

The Progress of Constitutional Commitments to Ensure Rights of Children in Conflict with Law in Bangladesh

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Abstract: The Children are one of the most sensitive citizens in our country. They are the potential embodiment of our ideals, aspirations, ambition and, future hopes. The development of a country largely depends on the enforcement of rights of children. They have the potential of becoming philosophers, rulers, scientists, politicians, legislators, administrators, teachers, judges, technologists, industrialists, engineers, workers, planners on which the country would rest. Children are very emotional and reactive to the actions taken against it. The rates of youthful offenders are increasing in an alarming way due to lacking of proper nourishing the children rights. The international community is very much concerned about enacting different conventions, declarations, legal instruments and making policies in ensuring the children justice system. Bangladesh also bears constitutional commitments with regard to the protection of the children rights since its inception and has the international obligation to incorporate conventional provisions into national legislations to ensure rights in conflict with law. This article aims at understanding the existing situation of the rights of children in conflict with law and also determining the progression of constitutional commitment to establish the rights of children in conflict with law. Moreover, one of the purposes is to highlight the reflection of constitutional commitment upon national laws and judicial activism.

Keywords: Children's rights, Children in Conflict with Law, Constitutional Commitments, International Obligation, Progression etc.

1. Introduction

The children are not aware of their legal rights and remedies in case of violations of those rights. They have to depend on their parents, legal guardians or others due to their mental immaturity in understanding the legal proceedings. So, children themselves are not in a position to claim their

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rights.¹ The rights of children also include the rights of children in conflict with the law in administrative and judicial actions. Youthful offenders are entitled to enjoy constitutional and statutory rights. Children commit crimes for multifaceted reasons. When a child is found in conflict with the law and arrested by police, they should be treated differently, considering the human basic rights and statutory rights. It is a common scenario in Bangladesh that children are the sufferer of violence and torture when they are pick up by the police. Police officer does not even, aware of provisions of the Penal Code, and Children Act. If any rights of a major person or an adult is violated, they can go before the court for speedy remedy. In contrast, if any child is aggrieved then the children have to depend on the adults for taking action. Furthermore, if any adult falls in conflict with law, then it is possible to defend by himself or herself. Even the adult may not engage counsel to defend him or her. It is the mercy of the system when dealing a child in conflict with law. It is obvious that the authority like Magistrates, Police, Judges, Probation Officers as well as other concerned officials who are involved in children justice system are bound for ensuring the proper application of law for the children in conflict with law.² If children enjoy their each and every right in a proper way and the best interest is considered in every sphere, they will be the future asset for a country. It is irreverent to make any discrimination of children rights on the basis of race, sex, color, place and children in conflict with law. So, the state has the responsibility to establish a children justice system in compliance with constitutional commitments and following international standards. It is pertinent to quote Robin Hayes's observation that:

“Our law enforcement must be given every tool available to protect children from predators and parents need to know who is living in their community.”

2. The Concept of Children in Conflict with the Law

The definition of children is not given, considering the psychological aspect of children. It is a matter of statutory fixing up of age limit which is up to the age of 18 years.³ ‘Child in conflict with the law’ includes any child who is accused of offences and found guilty after trial following sections 82 and 83 of the Penal Code, 1860.⁴ A child of 9 years who commits any offence does not face criminal liability.⁵ Again, child in between 9 and 12 years having no maturity to realize the consequences of its activities is exempted from liability.⁶ The criminal liability of children thus begins from the age of nine and from the age of twelve in the case of a lack of mental maturity.

¹ Children and the Justice System, <https://www.ohchr.org/en/children/children-and-justice-system> Accessed on 23 August 2023.

