

Fair Trial imperatives in the Context of Juvenile Justice (International Human Rights Law Perspectives)

Ishwor Prasad Khatiwada*

Abstract

Right to fair trial is one of the basic human rights. Fair trial entails equality of arms, whereby an individual accused is ensured as an equal party, all the rights necessary to defend him/her in the court against the other party, the state. Since, right to fair trial is non-derogable, universal right, a juvenile accused of committing 'crime' also possess right to fair trial. Most international human rights instruments that talk about fair trial rights do not mention in the text children as the fair trial beneficiaries. However, through simple analogy all the fair trial rights of adults can also be accrued for children in conflict with law. In addition, because of their age and vulnerability child should also get apart from the general fair trial guarantee, additional protection while they are tried in court of law.

* This article is based on the Research Report entitled "Ensuring Fair Trial in Cases Children in Conflict with the Laws". The Research work was conducted by the author in 2004 / 2005 under Research Partnership Programme, in the Danish Institute for Human Rights, Copenhagen, Denmark.

* Judge, Court of Appeal, M.A. (Tribhuvan University), LL.M. Punjab University

Concurring with the majority judgment of the European Court of Human Rights (ECHR), Walsh J. in, *Nortier v. The Netherlands*:

“Juveniles facing criminal charges and trial are as fully entitled as adults to benefit from all the Convention requirements for a fair trial. Great care must always be taken to ensure that this entitlement is not diluted by considerations of rehabilitation or of reform. These are considerations which should be in addition to all the procedural protections available. Fair trial and proper proof of guilt are absolute conditions precedent”.¹

Fair trial or due process rights has been recognized by the Universal Declaration of Human Rights (UDHR). Article 10 provides ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’. The term ‘everyone’ used in article 10 of the UDHR denotes all mankind including children. Many other International and regional human rights instruments also provide provisions for full equality to a fair trial². Hence, Children accused of having infringed penal law are entitled to all the fair trial guarantees and rights which apply to adults, and some additional special protection³. Therefore, it is important to analyze fair trial guarantees available to human beings while making an appraisal to the fair trial right of the child.

THE CONCEPT

The right to a fair trial is a basic human right. The terms of fair trial comprise all processes of criminal justice commencing from the investigation to ultimate stage of trial that is sentencing of the accused⁴. A decision as to the fairness of the hearing is based on an assessment of the course of the proceedings as a whole. When this right is violated, people innocent of any crime face conviction, imprisonment and even execution. The justice system itself loses credibility. The right to a fair hearing

¹ Deliberated in private on 25 February and June 23, 1993.

² See for detail, Article 9 and 14 of International Covenant on Civil and Political Rights, 1966 (ICCPR), Article 37 and 40 of The Convention on the Rights of the Child, 1989 (CRC), Article 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms, 1950 (ECHRFF), Article 7 of the African Charter on Human and People’s Rights (ACHPR), and Article 17 of the African Convention on Rights and Welfare of the Child (ACRWC).

³ Amnesty International Fair Trial Manual, See for detail, <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>. Accessed on 17 December 2004.

⁴ Yubaraj Sangroula, Critical analysis of situation of fair trial and safeguard of the rights of accused in Nepal; KSL Journal, Kathmandu School of Law, (2003) p – 1.

encompasses all the procedural and other guarantees of fair trial laid down in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet criterion of a fair hearing.⁵ The closely related principles of 'due process' and the 'rule of law' are fundamental to the protection of human rights. The protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation for 'substantive protection' against state power. The protection of human rights, therefore, begins but does not end with fair trial rights⁶.

Procedural fairness is one of the most important aspects of justice dispensation. The observance of the rules of procedure, and in particular, the protection of procedural rights of the accused guaranteed by the constitution and the law is considered as a basic notion of fair trial. The doctrine of 'due process'⁷, 'the principles of fundamental justice'⁸, 'the recognized principles of justice'⁹, the fundamental 'rights regarding criminal justice'¹⁰ and the 'fair trial' concept denotes, sometimes, synonymous meaning and to a great extent they are overlapping. The fairness in trial implies both institutional and procedural impartiality. A trial is said to be fair when all the actors of the criminal justice system act in a fair manner by abiding to the process lay down by the law.

It is a fundamental principle of criminal law that 'the court is under a duty to ensure the accused a fair trial.' Failure to accord to a fair trial violates minimal constitutional standard of personal liberty. Over the past 50 years, the courts in many jurisdictions have considered 'fair trial' issues. The 'due process' guarantee provided by the 5th and 14th amendment of the American Constitution puts much emphasis on the proper rules and procedures and its

⁵ Amnesty International Fair Trial Manual. See for detail <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm> - accessed on 17 December 2004.

⁶ RICHARD CLAYTON AND HUGH TOMLINSON, THE LAW OF HUMAN RIGHTS Vol.- 1, Oxford University Press, 2000, p – 550.

⁷ The U.S. 5th and 14th Amendments due process provision and the case law developed in this regard.

⁸ Section 7 of the Canadian Charter uses 'principles of fundamental justice'. In *R v Fisher* (1985) 39 MVR 287, Scollin J held that 'the protection of basic rights by the principles of fundamental justice must mean more than a mere guarantee of a scenic route to the prison-camp, and that life, liberty and security of the person are illusory if they can be unjustly taken away with impunity'.

⁹ The Constitution of the Kingdom of Nepal, 1990, Article 84

¹⁰ Id. at Article 14

due observance as an essential condition for securing justice. Despite its idiosyncrasies, this jurisprudence continues to influence the development of the law throughout the common law world.¹¹ The doctrine has been given its practical expression by the American judicial formulas. The fifth and fourteenth amendment 'due process' clause and sixth Amendment 'fair trial' clause of the American Constitution has guaranteed the procedural fairness in its letter and spirit. The Fifth Amendment of the U.S. Constitution provides 'no person shall be deprived of life, liberty, or property, without due process of law'. The Sixth amendment further incorporates a few other fair trial rights and states 'in all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury'. The U.S. Supreme Court, in the case of *Barker v Wingo*, has observed that *all accused persons* should be treated according to decent and fair procedure.

Proposals to extend some adult liberty rights to children did not succeed in American constitutional law until the 1960s. By the end of the 1960s, a rationale for extending constitutional liberty rights to children was beginning to emerge, expressed in the phrase "students in school as well as out of school are 'persons' under US Constitution. They are possessed of fundamental rights which the State must protect".¹² However, in the 1970s the U.S. Supreme Court balked when it had the opportunity to use this rationale to extend other liberty rights to children. For example, the court decided that juveniles did not have several of the rights that adults take for granted: the right to a trial by jury, the right to bail prior to adjudication, and protection from corporal punishment. By the end of the 1970s the court took seemingly contradictory position that while minors were protected by the Constitution and possessed constitutional rights, "the state nevertheless had greater power to restrict the rights of children" than adults.¹³

However, in recent days, many countries retreated from such concept of due process, thus also strengthening young people's access to formal justice - a move away from discretionary, individualized welfare and towards proportionality and determinacy. After 1970's a concern for the greater protection of the rights of young people in juvenile justice and child welfare systems spread through many jurisdictions.

