



universität
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MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„Analysis of the Administration of Child Justice In Bhutan“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of
Master of Arts (MA)

Wien, 2017 / Vienna 2017

Studienkennzahl lt. Studienblatt /
Postgraduate programme code as it appears on
the student record sheet:

A 992 884

Universitätslehrgang lt. Studienblatt /
Postgraduate programme as it appears on
the student record sheet:

Human Rights

Betreut von / Supervisor:

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List of Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
BNCA	Bhutan Narcotic Control Agency
CAAB	Child Adoption Act of Bhutan
CCPAB	Child Care and Protection Act of Bhutan
CCPCB	Civil and Criminal Procedure Code of Bhutan
CCPRR	Child Care and Protection Rules and Regulations
CICL	Children in Conflict with the Law
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
GNH	Gross National Happiness
ICCPR	International Covenant on Civil and Political Rights
NCWC	National Commission for Women and Children
OAG	Office of the Attorney General
PCB	Penal Code of Bhutan
RBP	Royal Bhutan Police
RCJ	Royal Court of Justice
RENEW	Respect, Educate, Nurture and Empower Women
ROGB	Royal Government of Bhutan
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
WCPU	Women and Child Protection Unit
YDF	Youth Development Fund
YDRC	Youth Development and Rehabilitation Centre

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Chapter One

1. Introduction

1.1 Problem Formulation

Bhutan is a small country nestled between the two giant countries of China in the north and India in the south. The country is geographically distinct, and territorially independent. Bhutan is called as *DrukYul*. In the national language of Bhutan, which is called as Dzongkha,¹ DrukYul can be comprehensively translated as the '*Land of the Thunder Dragon*'. Bhutan was untouched by modern developments, and it was only in the latter part of the twentieth century that roads were first built. The country was remote, geographically segregated and people led almost isolated lives. Local norms and traditional cultures have influenced the lives of people for many years. It is still a guiding force for them. With the advent of the modernity, it has helped people to become more mobile, and changed their discourse of development.² While, Bhutan opened its door to the outside world embracing modern ways of polity and development, a balanced approach was seen as necessary. The impact of modernisation with an available modern telecommunication facilities has changed the lives of people drastically. Modernisation has altered the views of the people, their ideologies and expectations. This on equal measure, has affected the lives of our young children across the country. Democratic governance, rights based approaches in all streams of people's lives and reinforced effects of international norms and standards has, made modern day governance more accountable. These accountability has also permeated into the mainstream of judicial processes. More so, administration of child justice and rights of children in conflict with the law, and rights of children in general are gaining a voice. In the past, children in Bhutan were mostly uneducated. Their roles were mostly anchored to house hold chores, looking after the cattles and helping to run errands in the family. With the expansion of people's ways of life, the traditional roles of children has presently taken a great shift. In the simplest terms, modern education has played a critical role to improve the living standards of children within the community and in the

¹ The language used in Dzongs, the Centres of administration in the past.

² U. Akiko, *Culture and Modernisation: From the Perspectives of Young People in Bhutan*, Thimphu, Centre for Bhutan Studies, 2003.

country.³ Such exposures of children in one way aside the culminated benefits, have made them more vulnerable to modern vices. International obligations arising out of the Convention on the Rights of the Child (CRC), and other Protocols thereto, has necessitated Bhutan to develop child related laws and protect them. Administration of Child Justice in particular is an interestingly evolving new concept in Bhutan. With spate of time, administration of Child Justice and [Rights of Children in Conflict with the Law] (CICL) has become a necessary tool in modern judicial machinery. This has created a new paradigm for protection and improved administration of justice. The Royal Courts of Justice (RCJ), the Royal Bhutan Police (RBP) and other functionaries has become critical actors in this area. More prominently, building a safe and child friendly environment for CICLs now requires a new judicial ambience. Therefore, the international obligations for child friendly justice on one side and the traditional courts administering justice for children on the other tend to widen the gap between expectations and actual administration of justice. A tactical balance of approach in judicial interventions involving CICLs is a must. Unlike the cases that involve adults, cases of children are sensitive and has to be viewed through various lenses of human rights. Each case requires individual assessment to analyse their conditions and circumstances that led to the offence. It calls for reformation and restorative justice. Punishment can [only] be one means of correction for CICLs. I interned with the RBP in Thimphu. During the internship, it was observed that role of police was paramount in ensuring other protections aside [justice]. It can be considered that the RCJ is only one player in the whole system. Taking note of such crucial points in the justice system, Bhutan is taking remarkable steps to improve the administration of child justice and ensure CICL protection. As a responsible member of the international community, Bhutan is committed to actively engage in implementing different child rights instruments especially the CRC in full. In line with the international commitments at the global and regional level, Bhutan enacted the Child Care and Protection Act of Bhutan (CCPAB) in 2011. In line with this legislation, she carried out the Needs Assessment Survey on the Child Justice System in Bhutan. Other studies on the matter are almost

³ T. Wangdi, 'Ensuring sustainability: Can Bhutan's Education System Ensure Intergenerational Transmission of Values?' *Journal for Bhutan Studies*, www.thlib.org, (accessed 3 April 2017).

negligible.⁴ In another attempt to map the child protection at a national level, Bhutan carried out the Mapping and Assessment of Child Protection in the country among other few studies.⁵ The results of the studies showed that there was dearth of awareness about various legislations among the key child protection players. The judiciary was one of them.⁶ It also showed a direct correlation between vulnerable children and children who comes in conflict with the laws. This proves that protection of CICLs and administration of child justice is a diversified matter. The youth including the minors were identified as the most vulnerable and susceptible.⁷ It can also be summated that children commit offences owing to their vulnerable situations which are beyond their control. A strong correlation has been identified between use of drugs, show of violence and breaking of the laws.⁸ Such studies have reaffirmed the belief, that role of different stakeholders are paramount in child protection and in the administration of holistic child justice. Judicial intervention as a way of protection for CICLs is necessary precondition. In the year 2014, statistics maintained with the Royal Bhutan Police (RBP) showed that most of the drug related cases were committed by youth under the age of eighteen years.⁹ Therefore, the concept of vulnerability in Bhutan should include children without adequate legal support and protection which would further exacerbate children coming in conflict with the laws. A strong Child Justice System is *sine qua non* in the modern administration of justice. The concurrence between need for protection of the laws and vulnerability are very high. Therefore, concluding from such findings, most of the children in Bhutan are vulnerable. In this matter, the Judiciary as an arm for child protection plays a critical role. As children coming in conflict with the laws increases, detention of children has, in many ways become an ultimate method of police intervention. In many cases, children are detained in the Detention Centres.¹⁰ The Child Justice Needs Assessment Survey found out that many children were detained in normal detention centres, and many were not produced before the court of law within twenty

⁴ Youth Development Fund, 'Tracer Study on Children in Conflict with the Law', p.9.

⁵ The Study was carried out by National Commission for Women and Children.

⁶ RENEW, 'Study on Status of Vulnerable Children', RENEW, 2015, p.1.

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ During the Child Justice Needs Assessment Survey, it was found out that children were in detention centres.

four hours.¹¹ The police personnel who handles children are normally least educated on matters of children. Use of force as a disciplinary action was also undeniable.¹² Shackles as method of restraint were also used against children.¹³ [Legal aid] were not rendered and exercised by children, although legal representations were normally carried out by the parents or the legal guardian[s] of the child.¹⁴ Although Child Bench was inaugurated recently with Drangpon[Judge] Passang Wangmo as the Child Judge,¹⁵ normal courts in other parts of the country are expected to carry out the child proceedings in their jurisdictions.¹⁶ The CCPAB with other legislations provide for procedural and substantive rights of CICLs. However, gaps in human resource, constrained by financial implications has impeded the implementations of the legislation in full. Probation Officers, who are crucial for the assessment of the child in conflict with the laws exist in the book only. The Mapping and Assessment of Child Protection System in Bhutan, rightly pointed out that there were very few support services available to facilitate children's access to justice. It again noted that Bhutan has not incorporated the concerns of children into her national policies.¹⁷ Most child related services were pointed to be corrective than preventive. Another notable observation made during the assessment was that judges in Bhutan required training in Child Justice System.¹⁸ As per the National Commission for Women and Children (NCWC), there were no credible data on child protection; and those few existing data were with individual agencies, which are in bits and pieces. Therefore, administration of Child Justice in Bhutan and protection of CICLs is almost a piecemeal approach. Many rules remain unimplemented shelved in offices with no effect.¹⁹ More amazingly, there is no

¹¹ Bhutan National Legal Institute, 'Needs Assessment Survey on Child Justice System Report', 2013, p.61.

¹² *ibid.*, p.53.

¹³ *ibid.*, p.34.

¹⁴ *ibid.*, p.35.

¹⁵ 'First child-friendly court assures quicker justice', Kuensel, 29 June 2017. Available from: <http://www.kuenselonline.com/first-child-friendly-court-assures-quicker-justice>, (accessed 4 July 2017).

¹⁶ The CCPAB states that unless Child Justice Court is established, normal courts should handle cases involving children.

¹⁷ Youth Development Fund, 'A Strategic Plan for the Child Protection and Care Services (CPCS) for Youth Development Fund (YDF) Report' Youth Development Fund Secretariat, 2014, p. 13

¹⁸ *ibid.*, p.14

¹⁹ *ibid.*, p.18

Specialised Judge on Child Justice.²⁰ However, the present Child Bench Drangpon has partly specialised on Juvenile Justice.²¹ The frequency of children coming in conflict with the laws are normally localised.²² This indicates that the relativity of children coming in conflict with the law vary from region to region. The study also revealed that battery, larceny, economic crimes like burglary and shoplifting were most common offences committed by children. Possession of controlled substances, auto stripping and assaults were other crimes committed.²³ In such instances, legal recourse becomes inevitable. According to the Annual Report of United Nations Children's Fund (UNICEF) of 2015, it stated that interrogation was a traumatising experience even for adults.²⁴ It was recommended that a safe and friendly judicial environment was prerequisite for the cause of justice and rule of law. It also stated that as part of investigation, the police personnel normally interrogated the CICLs. In the normal course of their duty, police usually comes in contact with children who has broken the law. In such instances, if any children has to be detained in the interest of justice, there are no separate detention centres across the country. Few Police Stations with separate Women and Child Protection Units (WCPU) have separate detention rooms for children. Separate conveyances for children normally do not exist.²⁵ Although, the detention centres provide for separate centres for girls, it was not apparent, if girls and women were housed together. Mechanisms for complaints exists only in some detention centres.²⁶ From such findings, it conclusively points that Bhutan still need to pull up resources and human capital to adequately standardise the system of administration of justice for children in the country. Resource gap[s] is the ultimate blame game tussle. It need to understand that collaboration is the means to effective administration of child justice. Justice for children cannot be perceived only as judicial matter. Role of other actors has to be acknowledged and reinforced to achieve effective and standardised child justice mechanism in the country. On the contrary, in Bhutan, once the alleged

²⁰ Need Assessment Survey on Child Justice System in Bhutan, 2013, p.1.

²¹ K.Denkar, email, 4July 2017.

²² Need Assessment Survey on Child Justice System, p.9.

²³ *ibid.*, p.10.

²⁴ UNICEF, Aspiring happiness for every child in Bhutan, *Annual Report*, 2015, p.22.

²⁵ 'Need Assessment on Child Justice System in Bhutan' Report.

²⁶ *ibid.*, p.22.

child [suspect] is remanded to the police, the intervention of the judiciary almost falls behind the veil. Here, the lenses of human rights for CICLs become apt and relevant. Unlike in the past, as *Venkat Iyer* notes, Bhutan is also buffeted by a rights' based culture. He mentions that these cultures has [partly] been the outcome of national legislations drafted inside the country, and the external influences brought in by globalisation. These changes has increased the role of courts as formal litigation avenues. As the emphasis on the rights of children increase, the informal system of dispute resolution cannot be final and resolute. The role of judges as the final arbiter of the law has drastically increased.²⁷ These has expanded the professional duties of judges from administration of justice to fulfilling the various needs of the modern society adding more risks and expectations. Courts have become a multi-disciplinary approach. However, considering the present child justice system in Bhutan, a question still remains on how the judiciary of Bhutan and other players in the arena of child justice are able to uphold the rights of CICLs and administer justice for children adequately. It should be fairly understood that children are complex human beings and justice for them is completely different. To realise justice for children, Bhutan should first consider that there exist a problem. Administration of justice is not 'putting' children behind the prison walls but recognising them as potential assets.

1.2 Rationale

Bhutan is steadily progressing based on the development paradigm of 'Gross National Happiness' (GNH). While on the other side of development, children's welfare has on equal terms, become relevant. The significance of justice for children and rights of CICLs has proportionately increased. As society diverges, it has changed the expectations and behaviourism of the Bhutanese children. In addition, legal literacy has also improved. In this cross cultural scenario, Child Justice and rights of children in conflict with the law has emerged as a crucial matter. Considering that justice has become an important part of children's lives in Bhutan, the Thesis intends to analyse the nascent child justice system in Bhutan. More importantly, the Thesis will critically

²⁷ Venkat Iyer, 'Law and Justice in Bhutan: A Review of the Book The Constitution of Bhutan: Principles and Philosophies' *the Druk Journal*, <http://drukjournal.bt/law-and-justice-in-bhutan-a-review-of-the-book-the-constitution-of-bhutan-principles-and-philosophies>, (accessed 7 April 2017).

analyse the administration of justice for children in conflict with the law to see how justice for children is administered. Through this, it seeks to identify possible gaps and inconsistencies in the Bhutanese Child Justice System. Administration of justice in Bhutan is a mixed of traditional belief system and modern legal ideologies. These traditional ideas are engraved very dearly in the system. To expose such traditional traits of culture, and juxtapose it with the modern system of administration of justice especially for CICLs, the Thesis endeavours to review and explore the rights of CICLs guaranteed in various legislations. There are not much substantive studies carried on the administration of justice for children. The Royal Courts of Justices are seen as the ultimate guardian of rights before the courts of law. The other determinants on the fate of the child remain in the hands of other law enforcement agencies. In short, rights of children are diversified; pocketed and different actors play in different stages of the judicial process. In this light, the Thesis will assess and review how the child justice system in Bhutan is actually [mandated] to function as per the CCPAB. This will identify various bottle necks in the administration of justice and explore the gaps in the implementation phase. Among others, the Thesis will also describe on the inherent rights of children from a very Buddhist perspective. If possible, the Thesis intend to add a small impetus on the burgeoning concept of child justice visavis the rights of children in conflict with the laws by bridging a link between the theory and practice. This little research will help to pit the possible gaps presently existing in the Child Justice System; stimulate newer thoughts into the working paradigm of the Judiciary and other players. It has to be believed that a slight disarray of judicial process will result in miscarriage of justice. A child rights based approach is a necessary precondition for any case involving children. On top, the role of the rehabilitation and social reintegration act as the ultimate test in the area of Child Justice. In this effort, this Thesis will also explore how rehabilitation is operationalised in Bhutan. It is felt with conviction that rehabilitation is not an ends of justice, but building a vibrant society with the support of the law is. The respect for best interest principle, the concept of wholesome development and good citizenry should spearhead a strong justice system. The Thesis intends to realise these aspirations and establish a rights based culture for children in Bhutan. I view that Justice for Children and rights of CICLs as a matter of

protection to propel a healthy growth of our society by rebuilding faith and depositing confidence in our children. This will help to revisit the current practices and propagate that correction of children's misbehaviour through punishment is never an end of criminal justice.