² Ibid

³ Section 4, Children act 2013

⁴ Section 2(3), Children Act 2013

⁵ Section 82, Penal Code, 1860

⁶ Section 83, the Penal Code, 1860

3. The Progression of Constitutional Commitment to Establish a Children Justice System

The logical interpretation of the statement found in the preamble of the Constitution can be related to the state responsibility in ensuring accused children rights under constitutional provisions. Government is bound to achieve the fundamental goal of creating a socialist society free from exploitation, establishing rule of law and securing fundamental human rights, freedom, equality and justice for all citizens.⁷ Children rights are human rights and they are the youthful citizen of the country. So, there is no scope to make any discrimination between adult and children rights as Constitution itself is committed to ensure rights of all citizens. Constitution further says that citizens of the county have equal status of law and get the equal protection of law.⁸ Every citizen shall be treated according to law with law and this right is the inalienable. No action can be taken violating the right to life, liberty, reputation, body and property against any citizen except due process of law.⁹ There is prohibition of deprivation of personal liberty and life without due process of law.¹⁰ Awarding degrading, cruel and inhuman punishment is the violation of constitutional rights.¹¹ Punishment which is given to adult offender may be inhuman and cruel for the youthful offender if similar type of punishment is awarded.

In Roushan Mondal case the High Court Division observed that the constitutional provision of state's power to make special provision for women and children for the welfare purposes has been reflected in the Children Act, 1974.¹²

After independence in 1971, the drafters of Bangladesh Constitution took cognizance of the importance of provisions regarding children right protection to be inserted into the constitution like other countries of the world. They considered some customary laws in this regard. Although Children Act, 1974 and the Children Rules, 1976 were considered the two most important legal instruments for administering the Children justice but these were not exhaustive in the true sense as the legal provisions for, moral, physical and intellectual development of children were absent. As a result, the overall improvements of children rights under legal structure have not been possible. In fact, it was a great challenge to legislate exhaustive special law for ensuring the rights of the children in conflict with law in Bangladesh.

It is a sad truism that Bangladesh did not take any remarkable steps for establishing the youthful offender's rights for long period beginning from 1974 and even from the ratification of the Convention on the Rights of the Child

⁷ The Preamble, The Constitution of the People's Republic of Bangladesh, 1972

⁸ Article 27, The Constitution of the People's Republic of Bangladesh, 1972

⁹ Article 31, *ibid*

¹⁰ Article 32, *ibid*

¹¹ Article 35(5), *ibid*

¹² [2nd Edition, page 88] [BCR 2006 HCD 275]

(CRC). However, the Children Act, 2013 is passed in Bangladesh in complying with the international and national constitutional obligation that is very positive one and certainly a milestone for youthful offender.¹³

3.1 The remarkable developments under the Children Act, 2013 are mentioned below:

- a) **Implementation of CRC provisions:** Bangladesh has enacted The Children Act, 2013 following the principles and obligations of CRC. This development is significant for ensuring the rights of youthful offender as well. All children of Bangladesh will enjoy the opportunity to be treated with law nationally and internationally.
- b) **Definition for a Child:** Determination of age of a child is very important to avail the opportunity of children rights under national and international laws. It is a precondition also to fix the actual age of an offender before starting trial otherwise it may vitiate the trial procedure. CRC highlights the age of a child as eighteen years. In previous Children Act, the age of child was up to 16 which has been modified in existing Children Act (Amendment) 2013 following the CRC standard. Now the children are those who are 18 years of age.¹⁴
- c) **Probation Officer's Provisions:** The Children Act, 2013 has inserted the provisions of duties of probation officers in details along with the responsibilities and appointment. According to law, probation officers are appointed in Upazila or metropolitan area and existing probation officer appointed under any other law shall continue functioning until such appointment. Probation officers appointed under any other law shall continue to function as probation officers as if they had been appointed under existing law. Moreover, the government may appoint social welfare officers or other officials of similar rank of the social welfare department to perform the functions of the probation officers. So, the new Act has made some remarkable modifications upon the previous one.
- d) **Child Welfare Boards:** The provisions of the establishment of child welfare boards at upozilla, district and national level have been inserted in a separate chapter of existing Children Act. A separate chapter in the 2013 Act is dedicated to setting up child welfare boards at national, district and Upazila levels. The activities of child development and certified institutes are reviewed, coordinated and evaluated by the monitoring responsibility of the National Board. One of the prime tasks of the Board is to provide guidelines for reintegration and rehabilitation of disadvantaged children who come into

¹³ <https://www.thedailystar.net/news/the-children-act-2013-a-milestone-of-child-protection> Accessed on July 10, 2023

¹⁴ Section 4, Children Act, 2013

contact with or conflict with the law into the social life. Moreover, the Board provides advice to the government regarding the limitations to the implementation of the development and welfare program.