¹¹ See for detail, CLAYTON supra note 6

¹² Philip Fetzer and Laurence Houlgate, Are Juvenile still "Persons" under the United States Constitution? The International Journal of Children Rights; Vol.-5, No. - 3, (1997), p - 319-320.

¹³ Id. at p - 320

In India, the right to a fair hearing has been deduced from the doctrine of natural justice¹⁴, as well as Articles 14 and 21 of the Constitution¹⁵. In his majority judgment, Subba Rao J. gave a very wide interpretation to 'personal liberty', and said, "it would embrace almost every facet of personal liberty recognized in the U.S. under the 'due process' clause."¹⁶ In many other subsequent judgments, Indian Supreme Court considered fair trial issue and examined its constitutionality on the basis of 'just, fair and reasonable' test¹⁷. The court has put much emphasis on the reasonableness of enacted law and has said that the law should not be regressive, fanciful and arbitrary; it should be fair, just and reasonable in all respects.

Constitution of the Kingdom of Nepal, 1990, The Interim Constitution, 2007 and other procedural laws have recognized the basic principles of fair trial and the Supreme Court has also at times laid down principles to impart fair trial rights in Nepal. The Supreme Court of Nepal has observed that both 'substantive' and 'procedural' requirements must be met to justify the deprivation of personal liberty.¹⁸ Despite the respect accorded to the notion of a fair trial by the constitutional, legal and judicial system, due to the vintage of the procedural laws and traditional approach of judicial process, one can find gaps in the application of fair trial principles in Nepal.¹⁹

FAIR TRIAL - A FREQUENTLY BREACHED RIGHT

The right to fair trial is one of the frequently breached rights. One can find examples from many jurisdictions. The U.S. Supreme Court stated in '*Re Gault (1967)*' that a child receives the worst of both worlds; that he gets neither the protections (fair trial) accorded to adults nor the solicitous care or regenerative treatment postulated for children. Richard Clayton and Hugh

¹⁴ *Union of India v. Tulsiram*, (1985) 3 SCC, The Indian Supreme Court

¹⁵ *Maneka Gandhi v. Union of India* (1978) S.C. P. – 597

¹⁶ *Kharak Singh v. State of U. P.* AIR 1963 SC 1295

¹⁷ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Rudul Sah v. State of Bihar* AIR 1983 SC 1086; *H.M. Haskot v. State of Maharashtra* AIR 1978 SC 1548; *Sunil Batra (I) v. Delhi Administration*, AIR 1978 SC 1675; *Hussainaira Khatoon v. State of Bihar* AIR 1979 SC 1360; *P.S. Shukla v. Delhi Administration* AIR 1980 SC 1535.

¹⁸ For example see, *Yaggamurti Banjade v Bagmati Special Court NKP 2027 (1970) p – 57*

¹⁹ See for detail, Ishwor Khatiwada, The Right to life, personal liberty and security under the Nepalese Constitution, paper presented in a seminar organized by the INTERIGHTS in Dhulikhel, Nepal, 2003.

Tomlinson have very aptly summarized the fair trial situation in United Kingdom. In their words²⁰:

“More United Kingdom applications to Strasbourg have been based on Article 6 than on any other provision of the Convention²¹. United Kingdom Article 6 complaints have been substantively considered by the court on more than 60 occasions. This is partly a consequence of the central importance of ‘fair trial rights’ in the Convention, and partly the result of the failure of public authorities to give proper weight to such rights. The court has found the United Kingdom to be in violation of Article 6 on 26 occasions²² and in violation of Article 7 on one occasion²³ .

The practical situation of fair trial guarantees is not so encouraging in Asian countries. Jurists gathered in Hong Kong, in 1999, had concluded that:

“A close look at the legal provisions for fair trial and actual practices relating to fair trial in Asia reveals a rather shocking picture. There is much that is defective in all the components relating to fair trial: the criminal investigation, prosecution, court proceedings as well as carrying out of the sentence. Although many countries are signatories to the ICCPR and some have even made constitutional provisions for fair trial, an examination of the state responsibilities for providing the necessary resources, both financial as well as human resources, shows a lack of serious concern for achieving the objective of ‘justice through due process...the right to fair trial is denied to people, particularly to those who do not belong to the affluent sections of society. These methods vary from the practice of torture, which is applied quite routinely in many countries, to various forms of neglect and various forms of pressure exerted by judges and prosecutors of

²⁰ CLAYTON supra note 6 at p - 675.

²¹ The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHRFF)

²² *Golder v United Kingdom* (1975) 1 EHRR, 524; *Silver v UK* (1983) 5 EHRR 347; *Campbell and Fell v UK* (1984) 7 EHRR165; *W, B, O and H v UK* (1987) 10 EHRR 29; *Granger v UK* (1990) 12 EHRR 469 (Scotland); *Maxwell v UK* (1994) 19 EHRR 97 (Scotland); *McMichael v UK* (1995) 20 EHRR 205; *Benham v UK* (1996) 22 EHRR293; *Murray v UK* (1996) 22 EHRR 29 (Northern Ireland); *Saunders v UK* (1996) 23 EHRR 313; *Findlay v UK* (1997) 24 EHRR 221; *Robins v UK* (1997) 26 EHRR 527; *Coyne v UK* RJD 1997 – V 1842; *Tinnelly and McElduff v UK* (1998) 4 BHRC 393, (Northern Ireland); *Osman v UK* (1998) 5 BHRC 293; *Hood v UK* (2000) 29 EHRR 365; *Cable v UK*, The Times, 11 March 1999; *Scarth v UK* (2000) , 22 Jul 1999; *T and V v UK* (2000) 7 BHRC 659; *McGonnell v UK*, (2000) 8 BHRC 56; *Rowe and Davis v UK*, The Times, 1 March 2000; *Condron v UK*, The Times, 9 May 2000; *Magee v UK*, The Times, 20 June 2000, *Averill v UK*, The Times, 20 Jun 2000.

²³ *Welch v UK* (1995) 20 EHRR 247

some countries. The purpose of denial of fair trial is sometimes political. Due process is also denied. The people's faith in institutions of justice has eroded a great deal due to grave failure in various institutions of administrative justice.”²⁴

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS GUARANTEEING FAIR TRIAL

Almost all international human rights instruments deal with fair trial rights, in some way or other²⁵. Under Convention on the Rights of Child (CRC), a Special Committee on the rights of the child has been established for the purpose of examining progress made by State Parties in achieving the obligation under the CRC²⁶. The Committee has among other things, identified a number of guiding principles regarding juvenile justice. Few important principles being principle of humanity, principle of privacy, principle of the essential role of the family, principle of inviolability of the defense, principle of judicial intervention and principle of celerity.²⁷ All these principles put emphasis on the protection of the fair trial right of the children whenever they conflict with law.

