



Justice for Children in Bangladesh: Diversion

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Introduction

Most of us have experience of what children are like, but we will have forgotten what we were like when we were children. Everyone is aware that a child is in every way a full-fledged human being and s/he is entitled to, more or less, the same rights as an adult. Unfortunately, children, because of their size, their inherent weakness and incomplete mental and intellectual development, are generally treated in a demeaning manner by adults. Sometimes our attitude towards children is truly shocking. Children are beaten, even killed for the pettiest misdemeanour. There is a stark difference in our behaviour towards children other than our own. We are less forgiving when it comes to the deviant acts of those 'other' children. When the child is not our own, we demonise him/her and seek the most severe punishment for them. There is an air of hostility and the resulting danger of exclusion, thus creating a cycle of deviant/criminal behaviour. If only we would stop to think why children act in the way they do and what we would do if it was our kith and kin that was in trouble.

Similarly, we readily take a near relative's destitute child under our wings, but not so for a child whose origins we do not know, a child who is alleged to have, or is found guilty of having, committed an offence. We fear that s/he would bring trouble and misguide or lead astray our own children. We do not consider that a misguided child who has not had the opportunity of receiving proper guidance may benefit from our help and become good, just like our own child. We also do not have the foresight to consider that a misguided child, unless treated properly, is liable to become much more troublesome and a burden on society and more of a threat to our peace and security. Unless treated properly and brought back to our norms, today's petty thief will become tomorrow's robber and perhaps even a murderer.

Children do not come into contact with the law of their own volition. No child is born a thief, beggar or a street-child nor wants or expects to be a victim of any crime. We must realise that young offenders are usually also victims, not just of crime, but also of neglect and abuse. The reality is that children come into contact with the law as a direct or indirect consequence of the activities of adults. They become petty thieves due to poverty and lack of proper guidance from their parents. Children who come into conflict with the law are, in reality, invariably victims. They are usually victims of extreme neglect, exploitation, seduction or threats.

It is internationally recognised that children need protection. The United Nations Declaration of the Rights of the Child, 1959 indicated that, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." It is with this view in mind that several international instruments have been formulated by the United Nations, including the Beijing Rules, Riyadh Guidelines, Havana Rules, Tokyo Rules and the Convention on the Rights of the Child. These instruments provide guidelines as to how children should be dealt with when they come into contact with the law, either as offenders, in need of care and protection, victims or witnesses.

The underlying theme of all the above instruments is to ensure that children do not face the rigours of the criminal justice system and that they should not be kept in any kind of detention, and if detention is felt inevitable then it should be considered only as a measure of last resort and for the shortest appropriate period of time. [Article 37(b) CRC]

Article 39 CRC enjoins the State to provide for the recovery and reintegration of a child of any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment.

Article 40.3 CRC enjoins the State to establish laws, procedures, authorities and institutions specifically applicable to children alleged as, or recognised as having infringed the penal law, and in particular to have measures for dealing with such children without resorting to judicial proceedings.

Article 40.4 CRC suggests dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.

Thus international law requires States to have a system for diverting children in conflict/contact with the law from the juvenile and criminal courts and also from detention in prison or other forms of institutionalised care.

Diversion:

Diversion is routing someone or something from one path [usually harmful or detrimental] to another path [more beneficial]. By definition it is planned and purposive, with a goal in mind. Often multidimensional investment is made for a greater long-term benefit for individuals as well as the community at large.

Diversion from Judicial Proceedings:

The Beijing Rule 11.1 provides that juvenile offenders shall be dealt with, wherever possible, without resorting to formal trial. Trial within the criminal justice system tends to stigmatise children as 'criminal', often leaving them marginalised and is liable to leave an indelible adverse impression on their mind for the rest of their lives. Often they are acquitted after trial, but going through the trial, in our societal context, leaves them with a bad reputation for life. Rule 11.2 enjoins that Police, Prosecution or other agencies shall be empowered to dispose cases without formal hearings. In many countries there is provision for specially trained police units to deal with children, for example D11 in Malaysia, the Youth Offending Unit in New Zealand.

In New Zealand 75-80% of cases involving child offenders are dealt with by the police and criminal trial is avoided. Depending on the gravity of the offence alleged, the police may send the child home with a warning, or call the child's parent/guardian and release the child on obtaining a bond. In case of a more serious offence, they may make a formal entry in a register and release the child. Where possible, the victim might be called and the matter settled with reparation and apology. This may be termed an optimum solution for all concerned as the matter is settled without leaving any acrimony or want for reprisal. In cases involving serious allegations, the matter is referred to other informal methods of disposition or to the Court.