- e) **Setting up of Children Court:** There were only two juvenile courts under the previous Children Act, 1974, where the ordinary courts were entrusted with additional functions of conducting trial of youthful offender. The remarkable achievement under the present Act is to insert provisions of establishment of Children Court in every district headquarter and as the case may be, in each metropolitan area. The 2013 Act provides that for the purposes of the Act and for the trial of offenses under this Act, at least one court, designated as a Children's Court, is to be established in each district headquarters and, as the case may be, in each metropolitan area. Under Section 16, the government can declare one or more courts of additional session judge in every district and in metropolitan area, as the case may be, Children Court and can declare their territorial jurisdiction. If there is found no additional session judge in any district, the district judge will discharge as Children Court in addition to their regular functions.
- f) **Participation of Child in Court Proceedings:** The Act 2013 requires that proceedings relating to children in contact with or in conflict with the law must be conducted in plain language that the child can understand and that the court, if necessary, requires the presence of a child Interpreter demands because the child has to cost.
- g) **Time duration of Trial:** The new Act has provided a time frame for completing the trial procedure. Generally, children court is mandated to complete the hearing of the parties within 360 days from the date of first appearance of the child before the court. If, for any reasonable and practicable ground, the trial is not completed within stipulated time, the children court can extend more 60 days after proper justification. The trial shall be continued each official day to the end of the trial without any interruption. The remarkable provision is that the child accused of crime will get released if the trial is not ended within extended time provided the charges are not rape, robbery, fraud, drug trafficking, murder and other heinous offences. But the trial of an adult offender continues if he or she commits crime along with child.¹⁵
- h) **Provision of Arrest:** Following the criminal responsibility of penal laws, the existing children Act includes that a child under the age of 9 years may not be arrested under any situation and shall not be detained by any preventive detention order. It is the responsibility of police to communicate the CAPO (Child Affairs Police Officers) and inform, immediately, the reasons, place of

¹⁵ The Children Act 2013: A Commentary by Justice Imman Ali. <<https://bangladesh.justiceaudit.org/wp-content/uploads/2018/07/The-Children-Act-2013.pdf>>

offence and detailed allegations of the offence after the arrest. Moreover, the arresting police officer will determine the age of the child on the basis of his or her birth certificate, school certificate or other relevant documents and prepare a file for the purpose of record. The police officer can apply his impression on the determination of the age of child in absence of any relevant evidence. Under this situation, if arresting police presume offender as child, it shall be deemed to be a child for the purpose of this Act. Respecting the rights of the child, there has been imposed restriction of applying handcuff and tying rope around the waist. Arrested child in conflict with law cannot be kept in a place which is not safe for it. So, measure must be taken to keep him suitable place until brought before the court. In no cases, a child should be kept with convicted child or adult offenders.

- i) **Legal Representation:** Legal aid support has been ensured by the convention on children rights and existing children Act, 2013. The law contains provisions on legal aid and support for children. Court cannot try a case of a child in contact with law or child in conflict with law without giving the opportunity of legal counsel. All proceedings including taking evidence of child in contact with law shall be conducted in an understandable language and if the child requires any interpreter for explanation of any proceeding, court can order to provide interpreter.¹⁶ If the parent or, in their absence, the carer, legal guardian or extended family member of a child does not appoint a representative for the child, or if such a person is unavailable or there are insufficient resources to hire an attorney, then an attorney from the advocate board of supreme court or form district legal aid committee will be appointed by the Children's Court for the purpose of conducting the case. The lawyer who is appointed on behalf of the child must be present in every hearing of the case and in case his inability to conduct the case for any reasonable ground, must inform in writing to the children court or other authority concerned. In that case, the hearing of that case will remain adjourned until new lawyer is appointed. It is worthy to mention that no concerned district legal aid committee will take more than 30 days in appointing new lawyer.