Indeed many aspects of procedural fairness have been recognized in international human rights jurisprudence. However, principles of fairness cannot be applied by rote but depend on the context of the decision in question. The most significant interpretation of the right to fair trial by the treaty bodies of the UN is that this right is not limited to the specifications in the treaty provisions. The idea of fairness cannot be defined precisely covering all the eventualities. Therefore, no exhaustive list may be deduced. Whether or not a particular element applies in a given case will depend on an individual circumstance. In a number of cases, several factors, such as sufficient access to legal council, enough time to prepare the defense, etc.,

²⁴ For further details, See Decline of Fair Trial in Asia; Asian Seminar on Fair trial 7 – 12 November 1999, Hong Kong; Organized by Asian Human Rights Commission & Danish Centre for Human Rights, (publication 2000), p 1– 3

²⁵ UDHR apart from proclaiming human rights to “all human beings and thus also to children in Articles 25 and 26 specially refer to the right of children. ICCPR in Articles 9 and 14 guarantees fair trial rights. CEDAW, CAT, ECHRFF, The Inter-American Convention on Human Rights, ACHPR, ACRWC, The Beijing Rules are other international human rights instruments that deal with the rights of child and their fair trial rights.

²⁶ Article 43

²⁷ The CRC and Juvenile Justice, UNICEF, Sebastien Dumortier, intern, HMG/UNDP Strengthening the Rule of Law and Reform of the Judiciary Programme; Kathmandu, December 12, 2003; p-8

were not necessarily serious violation of fair trial rights in themselves, but, when taken together, so adversely affected the defendant that the proceedings were found to be in breach of the right to fair trial in many jurisdictions. There is no established list of the elements of procedural fairness. Therefore, the duty of law enforcement official goes beyond the areas normally covered by constitutional 'due process rights' and should include various 'principle' aspects of fair trial.

ASPECTS OF FAIR TRIAL

The right to a fair hearing encompasses a variety of rights. As discussed earlier, no exhaustive list may be deduced covering all the eventualities of fair trial. Thus only, some major aspects of fair trial in context of international and regional human rights instruments shall be discussed. At the mean time references will be made from different jurisdictions, especially from India, U.K., and U.S.A., whenever appropriate.

Protection from *Ex-post facto* law: Various international human rights instruments provide protection of individual including children from *ex-post facto* law.²⁸ More generally, these provisions embody the principle that only the law can define the crime and prescribe a penalty and the principle that the criminal law must not be extensively construed to an accused detriment, for instance by analogy. It follows that an offence must be clearly defined in law. Any legislation, which criminalizes conduct that at the time it was committed was lawful, will be in breach of this principle. Interpretation of the law must operate so as to conform to the principle of reasonable certainty. However, this does not prevent the clarification or adaptation of the existing law. Thus, in case *S W and C R v UK*,²⁹ it was held that the removal of the 'marital rape exemption' by the House of Lords did not amount to a retrospective criminalization of conduct as it was foreseeable continuation of a line of case law.

Double jeopardy: The doctrine of double jeopardy protects a person from being subjected to trial and be punished for the same offence twice. This doctrine has been a basic principle of criminal justice and much cherished constitutional due process right equally applicable to all human beings including children.

²⁸ Universal Declaration of Human Rights, article 11 (2), ICCPR Article 15, CRC Article 40, ECHRFF Article 7

²⁹ 1995) 21 EHRR 363

Independent and competent court or tribunal: An independent, impartial and competent court is imperative to ensure fair trial. It is one of the crucial conditions for the dispensation of justice in a fair manner. If we put it negatively, no subversive court or tribunal can ensure a fair trial. There are numerous legal provisions, judicial principles and practices concerning to an independent, impartial and competent system of justice.³⁰ It is said that the organizational, functional and circumstantial situation of judicial functioning would help to assess its independency. In addition, the Basic Principles on the Independence of the Judiciary³¹ recognizes a set of conditions for an independent and impartial judiciary which is truly one of the basic requirements for fair trial.

Basic rules on initial contact: The Beijing Rules has mentioned three important aspects of initial contact with a juvenile³². It include (i) immediate notification to the parents of the child on the apprehension³³, (ii) considering the issue of release by a judge, without delay, (iii) respect of legal status, promoting the well-being, avoiding harm, and due regard to the circumstances of the case.

Treatment of Juveniles in Custody: The CRC puts an obligation on the State Parties to ensure human treatment of juveniles in custody³⁴. Indeed the right to life and liberty, that includes a dignified life, continues even behind the bars. In addition humane treatment is a non-derogable right available to all human beings, even if s/he is placed behind the bars. The basic need of a person (including food, rest, sleep, water etc.) must be met in all conditions and circumstances also when s/he is deprived of his/her liberty.

³⁰ UDHR Article 8, ICCPR Article 14, CRC Article 40, ACRWC Article 17, The American Convention on Human Rights 1969 Article 8, ECHRFF Article 6 (1)

³¹ The Principles was adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions of 29 November 1985 and of 13 December 1985

³² The Beijing Rules 10

³³ See ICCPR Article 9 and 14, CRC Article 40, European Convention on Human Rights, Article 5 (2), Article 6 (3), African Charter on the Rights and Welfare of the Child, Article 17. The right to be informed of the charge “promptly” requires that information be given in the manner described as soon as the charge is first made by the competent authority. It must be provided in a language understandable to either the accused or his lawyer, failing which the state must provide an appropriate translation of key documents or statements in order to meet the information required. CLAYTON supra note 6 at p-664

³⁴ “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age” Article 37, See also ICCPR Article 10

Further more the Beijing Rules requires specially instructed and trained police to deal with children³⁵. This Rule draws attention to the need for specialized training of all law enforcement officials who are involved in the administration of juvenile justice. In Philippines, for instance, a specific law exists regarding custodial treatment of juveniles, which requires among others due care of juveniles in custody by police³⁶. The ECHR has considered the issue of ill treatment by the police with an accused child in *Assenov v. Bulgaria*,³⁷ and stated

“Ill-treatment must attain a minimum level of severity... In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right...”

Social contact: International child rights instruments have guaranteed family and social contact right of a detained child. In particular, the CRC³⁸, the Beijing Rules³⁹ and the ACRWC⁴⁰ state that every child deprived of their liberty has right to maintain family and social contacts and communications. However, such contact may be denied in the interests of the detained child. The authority is under a positive duty to inform or notify to the parents or the guardian of the detained child on apprehension and detention.

Separate detention from adults: Under normal conditions children accused or found guilty of having committed a criminal act should be

³⁵ The Beijing Rules 12.1

³⁶ (i) identify himself properly, (ii) inform the reasons for such custody and advise on constitutional rights (iii) refrain from using vulgar or profane words and from sexually harassing or abusing, or making sexual advances on the juvenile (iv) avoid displaying or using any firearms, weapons, handcuffs, or other instruments of force or restraint, unless absolutely necessary and only after all other methods of control have been exhausted and have failed (v) refrain from subjecting the juvenile to greater restraint than is necessary for his apprehension (vi) avoid violence or unnecessary force (vii) notify the parents or nearest relative or guardian, if any, and the local social welfare officer as soon as the apprehension is made (viii) take the juvenile immediately to an available government medical or health officer for a physical and mental examination, and (ix) hold the juvenile in secure quarters separate from that of the opposite sex and adult offenders. The Philippines Rule on Juveniles in Conflict with Law, 2002 section 6.