In this Thesis, I will try to explore the answers to the following Research Questions:

How is the administration of Child Justice in Bhutan visavis rights of children in conflict with the law?

What are the possible gaps in the administration of child justice?

What are the things Bhutan still need to do to improve its Child Justice System?

1.3 Methodology

In order to review the administration of Child Justice in Bhutan visavis the rights of CICLs, many methods were open. However, most methods were time intensive and financially burdensome. It would cost extra human resource and financing. Therefore, after analysing all possible methods, a Desk Research through a legal approach to the matter was found suitable. In this Desk Research, I will review different child related legislations, studies and reports on Child Protection and Child Justice in Bhutan. This will entail an indepth literature review of all possible data and information on the matter. One of the guiding document [data] is the Need Assessment Survey Report on Child Justice. The Report is very comprehensive. It was based on extensive interviews conducted across many children in all twenty Dzongkhags.²⁸ The methodology will also entail the analysis of secondary data including various surveys and published findings on child rights across Bhutan. So, in order to bridge the gap in the information, I will also rely on other documents like the CRC, the CCPAB, 2011, the Child Court Procedure (CCP) and other genuine legal documents on the issue. Other international instruments on administration of child justice will include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [The Beijing Rules], the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and other international instruments on the matter as a guiding reference. The Child Care and Protection Act of Bhutan, 2011 considering its primary importance as a child justice legislation will be extensively quoted and used in the research. The recent Child Care

²⁸ Term for District in Bhutan

and Protection Rules and Regulations (CCPRR) of 2014 will also be used. This document act as the operational guideline to handle specific cases of CICLS. In addition, various Country Reports to the Committee on the Rights of the Child will also be referred comprehensively. Most of the references are based on various literatures and documents, aside legislations. Although interviews would have been possible to enrich the Thesis, it was not very viable. Therefore, methodologically, it is limited to reviewing of various literatures on the subject. Another important topic added here is the traditional concept of children in Bhutan. This is to highlight on the traditional views of children in Bhutan which offers the correlation between traditional values and child rights. Development of International Child Justice System is also incorporated in the Thesis to show how international practices has permeated into the Bhutanese Justice System. International instruments on Child Justice are also elaborated to showcase the international norms and standards of child justice. This help to portray different perspectives of child justice. Basically, the Thesis will analyse rights of children vis-à-vis the existing system of justice administration in Bhutan. Among others, the Thesis intend to draw sources and conclusions from the Concluding Observations made by the Committee on the Rights of the Child for Bhutan. These documents provide a very useful information about the extent of children's rights in Bhutan. Various Reports from UNICEF, Save the Children, Bhutan and Studies carried out by different agencies working for children in the country are also used to enrich the information.

1.4 Limitations

During the research, there were many limitations. Insufficient information and lack of credible source of information on child justice in Bhutan was the first hurdle. For better research and first-hand information, a field study in the matter was appropriate. As the research progressed, it was learnt that most documents were not online and inaccessible. This has limited the extent of the research and information gathering. A quantative survey would need more time, financial support and interviews. Travelling back to Bhutan would have been expensive given the strict time frame. Therefore this has limited the sources of information, and could not employ other research methods. Aside few studies carried out by various agencies that work for children, there were no

systematic reports on child justice in Bhutan. This has hindered professional gathering of information, interpretation and conclusions.

Chapter Two

2.1 The concept of ‘Child’ in Bhutan- The Bhutanese Perspective

Bhutan is a unique country. The traditions of Bhutan, in most cases are guided by principles of Buddhism and Buddhist ethos. From the perspective of religion, human birth is a miracle in itself. The ability to be born on this earth as a ‘human being’ is considered as a sacred and rare privilege. The sanctum of child as a human being from a Buddhist concept is invaluable. Conception itself is a remarkable journey. For conception to take place, it is believed in Bhutan that three components are necessary. The substance from the mother, the father and the immortal soul that is ready to take rebirth. It is believed that the soul of the person is immortal. The person after he dies, his soul undergoes through various stages of cleansing. Hell is not considered as way of punishment; but is a method of purging the bad deeds of the previous lives. Once the soul is purged, cleansed and merits are obtained, the soul obtains the power to be born again in different realms. Human birth is one kind of birth in the realm of universe.²⁹ It can be stated that the concept of human rights and child rights are inherent natural rights. These rights transcend positive laws and legal systems. The ability to be born as a human being is as rare as the pearl and the chance is precious. In our parlance, Bhutanese called this noble birth of a human being as ‘*Milue Rimpoche*’ which can be translated as *Precious Human Rebirth*. It is believed that after conception, bones are from the father, while the flesh, blood and soft tissues of the child are from the mother. This natural phenomenon leads to formation of the child. Child gains life from the day of conception. This is the reason why Bhutanese calculate that children are one year old during their birth.³⁰ This is called as ‘*Ranglo*’. Although such dates do not determine your age in the Census, it is invariably used to calculate a child’s or any person’s age. This system of calculation is predominant in the rural areas of Bhutan. In one of the basic premise of Buddhist belief, human birth is a rarity. Although, we see thousands of human beings all around us, each of them is distinct and none of them are same. To

²⁹ Barth and Wikan, *Situation of Children in Bhutan: An Anthropological Perspective*, Thimphu, Centre for Bhutan Studies, 2011, p.45.

³⁰ *ibid.*, p. 46.

compare how difficult it is to be reborn as a human being, in the Kanakacchapa Sutra,³¹ it is said that human birth is a one-time opportunity in eons of time. It is said in the Sutra that in a vast deep ocean, there lives a blind turtle. It lives on the sea floor, travels to any direction where the waves of the ocean carry it to. It has no direction of its own. In the same ocean, tossed up by the forces of the sea is the yoke of the cart. It floats ceaselessly, carried by tumultuous waves of the sea and the wind. In a long period of time, it is believed that with matter of pure coincidence, the head of the blind turtle locks with the floating cart yoke. This is the comparative synonym for the difficulty to obtain human rebirth and the basis to consider children as sacrosanct. This is the background of child rights and the respect for the child. The interdependence between child rights, child justice and the nobility of human birth is an inherent natural characteristic.

In Bhutan, the rights of the child can be depicted through Wheel of Life called as Mandala.³² Mandala defines the nature of coexistence as a primal phenomenon.³³ Mandala is a sanskrit word which *manda* refers to as **essence** and *la* is understood as the **container**. It resembles the wholeness of the universe.³⁴ The mandala is made up of circles and the innermost sacred area is surrounded by a square. In the inner part of the square, it actually is seated with a divine centre piece.³⁵ The divine centre piece is represented by the child. The child forms the core of the Mandala. This represents the core foundation of the Mandala, where other elements surround it. This careful depiction of the child is the representation of complex relationship of divinity and sanctity of a child which is a symbolism of humanity at large. The centre is the abode of the deity that is surrounded by a series of circles and squares symbolizing the principles of the CRC which emphasize their symmetry, interdependence and interrelatedness.³⁶ The lotus flower supports the mandala. This is the foundation of the

³¹ The wisdom library, [website], 2010 <http://www.wisdomlib.org>, (accessed 10 April 2017)

³² The CRC is depicted as a Mandala in Bhutan.

³³ Grey, 'The Bhavachakra or Wheel of Life Mandala as a Buddhist Paradigm', vol.7 issue. 2, 2007, p.1.

³⁴ *ibid.*, p.2

³⁵ Martin Brauen, The Mandala in Tibetan Buddhism, Rubin Museum of Art, 2009, <https://www.aras.org/sites/default/files/docs/MandalaBrauen.pdf>, (accessed 11 April 2017).

³⁶ Unicef Bhutan [website], 2017, <http://www.unicefbhutan.org.bt/about-us/crc/>, (accessed 11 April 2017).

external mandala, which encompass the spiritual, mental, social and physical support for the child. These qualities are essential foundation for healthy growth of the child. Like the lotus flower, that supports the external mandala, the basic four premise of the welfare of the child supports the holistic development of the child. The representations presupposes the duality of existence. The existence of child as a human being, and the sanctity of the child in the sphere of human existence.

The blue circle protects the four supporting elements of growth namely the spiritual, mental, social and physical supports from the surrounding world. The outer square represents the building or the ground plan of the palace. The 'T' shaped pictures represents the gates or point of entries.³⁷ Inside the square are the four pillars of the CRC which are Non- Discrimination, Survival and Development, Respect the Views of the Child and the Best Interest of the Child. This represents that not only does we have our own philosophy, but we can also blend to the western philosophies. At the entrances of the four pillars stands the four vehicles to promote the four pillars. The gateway to non-discrimination is the protection from violence and exploitation while health and welfare is the gateway to survival and development. Education, leisure and play represents the gateway to Best Interest of the Child, while identity, expression and access to information serves as a gateway to respecting the views of the child.³⁸ Colour of each direction are different. The colours are white, yellow, red, and green. Each colour represents a different symbol with meaning.³⁹ The white colour signifies purity and transparency. The views of the child are unhidden and transparent. Non-discrimination is depicted by yellow in colour. It represents the humility, which can be basis of equality in the minds of persons. Red is the symbol of life force. Therefore, to symbolise life force, survival and development of the child is painted in red colour. Green colour is for balance and harmony. The Best Interest of the Child is therefore represented in green to symbolise the need for a balanced child rights based approach. In the inner third circle, it is represented by a ring of the Lotus flower. The lotus

³⁷ Martin Brauen, *The Mandala in Tibetan Buddhism*, p.4. (accessed 11 April 2017).

³⁸ Unicef Bhutan, [website], <http://www.unicefbhutan.org.bt/about-us/crc/>, (accessed 11 April 2017).

³⁹ Nitin Kumar, 'Color Symbolism in Buddhist Art' *Exotic India Art*, 2000, <http://abhidharma.ru/A/Raznoe/Tibet/0021.pdf>, (accessed 11 April 2017).

represents the transmutation from mundane birth to spiritual rebirth.⁴⁰ Family is considered as the force to transmute the birth of the child to a greater human being. The ring of *Vajras*⁴¹ is represented by a community, which is considered as an essential force for the growth of the child. The outermost ring is composed of the ring of fire. Beyond the ring of fire, it is believed to have chaos, and absence of conducive environment for growth.⁴² The fire is represented by the State. The State is the guardian of all children and it cannot lead the children to cross the border into the fire. This is the correlation between presence of strong laws and child delinquency in any state. The correlation between Bhutanese ideas of life; and the western principles of justice are highly interlinked and appreciable. While such coexistence may be debatable, connate cultural values and moral ethos are ingrained in Bhutanese society. This represents the significance of a child in the cosmos of the universe. Child is considered as the seed of future generations. Such Buddhist ethos help to reinforce the values of care and protection. These traditional values, and the concept of children are on change. The coming of the international concept of children has changed the landscape of child in Bhutanese polity. However, the above description embodies the principles of Child Justice in the modern era. These rights build the fabrics of child justice for the judiciary of Bhutan. The diagram below represents the *Mandala*.⁴³



⁴⁰ The common symbols in Tibetan Art [website], 2003, <https://library.brown.edu/cds/BuddhistTempleArt/symbols.html>, (accessed 11 April 2017).

⁴¹ Vajra is a Buddhist religious instrument.

⁴² The common symbols in Tibetan Art [website], 2003.

⁴³ UNICEF Bhutan, CRC, <http://www.unicefbhutan.org.bt/about-us/crc/>, (accessed 4 July 2017).

2.2 The Evolution of Focus on Children in Bhutan

In the recent past, Bhutan was a conservative society. Most of the settlements were composed of villages with few literate people. It is important to narrate the stages of development of childhood and child rights in a typical Bhutanese culture. Culture is inseparable even in the justice system. After a child has been born, naming them, as in every culture across the world, is normally initiated by a religiously connoted person. In absence of any person, grandparents seasoned with age, normally takes the naming ceremony. Naming do not involve any elaborate ceremony, however, it may vary from region to region. Unless for the richer elites, child birth is kept low, and the situation is soon normalised.⁴⁴ Parents and family members formed a traditional method of protection for most children. As the children grew up, depending on the willingness of the parents to send them to the nearest schools most remained in their homes, running daily errands.⁴⁵ Herding the cows, collecting fire woods, or in typical circumstances, children would work to earn to support the daily sustenance of their parents.⁴⁶ The lives of the children were rudimentary. Many grew up in a traditional outset. However, such cultures have changed now. The most important change on the rights of children took place after Bhutan signed and ratified the CRC in 1999.⁴⁷ The signing of the Convention has imposed Bhutan with a duty to respect, protect and fulfil the rights of children in the country. Although traditional set of rights had existed in Bhutan, the Convention has helped Bhutan to adopt international principles of child rights and changed the nation's views on children. The CRC also reinforced the traditional precepts of children as source of national identity and Bhutan's future. The Convention introduced the concept of rights. Traditionally, rights of children were a contested issue and a delicate balance between family values. Unlike in the western countries, disciplining a child by a neighbour was an accepted norm.⁴⁸ Disciplining a child was sometimes viewed as a collective responsibility. Children were expected to be disciplined and most of the times, society equated children's behaviourism to the immediate parents. In most cases, people would comment that children should be fed well and disciplined. However, with

⁴⁴ Barth and Wikan, *Situation of Children in Bhutan: An Anthropological Perspective*.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ UNICEF Bhutan [website], <http://www.unicefbhutan.org.bt/about-us/crc/>, (accessed 4 July 2017).