4. Judicial Activism on Rights of Children in Conflict with the Law

For the existence of loopholes of previous Children Act, 1974, the higher and lower judiciary takes the initiatives for clarifying the vague enactments. The judges of the higher judiciary of Bangladesh have taken every measure by legal interpretations if the lower judiciary and the juvenile justice stakeholders have been misguided or given misinterpretations relating the issues regarding juvenile justice administration. The judicial interpretations arising from different cases

¹⁶ Articles 37 and 40 of the Convention on the Rights of Children.

played significant role to adopt the Children Act, 2013. The judicial observations and interpretations on cases are follows:

- a) **Philosophy behind the Separate Justice System for Juveniles:** The concept of the juvenile justice is not new. This has been evolved in the past 150 years or more. The reason for the development of this concept is that the juvenile lacks of full control relating to the violent acts even they don't have such mental maturity to the consequences of their behavior. The juvenile cannot think in the same way as the adults can do and they act without considering the seriousness of the offence.¹⁷
- b) **Definition of a Child:** As per the previous Children Act, 1974, a person is under the age of 16 years is a child.¹⁸ In the said Act, the child who has committed criminal offence termed as juvenile offender.¹⁹ If we see the international instruments and the laws of the other countries then we may find that child shall be treated under the age of 18 years of age. It is appropriate to mention here as a neighboring country of Bangladesh, India have its legal instruments for the administration of justice. As per the Juvenile Justice Act, 1986, in case of man and woman accordingly the age is under 16 and 18 years. In addition, when they enact the Juvenile Justice (Care and Protection of Children) Act, 2000 here juvenile is defined as under the age of 18 years of age.²⁰
- c) **Determination of Age:** In determining the age of children in conflict with law, the previous Children Act, 1974 was not sufficient. Court played a vital role in providing a criterion of fixing age in this regard giving several observations on cases. In a case, it is found that the learned trial judge presumed the offender as an adult and took his confessional statement as per section 164 of The Code of Criminal Procedure, 1898 which can't be said to be the contravention of section 66 of Children Act, 1974. But the point is that the accused was only 12 years of age during the commission of the offence.²¹ So, whether the age of the offender should be determined from the commission of the offence or from the trial to it's date of birth that was obscure in previous Act. The judicial observation contributed much more to insert the provision that the true age shall be counted from the date of commission of offence to its date of birth.
- d) **Occasion to Consider Age of a Child:** Given the international agreements, declarations and other instruments, we are inclined to think that the relevant date must be the date when the crime was committed, otherwise the overall

¹⁷ Para 29, (State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

¹⁸ Section 2 (f) of Children Act, 1974

¹⁹ Section 2(n), Children Act, 1974 (Repealed by the Children Act, 2013)

²⁰ (Para 28), (State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

²¹ (Para 13), (Jaibar Ali Fakir v. The State, 28 BLD 627)

aim of the law is to protect those who are immature, impetuous and careless who easily influenced, young, moody and unaware of the consequences of his actions would be doomed. The mental capacity of the offenders at the time of the commission of the offence has given more importance.²² The relevant date means the day when the event was committed is the correct approach of consideration.²³ The thing lacks maturity and the responsibilities of the underdeveloped child are taken into consideration whereas the picture is different in case of adults.²⁴

- e) **Age of Criminal Responsibility:** It is our misfortune that in some cases we have witnessed that the law enforcers are unschooled of the basic laws of the land especially the section 82 of the Penal Code, 1860. As the stated section has mentioned that if any offence is done by the child under the age of 9 years is no offence.²⁵ A police officer can't arrest a child under nine years of age having immunity from criminal liability.²⁶
- f) **Mode of Trial of Children:** Finally, we can go into the Court's nomenclature for dealing with young people/children. In England, the children court shall be treated as the Youth Court. Most countries shall have the provision of Juvenile Court. If any child is involved in the conflict with law, then Juvenile Justice Board is designated to deal this thing. In Scotland, the children's hearing is conducted by the such kind of body. So, it is irrelevant what the forum is called. However, our Children Act deals with the children those are destitute, neglected and vulnerable to cruelty and abuse. In addition, these delinquent children of all ages should be treated by a authority like the Children's Justice Panel or the Children's Justice Board to include the non-offending children whom the law also seeks to protect.²⁷
- g) **Separate Trial for Children:** We believe that the establishment of juvenile courts is must for the proper administration of justice for the children. these courts are responsible for the hearing where the children is involved. As per Rule 3, this indicates that juvenile cases are to be heard at least once in a week. If the courts are busy with regular cases, then it shall give priority in juvenile cases. In addition, there must be a designated court which deals juvenile delinquents.²⁸ Legal aid must be available where the child is involved in a case.²⁹ It is mandatory to facilitate 24 hours probation officers in every part of the country for the enforcement of section 50 of the Children