³⁷ (90/1997/874/1086) Strasbourg Judgment, 28 October 1998. Also see: *Tekin v. Turkey*, judgment of June 9, 1998, Reports 1998 – IV, p – 1517-18, Section 52 and 53. Mifsud Bonnici J. further said, in his dissenting opinion, that, it was up to the Bulgarian Government “to provide a complete and sufficient explanation as to how the injuries were caused” as firmly established by the court’s jurisprudence.

³⁸ Article 37

³⁹ Rule 15

⁴⁰ Article 19 (4)

detained separately from adults.⁴¹ The CRC⁴², ICCPR⁴³, ACRWC⁴⁴, JDLs Rules⁴⁵, Beijing Rules⁴⁶ all call for separation of accused minors awaiting trial and provide that the juveniles under detention pending trial shall be separated from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults. However, it does not mean that a child may be confined in a solitary place. Solitary confinement also amounts a breach of the fair trial right.

Detention as a last resort: The CRC states, “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”⁴⁷. The first part of this provision reflects an international standard that may be found in numerous international legal documents. However, a significant improvement in international standards has been brought about by the incorporation of the ‘last resort’ and ‘shortest period of time’ standards. These principles originated with the Beijing Rules⁴⁸. The JDLs Rules recommends that imprisonment should be used as a last resort⁴⁹. It also seek to minimize the deprivation of liberty by recommending states establishment of small open detention facilities with ‘no or minimal security measures’, to avoid the additional negative effects of deprivations of liberty.⁵⁰ The detention before trial should be ‘avoided to the extent possible’ and ‘limited to exceptional circumstances’⁵¹. The purpose of deprivation of liberty for a minor must be for ‘educational supervision’, or for bringing that person before a competent legal authority.⁵²

⁴¹ See for further discussion, Philip Veerman and Adir Waldman, when can children and adolescents be detained separately from adults? *The International Journal of Children’s Rights* (special issue – Children in Armed Conflict); Volume – 4, No. – 2, (1996) p – 148

⁴² Article 37 (c)

⁴³ Article 10.2 and 3

⁴⁴ Article 17

⁴⁵ The UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990

⁴⁶ Article 13.4

⁴⁷ CRC Article 37. Also see: article 9 of the ICCPR and, UN Standard minimum Rules for Non-custodial Measures (The Tokyo Rules) Rule 5

⁴⁸ The Beijing Rules, 1985 Rule 17(1 - c)

⁴⁹ The Rules for the protection of Juveniles Deprived of their Liberty, 1990, Rule 1

⁵⁰ The JDLs Rule 30. See also the United Nations Standard Minimum Rules for Non-Custodial Measures ‘The Tokyo Rules’

⁵¹ The JDLs Rules 17

⁵² *Bouamar v Belgium*, 29 February 1988, 11 EHRR 1

Even where a person surrendered himself to the authorities, the ECHR has held that the lawfulness of the detention could still be challenged. The protection will not be lost through voluntary surrender.⁵³ In the European context, the period of time for which a child detained or imprisoned can be a relevant but not overriding factor in determining whether a deprivation of liberty is lawful.⁵⁴ The rule that detention should be a last resort and used only for the shortest appropriate period of time has been included as a principle in the South African Constitution as well⁵⁵. This means that the period for which deprivation of liberty has been ordered can be tested against the constitutional requirement by the court.

Access to the court: As the ECHR observed in *Golder v. United Kingdom*⁵⁶ “the fair public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings” Access to the court is thus one of the most important fair trial rights of the accused person, including child.

Bringing/Producing before a judge: Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.⁵⁷ Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Although, the time limit for the production before a judge has not been precisely prescribed in international human rights instruments leaving room for appreciation in the national context, it has been a widely accepted standard of criminal justice that an accused of criminal charge must be produced before a judge within 24 hours of arrest. Detention beyond that period would violate right with regard to ensuring prompt appearance before a judge.⁵⁸

⁵³ *De Wilde, Ooms and Versyp v Belgium*, 18 June, 1971, 1 EHRR 373

⁵⁴ Geraldine Van Bueren, *The International Law on the Rights of the Child; Save the Children*, Martinus Nijhoff Publishers, 1995 p – 214-215

⁵⁵ See, Article 28(1)(g) of the South African Constitution

⁵⁶ (1975) 1 EHRR (European Human Rights Reports), 524. A violation was found in *Silver v United Kingdom* (1983) 5 EHRR 347, on similar facts. Also See, *Fayed v UK* (1994) 18 EHRR 393

⁵⁷ ICCPR, Article 9. Also see article 5 (3) of the ECHRFF.

⁵⁸ Article 24 (3) of the Interim Constitution of Nepal, 1990, Article 22 of Indian Constitution and many other democratic constitutions have provided 24 hours time limit. Also see: *Rogan v United Kingdom*, November29, 1988, 11 EHRR 117

Remand hearing: Risk of flight or of committing further offences are legitimate grounds for detention awaiting trial but the longer someone is detained the more pressing the reasons must be.⁵⁹ The court must examine whether there are specific reasons why this suspect must be detained pending trial, not enough to derive this from the nature of the charge.⁶⁰ Judicial officer must personally review all the issues in the case and hear the detainee if s/he wants to be heard⁶¹. The role of the trial court is not to act as a court of third or fourth instance, but it is to ensure that domestic law has not been interpreted in an arbitrary manner, since no lawful detention can ever be regarded as ‘arbitrary’.⁶² The ECHR has said that the intervals between reviews of detention for remand prisoners should be relatively short.⁶³

Prohibition on torture or inhuman and degrading treatment: Infliction of torture on the accused and extortion of confession by inflicting any type of torture is a violation of fair trial right of the accused⁶⁴. The thematic Convention, on the right against torture, the CAT⁶⁵ states that the state parties are obliged to stop and prevent torture in their jurisdictions, to make it a criminal offence, to investigate all allegations of torture and bring to justice suspected torturers while ensuring that anyone suspected of torture receive fair treatment throughout proceedings, to exclude evidence obtained through torture as evidence in trials and to ensure redress for victims.⁶⁶

Abuse of the process: The concept of abuse of process is not explicitly guaranteed right though it may be deduced under fair trial or the ‘personal liberty’ provision of the constitutions or the international human rights instruments. However, the English courts now recognize the power of the court to prevent a prosecution which amounts to an abuse of its processes as a matter ‘of great constitutional importance and should be jealously

⁵⁹ *Womhoff v Germany*, 27 June 1968, 1 EHRR 55

⁶⁰ *Mansur v Turkey*, Decision of the court, 08 June 1995, 20 EHRR 535

⁶¹ *Schiesser v Switzerland*, Decision of the ECHR, 4 December 1979, Series A, No. 34

⁶² *Winterwerp v Netherlands*, 24 October 1979, 2 EHRR 387

⁶³ *Bezicheri v Italy*, 25 October 1988, 9 EHRR 71

⁶⁴ See CRC Article 37, ACRWC Article 17, UDHR Article 5, ICCPR Article 7, ECHRFF Article 3, ACHPR Article 5

⁶⁵ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was adopted by consensus by the UN General Assembly in 1984 and entered into force in 1987.