⁴⁸ Barth and Wikan.

the coming of the Convention and the partnerships like the UNICEF, views on children are steadily changing. So is the concept of justice. This rudimentary lifestyle is narrated to sketch the idea of life, rights and justice in Bhutan. Laws were not very developed and legal protections for children were not very elaborate or were inexistent.⁴⁹

2.3 The Change from a Dutiful Child to a Right bearing Child Concept

Micheal Freeman argues that while we have achieved so much for children in this century, it had not been the century of the child.⁵⁰ Unless agreed otherwise, not all children can make their own decisions. It can be assumed that no families can either make all the decisions for their children. Therefore, this arouse the concept of the **Best Interest of Children** as a guiding concept in modern child rights. The interference from the third party- the State has been a logical outcome.⁵¹ Internationally, seeing children as a *Special Case* has taken predominance. *Special Case* is defined as taking priorities of the children over other interests in the society. So therefore, the rights of the children are given a legal protection; when the rights of children conflicts over the rights of others, the rights of children shall supercede.⁵² This is the start of the formulation of the *best interest* of the child in short. It is also argued that *rights for children* and *children's rights* are two distinct analogy of rights. While rights for children are general human rights, children's rights pertains to special rights entitled only to children by the virtue of their age and circumstances.⁵³ This has been the foundation of the Convention, which has permeated the ideologies of countries across the globe and Bhutan had not been an exception. This has led to the change in concept from a duty bearing child to a child with rights. This has not only overturned the concept of duty bearing child, but has shifted the duty to protect children to the adults and the state. This is a duty based approach concept. As individuals make decisions on the child, they would be mindful of their duty juxtaposing the rights of children as the determinant factor behind each decision. This has also reinforced the fundamental human values of inherent human

⁴⁹ Before the coming of the Constitution and other laws that are presently existing, the *Thrimzhung Chenmo* was the Supreme Law. It stressed about children's property and inheritance rights.

⁵⁰ Lucinda Ferguson, *The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare*, University of Oxford, UK, 2014, <https://weblearn.ox.ac.uk/access/content/user/4508/Children> (accessed 14 April 2017)

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

dignity, and the inalienable rights of children as part of the human family. It has imposed family as a protective fundamental group of the society, and has changed the landscape of family from a disciplining agent to a protective agent for a child. In short, it has changed mentality and customary traditional practices that had existed in Bhutan. Although we cannot ascertain the change, to all the populations across the country, but it has put a strong agent of change in the minds of people. Perceptibly, changing the mindset of the legislators had been one of the core achievement of the CRC in Bhutan.

2.4 From the [Rights] of the Child to the [Duty] to Implement in Bhutan

Child Justice is within a broader spectrum of child rights in Bhutan. Unless broader correlations are set up, child justice [rights] cannot be achieved without the achievement of other integral rights. They form the framework for supporting the rights of the child, where child justice is a piece in the framework of other related child rights. Landscape of child rights in Bhutan is unique. While the concept of child rights has become an integral part of Bhutan, it has imposed two pronged duty to the nation. Bhutan has to, on the first hand, implement the rights of children, and on the other, balance and protect the traditional best practices in arena of child rights. Article 2 of the CRC states that the State Party shall respect and ensure the child to enjoy their rights to the fullest extent possible with no discrimination of whatsoever nature. This is a very strong message to the State Parties to enforce the rights of the child set in the Convention. This has established the basis of equal rights for children, and no state can, under any circumstances, discriminate children and stop them from enjoying their rights. This has in one set of goals, ensured fullest enjoyments of rights by the children inside any country, to which the country is signatory to the Convention. On the other hand, the Convention imposes direct responsibility on the nation. Bhutan had not objected to any of its provisions. This implies that Bhutan directly accepted all the legal obligations arising out of the Convention. Although the [rights] set out in the Convention are almost general, but it has, in one way or the other, set out various rights of CICLs and on the administration of child justice. Bhutan was therefore obliged to not only take appropriate measures to protect children against discrimination,[which for this matter] include discrimination arising from misapplication of laws, and inappropriate structural guarantees put in place. In any actions that matter in relation to children, Bhutan is

guided by the principle of the Best Interest of the Child. This concept has introduced a yardstick to all actions concerning children.⁵⁴ Bringing a new horizon to child protection, the Convention states that child protection is a duty, which lies on the premise that protection and care of the child is necessary for their well being. The State Parties are bound to bring legislative and administrative measures, which benefits children.⁵⁵ Therefore, Bhutan in particular was bestowed with immense responsibilities. Should not only she establish institutions and facilities, but she was also mandated to meet up with international standards, which in a country like ours, needed financial capacity and human resources.

As per Article 4 of the Convention, Bhutan took steady efforts to steer [child rights] into the mainstream of national policies and development agenda. However, it is certain that [child justice] was not initiated as a separate judicial endeavour. The Constitution of Bhutan was drafted in the year 2008. The Constitution enumerates equal protection of the law and sets out fundamental rights, which stands to respect human dignity and freedoms. Children has acquired a special status in the Constitution. Article 9 (18) of the Constitution of Bhutan states that the [State] shall endeavour to take appropriate actions to protect children from all forms of discrimination and exploitation. This Principle of [State Policy] enshrined in the Constitution enable Bhutan to be guided by rule of law and children's rights. These statements of the law reflects the full and concrete commitment to respect, protect and fulfil the rights of children. The CCPAB of 2011 is another specific legislative achievement. The Child Adoption Act of Bhutan (CAAB), 2012 is an another legislative milestone for Bhutan. Although this do not correlate with rights of CIJL and child justice directly, but it exposes about various national duties. Bhutan is a developing country. Aside internal revenue generations, assistance from different development partners has been crucial in achieving the rights of children in the country. In many aspects of child rights, development partners like the United Nations Development Programme (UNDP), Save the Children Bhutan and United Nations Children's Fund (UNICEF) had been the forefront development partners which have assisted Bhutan to achieve its goals on children. They have been the first international

⁵⁴ The Convention on the Rights of the Child, Article 3.

⁵⁵ *ibid.*

agencies to focus on child rights in the country.⁵⁶ However, full implementation of the various mandates still remain a challenge in Bhutan.

Chapter Three

3.1 The International Dimension and Development of Child Justice

The concept of administration of Child Justice and rights of CICLs in Bhutan is relatively new.⁵⁷ The development of Child Justice in the international sphere has, to some extent, shaped Bhutan's welfaristic approach to Child Justice. The discussions on the international evolution and development of Child Justice and their best practices are intended to see how, international forces have unnoticingly guided Bhutan in her development discourse on Child Justice and rights of CICLs. Historically, the idea of Child Justice dates back to thousands of years. It is stated that the Code of Hammurabi had references to children who ran away and who disobeyed their parents. The idea of age of responsibility was found in Roman civil law and the Church law known as the Canon.⁵⁸ Children and adult were differentiated based on the age of responsibility. In early Jewish law, conditions for punishment considered immaturity as grounds to not impose punishments. The Muslim Law allowed for leniency in punishing youthful offenders and children under seventeen years of age to exempt them from the death penalty. Under the Roman law, children under the age of seven were called as infants and were not held criminally responsible. However, on the contrary, youth approaching the age of puberty, who could differentiate between what is right and wrong were held accountable. In the United States of America they followed the roots of English Common Law. Under the English Common Law, the Chancery Courts considered the petitions of those in need of aid or intervention which generally were women and children. Through these Courts, the king exercised the right of *parens patriae* (parent of the country), and provided assistance to needy women and children. The principle of *parens patriae* later became the basis for the Juvenile Court in America.⁵⁹ The coming of the Twentieth Century was described as the Century of the Child. This was the beginning of the welfaristic approach to children. Children were referred to

⁵⁶ Voices of youth [website], <http://www.voicesofyouth.org/en/users/>, (accessed 5 July 2017).

⁵⁷ Child Justice can be said to become a formal separate subject only after the drafting of the CCPAB.

⁵⁸ History and Development of the Juvenile Court and Justice Processes, [website], 2008, <https://www.sagepub.com/sites>, (accessed 16 April 2017).

⁵⁹ History and Development of the Juvenile Court and Justice Processes, [website].

reformatories and industrial schools instead of prison as an alternative to deportation.⁶⁰ In the nineteenth century, the system of probation was developed in Massachusetts and Criminal Courts were required to appoint Probation Officers in cases involving children. The people behind these efforts were called as the *Child Savers*.⁶¹ Two prominent *Child Savers* known as Lucy Flowers and Julia Lathrop. Interestingly, both of them were women. They introduced the first Juvenile Court in the world. The central idea behind the separate Juvenile Court was that any cases of children either of child delinquency, dependent and neglected children shall be dealt separately in a Children's Court. The judge now had the discretion to use individualised treatment instead of punishing them. This was the beginning of the Welfarist Approach.⁶² As per the Welfarist Approach, welfarism promoted the idea that children should be dealt separately from the adults in either institutions or in the court. When it comes to separation of children from the adults, it also entailed separate procedures for children. The idea of Social Worker and the Probation Officers became prominent. The Welfarist Approach focuses on the welfare of the child as the basic requirement to enjoy their rights. It do not correlate child rights and rights of the parents.⁶³ The concept of welfarism did not regard children as rational or self-determining agents. Such a view was also based on the moral and intellectual development theory in criminology, which suggests that the younger the actor, the less probable their behaviours are guided by informed sense of right and wrong.⁶⁴ The welfarist model did not allow the children to undergo the full due process of the law; it was intensely based on protectionist policies. They used indeterminate institutionalisation of children, which drew much criticism. This led to the development of the Justice Model of Child Justice.⁶⁵ The Justice Model of Child Justice was a direct contrast to the Welfarist Model of Child Justice. As the culture of rights evolved over time, the Justice Model was seen as an alternative discourse. This discourse swayed away from the welfarist approach. Interestingly, in contrast to the established norms

⁶⁰ A. Skelton, 'Restorative Justice as a Unifying Force for Child Justice Theory and Practice' a paper for the 1st world congress on restorative justice Lima, Peru, 2009.

⁶¹ A. Skelton, 'Restorative Justice as a Unifying Force for Child Justice Theory and Practice.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Violet Odala, *The Spectrum of Child Justice in International Human Rights Framework: from Reclaiming the Delinquent Child to Restorative Justice*, Ethiopia, p. 550.

⁶⁵ *Op.cit.*, p.553.

under the welfarist approach, children were considered as rational or self determining.⁶⁶ The Justice Model was apparently based on the principles of law where the guilty is punished. Therefore, it assessed the degree of culpability of the child and proportional punishment was given to the child. In this line, they developed the concept of '*just desert*'. The rationale behind children's justice was to weigh the balance between protection of the child, studying their special circumstances and protection of the society in general.⁶⁷ The focus was not on the Best Interest of the Child, but on the idea of retribution. In direct contrast to the welfare model of Child Justice, the Justice model reaffirmed that the child has the capacity to commit crimes and thus bear the consequences of their actions.⁶⁸ The Justice Model viewed child as the conscious law breaker. This model of justice was based on the premise that individuals exercised his free choice and will to commit a crime. When criminal law is based on this principle, it does not consider the individual circumstances of the offender but only the ultimate consequences. Reformation and the discretion in decision making are narrowed down to restrict the judge to only interpret the law, and no judge can make the law.⁶⁹

Punitive sanctions was the ultimate aim of the Justice Model. The Justice Model was not a perfect one. It had its own weaknesses, which became a point of contention and reproval. The most noted criticism was that the Model failed to consider the immaturity of the child's mental acumen and faculty. Treatment of children differently from the adults is the basis and the foundation of modern justice system. Punishment as the method to deter the offenders from committing future crimes and protection of the society do not hold ground today.⁷⁰ This Method of Justice is a water tight compartment based on mere execution of the law. As Odala rightly points that one of the problems with the just deserts approach was that when it intended to reduce arbitrary and excessive use of punishment, it resulted in the expansion of punishment. He stated that the Justice Method has militated against the use of less harmful and less expensive forms of sanctioning that appeared weak and inadequate by comparison. In the heart of

⁶⁶ Op.cit., p. 553.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ S. Bakta, 'A critical Analysis of the Child Justice System in Tanzania', PhD Thesis, University of Cape Town, 2016, p. 22.

⁷⁰ *ibid.*

the Justice Model of Child Justice remains Somalia and the United States of America. Both of them have not ratified the CRC.⁷¹

Child Justice have changed overtime to meet the demands of the changing society. It has progressed from a Welfaristic Model to Justice Model, and overtime has evolved to the Rights based Approach of Child Justice. The transformation of child justice models, has been primarily based on the evolution of child rights and the understanding of child rights. Another peculiar model of Child Justice was developed in the United States of America. This was termed as the Law and Order Model of Child Justice. This has been described by a number of writers as an ‘assault’ or ‘attack’ on the juvenile justice system.⁷² This model has started one of the most blatant attack on the rights of the juvenile offender. In this model, it was characterised by transferring juvenile offenders into adult prisons. This was called as the doctrine of *waiver*. Zimring⁷³ opines that the huge political pressure on the juvenile courts in the United States of America was stemming from the fact that authorities wanted to expand the imprisonment in the juvenile justice system to meet the adult criminal justice system.⁷⁴ The transfer of youth to the adult court has removed many children from protection.⁷⁵ The judges and the prosecutors were given new powers to align child justice to criminal justice methods in the adult criminal justice. When it comes to punishment of children, this method has purely been a punitive than rehabilitative.⁷⁶ As Skelton argues that the most concerning nature of the Law and Order Model was the referring of young children as young as thirteen years of age into the adult criminal justice system. The system of *waiver* has increased powers of the prosecutors and the judges. In many cases, the system of *waiver* was offence driven.⁷⁷ In the begining, it was often argued that such method was employed only in serious crimes, which included murder and other violent criminal misbehaviours. However, with time, this method transitioned into taking children who had committed minor offences too.

⁷¹ V. Odala, *The Spectrum of Child Justice in International Human Rights Framework*, p.556.

⁷² A. Skelton, ‘Restorative Justice as a Unifying Force for Child Justice Theory and Practice’.

⁷³ Zimring American Youth Violence (1998), as cited in A. Skelton, ‘Restorative Justice as a Unifying Force for Child Justice Theory and Practice’.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

The following case is noteworthy. It was *Kent v. United States* in 1966.⁷⁸ Morris Kent was a child of fourteen years of age. He committed several house breakings and attempted purse snatching. After two years, his finger prints were discovered in an apartment of a woman who had been robbed and raped simultaneously. He was detained by the police and interrogated. Kent admitted to the offence. Kent's mother got a lawyer, and also arranged for the psychiatric examination of the boy. It was found out that the boy suffered from 'severe psychopathology'. In the light of his mental instability, he was recommended to undergo psychiatric observation in the hospital. In this case, the Judge and the prosecutor were armed with a two pronged legal strategy. They had the authority to waive this jurisdiction and refer the case of the boy to a Criminal Court. In this case, he would be tried as an adult. However, Kent's lawyer argued that the boy needed genuine medical care, and his only legitimate remedy was referring him to a hospital for treatment. However, the Juvenile Court rejected the arguments and the motions put forward by Kent's lawyer, and instead he was referred to the Criminal Court for prosecution as an adult. This case was viewed as cause of great concern.⁷⁹ This case displayed the typical characteristics of the Law and Order Model of Child Justice practically adopted in the United States.