²² (Para 60), (State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

²³ State Vs Deputy Commissioner, Satkhira, 45 DLR 643

²⁴ Johnson Johnson v. Texas, 509 U. S. 350, 359-362 (1993).

²⁵ Section 82 of Penal Code, 1860

²⁶ (Para 16), (State Vs. Secretary, Ministry of Home Affairs, and ors., 16 MLR (HCD) 254)

²⁷ (Para 71), (State Vs Md. Roushan Mondal @ Hashem, 59 DLR 72)

²⁸ Article 37(d) of CRC, 1989

²⁹ Article 40(2)(b)(ii) of CRC, 1989

Act.³⁰ Although there is a provision of joint trial of offences under section 239 of CrPC, a child who is accused of a crime committed with adult offender cannot be tried jointly under the exceptional provision of the Children act 1974.³¹

- h) **Bail:** International standard regarding bail of children is that they should be renewed on bail and rejection of bail is an exception in considering best interest of children. If a child charged with a criminal offense is not granted bail, the court must order it be placed in a pre-trial detention center or safe place.³² If the competent judge to whom the matter is presented for trial is inclined to do so, he may consider bail, especially bearing in mind that a safe home atmosphere is probably unsuitable for a child of such a tender age. However, bail may be made conditional on giving custody of the girl to someone the competent judge deems appropriate. It is the ultimate duty of the court for ensuring the best interest of the child in every aspect.³³
- i) **Sentencing:** Generally, penalty cannot be imposed on children. But there is an exception. A child may be sentenced to imprisonment after conviction if the judge is of the opinion that the offense is sufficiently serious to warrant a penalty under the provisions of section 52 and 53 the Act or if the court thinks that sending to the certified institution may bring moral danger or such child is so unruly or depraved character that any other alternative remedy would be insufficient. So, court has to form opinion upon fact and circumstances for the purpose of ensuring the best interest of the children in conflict with law.³⁴
- j) **Release on Good Behavior:** The children who are kept in a certified facility or approved home are always under the constant and continuous scrutiny regarding their origin, character and achievement. As the Children Rules, 1976 also indicates about the management of certified institutes. Superintendent monitor every inmate for taking the information regarding education, their family background, training and such other relevant things for preparing individual case file. The governing body shall exercise the same powers as the Director can entertain.³⁵ So, it is crystal clear about the intention of the legislator for ensuring the assessment of the sentence of the juvenile to assess the improvement of the character and behavior of the juvenile with a view to releasing the juvenile with or without conditions. It is our view that if any delinquent demonstrates so many improvements in

³⁰ (Para 28), (The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs & Ors, 29 BLD 656)

³¹ Shiplu and another Vs State, 49 (1997), HCD, P-53).

³² (Para 25), (State Vs Metropolitan Police Commissioner, 60 DLR 660)

³³ (Para 26), *ibid*

³⁴ (Para 26), (Fahima Nasrin vs Bangladesh, 61 DLR 232)

³⁵ Rule 9 of the Children Rules, 1976.

his/her character then this development may be taken into consideration to release the offender. As this is the ultimate purpose of law.³⁶