⁶⁶ Amnesty International Fair Trial Manual: <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>- Accessed on 17 – 12 – 2004

preserved⁶⁷. An abuse of process is something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding. The categories of ‘abuse’ are not closed, but include: unjustifiable delay and serious prejudice⁶⁸, having given a promise, undertaking or representation that the accused would not be prosecuted⁶⁹, second time trial for the same facts⁷⁰, substantial prejudicial pre-trial publicity⁷¹, trial after the loss or destruction of relevant material by the prosecution⁷², and where it would be contrary to the public interest in the integrity of the criminal justice system because the prosecution have been guilty of ‘investigative impropriety’.⁷³

Right to assistance from an interpreter:⁷⁴ A person charged with a criminal offence has right to have free assistance of an interpreter if he cannot understand or speak the language used in court. The guarantee applies once the individual is ‘charged’, and to the pre-trial,⁷⁵ trial and appeal proceedings. The guarantee is intended to enable the accused to understand the language of the court, and does not entitle him to insist on the services of a translator to enable him to conduct his defense in his language of choice. Whether the accused is incapable of understanding the language is a determination of fact for the state to make, and the onus is on the accused to show the inaccuracy of its assessment. The state must make free interpretation a part of criminal justice facilities so that the financial cost of an interpreter does not deter the accused from obtaining such assistance and thus prejudice the fairness of the trial.⁷⁶ The substance of the ‘assistance’ extends beyond provision of an interpreter at the hearing to include translations of ‘all statements which is necessary for him to understand in order to have a fair trial’.⁷⁷ This will not require a written translation of every official document, but it implies that communications

⁶⁷ Per Lord Salmon, *R v Humphrys* (1977) AC 1, 46

⁶⁸ A-G’s Reference (No. 1 of 1990) (1992) QB 630

⁶⁹ *R v Croydon JJ, ex p Dean* (1993) 98 Cr App Rep 76

⁷⁰ *DPP v Humphrys* (1977) AC 1

⁷¹ *R v Taylor and Taylor* (1993) 98 CR App Rep 361

⁷² *R v Beckford* (1996) 1 Cr App Rep 94

⁷³ *R v Horseferry Road Magistrate’s Court, ex p Bennett* (1994) AC 42

⁷⁴ See ICCPR Article 14, CRC Article 40, ECHRFF Article 6 (3), ACRWC Article 17

⁷⁵ See, *Kamasinski v Austria* (1989) 13 EHRR 36

⁷⁶ CLAYTON note 6 at p – 670

⁷⁷ *Kamasinski v Austria* (1989) 13 EHRR 36, para 74

between the accused and his legal aid lawyer must be translated⁷⁸ and that, where a lawyer (but not the accused) understands the language in which the hearing is conducted, that the accused be given a personal translation of the proceedings in order to enable him to properly instruct his lawyer.⁷⁹ A trial is a nullity if the accused cannot comprehend the charges and instruct his lawyers.⁸⁰ The Canadian Charter has given importance to the right to an interpreter. It is the duty of the judge to determine whether the need for an interpreter has been established. In *R v Tran*⁸¹, the Canadian Supreme Court has said that the right to interpreter applies to all proceedings. The interpretation must meet the standard of ‘continuity, precision, impartiality, competence and contemporaneousness’.

Right to be assisted by legal counsel:⁸² Right to legal counsel is one of the basic due process guarantees. The purpose of the guarantee is to ensure adequate representation in the case, equality of arms to the accused and vigilance by the defense over procedural regularity on behalf of his client. This right has two folds: (a) access to legal counsel, and (b) counseling freedom. Restricted counseling or the counseling in the presence of police or the victim would breach the right of the accused.

The UN Human Rights Commission has said that the suspect has a right to representation at preliminary hearings, at trial and during any relevant appeals. Legal assistance must be assigned to the accused if he does not have the means to pay for it.⁸³ In, *Reid v Jamaica*⁸⁴, the Commission further said that ‘the lawyer assigned to the accused must provide effective representation’. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When

⁷⁸ *X v Germany* (1983) 6 EHRR353

⁷⁹ CLAYTON supra note 6 at p- 670. Also see: *Kamasinski v Austria* (1989) 13 EHRR 36.

⁸⁰ *R v Iqbal Begum* (1991) 93 Cr App R 96

⁸¹ (1994) 2 SCR 361

⁸² ICCPR Article 14, CRC Article 37 & 40, African Charter on the Rights and Welfare of the Child Article 17, The Beijing Rules 15

⁸³ *Wright and Harvey v Jamaica*, Comm No. 459/1991, 27 October 1995

⁸⁴ UN Comm No 250/1987, 20th July 1990

exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary.⁸⁵

Equality of arms: The right to equality of arms means that all parties must have access to the records and documents, which are relied on by the court. The parties should have the opportunity to make copies of the relevant documents from the court file. Every party to the proceedings must have a ‘reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-a-vis his opponent’⁸⁶. A court should not decide a case on the basis of submissions from one side, which the other has had no opportunity to respond to. Also the preparation of the case is a key aspect to “equality of arms”, which has been viewed by the court as a key element of fair procedure. The accused should not be placed in a position where he is at a substantial disadvantage in presenting his case compared to the prosecutor⁸⁷. UN Human Rights Commission has observed that ‘it is an important element of a fair trial that the defence should have an opportunity to view the documentary evidence against the accused.’⁸⁸

The UDHR provides ‘full equality to a fair hearing’⁸⁹. The ICCPR and the CRC also have guaranteed this right. The accused must have adequate time and facilities for the preparation of defense and to communicate with counsel. What is “adequate time” depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. Lawyers should be able to counsel and to represent their clients in accordance with their established

⁸⁵ General Comment no. 13(21) of 12 April 1984 on Article 14 ICCPR, UN Doc. HRI/GEN / 1/ Rev.1 (extract) para. – 11. For further details, also see: *Viana Acosta v. Uruguay*, UN Com. 110/1981 – ref. p -10; *Conteris v. Uruguay*, UN Com. 158/1983 – ref. p – 11, *J. Campbell v. Jamaica*, UN Com. 307/1988 – ref. p – 12, *La Vende v. Trinidad and Tobago*, UN Com. 554/ 1993 – ref. p – 14, and *Brown v. Jamaica*, UN Com. 775/1997 – ref. p. – 16

⁸⁶ *De Haes and Gijssels v Belgium* (1997) 25 EHRR 1 para. 53

⁸⁷ See: *Neumeister v Austria*, 27 June 1968, 1 EHRR 91, *Delcourt v Belgium*, January 17, 1970, 1 EHRR 355.