As the method of justice for children transitioned, coupled by the need of the time and changing legal scenarios and ideologies, the Law and Order Model of Child Justice gave way to another model of Child Justice. This was called as the Restorative Justice Model.⁸⁰ The shift in the paradigm of thought was propelled by the inadequacies in the former justice models. Referring a child through the ordinary criminal justice system was found expensive, and it did not reduce recidivism. Therefore, the shift to Restorative Justice Model was a justified move.⁸¹

Charles Barton⁸² states that the growing prominence of the restorative justice model in criminology has necessitated the change in paradigm of justice.⁸³ He argues that in the

⁷⁸ The History of Juvenile Justice, ABA Division for Public Education [website], <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>, (accessed 17 April 2017).

⁷⁹ *ibid.*

⁸⁰ S. Bakta, p.35.

⁸¹ *ibid.*

⁸² Charles Barton is a professional philosopher and conflict resolution specialist who lectures and trains in Law and Morality, Professional and Applied Ethics, and Restorative Justice.

past, criminal justice was administered by professionals who administered justice based on the notion of *just* and *fair*. In this method of administration of justice, even if it is administered by competent professionals, they cannot fulfil the specific justice needs of the parties. He believes that it is only the parties who will be able to assess the needs and circumstances for a constructive response. The Restorative Model of Justice considers that any wrongful act is primarily a violation of specific people; and victims are the persons who are most aggrieved. Therefore, restorative justice, as the name suggests, work to restore people's relationships and communities.⁸⁴ This act as a balancing tool between the needs of the offender, the needs of the victim and the society at large. In this method, every offence is seen as an opportunity to learn through proper communication. The basic essence of restorative justice is to repair the harm caused by the offender by allowing negotiations to change people and relationships.⁸⁵ If we compare the Restorative Model to the Welfarist Model and the Justice Model, it showcases contrasting differences. While the Welfarist Model focuses on the welfare of the offender; the Justice Model views to render justice to the offender. The Restorative Model attempts to fill the gap that is left by the two models. Although, it also takes a welfarist approach, it particularly allows interventions to repair the harm, restore the broken relationships and allow communication as a vital reparative strategy.⁸⁶

Restorative Justice view justice as a means to repair the harm, and elevates the role of both the victim and the offender by considering community as an important coparticipant. Therefore, the Restorative Justice Model basically lies on the premise that crime is against another person and the community. It considers punishment alone is not an effective means to change the behaviour of the offender and it just disrupts the relationships and harmony of the community.⁸⁷ It is also argued that punishment imposed by relatives, friends or other persons which the wrong doer personally respects has more effect than punishments meted out by the formal justice system.⁸⁸

⁸³ Charles Barton, 'Theories of Restorative Justice', Australian Journal of Professional and Applied Ethics, vol. 2, no. 1, July 2000.

⁸⁴ S. Bakta, p.35.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *Balanced and Restorative Justice for Juveniles*, University of Minnesota, 1997.

⁸⁸ *Restorative Approach to Juvenile Justice in Namibia*, Legal Assistance Centre, 2002.

Arguably, no method of justice is a clear cut strategy. It also carries associated risks and challenges. It is believed that restorative justice may become a diluted justice method, which may become restoring loss to the offender to re-educating the offender. It also has the risks of lessening the legal guarantees for the offender, which may marginalise the victim.⁸⁹

With the expanding models, child justice has undergone tremendous changes. It has changed from Welfare Model to Justice Model, and to the Restorative Model as a strategy to find an appropriate answer to child justice. This struggle reflects the ever evolving nature of child justice, and traditional method of justice has given way to more effective methods. Another important development in child justice method is the development of Rights based Model of Child Justice. K. Hollingsworth⁹⁰ states that children has one basic core rights called as the foundational rights. The importance of these rights entails, finding a justice system that is consistent with the rights of the children. It is the duty of the state structure to make a system of justice that do not damage the foundational rights of children.⁹¹ She argues that the premise of punishment is the coercive use of force which deliberately restrict the liberty of another person.⁹² In the Right based Model of Child Justice, justice revolves around the fundamental core of the best interest of the child. The Best Interest of the Child shall be reflected in the legislation, and national policies to reflect the child's sense of dignity; and the need to reintegrate into the society.⁹³

In this approach, the whole intention of the Child Justice System is to reintegrate the child to the society and promote the role of active citizenry. The Child Rights based approach obliges the States to keep children out of the formal justice system and stresses on diversion as an important method. Therefore, when it comes to rights based approach, it mostly mentions on the need to adopt non-custodial measures. Deprivation of liberty is the last resort, and if that needs to be done, it shall be for the shortest

⁸⁹ *ibid.*

⁹⁰ K. Hollingsworth, *Re-imagining justice for children: A new rights-based approach to youth justice*, Newcastle Law School, 2014.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ K.G Geso, 'A Child Rights-Based Approach to Diversion in Ethiopia: An Analysis of the Community-Based Correction Program in Addis Ababa', Masters Thesis, Institute of Social Studies, the Hague, 2015, p .11. Available from: Kgeso moodle data temp turnitintool 2088981007 pdf (accessed 18 April 2017).

possible time.⁹⁴ In this model of Child Justice, they advocate for non-custodial methods to criminalisation, and child friendly treatment to children who have come in conflict with the law. In short, the model looks around the survival and development of the child. A child rights-based juvenile justice system which promotes diversion among others, ensures the well-being of the child offenders by avoiding the negative consequences of inappropriate treatments and procedures in the formal justice systems.⁹⁵ The States are mandated to take all the legislative, administrative and policy matters to ensure justice for children. Therefore, it mandates all States to enable children enjoy their rights to the fullest without discrimination. This method also considers children as a vulnerable group, and accords special protection for them.⁹⁶ This is the modern form of child justice. It endeavours to oversee the need to establish a child justice system; study the varying needs of a child, and tries to fulfil their needs based on their rights established by the law. This, in turn underscores the need to consider alternatives to punishment and, where punishment is necessary, the need to consider the rehabilitation and reintegration of the child into society.⁹⁷ It revolves around the wholesome development of the child by creating an enabling environment through legislation and peripheral support. The Right based Model of Child Justice is a typical modern notion of Child Justice. It includes child participation, non-discrimination of the child and the Best Interest principle of the child.⁹⁸ Rights of children do not limit to protecting their rights, it extend to making effective policies to prevent delinquency of children. It is understood that rights of children are mostly challenged by circumstances that favour child delinquency. One of the defining marks of right based justice system is the age of criminal responsibility. It is an accepted norm that any child under the age of criminal responsibility cannot commit a crime. This implies that children are not allowed to be prosecuted under this age. The minimum age of criminal responsibility helps to recognise that the child attains emotional, mental and intellectual capacity to appreciate their actions. A standard minimum age of criminal responsibility establishes that no child under that years of age can commit any offence. This is based on the legal

⁹⁴ Op.cit.

⁹⁵ *ibid.*

⁹⁶ S. Bakta, p.47.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

principle called the *doli incapax*. Among various models of Child Justice propounded, a Right based Model of Child Justice serves to ensure the protection of the rights of children. It takes a very holistic approach to take the wholesome development of a child through an enabling legal environment. Interventions by employing non-judicial method is an important part of Rights Based approach of Child Justice.

3.2 The Definition of [Child Justice]

It is agreed that definition and terminologies are an important aspect in the matter of child justice. In the first instance, international instruments are not consistent with the use of words, and in the second instance, many terms have negative connotations.⁹⁹ International instruments [hard law] have different choice of terminologies. In the Riyadh Guidelines, they do not favour the use of the word, '*delinquent*', but end up talking about delinquency to describe the collective action of a young child. The drafters of the Beijing Rules chose to use the word '*Juvenile*'.¹⁰⁰ The CRC uses the generic term, '*children*' to describe all the individuals who are under the age of eighteen years. Although the definition of justice may differ from one State to another, justice for children in short, establishes a fair and responsive system and processes to ensure justice and uphold their 'best interests'. Justice for children entails contribution towards their goal of survival, development, participation, and protection of children. It is in one sentence, the protection of their rights in all stages of judicial or non-judicial proceedings by providing services to children to enable them return to the society. Justice include the complete rehabilitative infrastructure in place.¹⁰¹ For the purpose of the Thesis, word 'Juvenile' and 'Child' are interchangeably used.

Chapter Four

4.1 International Standards and Norms on Child Justice

Over the years, the United Nations has spearheaded the development of the International Legal Framework to standardise juvenile justice. Child specific [hard law] instruments like the CRC have played a critical role to streamline the role of the state to protect both children and CICLs. In addition, non-binding declarations [soft laws] and recommendations from the Committee on the Rights of the Child has set out the rights

⁹⁹ UNICEF, Juvenile Justice, International Child Development Centre, Italy.

¹⁰⁰ *ibid.*

¹⁰¹ Kigala, *Justice for Children Policy, Rwanda*, 2014.

of young offenders and other specific areas of juvenile justice, including diversion, prevention of delinquency, community sanctions including detentions.¹⁰²

4.2 The United Nations Convention on the Rights of the Child (UNCRC)

The [CRC] is the most predominant UN instrument. This is one of the most ratified UN instrument on child.¹⁰³ The UNCRC rests on four principles of non-discrimination, survival and development; best interest of the child and child participation.

- a) Non-discrimination:** Discrimination among children is a serious violation of their rights. The CRC stipulates that the Convention shall be applied to all children irrespective of religion, age or abilities. Therefore, discrimination is a strong barrier to justice and enforcement of law. It considers children as a distinct group of individuals. This provision is very relevant to children who are disadvantaged and marginalised. Justice is an important matter in the lives of every child. Any action shall be fair to treat every child as an equal human being. A discriminate approach act as a derailing factor for all other rights.
- b) Survival and Development:** Survival on one side and development on the other are two most important aspects in the life of a child. The CRC mandates the States Parties to recognise the inherent right to life of every child.¹⁰⁴ State Parties are also under duty to enable maximum extent possible the survival and development of the child. Prohibition of death penalty of children comes in line with this mandate.
- c) Best Interest of the Child:** The principle of Best Interest of the child is an important yardstick for all actions concerning children. The Convention underlines that any action whether it is taken by the public, private social welfare institutions, courts of law, administrative authorities or legislative bodies shall uphold and abide by the principles of the Best Interest of the Child.¹⁰⁵ The Best Interest of the Child shall be the yardstick for protection and care. State Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall meet with the standards established by

¹⁰² Children and Juvenile Justice: Proposal for improvements, Strasbourg, 2009, <https://www.rm.coe.int/CoERMPublicCommonSearchServices>, (accessed 24 April 2017).

¹⁰³ All countries has signed and ratified the UNCRC except Somalia and the USA.

¹⁰⁴ Article 6

¹⁰⁵ Article 3

competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as their competent supervision.¹⁰⁶ Child Justice, in short shall fulfill the best interest of the child.

d) Participation: Participation of the child in any matters that affect them is an important step towards their inclusion. Article 12 of the CRC states that children have the right to participate in decision-making processes that may be relevant in their lives so that they can influence decisions taken in their regard within the family, the school or the community.¹⁰⁷ The child should be able to form his or her views, and also express it freely in the decisions that affect him or her. The principle allows the right to express their views, and that those views be heard and given due weight in accordance with the child's age and maturity. As active citizens of change, it recognises the potential of children to make decisions that are right for them. It can be presumed that children are better aware of their own surroundings; and they know how to make better decisions.

Every human being have inherent human dignity, and inalienable rights. This is the foundation of peace, harmony and justice in the world.¹⁰⁸ Based on such noble premise, the [CRC] believes that childhood is a special moment in the life of the child, which needs special care and assistance. Therefore, family as the fundamental group in the society is responsible for giving a peaceful natural environment to enable them grow well in the atmosphere of happiness, love and understanding.¹⁰⁹ Most importantly, it is the need for legal protection through proper administration of justice. This can protect them from torture or other cruel, inhuman or degrading treatment or punishment.¹¹⁰ Another important component of the Convention is the protection of the rights of children deprived of liberty. It states that any children deprived of liberty shall be treated humanely. They shall have prompt legal access and other appropriate assistance.¹¹¹ These four principles form the core principles of child justice.

¹⁰⁶ *ibid.*

¹⁰⁷ Article 12

¹⁰⁸ Preamble, United Nations Convention on the Rights of the Child, 1989.

¹⁰⁹ *ibid.*

¹¹⁰ Article 37(a).

¹¹¹ *ibid.*

Article 40 of the Convention is exemplary. It states that every child alleged as, accused of, or recognised as having infringed the law has to be treated in a manner consistent with the promotion of child's sense of dignity and worth. Legal guarantees in the Convention gives basis to rule of law and the protection of the law. While Article 39 says that State Parties shall promote physical and psychological recovery and social reintegration of a child, it also states that such recovery and reintegration shall take place in an environment that is healthy, and fosters self respect and dignity of the child. In addition, a variety of dispositions such as care, vocational training programmes and other alternatives to institutional care are also mentioned to ensure that children are dealt in the manner appropriate to their well being and proportionate to the circumstances and the offence.¹¹² The CRC has made the government to undertake the obligations to protect and ensure rights of children. This has also made countries accountable before the international community.¹¹³

4.3 UN Standard Minimum Rules for the Administration of Juvenile Justice [Beijing Rules]

In the year 1980, the Sixth United Nations Congress on the Prevention of Crime organised a meeting in Caracas, Venezuela. In that meeting, they sorted out several basic principles which were necessary for the administration of juvenile justice in order to protect the fundamental human rights of juveniles in conflict with the law. The rules could then serve as a model for member states of the United Nations in the treatment of juvenile offenders.¹¹⁴ In the following years, the Committee formulated the draft Rules in collaboration with the United Nations Social Defence Research Institute. The draft was endorsed by the regional preparatory meetings for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. This was further

¹¹² Article 40 (4).

¹¹³ Children's Rights are Human Rights, United Nations Convention on the Rights of the Child, Network of Community Activities, NSW Australia, <http://www.networkofcommunityactivities.org.au> (accessed 25 April 2017).