In response to UNCRC Article 40.3(b) many countries have set up informal methods of disposition, such as Family Group Conferencing (FGC) in New Zealand. There is an official coordinator who convenes a meeting of the child offender and his parents with the victim and any other person whose presence is deemed beneficial. When the question of placing the offending child in the care of anyone other than the parent comes into the equation, then other close relatives of the child are included in the FGC, so that the family can decide what course of action would be best suited for the child.

In Scotland there is the system of hearing before a Children's Panel, comprising three trained persons from the community who decide on the best course of action for the child. In Malaysia, the 'Court for Children' comprise one Magistrate and two other lay persons, of whom one must be a woman; and in India the 'Juvenile Justice Board' shall comprise a Magistrate, who must have knowledge or training in child psychology or child welfare, and two social workers of whom at least one must be a woman, and the social workers must have been actively involved in health, education, or welfare activities pertaining to children for at least seven years.

In Bangladesh the new Children Act of 2013 has introduced, among other beneficial concepts enjoined by international instruments, the Child Affairs Desk and the Child Affairs Police Officer (CAPO) in every police station. Most important of all, the concept of diversion, including Family Group Conferencing (FGC) and Alternative Dispute Resolution (ADR) mechanisms, has been included in the statute and will be fully functional when the enabling Rules are passed by Parliament. The CAPO, with the assistance of the Probation Officer, has been given wide powers to effect diversion from the police station where the child is produced upon arrest. This method will enable dealing with children outside the criminal justice system, which has proven to be a beneficial system worldwide. It will serve the best interests of the children and at the same time save all the expenses necessary from beginning of the trial process till completion of the sanction ultimately awarded.

Diversion by the Prosecution:

The prosecutor may decide in appropriate cases that the child should be dealt with other than by trial in the court system. This saves public money and conforms to international norms. Diversion should be considered as a matter of course in case of first offenders and where the offence alleged is not so serious. Again, other less formal methods of disposition may be chosen. Although Bangladesh does not have an independent prosecution service as for example in the UK, it is hoped that in time with awareness building, the Public Prosecutor's office will, in appropriate cases, consider diversionary measures rather than proceeding with arraignment and trial.

Diversion by the Judge:

The Children Act 2013 empowers the judge conducting the trial to decide at any stage of the proceeding that the case in hand is better suited for disposition through diversion¹. In addition, in cases involving less serious offences, the judge has the power provided by section 37 to refer the case to the Probation Officer for dispute resolution by bringing together the offender and the victim.

Alternative sentencing:

The Children Act, 2013 contains provisions for a different sentencing scheme for child offenders. Even in cases where the child offender is adjudged to have committed an offence carrying the sentence of death or life imprisonment, the sentence that may be awarded is one of detention for a minimum of three to a maximum of ten years in a certified child development centre². For offences carrying a lesser sentence than life imprisonment or the death penalty, the maximum of three years' detention in a development centre may be awarded. Other than cases of murder, rape, robbery, dacoity, dealing in drugs or other heinous offences, the child may be released from the detention on reaching 18 years of age considering his behavioural improvement. Apart from cases of offences carrying the death sentence or life imprisonment, the court may, instead of sending the child to a development

¹ See section 49

² See section 34

centre, discharge him with a warning or release him on issuing a probation order. The sentencing provision is, of course, not dependent on framing of Rules and is already in force.

Dispositions suggested by the Beijing Rules:

There shall be a large variety of dispositions available to the competent authority allowing flexibility in order to avoid institutionalisation so far as possible:

- (a) care, guidance and supervision orders;
- (b) probation;
- (c) community service orders;
- (d) financial penalties, compensation and restitution
- (e) intermediate treatment and other treatment orders;
- (f) orders to participate in group counselling and similar activities;
- (g) orders concerning foster care, living communities or other educational settings

The scope of implementing some of the dispositions mentioned above already exists in Bangladesh, whereas the others might be profitably utilised if enabling laws were enacted. Thus, for example, community service orders could be introduced in our country as a way of disposition that would avoid institutional care for the child and involve the community in caring for the children.

As an illustration we may look at, in particular, the community service orders and other dispositions used in New Zealand [obtained from the internet]:

Community-based sentences are Orders of the Court; they have mandatory conditions that must be adhered to. The Court can also impose additional conditions to them.

A representative from the local authority's social work department is allocated to supervise the order. If the offender fails to comply with the conditions of the order, they can be taken back to Court under breach proceedings.