- k) **Restrictions in Keeping the Children in Prisons:** The children in conflict with law cannot be kept in prison during pendency of trial and after conviction. This is a general rule that has been inserted in both previous and present Children Act. In an exceptional case, if it is found that the child is unruly or so depraved character that it cannot be sent to any certified institute or that any other methods are not suitable, then as a last resort can send the child in prison.³⁷ So, there is no alternative to build enough certified of correction centers for complying with the legal provisions of the Act. Judicial observation in a case has highlighted the immediate necessity to increase the certified institutions towards government. Courts recommend that the government must take necessary steps to supply enough number of safe homes within close distance in every district. There will be injustice to the child who are not granted bail unless adequate safe homes are provide for their housing. In observation of court also says that the government is failing its legal duty to provide facilities of accommodation for the children in conflict with law.³⁸ It is worth mentioning that the recommendations given by court played a significant role to increase the number of certified centers in the country.
- l) **Duty of Arresting Police Officer:** Judicial interpretation on the provision of arrest of children in conflict with law shows necessity of some changes in the Children Act, 2013. The arresting police officer or officer in charge of the police station has to inform the parents or guardian if a child is arrested. But court, in a case finds that police officers are not aware of the provision of Penal Code or even The Children Act, 2013. There is a failure of complying legal mandate given to arresting police officers.³⁹ In the same case, Ashim Kumar Das, who was S.I of police, arrested Arifa but did not communicate her parents.⁴⁰ Moreover, at first instance, the arresting police officer has to consider bail of children in conflict with law. Bail should be granted as of right in case ofailable offence. The officer in charge in police station, even, may release the child on bail in nonailable offences if that child cannot be brought before the court.⁴¹ There is a restriction of release if such release brings moral danger or possibility of association with reputed criminal.⁴² Chief Metropolitan Magistrate finds that police brought Arifa before court on 21.04.2008 though it was uncertain of her whereabouts at previous night. But

³⁶ Supra Note 27 (Para 31)

³⁷ Section 33, The Children Act, 2013

³⁸ (Para 10), (The State Vs. Bangladesh &Ors, 19 BLT 376)

³⁹ (Para 17, 18), (State Vs. Secretary, Ministry of Home Affairs, and ors., 16 MLR 254)

⁴⁰ (Para 6), *ibid*

⁴¹ Section 48 of the Children Act, 1974 (Repealed by the Children Act, 2013)

⁴² (Para 8), (State Vs The Metropolitan Police Commissioner, 60 DLR 660)

police should have kept Arifa in remand home or place of safety till appearance before the court.⁴³ Court did not find any record of detaining Arifa in safe place or in detention center on or after 20.04.2008. So, judicial observance of negligence by police regarding arrest and bail attracted the attention of drafter of present Children Act 2013.⁴⁴

5. Conclusion

Bangladesh has demonstrated its commitment since its statehood, as reflected in Article 28(4) of the 1972 Constitution and the 1974 Children's Act. But the journey of accepting and recognizing of problems, formulation of policy, attempt to formulate legal frameworks and programming with regard to children in conflict with law started after the signing of CRC convention in 1990. The government in complying with its commitments formulated five years' (1992-1997) National Program of action for children (NPA) in 1992. The Bangladesh government passed a national child policy in 1994, stating that the purpose of the existing justice system is to reform misguided children. A National Children's Council has been established under the direction of the Department of MoWCA, with responsibility for providing guidance on the formulation of general policies and the implementation of the National Children's Policy. Later, in 2002, the Inter-ministerial Committee for Improving the Conditions of Children Detained in Prisons was established. This committee was renamed the National Task Force (NTF) and formed at the district and Upazila levels. The National Task Force makes policy decisions, recommends and monitors various steps to improve the situation of children in conflict with the law. Three child development centers have been established under the Ministry of Social Welfare in Tongi that accommodates 300 boys and another CDC that accommodates 150 girls has been established at Konabari, Gazipur. CDC accommodating 150 boys has also been established at Jashore. In addition, the area of child justice in Bangladesh is governed by a number of laws including the Children Act, 2013, Bangladesh Penal Code 1860, Majority Act, 1875 and Child Marriage Restraint Act, 1929 and many more. In fact, all these are the testimony of the reflection of constitutional commitments on the development of Children in conflict with the law. Finally, we may quote the comments of Indira Gandhi as follows:

“We must protect families, we must protect children, who have inalienable rights and should be loved, should be taken care of physically and mentally, and should not be brought into the world only to suffers.”

⁴³ Section 49 of the Children Act, 1974 (Repealed by the Children Act, 2013)

⁴⁴ (Para 9, 10), (State Vs The Metropolitan Police Commissioner, 60 DLR 660)