¹¹⁴ UN Standard Minimum Rules for the Administration of Juvenile Justice, Department of Public Information, New York, 1986, <https://www.ncjrs.gov/pdffiles1/digitization/145271ncjrs.pdf>, (accessed 25 April 2017).

agreed and amended at an Interregional Preparatory Meeting held at Beijing.¹¹⁵ The Rules were formally approved on 6 September 1985. The United Nations General Assembly later adopted the Rules on 29 November vide Resolution 40/33.¹¹⁶ The Rules represent the minimum standards or conditions which are accepted by the United Nations to handle child offenders under any system.¹¹⁷ These are minimum rules to administer justice for children. On the fundamental perspective, the Beijing Rules seeks the States to further the well-being of the juvenile and their family. It seeks to develop conditions that will ensure the juvenile to lead a meaningful life in the community by fostering a process of personal development that is free from crime and delinquency.¹¹⁸ The Rules consider Juvenile Justice as an integral national development policy and assumes that protection of the young people [child] will help to maintain peace and order in the society. Building up a Juvenile Justice System with improved and sustained competence of personnel including their method of work, approaches and attitudes is another critical part of the Beijing Rules. It also stresses on the need to constantly improve juvenile justice through the development of progressive social policy for juveniles.¹¹⁹ In contrast to the CRC, the Beijing Rules do not specify the age of the child, but defines [juvenile] as a child or young person.¹²⁰ Perceptibly, it states that [juvenile justice] in each national jurisdictions shall be based on established laws, rules and provisions which are applicable to juvenile. It also mentions about the necessity of specific national legislation for the optimal implementation of these Standard Minimum Rules, both legally and practically. On the age of criminality, the Beijing Rules states that the age shall not be 'too low'. If so, it will not render any meaning to the concept of *responsibility*.¹²¹ There was no internationally accepted age of criminal responsibility at that time. Critically, Rule 5 of the Beijing Rules is an important component of juvenile justice. A systematic juvenile justice system is result of constant endeavour over the years. However, when it comes to the aims of juvenile justice system, the Beijing Rules focus on the well-being of the juvenile to ensure that any reaction to juvenile offenders

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*, General Principles, Part I.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*, Rule 2.2(a).

¹²¹ *ibid.*, p.5

are in proportion to the circumstances of both the offenders and the offence.¹²² The principle of proportionality is a remarkable instrument to divert from punitive sanctions.¹²³ The Rule states that the justice system shall not only consider the action of the accused and the gravity of the offence, but also take into account the circumstances of the offence. The issues combined in the rule may help to stimulate development in both regards - new and innovative reactions that can act as desirable precautions against widening formal social control over juveniles.¹²⁴

Investigation and prosecution is a hallmark of every justice system. The Rule is notable in respecting the privacy of the juvenile. In many circumstances, contact between the law enforcement agencies and a juvenile offenders are inevitable. The Beijing Rules creates a space to ensure the respect for the legal status of the juvenile, promote his or her well-being and avoid harm to him or her. This is a basic guarantee for respect of human rights, a defence against the abuse of power. The Rules balances the dynamics of power between the offender and the law enforcement personnel. This is especially important in the initial contact with law enforcement agencies, which might profoundly influence the juvenile's attitude towards the State and society.¹²⁵

Rule 11 of the Beijing Rules discusses diversion as an alternative to formal trial. Diversion is basically, the removal of child from the formal justice system. This serves to negate the effects of incarceration and in many instances, non intervention is the best response. Based on such noble edifices of law, the Beijing Rules had been the forerunner of modern child justice system.

Within the ambit of the law enforcement, the Beijing Rules has proceeded one step further. It has emphasised on the specialisation of the police force.¹²⁶ Police play a critical role; specialisation acts as a lifeline for an informed decision making. This is another important aspect of criminal justice, which affects the rights of the children detained pending trial. Like in other human right instruments, detention pending trial is

¹²² *ibid.*, Rule 5.

¹²³ Compendium of United Nations standards and norms in crime prevention and criminal justice, Rule 5, Commentary, p. 55.

¹²⁴ *ibid.*

¹²⁵ *ibid.*, p. 59.

¹²⁶ Rule 12.

allowed as a measure of last resort for a shortest possible time.¹²⁷ This minimises the risk posed by detention to the child. It further states that any juvenile awaiting trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.¹²⁸ Children also need separate facilities from adults. Such basic guarantees are enshrined to enable the child to remain out of contact from the adults. This prevents children from exposing to negativity. In order to facilitate protection, children are expected to receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality. These foundational guarantees help children to develop positive personality, and become a good citizenry. Fair legal process is a vital component of rule of law. Fair trial and legal processes are imperatively mentioned in the Beijing Rules. It states that when a juvenile offender has to undergo formal legal processes, the offender should receive fair trial.¹²⁹ This stands as the testament of professional administration of the due process of law. Legal representation¹³⁰ is a necessary precondition for fair trial. In this matter, it states that for the purpose of fair trial, a child shall be represented by a legal counsel, and the state, if they have the system of legal aid, shall seek to provide legal aid. Based on the need, the parents or the guardians can also participate in the legal proceedings.¹³¹ The guiding principles under Rule 17 do not prescribe the approaches, but endeavours to identify the approach that are most closed with internationally accepted principles.¹³² These guiding principles act as point of reference and guide the [competent] authority to dispose a case. It balances the reaction, deprivation of personal liberty and the well being of the child. It outlawed corporal or physical punishment for children. The discretion of the Competent Authority is widened by allowing them to discontinue the proceedings at any time. Such discretions are necessary to reduce redtapism; and use

¹²⁷ Rule 13.1.

¹²⁸ Rule 13.3.

¹²⁹ Rule 14.1.

¹³⁰ Rule 15.

¹³¹ *ibid.*

¹³² Rule 15, commentary, p. 66.

first experiences of the Competent Authority to decide a case. Cessation of intervention can be decided if it appear to be in the best interest of the child.¹³³

The [Rules] also talks about various disposition measures to allow flexibility and avoid institutionalisation to the greatest extent possible. It stresses on the important role of parents as the natural and fundamental unit of society for healthy growth of the child. It also considers that for progressive development of criminology,¹³⁴ institutionalisation of a child is not the best option. Juveniles are more prone to the effects of negative influences. Taking into account such critical life building measures, the Rules tries to balance liberty, family environment, and other aspects of child development to achieve holistic growth of the child. Expeditious proceedings is a hall mark of an efficient justice system. To avoid undue delay, the Beijing Rules stipulates that each case shall be handled expeditiously. The Rules believes that [prolonged] procedure may dissipate the justice making the juvenile difficult to follow the procedures. Such instances will challenge the child intellectually and psychologically.¹³⁵ Considering such notable hinderances to expeditious handling of cases, the Rules has reinstated the prompt handling of cases to avoid undue strain to the child. This is an exceptional accomplishment in the area of child justice. The maxim '*justice delayed is justice denied*' is appropriately echoed in the instrument.

Rule 22 of the Beijing Rules states about the relevance of professional competence. It states that the juvenile justice system shall reflect the diversity of children from different backgrounds. It also states that there should be effort to represent woman and minorities. One of the fundamental bottomline of a robust justice system is the existence of professional and competent working personnel. Such manpower ensures efficient administrative working machinery, and delivers justice without delay. It is stated that professional qualifications are an essential element in ensuring the impartial and effective administration of juvenile justice. In order to fulfil the requisite obligations and duties thereto, professional training is a necessity. A mismatch of obligations and professionalism will deprecate justice.

¹³³ Rule 17.4, commentary, p.67.

¹³⁴ Rule 13, commentary, p.62.

¹³⁵ Rule 20, commentary, p.69.

One of the remarkable part of the [Rules] is the institutional treatment of CICLs. Institutionalised treatment is to provide care, protection, and other educational and vocational skills, with an aim to assist children to play constructive roles in society.¹³⁶ The Rules also reinforces the notion of keeping the child separate from the adults. It also talks about equal treatment of both the sexes based on the principle of fair treatment between the male and the female offenders. It states that the young female offenders in the institution deserve special attention in regards to their personal needs. It do not allow women to receive less protection than their male counter parts.¹³⁷ This represents the equal treatment based on sex. To foster positive development through good family relationships and care, the [Rule] allow parents to access their child in the institutions.¹³⁸ The [Rule] also reinforces the Caracas Declaration ¹³⁹ of the Sixth Congress, which calls for equal treatment of women in the criminal justice system.¹⁴⁰ As a correct method to formulate policies, the [Rule] gives research as the basis for informed juvenile justice policy. This helps to prevent obsoleted ideas, but catch on with the advances in knowledge, development and improvements in juvenile justice. Hence, in order to improve the juvenile justice, it stipulates research by independent bodies to understand the views of children. A wide ranging studies are necessary to identify and provide effective and equitable services. It states that there shall be comprehensive and regular assessment on particular needs and problems of juveniles and identify the issues with clear-cut priorities.¹⁴¹ The [Rule] is very comprehensive and offers a very tactical idea on the administration of juvenile justice.

4.4 UN Standard Minimum Rules for Non-custodial Measures [The Tokyo Rules]

The UN Standard Minimum Rules for Non-custodial Measures herein after called as the [Tokyo Rules] provides a set of basic principles to promote the use of non-custodial measures and the minimum safeguards for persons subjected to alternative measures. The use of non-custodial measures is to involve the community and re-direct the

¹³⁶ *ibid.*, Rule 26.1

¹³⁷ *ibid.*

¹³⁸ *ibid.*, Rule 26.5

¹³⁹ The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/RES/40/32, 1985.

¹⁴⁰ Rule 26, Commentary, p.73.

¹⁴¹ Commentary to Rule 30.4.

offenders into the society to reform.¹⁴² Non-custodial measures seeks to balance the needs of the society on one hand, the rights of the offenders on the other with the rights of the victims. More precisely, the [Tokyo Rules] urges the Member States to develop non-custodial measures and provide options by observing their human rights. It states that non-custodial measures help to reintegrate the offender by internalising social values with the community.¹⁴³ It recognises that non-custodial measures represent an important component of crime prevention. By acknowledging non-custodial measures as having unique characteristics, it employs to make the offender transform under natural circumstances.¹⁴⁴ Considering such benefits, both to the criminal justice system and to the individual offender, it seeks to protect the basic human rights of the offenders more effectively.¹⁴⁵

4.4.1 Pre-trial Dispositions

Pre-trial detentions protects the offender from flight. Rule 5 of the [Tokyo Rules] states that:

Wherever it is appropriate and compatible, the police, the prosecution service or the judiciary dealing with [criminal] cases should have power to discharge the [offender] if they find the case unnecessary.

Red tapism, power imbalance and unclear roles among the agencies dealing with the [criminal] cases result in the custody of the offenders. In this case, ‘discharge of the offender’ constitute the earliest possible non-custodial measure. Non-custodial methods are accepted in many jurisdictions as an effective mechanism to deal with the offenders to avoid stigmatisation.¹⁴⁶ More reasonably, it decriminalises the CICLs and restore them into the society. This can be said as the ‘first crucial step’ of the Tokyo Rules which is a soften stance to the CICLs. Pre-trial detentions, in many cases involve the deprivation of liberties. Rule 6.1 makes it clear that pre-trial detentions shall be employed only as a measure of last resort. If any pre-trial detention has to be used, it

¹⁴² United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), General Principles, 1.1, p.117.

¹⁴³ Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures, the Tokyo Rules, New York, 1993, p.5.

¹⁴⁴ *ibid.*, p.6.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*, p.15.

shall be for the purpose of investigation and to pre-empt additional offences.¹⁴⁷ This echoes the fundamental principle of legal safeguards employed for child protection in other international child rights instruments.¹⁴⁸ To affect non-custodial measures, it urges the relevant authorities to avail such measures as soon as the criminal proceedings begin.¹⁴⁹

4.4.2 Sentencing Dispositions

Judicial interventions in the matters of CICLs normally lead to concrete decisions. The judicial authority [courts] if resorted becomes the final arbiter of laws in most cases. The underlying guiding principles of any judicial authority are dictated by the existing law, the need to protect the society and rehabilitative needs of the offender. In this pursuit, the judicial authority has to balance a wide range of considerations when choosing an appropriate sentence.¹⁵⁰ Alternatively, sentencing authorities have varied sentencing options. This represents the multifaceted nature of the needs of children coming in conflict with the law. It also reflects the wide range of non-custodial measures required for different cases. Action in each case is determined by the circumstances of each case. In principle, it enlists sentencing dispositions. Verbal sanctions such as admonition, reprimand and warning act as a substitute for penal sanctions and offer them an opportunity to learn from their mistakes. A harsh penal sanction may result in significant damage on the child. This may further damage them emotionally and destroy their prospectus to reintegrate into the society.

Economic penalties such as fines, and community service are effective non-institutional sanctions. While fines limit the disposable capacity of the offender, community service is a form of restitution that benefits the community rather than the individual victim.¹⁵¹ Non-punitive methods reduce the impact of punishment. However, any action for the child should commensurate the seriousness of the offence. The Tokyo Rules imbibes the

¹⁴⁷ Rule 6.2

¹⁴⁸ Article 37(b) of the CRC states that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

¹⁴⁹ Rule 6.2

¹⁵⁰ Rule 8.1

¹⁵¹ Commentary to the Tokyo Rules, Rules 8.2, p. 18.

genuine culture of respect for the child, and social reintegration as the ultimate aim of justice.

4.4.3 Post-Sentencing Dispositions

In order to avoid institutionalisation and assist the offenders to reintegrate early into the society, the [Tokyo Rules] set out sentencing alternatives called as post-sentencing dispositions.¹⁵² These are measures intended to reduce prison sentence or offer alternatives to prison sentences.¹⁵³ These measures are generally carried out by substituting the severe non-custodial measures by the less severe ones. One of the examples of post-sentence disposition is the reducing of sentence for a good behaviour in the custody. This is intended to reduce effect of incarceration, and facilitate the offender to cope up with the society after their release.¹⁵⁴ Incarceration in the prisons can result in moral, emotional and social disconnection. A prolonged period of detention can, based on various circumstances, have negative consequences to the offender. These effects can debilitate the effort to reintegrate. This is particularly more detrimental to children resulting in long term impairments to both their cognitive and physical development. The exacerbated impact of detention retards the ability of children to cope with the society.¹⁵⁵ Based on such undeniable effects on children, both mentally and physically, the [Tokyo Rules] promote rebuilding as the ultimate aim of justice. Proper guiding rules are necessary precondition to effect such transitions.¹⁵⁶ It also states that the States shall make legal provisions to ensure the earliest possible release of the offender.¹⁵⁷

4.4.4 Recruitment and Staff

Professional experience and training are essential component of any human resource. Disregard to capacity building and skills development can result in incapacity and under performance. In context of the [Tokyo Rules] which intend to rehabilitate the offender, it

¹⁵² Post-sentencing dispositions are exercised by the Competent Authority. These dispositions are subject to the review of competent independent authority.

¹⁵³ General observations to part IV of the Tokyo Rules, p.20.

¹⁵⁴ Commentary, Rule 9.1, p.20.

¹⁵⁵ C. Hamilton, et al., 'Administrative Detention of Children: Global Report', https://www.unicef.org/protection/Administrative_detention_discussion_paper_April2011.pdf, (accessed 6 July 2017).

¹⁵⁶ *opcit.*, Rule 9.1.