Community Service Order

Community service requires the offender to perform unpaid work that benefits the community. As a comparison, we find that under Scottish law, a community service order (CSO) can only be made as an alternative to a custodial sentence.

The length of a CSO can vary from 80-300 hours. They are designed as a penalty, with the offender paying back the community for their crime; however, many offenders develop new skills and benefit from the experience.

Restriction of Liberty Order

With the advent of technological development, which has reached the far-flung village, other innovative dispositions may be put in place. One such method is commonly known as tagging. A restriction of liberty order (RLO) requires the offender to wear an unobtrusive transmitter (tagging device), which signals their whereabouts to a central computer. The computer will be alerted if the offender leaves the area they are restricted to or tampers with the transmitter. Under an RLO, an offender's movements can be restricted for up to 12 hours a day for a maximum of 12 months. Although we do not at present have the resources or the level of technology required for such measures, we can hope that the rapidly advancing technologies will be available to our law enforcing agencies in the not too distant future.

These are in fact a reflection of the dispositions suggested in the Tokyo Rules.

Use of the Community:

The Tokyo Rules provide for a set of basic principles to promote the use of non-custodial measures. They intend to promote greater community involvement in the management of criminal justice, specifically the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society [Rule 1.1 and 1.2]. Consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by Court [Rule 2.5]. Public participation should be encouraged as it is a major resource and one of the most important factors in improving ties between offenders undergoing non-custodial measures and the family and community [Rule 17.1]. Public participation should be regarded as an opportunity for members of the community to contribute to the protection of their society [Rule 17.2].

The possibility of utilising the community in Bangladesh is immense since the extended family system still exists and there is still a sense of communal co-operation particularly in the rural community. Each child belongs to his immediate community, namely his family, and a larger community, comprising his extended family, and even a wider community, his co-villagers. We also have the advantage of having the local government structure in place, the Union Parishad, with responsible government officials, including the Chairman and UP Members. In addition there will be respected persons within every community, for instance teachers, imams, doctors and the village elders etc. With a minimal amount of training in child psychology and relevant legal provisions, the 'community force' would be more than adequate to deal with any number of children coming into contact with the law. That would also help alleviate the problems faced due to paucity of probation officers.

The Riyadh Guidelines go one step further and provide methodology for preventing children from developing criminogenic attitudes. The underlying idea here is to engage and motivate the parents and the community to provide activities for the children that will develop their personality and good human characteristics and thereby prevent them from developing deviant behaviour. The guidelines expose the phenomenon that is labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour by young persons. The guidelines provide that community-based services and programmes should be developed for the prevention of juvenile delinquency. They enjoin governments to establish policies that are conducive to the bringing up of children in stable and settled family environments. Families in need of assistance in the resolution of conditions of instability or conflict should be provided with requisite services. Where attempts to create a favourable environment within the family or the extended family fail, alternative placements, including foster care and adoption, should be considered. Though 'adoption' in the Western sense is not allowed by Islam, there is no reason why concepts such as *kafalah* should not be considered in the Bangladesh context. The guidelines further provide that the communities should provide a wide range of community-based support measures for young persons, including community development centres, recreational facilities and services to respond to the special problems of children who are at social risk. Voluntary organisations and sports organisations should be created at the local level in order to engage the youth in projects and sports. Schools should be encouraged to remain open after hours to facilitate extra-curricular activities.

Alternatives to institutionalisation:

Keeping children in detention centres or homes as a means of correction has the reverse effect. They tend to feel stigmatised and alienated and as a result they lose their self-esteem and develop anger and despondency. They often tend to self-harm. Putting destitute, abused and neglected children into institutional care results in negative effects on their personality, and makes a bad psychological situation even worse. Moreover, children in institutions are at

risk of physical and sexual abuse and also tend to develop into gangs, which tend to increase their criminogenic behaviour.

Conclusion:

If our attitudes towards children in need of protection, including those who have developed deviant behaviour, change favourably, then there are great prospects ahead for all the children of our country. The international instruments have provided many beneficial provisions, ideas and suggestions that can be fruitfully utilised for the benefit of our children who come into contact with the law. Our new law also brings in much innovation and hope, but will only be fruitful when the law can be properly and fully implemented. By motivating the community and with the help of the government in setting up the necessary infrastructure for the community-based alternatives and the informal methods of disposition, one believes that the children of this country can have a great future. With a healthy and law-abiding youth population we can all look forward to a safe and secure society. Let us strive to do better for our children, as it is they who will carry on our legacy.