⁸⁸ UN Human Rights Comm. No 451/1991, 15 July 1994

⁸⁹ UDHR, Article 10

professional standards and judgment without any restriction, influence, pressure or undue interference from any quarter.⁹⁰

The European Commission on Human Rights has held that if only one of two witnesses to an oral agreement was allowed to be called⁹¹, if the applicant was denied a reply to written submissions by counsel for the state⁹²; or if the applicant was not given the opportunity to comment on a medical report⁹³ would amount breache of the right to equality of arms. Detainee has a right to see statements relied upon by the authorities to justify continuing detention.⁹⁴ Accused person in detention awaiting trial has a right to priority in the organization of trials. The ACHPR has dealt with the importance and meaning of equality of arms in the African context and said:

“...The right to fair trial involves fulfillment of certain objective criteria, including the right to equal treatment. The right to equal treatment by a jurisdiction, especially in criminal matters means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner”.⁹⁵

Presumption of innocence: The right to remain silent under police questioning lies at the heart of the notion of fair procedure, and is widely recognized international standard.⁹⁶ By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge

⁹⁰ General Comment no. 13(21) of 12 April 1984 on Article 14 ICCPR, UN Doc. HRI/GEN / 1/ Rev.1 (extract) para. – 9

⁹¹ *Dambo Beheer BV v Neitherlands* (1993) 18 EHRR 213

⁹² *Ruiz-Meteos v Spain* (1993) 16 EHRR 505

⁹³ *Feldbrugg v Neitherlands* (1986) 8 EHRR 425

⁹⁴ *Lamy v Belgium*, 30 March 1989, 11 EHRR 529

⁹⁵ *Avocats Sans Frontieres v. Burundi*, Com. 231/99 – ref. p – 30

⁹⁶ Article 11 (1) of the UDHR, Article 14 of the ICCPR, Article 40 of the CRC, Article 17 of the ACRWC, Article 7 of the ACHPR, and Article 6 (2) of the ECHRFF

has been proved beyond reasonable doubt⁹⁷. The UN Human Rights Commission has opined that ‘any confession obtained from the suspect must be free from direct or indirect physical or psychological pressure’⁹⁸. The *onus probandi* does not lie with the accused, whose innocence is presumed and need not be proved. It is the State that has to demonstrate the accused’s guilt. The presumption will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty⁹⁹. This rule also protects the accused from prejudicial statements by public officials that disclose the view that the applicant is guilty before he has been tried and convicted¹⁰⁰. However, it does not preclude authorities from providing factual information to the public about criminal investigations, as long as this does not amount to a declaration of guilt.¹⁰¹

Right to remain silent: The CRC¹⁰² provides right ‘not to be compelled to give testimony or to confess guilt.’ The essence of the right is the notion that the person whose freedom is placed in question by the judicial process must be given the choice of whether or not to speak to the authorities¹⁰³. In *Serves v France*¹⁰⁴ the ECHR has considered the issue of right to silence and protection against self-incrimination and observed that the right of an accused to remain silent and not to incriminate:

“...rational lies, inter alia, in protecting the ‘person charged’ against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriage of justice. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained

⁹⁷ General Comment no. 13(21) of 12 April 1984 on Article 14 ICCPR, UN Doc. HRI/GEN/1/Rev.1 (extract) para. – 7. Also see: Gridin v. Russia; UN Com. 770/1997 – ref. p. – 16.

⁹⁸ UN Comm No. 330/1988, 7th April 1994. In this case the commission found a violation of Article 14(3)(g) because the murder suspect was forced under death threats to sign a confession.

⁹⁹ See, *Allenet de Ribemont v France* (1995) 20 EHRR 557 para 35.

¹⁰⁰ *Krause v Switzerland* (1980) 13 DR 213, and *Allenet de Ribemont v France* (1995) 20 EHRR 557.

¹⁰¹ CLAYTON supra note 6 at p – 663

¹⁰² Article 40, The ICCPR Article 14 provides the right ‘not to be compelled to testify against himself or to confess guilt’. Also see: Canadian Charter, Section 7

¹⁰³ *R v Hebert* (1990) 2 SCR 151

¹⁰⁴ *Serves v France* (1997) 28 EHRR 265 para 47

through methods of coercion or oppression in defence of the will of the 'person charged'".

The right to be present at an adversarial hearing:¹⁰⁵ Every accused person has right to be present in an adversarial hearing. He can participate in the process personally or through his representative and/or lawyer. The juveniles are vested with the right to be represented by their parents or legal guardians. The assumption that a parent will adequately safeguard the legal rights of a child in an interrogation is questionable. It is said that parents are as likely as the child to be ignorant of legal rights, and may also feel intimidated. So, parents may only be fit to the role of supportive observer rather than that of advisor to a child with respect to his or her rights. However, some parents may even see their role as being to assist the police to put pressure on the child to confess.¹⁰⁶

Trial in absentia: It is general rule that a criminal trial must take place in the presence of the accused. As a result, no part of the trial should take place in camera in the absence of the accused. However, in exceptional circumstances, misbehavior by the accused, voluntary absence¹⁰⁷ trial may proceed in absence of the accused. However, when the accused is absent for reasons beyond his control then the trial cannot continue in his absence unless he consents. A trial in absentia is acceptable if the state has diligently but unsuccessfully given the accused notice of the hearing¹⁰⁸. In some circumstances it is also permissible to proceed where the applicant is absent through illness.

The right to examine and cross-examine: The right to defense also includes the right to examine and cross-examine the witness. The ICCPR¹⁰⁹, CRC¹¹⁰ and ECHRFF¹¹¹ provide guarantee to the accused person the right to examine witnesses for the prosecution and to call and examine witnesses on his behalf under the same conditions as witnesses against him. The right

¹⁰⁵ ICCPR Article 14, CRC Article 37, ECHRFF Article 5 (4) & 6 (3), ACHPR Article 7

¹⁰⁶ Rob white and Christine Alder; *The Police and Young People in Australia*; Cambridge University Press, 1994, p – 38.

¹⁰⁷ *Maleki v. Italy*, UN Com. 699/1996 – ref. p – 15 (paras. 9.3 – 9.5). Also see : *Monguya Mbenge v. Zaire*, UN Com. 16/1977 – ref. p – 8; *Karttunen v. Finland*, UN Com. 387/1989 – ref. p – 13.

¹⁰⁸ *Colloza and Rubinat v Italy* (1985) 7 EHRR 516

¹⁰⁹ Article 14 .

¹¹⁰ CRC Article 40.

¹¹¹ Article 6 (3).

applies during trial and appeal proceedings, but not at the pre-trial stage. However, this right is not absolute. But the limitations must not contravene the principle of equality of arms.

Identity of accuser and witness: It is a fundamental right of a defendant to know the identity of his accusers, including witnesses for the prosecution brought against him. This is a right, which should only be denied, in rare and exceptional circumstances. Screens may be used to protect the anonymity of witnesses. Whether or not these circumstances exist is a matter for the discretion of the concerned trial judge.