¹⁵⁷ Rule 9.4.

states that training should enable staff to make informed decisions about their duties and roles to rehabilitate the offender. The component of training of staff is a key factor. The Rules also necessitates the staff to receive clear instructions about the non-custodial measures.¹⁵⁸

4.4.5 Policy Formulation

Appropriate policies results in right interventions. We believe that policies form the bed rock of right and appropriate decisions. The commentary to Rule 20 states:

The systematic collection and exchange of information through research and policy analysis are desirable to evaluate and promote planning and use of programmes for non-custodial measures.

The [Rules] considers research as an important tool for planing and policy-making in the matter to reflect the evolving nature of criminal justice system. The commentary to the [Rules] also states that plans to execute non-custodial measures should not be viewed as the sole issue of the criminal justice system, or even narrowly as a decision to solve an immediate issue facing the criminal justice system. It also reiterates the need for comprehensive national development plans.¹⁵⁹ Rule 21.3 view the matter as a shared concern for different stakeholders. It states that review and assessment of the policies shall not be carried out by a sole organisation, but assessed collaboratively between the legislators, criminal justice agencies and other competent bodies.¹⁶⁰ This is to ensure smooth inter-agency coordination.

4.5 UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990 [The Havana Rules]

Unfortunately, juveniles deprived of their liberty across the world is on rise.¹⁶¹ To protect the juveniles deprived of their liberty, the UN Rules for the Protection of Juveniles Deprived of their Liberty was adopted by the United Nations in 1990. This is also called as the [JDLRules] or the [Havana Rules]. In some countries,¹⁶² the age of

¹⁵⁸ Rule 16.2

¹⁵⁹ Commentary, Rule 21.1, p.37.

¹⁶⁰ Commentary, Rule, 21.3.

¹⁶¹ People's Advocate and Observatory for Children's Rights, 'Monitoring Report of the conditions and treatment in the institutions of custody, pre-trial detention and prisons', Albania, 2016, http://observator.org.al/wp-content/uploads/2017/03/Monitoring_report_jj_13March2017.pdf, (accessed 6 July 2017).

¹⁶² The United States of America and Pakistan.

criminal liability of children are relatively low. The [JDLRules] acts as a platform to monitor and improve the conditions of juvenile welfare and health. More constructively, the [Rules] ensure that juvenile deprived of their liberty are treated fairly considering their age.¹⁶³ In drafting the Rules, the United Nations has seriously reckoned the conditions and circumstances of juveniles deprived of their liberty. It has recalled that children, who are deprived of the liberty are more susceptible to abuse and violation of their rights.¹⁶⁴ In the interest of justice, if any juvenile has to be deprived of their liberty, the Rules exhorts to limit it to the shortest possible time.¹⁶⁵ Fundamentally, it states that the juvenile justice system should uphold the rights, safety and promote the physical and mental well-being of juveniles. It expressly implores to use imprisonment as a measure of last resort. Apparently, the [Rules] intends to establish minimum standards that are accepted by the UN for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, with a view to counteracting the detrimental effects of all types of detention and foster integration into the society.¹⁶⁶ In pursuit of these objectives, it stands to serve as standards of reference to professionals involved in the management of the juvenile justice system.¹⁶⁷

4.5.1 Deprivation of Liberty

In order to demystify the supposition of deprivation of liberty, the Rules states that:

*The deprivation of liberty should be understood as [any] form of detention or imprisonment or the placement of a person in a public or private custodial setting, enforced by judicial, administrative or other public authority which restricts the person to leave at will.*¹⁶⁸

Essentially, deprivation of liberty, as generally understood includes detention and imprisonment. More extensively, the [Rules] includes other custodial settings, which are administered through judicial or administrative orders. The element of justice and fair trial necessitates that the States avoid formal custody of children. States are entailed to

¹⁶³ *The United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, 1990, [youthjusticenc.org/download/juvenile-justice/international-justice/United Nations Rules for the Protection of Juveniles Deprived of their Liberty.pdf](http://youthjusticenc.org/download/juvenile-justice/international-justice/United%20Nations%20Rules%20for%20the%20Protection%20of%20Juveniles%20Deprived%20of%20their%20Liberty.pdf), (accessed 7April 2017).

¹⁶⁴ *ibid.*

¹⁶⁵ *The United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Rule 17.

¹⁶⁶ *ibid.*, *Fundamental Perspectives*.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*, Rule 11(b).

respect and fulfil other corresponding rights. It states that if deprivation of liberty is unavoidable and necessary in the interest of justice and public safety, it should be used in conditions and circumstances that are conducive to uphold and respect the human rights of the child.¹⁶⁹ To bring in the same meaning, the word, juvenile and child are used interchangeably.

4.5.2 Juvenile under arrest and awaiting trial

Juveniles under arrest and awaiting trial can be stressful and tormenting. It is a crucial period of vulnerability. In such instances, juveniles become subjects to the dictates of the laws and the law enforcement authorities. Hence, the doctrine of '*presumption of innocence until proven guilty*' holds a cardinal legal defense. Therefore, the Rule reflects basic human rights based legal principles which cannot be denied to any citizenry. The [Rules] implores to use detention as the measure of last resort.¹⁷⁰ If detention is used, it necessitates juvenile courts and other agencies that work for children to expedite the case. Expeditious proceedings should limit the duration of detention. Most importantly, to avoid criminal contamination, it obliges the states to keep the untried juvenile separate from the convicts.¹⁷¹ One of the primary elements of child justice is the presence of legal aid. Right of legal counsel is the fundamental prerequisite for fair trial and equitable judicial process. In many jurisdictions, including ours, justice for children is perceived only as the application of child laws. In reality, it needs well-organised efforts to offer children deprived of the liberty to pursue work, education or training among other alternatives. Leisure and recreation are also necessary components of justice.¹⁷²

4.5.3 Management of juvenile facilities

Juvenile facility is one area which can either result in improvement of the juvenile or can violate their rights. A well balanced approach is a necessary precondition. The Rule states that records should serve as the basis of justification for all important decisions for the child. It also states that no child shall be detained in any facility

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*, *Fundamental Perspective*

¹⁷¹ Part III, Rule 17.

¹⁷² *ibid.*, Rule 18 (a) (b) (c).

without a register.¹⁷³ Another significant principle criterion is the keeping of the different categories of juveniles deprived of their liberty in separate facilities. The intervention should be able to protect the juvenile of their physical, mental and moral integrity by working for their well-being.¹⁷⁴ In almost all jurisdictions, juveniles in conflict with the laws are kept separate from adult offenders. This shield them from adult criminal influences. However, the Rules also build on the positive influences of the family. Therefore, to reinforce the role of family in the growth of the child, it allows children to live with the members of the same family.¹⁷⁵ In further establishing the minimal security arrangement for detentions, it has maintained the concept of ‘open detention facilities’. Physical environment and accommodation are imperative cogs in the machinery of child detention. Therefore, Rule 31 states that juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity. This represent the commitment to fully respect the health and basic human rights of the juvenile. Human dignity and human rights are inherent natural rights for every human being. Environments in the detentions determine the safety, comfort and possible scope of reintegration. Sanitary installations, possession of personal effects, use of own clothing, suitable and adequate food are basic requirements of any human person. Clean drinking water is also an essential standard of dietetics, hygiene and health in the Rules.¹⁷⁶

4.5.4 Right to Education

Right to education is part of the Rules. The [Rules] requires education, training and work as mentioned in other child justice instruments. It compels education to be part of the detention facility program. For this, Rule 38 states that:

[Every] juvenile of compulsory school age has the right to education based on his needs and abilities to prepare his or her return to society.

Above all, the [Rules] also talks about juveniles with learning disabilities caused by illiteracy and other cognitive incapacities.¹⁷⁷ Therefore, the Rule stress on the rights of the juveniles to continue their education by providing them with facilities like libraries,

¹⁷³ *ibid.*, Part IV, Rule 20.

¹⁷⁴ *ibid.*, Rule, 28.

¹⁷⁵ *ibid.*, Rule 29.

¹⁷⁶ *ibid.*, Rule 37.

¹⁷⁷ *ibid.*

with unimpeded access to appropriate educational programs.¹⁷⁸ In one hand, the Rules sets an internationally acceptable norm for the treatment of children deprived of their liberties, and on the other, it sets the basic standards of human rights for juveniles deprived of their liberties. This gives rise to responsibilities and a thought for any country, institution or legislators in the matter.

4.5.5 Recreation, practice of religion and medical care

Recreation, right to practice religion and medical care are basic human rights. While [every] juvenile has the right to free time for recreation, it also requires adequate space, installations and equipment.¹⁷⁹ In the facility, children should get to actively participate in the programs. Another basic tenet of the [Rules] is to facilitate juveniles deprived of their liberties to practice their religion and professed faith. On the contrary, it also recognise the right not to participate in religious services and decline to religious activities. This can be said as religious equivalence - the right to practice or decline it alternatively. This is reflected in other child justice norms and instruments like the CRC and the Model Law on Child Justice among others.¹⁸⁰ The Rules shares the common values of justice, principles of fair trial, due process of law and human rights for children as an inalienable foundation to help children grow and reintegrate into the society. Medical care, including both preventive and remedial, is mandated to be provided through appropriate health facilities.¹⁸¹ One remarkable aspect of the [Rules] is the right to be examined by a physician to ascertain evidence of prior ill-treatment.¹⁸² This will help the juvenile to get appropriate medical attention and care. Particularly, medical services should seek to detect, any physical or mental illnesses, abuse of substances, and other health conditions.¹⁸³ It states to keep track of the health conditions of the juvenile to assist in reintegration and know the health conditions of the juvenile in the detention. It states that the the juvenile should be promptly examined if the juvenile falls ill, or complains of illness, or shows any signs of physical and mental difficulties. If any juvenile in the facilities undergo issues of mental health, they are expected to get

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*, Rule 47.

¹⁸⁰ Article 14 of CRC, Article 68 of the Model Law on Juvenile Justice of the UNODC.

¹⁸¹ *ibid.*, Rule 49.

¹⁸² *ibid.*, Rule 50.

¹⁸³ *ibid.*, Rule 50.

treatment in specialised institutions.¹⁸⁴ Therefore, it represents a perfect example of a well integrated protection system for children deprived of their liberties.

4.5.6 Contact with the outside community

Contact with the wider community builds exposure and moreover, it fights alienation. This is integral right to fair and humane treatment of the juvenile. It facilitates to reintegrate the child into the society. The [Rules] states that juveniles should be able to meet and communicate with their families, friends and persons or representatives of reputable outside organisations.¹⁸⁵ Any children in the detention can leave their detention facilities to their homes for educational, vocational or other important reasons. The time spent at home will be counted as the period of detention. This correctly employs the reasoning to avoid ‘double jeopardy’ in a strict legal sense. Every juvenile has the right to communicate in writing or by telephone. They also have right to receive correspondence.¹⁸⁶ Contact with the wider community is expected prepare the children to return into the society.¹⁸⁷

4.5.7 Physical restraint and use of force

In most cases, use of force, to an acceptable degree is allowed by the law. The [Rules] allows the use of force in exceptional cases. [Unbridled] use of force can result in abuse. Moreover, it can result in physical exploitation. The Rules states that instruments of restraint and force can only be used after all other methods of controls are exhausted. It also states that any instrument of restraint and force can be only used to prevent self harm, injury to others and serious destruction of property.¹⁸⁸ Carrying and use of weapons are strictly forbidden. This help to equipose between the serious need to prevent a greater harm on one hand and respect the basic human rights of juveniles deprived of their liberty on the other. These [Rules] are guarantees of human rights to children deprived of their liberties.

4.5.8 Disciplinary processes

Disciplinary processes are important to maintain the safety and order in the life of the community. However, the Rule 66 mentions that disciplinary processes and measures

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*, Rule 56.

¹⁸⁶ *ibid.*, Rule 61.

¹⁸⁷ *ibid.*, Rule 59.

¹⁸⁸ *ibid.*, Rule 64.

should uphold the inherent dignity of the juveniles and fundamental objectives of institutional care. This should stimulate the sense of justice, self-respect and respect for basic rights of every person.¹⁸⁹ Another basic posit of the Rules is that no disciplinary measures should be cruel, inhuman and degrading. This significantly supports basic human right against cruelty, inhuman and degrading treatment.¹⁹⁰ No juvenile can be disciplined outside the terms of the laws in force. The juveniles also should be looked after by staff who has the professional capacity to deal with them. They are expected to possess ability, integrity and humanity to deal with the juveniles. These personal attributes enable juveniles to gain respect and provide them with positive role modelling.¹⁹¹ The Rules encapsulates the ways to treat juveniles deprived of liberty in order to reintegrate them into the society. It stipulates that the juvenile justice system should uphold the rights, safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort. These are the bed rocks for administration of juvenile justice and fair treatment of CICLs.

4.6 Guidelines for Action on Children in the Criminal Justice System, 1997 [The Vienna Guidelines]

The Guidelines for Action on Children in the Criminal Justice System of 1997 is also known as the [Vienna Guidelines]. The Resolution 1996/13 of the Economic and Social Council recognised the need for strengthened international cooperation and technical assistance in the field of juvenile justice.¹⁹² In pursuant to this Resolution, the Vienna Guidelines was developed in Vienna through an expert group. The [Vienna Guidelines] is addressed to the Secretary General, relevant United Nations agencies, State Parties to the CRC, and other Member States who apply and use the United Nations standards and norms in juvenile justice.¹⁹³ The [Vienna Guidelines] provide a framework to implement the CRC, especially in the administration of juvenile justice. The Guidelines was also to facilitate assistance to the states to enable them to implement the CRC and related

¹⁸⁹ *ibid.*, Rule 66.

¹⁹⁰ *ibid.*, Rule 67.

¹⁹¹ *ibid.*, Rule 83.

¹⁹² *Economic and Social Council Resolution 1997/30.*

¹⁹³ The Vienna Guidelines, the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty is referred to as United Nations standards and norms in juvenile justice.

instruments.¹⁹⁴ To implement the Vienna Guidelines appropriately, it considers respect for human dignity and the four General Principles of the CRC, rights- based orientation, participation of children and proactive measures amongst others.¹⁹⁵

The [Vienna Guidelines] reiterate the importance of a comprehensive and consistent national approach to juvenile justice. These national approaches shall be built on the basis of respect for indivisibility and interdependence of the rights of the child.¹⁹⁶ Moreover, it urges the States to include the principles of CRC, and the UN standards and norms in juvenile justice both in the in the policies and decisions. The justice system should guarantee rights of children, prevent the violation of their rights and promote children's sense of dignity and worth. Further, it implores to the states to respect the age of the child, the stage of their development and allow meaningful participation of the child to contribute to the society.¹⁹⁷

While Article 14 (a) states about a comprehensive child centred juvenile justice process; that no child under the age of criminal liability should be subject to criminal charges. The [Guidelines] confers a significant obligation on the States. It entail the states to establish Juvenile Courts, review their child procedures, and prevent recidivism and promote social rehabilitation of children. The States are also mandated to explore a wide range of alternative and educational measures to uphold the rights of the child offender.¹⁹⁸ Another symbolic contibution of the Vienna Guidelines is the use of [informal] methods to resolve disputes.¹⁹⁹ It also include legal assistance like interpretation services to be provided freely by the State. Article 18 talks about the need to reduce placement of children in the closed institutions. Like other child justice instruments, it also says that if the children has to be placed in the institutions, it should be used only as a last resort and for the shortest possible period. In order to keep a link between the child, their families and the outside community, the [Guidelines] also states that authorities should allow access to children by their relatives and persons of

¹⁹⁴ *Guidelines for Action on Children in the Criminal Justice System*, 1997, Article 4

¹⁹⁵ It includes a holistic approach to implementation; the integration of services on an interdisciplinary basis; empowerment of partners; and accountability and transparency of operations.

