotten aspects of the juvenile justice system, at present. The prevailing law and the State's policy has not paid proper attention to the victim's care, protection and rehabilitation. In case where the victim is a child the need of their care, protection and rehabilitation becomes more sensitive and urges for paramount consideration is given by the state. The satisfaction of the victim would balance the resentment of the society against the offender and, thereby, providing a positive societal support to the juvenile justice system.

Judicial Agenda for Prospective Reform:

The court has to play a leading role in the juvenile justice process. The proactive role played by the court will pave the way to develop a modern juvenile justice system. Keeping in view to the national and international realities with regard to juvenile justice, as it is experienced, the probable areas of judicial intervention for prospective reform may be pointed out as follow:

(1) The Supreme Court:

Within the framework of the Constitution and the Judicial Administration Act, 1990 the Supreme Court has to play a pro-active role to strengthening

the juvenile justice system. In particular, the Supreme Court is competent enough to play its role in the following manner:

- Applying judicial activism in the juvenile issues;
- Framing Rules on court process with regard to juvenile justice;
- Monitoring and supervising the functioning of the subordinate courts;
- Strengthening the data based information system;
- Creation of central steering committee to look after juvenile matters;
- Conducting an in-depth research to find-out obstacles and difficulties in implementing national and international child rights laws, treaties and conventions;
- Coordinating with the governmental and non-governmental agencies;
- Managing additional resources;
- Arranging suitable trainings and sensitization programmes for the judicial personnel; and
- Issuing juvenile justice process guidelines.

(2) The Appellate Court:

The Appellate Courts are expected to intervene and play a pro-active role in matters pertaining to juvenile justice. In particular:

- Applying judicial activism in the juvenile issues;
- Monitoring and supervising the functioning of the subordinate courts;
- Strengthening the data based information system;
- Effective control over pre-trial illegal detention;
- Considering detention as an exception not as a rule, (it must be last resort for shortest possible time);
- Restoration, reformation, and re-integration in the society are given paramount importance in every stages of justice process;
- Easy and effective remedial access guaranteed;
- Hearing without delay (speedy trial) and fair trial ensured, and highest priority is given to the juvenile offender's case;
- Avoidance of common prison detention;

- Placement of juvenile awaiting trial in reform home, wherever available;
- Hearing in camera and confidentiality maintained;
- Ensuring presence of lawyer during trial on behalf of the child ensured;
- Summary procedure followed in the juvenile case and review on internal court procedure and adaptation of suitable practices
- Special procedure, special care and special protection are provided during examination of witness. Guardian ***ad litem*** may be appointed whenever appropriate;
- Fairly moderated sentence awarded as a last resort and for shortest period of time;
- Execution of sentence keeping the Child in private person's custody as provided by the law;
- Sentence may be suspended in appropriate case;
- Continuous follow-on by the court on the situation of judgment execution process;
- If, diversion is possible and appropriate in the best interests of the Child, such opportunities are provided and facilitated accordingly.

(3) The Trial Court:

Until separate juvenile court is constituted, the trial court (i.e. the district court) is entrusted to precede juvenile cases with a view to protecting the best interests of the child. The district judiciary has to play an important role by intervening in the justice process and pave the way for prospective reform. The tools, issues and for judicial intervention may be pointed out as:

(a) Available tools to be applied;

- Due observance of the UN Committee Principles and International Umbrella Principles;
- Application of the " recognized principles of justice "as it is mentioned in article 84 of the constitution;
- Incorporation of international human rights and child rights instruments on juvenile justice in judicial practice within the framework of section 9 of the Treaty Act, 1990;
- Exercise of inherent power of the independent judiciary to impart justice, whenever it is appropriate and possible;

- Judicial creativity approach while implementing domestic laws.

(b) Intervening issues may be:

- Effective control over pre-trial illegal detention;
- Maintaining access to justice, access to documents collected during investigation, access to family and legal aid of the juvenile offender deprived of liberty;
- Making sure that the apprehension notice is given to the parents or guardian immediately after such apprehension;
- Considering detention as an exception not as a rule, (it must be last resort for shortest possible time);
- Restoration, reformation, and re-integration in the society are given paramount importance in every stages of justice process;
- Easy and effective remedial access guaranteed;
- Hearing without delay (speedy trial) and fair trial ensured, and highest priority is given to the juvenile offender's case;
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- If, diversion is possible and appropriate in the best interests of the Child, such opportunities are provided and facilitated accordingly.

(4) Quasi-Judicial Authority:

The Chief District officer and other officers exercising judicial power (quasi judicial authority) also must function in a tune compatible with those as it is mentioned for the trial court.

Conclusion:

It is a matter of common concern that the Nepalese juvenile Justice system must evolve in accordance with the international legal framework. The Juvenile justice system in Nepal, at least in principle, is in tune with international standards. Human rights and Child rights Treaties and Conventions are ratified without any reservations, the constitutional and the domestic legal provisions are also in tune with international human rights norms. However, there is a wider gap between legislative provisions and the practice. Certainly, there are some deficiencies in the legislative provisions. They can be removed through the legislative amendments. But words are useless if they are not translated into action. There is a need to break through the wispy a washy approach prevalent in the developing society. Various reports mention that a large number of areas on juvenile justice are out of touch. Government argues for the lack of fund available; others argue for the lack of willingness. Both may be nearly right. As a result, a large number of humanity is suffering. The situation must be improved. A lot of things are yet to be done. It is the responsibility of all the stakeholders to provide a child- friendly system of justice in order to ensure an efficient restoration and re-integration into the society. Mere words cannot translate the ideals into reality. The idea of modern juvenile justice can be realized only if the state and other stakeholders are committed to that end.