Public hearing imperative and camera proceedings: The public character of hearings protects litigants against the administration of justice in secret without public scrutiny. It is also one of the means whereby confidence in the courts can be maintained. Open justice promotes the rule of law. Citizens of all ranks in a democracy must be subject to transparent legal restraint, especially those holding judicial or executive offices. Publicity whether in the courts, the press or both, is a powerful deterrent to abuse of power and improper behavior. *Lord Woolf MR* gave four reasons for the principle of open justice¹¹² (1) it deters inappropriate behavior on the part of the court (2) it maintains public confidence in the administration of justice and enables the public to know that justice is being administered fairly, (3) it may result in new evidence becoming available, and (4) it makes uninformed and inaccurate comment about court proceedings less likely.

Nevertheless, the court has an inherent power to exclude the public where the public hearing would defeat the end of the justice. There are number of grounds on which such an order may be made including the fact that the case involves the maintenance and upbringing of minors. Also a private hearing is necessary to protect the interests of any child. The ICCPR¹¹³ provides general rule for a public hearing and sets exceptions for hearing *in camera*. Under the English system, the public, but not the press, can be excluded when a child is testifying in a case of alleged indecency.¹¹⁴ The Canadian Charter¹¹⁵ provides that a person charged with an offence is entitled to a 'fair and public hearing'. The Supreme Court of Canada

¹¹² Ex Parte Guardian Newspapers (1999) 1 All ER 65, 79, 82. See CLAYTON supra note 6 p – 583

¹¹³ Article 14

¹¹⁴ *R v Legal Aid Board*, ex p Kaim Todner(a firm) (1998) 3 WLR 925, 934, As cited in CLAYTON supra note 6 at p 584-585

¹¹⁵ Section 11(d)

observed that there was no justification for a requirement that all trials of juveniles should be held *in camera*. A complete public trial should be the rule and exceptions should be established on a case-by-case basis¹¹⁶.

Privacy and confidentiality: The CRC states that every child has right “to have his or her privacy fully respected at all stages of the proceedings”¹¹⁷. The Beijing Rules provides confidential measures in two ways;¹¹⁸ viz.: (1) Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons (2) Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

Hearing within a reasonable time: The notion of criminal justice that ‘justice delayed is justice denied’ has found places in many human rights instruments¹¹⁹. A speedy trial means a trial held reasonably and expeditiously at each and every stage of justice processes. The purpose of ‘the right to trial within a reasonable time’ is to minimize three detrimental effects of pre-trial detention: time spent by an accused in custody or under restrictive bail conditions; anxiety of the accused awaiting trial; and deterioration of evidence necessary to the accused defense.

Where a complaint is made of denial of the right to speedy trial, it is primarily for the prosecution to justify and explain the delay, which the court ought to weigh on the basis of all the circumstances of a given case including the nature of the alleged offence, the number of the accused and their witnesses, the workload of the court concerned, prevailing local conditions and so on, before pronouncing upon the complaint. It is not expedient to determine with precision when and in what way the right to speedy trial has been denied. Whether delay is reasonable is a matter of fact which is likely to be entangled with constitutional right to personal liberty, while an inordinately long delay may be taken as presumptive proof of prejudice. A plea that a speedy trial has been denied cannot be accepted by a claim from the prosecution that at no time speedy trial was demanded by the

¹¹⁶ CLAYTON supra note 6 at p – 734

¹¹⁷ Article 40

¹¹⁸ The Beijing Rule 21

¹¹⁹ Article 9 and 14 of the ICCPR, CRC Article 40, Article 5 (3) and 6 (1) of the ECHRFF, ACHPR, Article 7, Beijing Rules

accused.¹²⁰ The economic difficulties is no excuse for excessive length of procedure, because the rights set forth in the ICCPR constitute minimum standards which all state parties have agreed to observe¹²¹. The fact that a defendant in a criminal case is detained in custody is a factor to be considered in assessing reasonableness¹²². Factors such as the workload of the court and a shortage of resources are not a sufficient justification for delays in a trial¹²³. No general guidelines have been laid down for what constitutes a 'reasonable time'. It is submitted that the proper approach is to decide whether the overall delay is 'unreasonable' and then to consider whether the state is able to justify each period of delay.¹²⁴

In, *Assenov v. Bulgaria*¹²⁵, the court observed that 'the applicant was a minor and thus, according to Bulgarian law, should have been detained on remand only in exceptional circumstances. It was, therefore, more than usually important that the authorities displayed special diligence in ensuring that he was brought to trial within a reasonable time'. In *Hussainara Khatoon*¹²⁶, the Indian Supreme Court held that speedy trial is an essential ingredient of reasonable, fair and just procedure under article 21 of the Constitution. In *A. R. Antulay*¹²⁷, the court observed that the fair, just and reasonable procedure implicit in the Constitution is a right of the accused to be tried speedily at all possible stages of judicial processes. State cannot invoke excuses such as difficult economic circumstances to justify delays in criminal procedure.¹²⁸

Reasoned decision: A judge determining an issue of law or fact is under a duty to give reason for his decision. This is a function of 'due process and justice' and has a two-fold rationale: the party should be in no doubt why they have won or lost and a fully reasoned judgment is more likely to be

¹²⁰ Harishchandra Prasad Upadhyay, The speedy and Fair Trial Imperative and Judiciary, Paper presented at the Seminar cum workshop on Criminal Justice System for District Judiciary, HMG/UNDP Reform of the Judiciary Programme, Dhulikhel, Nepal (2002) P – 215, 221.

¹²¹ *Lubuto v. Zambia*, UN Com. 390/1990 – ref. p – 13 (para 7.3).

¹²² *Abdoella v Netherlands* (1992) 20 EHRR 585

¹²³ See, *Zimmerman and Steiner v Switzerland* (1983) 6 EHRR 17 para29

¹²⁴ CLAYTON supra note 6 at p – 654

¹²⁵ (90/1997/874/1086) Strasbourg Judgment, 28 October 1998.

¹²⁶ *Hussainara Khatoon v State of Bihar*, 1980, SCC 88 Also see: *Hussainara v. Home Secretary*, 1979, SC. p – 1360; *Sher Singh v. State of Punjab*, 1983, SC. P – 465

¹²⁷ *A. R. Antulay and others v R. S. Nayak*, (1992) 1 SCC 225.

¹²⁸ *Fillastre and Bizouar v Bolivia*, UN Communication no. 219/1986, 25th July 1994.

soundly based on the evidence¹²⁹. A court must give reasons for its judgment so that any party with an interest in the case is informed on the basis of the decision, and to enable the accused in a criminal trial to exercise the right of appeal available to him. Courts in national jurisdictions are given a great deal of discretion as to the content and structure of their judgments, and a reasoned judgment does not have to deal with every argument raised, provided that it indicates the grounds on which the decision is based with 'sufficient clarity'. However, if a point would be decisive for the case if accepted, the court should address it.¹³⁰

Right to appeal: The CRC¹³¹ states that every child has right, if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law. Thus, at least, one time appellate right has been recognized by the international human rights instruments.