¹⁹⁶ *Vienna Guidelines*, 1997, Article 10

¹⁹⁷ *ibid.*, Article 11(a)

¹⁹⁸ *ibid.*, Article 15

¹⁹⁹ *ibid.*

legitimate interests.²⁰⁰ Every personnel working for children in the criminal justice system should be trained on human rights, principles and provisions of the Conventions and other UN standards and norms in juvenile justice as an integral part of their training programmes.²⁰¹ It states that the police and other law enforcement agencies like the judges, prosecutors, lawyers, administrators, prison officers and other personnel should be sensitised on various child issues for an informed decision making. Another important provision under these Guidelines is the need to establish mechanisms to ensure prompt and thorough investigation into allegations against the officials for willful violation of the fundamental rights and freedoms of children.²⁰²

4.6.1 Measures to be taken at the international level

The [Guidelines] seeks to recognise child justice at the international, regional and national level.²⁰³ When it comes co-operation, it states that there is an urgent need for co-operation among different bodies in the field of juvenile justice. Particularly, it stresses that effective implementation of the CRC and the international standards should be aimed at uplifting human rights of children in detentions, strengthening the rule of law and improving the administration of juvenile justice systems.²⁰⁴ Realistically, such changes should be effected by legal reforms, strengthening national capacities and infrastructures. To improve human resources, it states that training shall be initiated for police, law enforcement officials, judges, magistrates, prosecutors, lawyers, administrators, prison officers and other professionals working in institutions where children are deprived of their liberty.²⁰⁵ It also includes other personnel like health officials, social workers, peacekeepers and other professionals concerned with juvenile justice.

²⁰⁰ *ibid.*, Article 20

²⁰¹ *ibid.*, Article 24

²⁰² *ibid.*

²⁰³ *ibid.*, Article 26

²⁰⁴ *ibid.*, Article 28

²⁰⁵ *ibid.*, Article 28 (a)(b)(c)

Chapter Five

5.1 Legal Framework for the Protection of CICLs in Bhutan [Operational Legal Structure for Administration of Child Justice]

Children coming in conflict with the laws in Bhutan is on rise. In the recent World Health Organisation (WHO) Report, Bhutan has highest number of minor smokers and tobacco users in South East Asia region.²⁰⁶ Although it is not clearly accounted, recent media reports that children engages in drugs, marijuana smoking and use of tobacco.²⁰⁷ This is a one perspective picture. International standards require Bhutan to establish laws, procedures, authorities and institutions that respects the rights of children coming in conflict with the laws. The International Covenant on Civil and Political Rights (ICCPR) states that children coming in conflict with the laws have to be directed towards rehabilitation and reintegration to build a better society.²⁰⁸ Arguably, past Bhutanese legal frameworks for protection of children in conflict with the laws [administration of Child Justice] were incomplete.²⁰⁹ In the preliminary Concluding Remarks, Maria Herczog, the Committee Expert serving as co-Rapporteur for the report of Bhutan observed almost negatively, that new legislations were easier to draft than to implement.²¹⁰ The Concluding Observations in the Second Periodic Report of Bhutan reiterated that Bhutan should adopt a comprehensive Children's Code [that] incorporates the principles and provisions of the CRC.²¹¹ The Children's Code which the Committee had reiterated were to protect children in conflict with the laws and ensure fair administration of justice. The Committee also further recommended Bhutan to take more measures to uphold the 'best interest of the child'. Bhutan was asked to integrate it

²⁰⁶ 'Bhutan has highest number of adolescent tobacco users in SEA region', *Bhutan Broadcasting Service*, 5 July 2017. Available at <http://www.bbs.bt/news/> (7 July 2017).

²⁰⁷ Y.C. Rinzin, 'Drug abuse among students highest in Thimphu', *Kuensel*, 29 May 2017, <http://www.kuenselonline.com/drug-abuse-among-students-highest-in-thimphu/>, (accessed 6 July 2017).

²⁰⁸ *International Covenant on Civil and Political Rights*, 1966, Article 14(4)

²⁰⁹ In the year 2008, Bhutan was did not have the consolidated Child Care and Protection Act. The Bill was in the developing stage.

²¹⁰ Committee on the Rights of the Child, 'Committee on Rights of Child considers report of Bhutan', 2008, <http://reliefweb.int/report/bhutan/committee-rights-child-considers-report-bhutan>, (accessed 18 May 2017).

²¹¹ (CRC/C/BTN/2), September- October, 2008.

into her legislations, policies and programmes. The Committee also urged Bhutan to consider the ‘best interest of the child’ when making administrative and judicial decisions affecting children.²¹² It also further recommended Bhutan to respect the rights of children to be heard. More specifically, the Committee pointed out that Bhutan should improve legislations, policies, guidelines and institutional structures to protect children separated from their parents.²¹³ In the matters of administration of child justice in the country, the Committee further recommended Bhutan to ensure that a system of juvenile justice as envisaged in the CRC is fully integrated into the legislations and into practice. The Committee particularly stressed on Articles 37, 40 and 39 of the CRC among other relevant international standards.²¹⁴ The recommendations of the Committee was a genuine reminder. Few legislations like the Penal Code of Bhutan, 2004, and the Civil and Criminal Procedure Code of Bhutan, 2001 were in place before these recommendations. However, the recommendations categorically mentioned about few important aspects which were very relevant for CICLs and administration of Child Justice. The Committee recommended that deprivation of liberty has to be used only as a measure of last resort and for a shortest possible time. Other recommendations were on legal aid, free interpreters, and more importantly, the need to train judges, police officers, defense lawyers and prosecutors on juvenile justice for an informed decision making.²¹⁵ These recommendations reinforced the already existing protection for CICLs and gained more insights into [proper] administration of Child Justice. Subsequently, Bhutan submitted the combined Report to the Committee in 2014. Bhutan is yet to receive the Concluding Observations for the Report. The report defined child in conflict with the law as:

‘a child in conflict with the law is a child who is above 12 years of age...’

This age was later reflected in the CCPAB, 2011. This has further streamlined the age of criminal responsibility so that [appropriate] protection of children in conflict with the law is taken. Legislations that are enumerated herein after are the legal frameworks for protection of children in conflict with the laws and the fair administration of justice.

²¹² The Committee on the Rights of the Child, ‘Concluding Observations for Bhutan’, 2008.

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid.*, Recommendation No. 71(d)(e)(f)(g).

These [legislations] ensure both administrative and procedural safeguards and protection of the law to ensure a fair trial. Aside procedural guidelines which are provided by the CCPAB, the Child Court Procedure, and the Rules and Regulations under the CCPAB, other legal frameworks that support children in conflict with the law and administration of justice are:

5.1.1 The Constitution of Bhutan, 2008

The Constitution of Bhutan was born under the benevolent leadership of His Majesty the Fourth Druk Gyalpo. Today, the Constitution stands as a testimony to the rights of the Bhutanese people and represent the willingness to support for common vision and human progress. The Constitution is the sacrosanct edifice for rights of the people, which forms the basis of liberty and freedom in the country. The former Chief Justice, His Lordship, Lyonpo Sonam Tobgye said that the Constitution seeks to secure perpetual happiness for the posterity by laying strong foundations of justice and governance in the country.²¹⁶ The Constitution is the overarching supreme legislation in the country.

Article 7(15) of the Constitution states that:

All persons are equal before the law and are entitled to equal and effective protection of the law and shall not be discriminated against on the grounds of race, sex, language, religion, politics or other status.

It should be understood that the broad term ‘all persons’ encompasses [children]. This is a Fundamental Right under the Constitution. Therefore, the Constitution of Bhutan considers every citizen of Bhutan to be equal before the law, giving them equal and effective protection of the law. This is a very fundamental legal protection for fair administration of justice. The Constitution the person is guarantees that [persons] including CICLs has the right to be presumed innocent until is proven guilty.²¹⁷ To interpret this legal principle, it means that any child who is above twelve years of age and who is alleged to have committed an offence is considered as innocent until the child is proven guilty by the prosecution. The burden of proof lies on the prosecution.²¹⁸

²¹⁶ S.Tobgye, *Making of the Constitution of the Kingdom of Bhutan*, Thimphu, 2014.

²¹⁷ *The Constitution of Bhutan 2008*, Article 7 (16)

²¹⁸ The legal system of Bhutan is based on English Common Law, primarily on the adversarial system of procedure with some elements of the inquisitorial system. The judges act as the umpires of the litigants.

As a very important constitutional safeguard, the Bhutanese Constitution has enshrined that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.²¹⁹ However, it was noted that Bhutan did not define what constitutes torture or cruel, inhuman or degrading treatment or punishment in the Penal Code of Bhutan.²²⁰ The provision of Fundamental Rights under the Constitution acts both as vertical and horizontal rights against the state and against the individual.²²¹ The Constitution of Bhutan enumerates liberties of a person, which [includes] a child in conflict with the law. Sonam Tobgye, the former Chief Justice points out that right to liberty protects physical liberty through other rights like rights against arbitrary arrest or detention, the right against unreasonable search and seizure, the rights to information and more briefly, the right to be treated with humanity and respect.²²² The Constitution has, only in some instances referred to [children] as separate legal persons from adults. It has, in many cases, included children within the definitions under ‘all persons’. This does not misrepresent constitutional guarantees for children coming in conflict with the law. Instead the law embraces children as normal citizens. In furthering the Right to Life, Article 7(18) of the Constitution echoes the ICCPR by stating that no person shall be subjected to capital punishment. This reaffirms the genuine respect for right to life; makes it clear that no criminal convictions can, in any circumstances, curtail the life of a child.²²³ Furthermore, the Constitution, as the supreme law of the state, ensures that there are no arbitrary detentions, and implores the [person] in conflict with the law to be represented by a legal representative of his or her choice in any criminal proceedings.²²⁴ The Constitution also strives to create conditions for Bhutan to achieve good and compassionate society based on universal human values and rule of law. It states that every person shall have a duty to act in aid of the law to protect human rights, human dignity and fundamental human freedoms. More importantly, it also prohibits abuse of

²¹⁹ *The Constitution of Bhutan* Article 7 (17)

²²⁰ The Committee on the Rights of the Child, ‘Concluding Observations for Bhutan’.

²²¹ S. Tobgye, *The Making of the Constitution of Kingdom of Bhutan*.

²²² S. Tobgye, *The Making of the Constitution*.

²²³ *The Constitution of Bhutan* Article 7 (18)

²²⁴ *ibid.*, Article 7 (21)

children.²²⁵ These are not mere legal guarantees, but strong framework for protection of human rights of children.

5.1.2 The Child Care and Protection Act of Bhutan, 2011

It is refutable that violence, exploitation and abuse of children cannot exist in the arena where they are most expected to get protection. In pursuant to this, The Child Care and Protection Act was an outcome of the culmination of recommendations by Committee on the Rights of the Child ²²⁶ and the commitment of the Royal Government of Bhutan (RGOB) to uphold the rights of children. In the Concluding Observations in 2001, the Committee on the Rights of the Child noted that Bhutan did not have comprehensive rights based approach to implementation of the Convention. The Committee recommended Bhutan to speedily promulgate a legislation relating to child rights.²²⁷ The Committee also recommended Bhutan to consider adopting a comprehensive Children's Code which would incorporate the principles and provisions of the Convention.²²⁸ In this backdrop, the Child Care and Protection Act of Bhutan was enacted by the Parlaiment of Bhutan in 2011. The CCPAB forms the overall mother legislation for children in Bhutan. The CCPAB categorically provide that a child in conflict with the law shall be provided with the opportunity to be heard in any judicial and administrative proceeding either directly or through a representative or an appropriate body in accordance with the Civil and Criminal Procedure Code of Bhutan (CCPCB).²²⁹ This legislation also seeks to consolidate and provide care, protection, guidance, counseling, treatment, development, rehabilitation, adjudication and disposition of matters relating to children in conflict with law in the most favorable manner and in the best interest of the child.²³⁰

It also considers [Child Justice System] as an essential apparatus to uphold the rights of children in conflict with the laws, to keep them safe and promote their physical and mental well-being.²³¹ As a basic procedural right of children coming in conflict with the law, the CCPAB commands that no child shall be arrested, detained and imprisoned arbitrarily. When it comes to arrest, detention or imprisonment of a child, the 'Act'

²²⁵ *ibid.*, Article 8

²²⁶ The Committee on the Rights of the Child, 'Concluding Observations for Bhutan', 2001.

²²⁷ Concluding Observations for Bhutan, 2001, Recomendations 13 (a).

²²⁸ *ibid.*

²²⁹ *The Child Care and Protection Act of Bhutan 2011* s 9

²³⁰ *The Child Care and Protection Act of Bhutan.*

²³¹ *ibid.*, s6

mentions that it shall be used only as a measure of last resort and for the shortest possible period of time.²³² This section echoes the child rights based approaches enshrined in various international child rights instruments. The ‘Act’ is a semblance of international human rights instruments and various international child rights instruments in particular. The Act, among other provisions, tries to ensure fair trial, and guarantee justice as a minimum requirement for a just society.

It takes a broad legal, administrative and justice oriented perspectives to ensure that rights of children are respected. Among various protection mechanism offered, it states that if a child has to undergo confinement in his or her best interest, the State has to provide conducive physical environment and accomodation to achieve rehabilitation.²³³ It mentions that if a child commits an offence, all remedies shall be exhausted to divert the child from the criminal justice system. However, if the nature of the offence committed by the child and the criminal history of the child indicate a serious harm, proceedings for the offence against the child can be initiated. As per the Penal Code of Bhutan, a child above twelve years of age shall, if the offence is serious, bear half the sentence stated in the Penal Code.²³⁴ It allows the Court to consider the availability of appropriate facilities and correctional institutions.²³⁵ The rights of children in conflict with the laws are interlinked and it resounds similar approaches among various other legal frameworks and laws. The [Act] strives to prevent stigmatisation, victimisation and criminalisation of children by enabling reintegration through established norms and standards for the administration of child justice.²³⁶ In this light, the CCPAB particularly consolidates the rights of children in conflict with the law, enunciates due process of the law and spells out the model of child justice in Bhutan.