FAIR TRIAL CONCERN IN DIVERSIONARY PROCESS

The CRC¹³² exhorts, wherever appropriate and desirable, to encourage measures for dealing with children in conflict with law without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected. It is this provision that lays the basis for the promotion of diversion, which entails channeling cases away from courts to a variety of programs and other alternative courses of action. It requires 'human rights and legal safeguards must also be protected where children are diverted from judicial proceedings'¹³³.

The purpose of diversion is not to provide children an easy ride and therefore get away from formal criminal justice process after commission of crimes but to give them options that enhance their sense of responsibility and accountability. Discretion is necessary in order to guarantee the most

¹²⁹ CLAYTON supra note 6 at P – 588.

¹³⁰ Id, at p-652-653, Also see, *Van der Hurk v Netherlands* (1994) 18 EHRR 481, para 61, *Hadjianastassiou v Greece* (1992) 16 EHRR 219 para 33, and *Hiro Balani v Spain* (1994) 19 EHRR 565 para 28)

¹³¹ Article 40.

¹³² Article 40 (3)(b)

¹³³ JULIA SLOTH – NIELSEN, THE INTERNATIONAL FRAMEWORK, CHILD JUSTICE IN AFRICA – A GUIDE TO GOOD PRACTICE, Community Law Centre, 2004, University of western Cape, P. – 28

appropriate action to be taken in each individual case. At the same time, it should be realized that discretion is not arbitrary. The discretion must be exercised in conformity with human rights norms and legal safeguards guaranteed by the law. Any diversionary measures require the consent of the juvenile or her/his parents or guardian and the consent should be made knowingly and voluntarily. All the accused have right to a fair trial and this right cannot be violated except it is voluntarily waived by the accused for meaningful purpose.

Diversion can be used where a child admits offence is reasonably found guilty of offence. The diversion process include youth who would otherwise be adjudicated as delinquent; and those who would probably be filtered out of the formal justice system prior to court disposition. Since diversion process requires confession or reasonably proved situation as pre-condition, considerations should be given for the protection of the constitutional right to presumption of innocence. The accused person's right to a fair trial and due process right have to be protected and respected even in diversion process. Diversion involves the referral of cases away from the criminal justice system where suitable evidence for prosecution exists. It is, therefore, imperative that children are not diverted to a program or other informal diversion option in lieu of the possibility of prosecution. In other words, if the state does not have sufficient evidence to prosecute a matter, it cannot resort to diverting the child as a 'second prize'. The state cannot absolve itself of the onus of proving the guilt of an accused beyond a reasonable doubt by making use of diversion to achieve a result it would otherwise not obtain. This would constitute a serious invasion of the accused person's right to be presumed innocent until proven guilty¹³⁴. Likewise, an accused person's right to remain silent might potentially be compromised by the possibility of diversion. Diversion should be preceded by the child's acceptance of responsibility for his or her actions. There is a danger that a child could be unduly influenced into accepting responsibility for an offence at the expense of his/her right to remain silent. This right being inviolable, only a voluntary acceptance of responsibility gives credence to diversion procedures¹³⁵.

¹³⁴ JACQUI GALLINETTI, LUKAS MUNTINGH AND ANN SKELTON, CHILD JUSTICE CONCEPT, CHILD JUSTICE IN AFRICA – A GUIDE TO GOOD PRACTICE, Community Law Centre, 2004, University of western Cape, P. – 33

¹³⁵ Id.

Waiver of due process rights:¹³⁶ The U.S. Supreme Court has set a standard for sanction as to whether ‘*the waiver is intelligent, understanding and voluntary*’. In addition, the Supreme Court said that in case of juvenile it should not be based solely on one characteristic or procedure, but rather on all the relevant circumstances of the case, that is, the totality of circumstances test¹³⁷. So far the waiver of the right to counsel is concerned, American States have different regulations. Some States have made it mandatory and others permit it for waiver. The conditions for waiver also vary from state to states. Some restrict it to cases where the charge is not a felony, and where there is no possibility of commitment or placement of the child; others make waiver possible only if the parents, guardian, or custodian is available to represent the child.

Moreover, the court may not accept a waiver of counsel unless it determines, after thorough inquiry, that the juvenile has conferred at least once with a lawyer and is waiving the right competently, voluntarily and with a full understanding of the consequences¹³⁸. Some States of USA impose restrictions on juvenile’s waiver of fair trial right. The reason for this is based on concern that a juvenile would not be capable of making an intelligent decision to waive the right, and some waiver decisions may be the product of express or implied coercion by parents, police or court officials as the youth perceive that exercising this right will provoke hostile official reactions. Also, they may feel that such waiver can show the cooperative attitude necessary to warrant more lenient punishment from the court.¹³⁹

¹³⁶ U.S. Supreme Court in *Fare v Michael C* (1979) has underlined a nine-point standard as criteria in determining whether a juvenile is capable of understanding and waiving one or more of his constitutional rights. Those nine points are: (1) Age (2) Education (3) Knowledge of the substance of the charge, and the nature of the right to remain silent and the right to an attorney (4) Whether the accused is allowed to contact with parents, guardian, attorney, or other interested adults (5) Whether the interrogation occurred before or after indictment (6) Methods used in interrogation (7) Length of interrogation (8) Whether the accused refused to voluntarily give statements on prior occasions (9) Whether the accused had repudiated an extra-judicial statement at a later date¹³⁶.

¹³⁷ DEAN J. CHAMPION; *THE JUVENILE JUSTICE SYSTEM – DELINQUENCY, PROCESSING AND THE LAW*; 2001, p – 367

¹³⁸ National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, U.S. Department of Justice, ‘Pre-adjudication and Adjudication Processes’ Vol. VII of IX, p. – 52.

¹³⁹ Xiaojie Wen, *Comparative Research of Juvenile Justice; The Research Partnership 4/2002, The Danish Centre for Human Rights, P – 58.*

CONCLUDING WORDS

A child has the right without any discrimination to receive such measures of protection as required by his status as a minor from the family, society and the state. No doubt, juveniles facing criminal charges and trial are as fully entitled as adults to benefit from all the requirements for a fair trial. Children are also entitled to special measures of protection in addition to the measures which state parties are under a duty to ensure to all individuals. The child rights instruments further stipulates 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.

However, juvenile justice critics have been consistently asserting that within the past three decades, judicial decisions, legislative amendments and administrative changes have transformed the juvenile court “from a nominally rehabilitative social welfare agency into a scaled-down second-class criminal court that provides young offenders with neither therapy nor justice.”¹⁴⁰ Hence the substantive and procedural convergence between juvenile and criminal courts should eliminate virtually all of the conceptual and operational differences in strategies of criminal social control for youths and adults.

¹⁴⁰ BARRY C. FELD, REHABILITATION, RETRIBUTION AND RESTORATIVE JUSTICE: ALTERNATIVE CONCEPTIONS OF JUVENILE JUSTICE; Restorative Juvenile Justice: Repairing the Harm of Youth Crime; Gordon Bazemore and Lode Walgrave (ed.), Criminal Justice Press, New York (1999) p– 17.