5.1.3 The Child Court Procedure, 2015

The Child Court Procedure is an offshoot of the CCPAB. The Child Court Procedure was a result of extensive works done by [delegations]²³⁷ of Bhutan who visited Italy. Aside the [procedures] laid down in the CCPAB, the by-law created the main genesis of

²³² *ibid.*, s5

²³³ *ibid.*, s9

²³⁴ *Penal Code (Amendment) Act of Bhutan 2011* s 10

²³⁵ *Penal Code (Amendment) Act* s11

²³⁶ *The Child Care and Protection Act* s 15

²³⁷ The delegation consisted of officials from the Royal Courts of Justice, the Royal Bhutan Police, the National Commission for Women and Children, and the Bhutan National Legal Institute.

a streamlined court procedure for children. The Procedure draws inspiration from a variety of sources like the Constitution of Bhutan, the CRC, the Optional Protocols, the CCPAB, and other relevant national legislations.²³⁸ The procedure is non-binding in nature but attempts to offer a basic guide for appropriate judicial proceedings involving a child.²³⁹ The procedure mainly looks at the overarching needs of the child in the judicial proceedings²⁴⁰ and identifies possible alternatives to enable social reintegration. When it comes to judicial proceedings involving children, it tries to ensure fair representation, participation and protection as the basic rights of the CICLs. To promote and monitor child friendly approach to criminal justice, it considers child psychology as an integral branch of judicial knowledge. Such knowledge will, on the one hand throw light on the criminal misbehaviour of the child and, on the other, help to analyse the needs of the child.²⁴¹ Knowing child psychology can help a judge to understand the possible remedies that best fits them. It can also assist the judge to decipher the main agents of criminal misbehaviour of the child and its underlying causes. This elementary matrix of criminal misbehaviour, its root causes and possible remedies will expedite judicial process and render fair justice. The Child Court Procedure reflects the basic legal guarantees for CICLs. It enumerates rights of the child before the trial, rights during adjudication and after the trial.²⁴² Among other rights, it clearly mentions about various rights of a female CICL- to be housed separately, and provided with special attention of their personal needs.²⁴³ It also mentions that a female child detainee, [if any] should be handled by a female worker alligning primary assistance appropriate to sex, age and circumstances of the child. The Child Court Procedure, aside laying various procedural rights, enumerates different stages of adjudication proceedings. It also talks about period of remand of a child in custody for judicial investigation. No child can be remanded for more than thirty days, even if the nature of the crime is heinous.²⁴⁴ This is a procedural right of the child under section 98 of the CCPAB. Another remarkable, but a delicate approach is the concept of ‘Family Group Conferencing’. Family Group

²³⁸ *The Child Court Procedure, 2015*

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ *ibid.*, p.7.

²⁴² *ibid.*, p.16-18.

²⁴³ *ibid.*, p.18.

²⁴⁴ *ibid.*, s20, p.22.

Conferencing is allowed for children committing a categorical offence of petty misdemeanor or misdemeanor only.²⁴⁵ It is allowed only for the first time offences. After the child pleads guilty, the judge has the discretion to allow or disallow the child for Family Group Conferencing. This constitutes the essential facet of the criminal justice procedure for children in Bhutan. It also lays down appeal as a procedural right mentioning that the matter shall be appealed within ten working days from the date of the judgement. The High Court and the Supreme Court are the last Courts of Appeal.²⁴⁶

5.1.4 The Civil and Criminal Procedure Code of Bhutan, 2001

The Civil and Criminal Procedure Code of Bhutan, 2001(CCPCB) is the main procedural law for judicial process in the country. The Preamble of the Code states that Bhutan establishes the Code to maintain the quality of an unimpaired flowing of heavenly stream of justice. The [Code] is made to resemble the heavenly stream of justice. The Code firmly establishes the concept of ‘equality under the law’, ‘open and fair trial’, and ‘impartiality’ of judicial process. These legal principles have built trust in the judicial process and enhanced the rule of law. The Civil and Criminal Procedure Code like the Constitution of Bhutan, in many instances of criminal procedure, do not qualify children as a [separate person]. However, it mentions about persons lacking the capacity to sue or to be sued owing to physical, mental incapacity or being a minor.²⁴⁷ The Code says that minor persons can be represented by their parents, family member, guardian or the legal representative.²⁴⁸ The other protective regime under this Code allows children to be treated differently than the adults. The CCPCB states that persons with the same criminal offence may be charged and tried together.²⁴⁹ Children mostly, in practice, undergoes an *incamera* trial in the judicial process. This legal safeguard disallows children to be tried together with an adult. Another principle of law enshrined in the CCPCB is the concept of ‘*Nono Contendere*’ or the ‘*Plea of Guilty*’. The Code considers children to be incompetent to plead guilty before the court of law. In such cases, it is only the parents, members of the family, legal guardian or the legal representative that can or [may] make the plea of guilty in the best interest of the child.

²⁴⁵ *ibid.*, s40.2.1, p.35.

²⁴⁶ *ibid.*, s 41.1, p.36.

²⁴⁷ *The Civil and Criminal Procedure Code of Bhutan 2001*, s 148

²⁴⁸ *The Civil and Criminal Procedure Code* s148.1

²⁴⁹ *ibid.*, s194

Chapter 44 of the Code talks about the Juveniles. However, this section preceded the present CCPAB which is in place today. The Code mentions few of the procedural rights which are basic legal rights in any judicial process.²⁵⁰ Many of the rights are brief and succinct.

5.1.5 The Prison Act of Bhutan, 2009

Children in detentions as detainees can be vulnerable. They are, in most cases, susceptible to abuse and violation of their rights.²⁵¹ In this matter, the Prison Act of Bhutan is an important legislation. The [Act] in most, deals with the rights and duties of prisoners in the country and also covers the [detention] of children before conviction.²⁵² A prisoner, for this purpose is defined as any person, whether he or she is convicted, and is placed in the detention in any prison or reformatory training centres.²⁵³ The definition includes children within the term ‘prisoner’. It also defines ‘juvenile delinquent’ as ‘any person who is below the age of eighteen years, and is serving in the detention as a result of an offence’. Moreover, the [Act] mentions about the Youth Development & Rehabilitation Centre (YDRC). The Prison Act states that all national juveniles shall be sent to the YDRC for reformation programs after a Court issues an Order thereto.²⁵⁴ The Act is mainly concerned with the rehabilitative part of the child. In this light, once juveniles are sent into detention facilities for reformation programs, the [Act] intends to review their treatment of care and attention. Juveniles are expected to continue their education in the local schools.²⁵⁵ They are also mandated to be engaged in meaningful vocational works to develop their skills.²⁵⁶ However, another contrasting part of the [Act] is that the juveniles after they attend eighteen years of age, are automatically transferred to normal prisons until they complete their terms.²⁵⁷ This is arguably contradictory.

²⁵⁰ *ibid.*, s 213

²⁵¹ *Office of the Special Representative of the Secretary-General for Children and Armed Conflict*, [website], 2017, <https://childrenandarmedconflict.un.org/effects-of-conflict/children-in-detention/>, (accessed 7 July 2017).

²⁵² *The Prison Act of Bhutan 2009*, s 4

²⁵³ *The Prison Act* s 185 (b)

²⁵⁴ *ibid.*, s143

²⁵⁵ *ibid.*, s144

²⁵⁶ *ibid.*, s145

²⁵⁷ *ibid.*, s146

5.1.6 The Penal Code of Bhutan, 2004

The Penal Code of Bhutan, 2004 (PCB) is another legal framework for protection of CICLs. The PCB aspires to protect the society with enlightened laws, by perpetuating good and chaste actions. It also intends to correct those who have gone wrong and secure justice.²⁵⁸ It offers legal protection to children by making some actions against them as punishable offence.²⁵⁹ Moreover, it identifies juvenile delinquency as a separate chapter.²⁶⁰ Based on the recommendations of the Committee on the Rights of the Child, these provisions were amended in 2011.²⁶¹ The amendment raised the age of criminal responsibility to twelve years.²⁶² Now the law does not hold any child responsible if they are below twelve years of age. For children who are above twelve years of age, found guilty of a sentenceable offence, they may be directed by the court to available facilities and correctional institutions.²⁶³ If damages are payable under the law, the parents or the legal guardian of the juvenile will be directed to pay damages.²⁶⁴ The PCB in most cases, state the substantive rights of the CICLs. After the child attains twelve years of age, the PCB do not differentiate between the offences committed by the child or the adult. The only [protective] provision for them is that they may be given half the sentence.

5.1.7 The Police Act of Bhutan, 2009

The Royal Bhutan Police play a major role in controlling crime and maintaining security. They are mandated by the Constitution to protect and safeguard the society, and maintain law and order.²⁶⁵ In this pursuit to prevent crime and preserve peace, the police need to identify and apprehend those who goes against the laws.²⁶⁶ In such matters, the police possesses the power to effect an arrest [even] children above the age of twelve.²⁶⁷ Arbitrary arrest and deprivation of liberty are prohibited by the laws and

²⁵⁸ *The Penal Code of Bhutan 2004*, p.1.

²⁵⁹ *The Penal Code* s215

²⁶⁰ *The Penal Code* Chapter 9

²⁶¹ Concluding Observations for Bhutan, 2008, Recommendations 71 (c)

²⁶² *The Penal Code (Amendment) Act, 2011*,s 10

²⁶³ *The Penal Code* s116

²⁶⁴ *The Penal Code*, s117

²⁶⁵ *The Constitution of Bhutan* Article 28 (3)

²⁶⁶ The duties of the police in Bhutan ranges from apprehending the suspect to prosecuting them in minor cases.

²⁶⁷ *The Civil and Criminal Procedure Code 2001* s 213

authorities ensure that it is enforced.²⁶⁸ Use of ‘reasonable force’ are also allowed. As for [detainees], they are usually shuttled between the court and the police during the trial.²⁶⁹ The major part of the Act is that it do not allow police to decide cases. They have the power to investigate, but not to decide.²⁷⁰ The courts of law has the final binding power of adjudication. This will help to curtail abitrariness, misuse of power and promote fair trial. However, the Act allows the use of [fetters] by the police. It only states that no children in [civil cases] can be handcuffed.²⁷¹ It means that in a criminal case, handcuffs [can] be used based on reason and necessity. It also allows investigation into any criminal offences committed within the jurisdiction of various police stations.²⁷² For an investigation to be fair and objective, the investigator is mandated to pay special attention to the interests and vulnerability of the accused.²⁷³ When read in consonance with the definition of vulnerability, CICLs are considered as vulnerable children in Bhutan.²⁷⁴

Chapter Six

6.1 Child Justice System of Bhutan- [Functioning Modality of Child Justice in Bhutan]

Child justice in Bhutan, as a [support] to the basic fabric of justice, was an outcome of a serious judicial thought and reflection. Although Bhutan considers children in the nation as persons needing special care and assistance, predating the CCPAB, their rights were not elaborate.²⁷⁵ There were no separate courts for children and they were tried in normal courts.²⁷⁶ They were tried by the same judge, in the same court under the CCPCB. Judges and Bench Clerks dealt with children who came into conflict with the laws in their jurisdictions. The drafting of the Constitution of the Kingdom of Bhutan

²⁶⁸ ‘Country Reports on Human Rights Practices for 2016’, *Bhutan Human Rights Report*, 2016, <http://www.state.gov/documents>, (accessed 23 May 2017).

²⁶⁹ During the trial, as long as detention persists, detainees are brought to the court from the centres and back.

²⁷⁰ *The Police Act of Bhutan 2009* s111

²⁷¹ *The Police Act* s 85

²⁷² *The Police Act* s 92

²⁷³ *ibid.*, s 91(c)

²⁷⁴ RENEW, ‘Study on status of Vulnerable Children’, RENEW Bhutan, 2015, <http://www.renew.org.bt>, (accessed 23 May 2017).

²⁷⁵ Predating 2011, there was no separate child legislation, and most rights of children were reflected in various substantive and procedural laws.

²⁷⁶ The Child Court Procedure states that unless Child Justice Courts are established, normal Courts shall adjudicate child related cases.

and the CCPAB took a great leap to take justice of children forward. To the number of CICLs, the Child Justice Needs Assessment Survey found out that Thimphu was having a comparatively large number of CICLs. The trend was followed by Paro.²⁷⁷ In contrast, Haa District Court was recorded with the least number of child cases. After the careful analysis of both [soft] and [hard] laws on child justice within Bhutan and outside, it can be summated that Bhutanese Child Justice is a [Rights Based] Child Justice Model. As it says, the actions of courts are restricted to their roles within the courts based on various rights of children. Other agencies are mandated to take equal part in the matters of justice for children.²⁷⁸ Prevention of crime is also an important matter. Like the UN Approach to Justice for Children, which allow that children are better served and protected by the justice systems,²⁷⁹ the Child Justice System in Bhutan is guided by the CCPAB in a similar way. The legislations [weighs] the principle of the ‘Best Interest of the child’, fair treatment, prevention of child offences and diversion to facilitate social reintegration.²⁸⁰ While the machinery of justice should protect the [rights] of children that are guaranteed in the Constitution and other laws, implementing these basic premises set in the laws need a robust child justice system. For the cogs of Bhutanese child justice machinery to move, a child above the age of twelve years should have committed an offence.²⁸¹ Then, the roles of police are activated. The police is responsible to assess the child and examine if the child fits within the definition of a child in conflict with the law. If the preliminary issue is affirmative, the police, after recording the details of the child, they may consider for diversion of the child.²⁸² While the Probation Officer is responsible to assess the child, the role of police is limited to tracing the parents or the legal guardian of the child if the child is alone, and assist the Probation Officer in assessment.²⁸³ These requirements are merely reflected in the law. The Probation Officers are yet to be appointed. Ideally, the Probation Officer should

²⁷⁷ Needs Assessment Survey on Child Justice System, *Child Justice System in Bhutan*, Thimphu, Bhutan National Legal Institute, 2013.

²⁷⁸ *The Child Care and Protection Act*, pp.8-11.

²⁷⁹ Guidance Note of the Secretary-General, UN Approach to Justice for Children, 2008, p.1, https://www.unicef.org/protection/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf, (accessed 19 June 2017).

²⁸⁰ *The Child Care and Protection Act*, p. 2-4.

²⁸¹ *ibid.*, s 72

²⁸² *ibid.*, s 83

²⁸³ *ibid.*, s 89

make an Assessment Report. This report will determine whether the child can be prosecuted among other alternatives.²⁸⁴ If the child in conflict with the law has to be prosecuted, and further investigation is necessary, the role of police arises again. The role again is limited to investigations within a very specific time. The police are allowed to examine a person, make a local investigation and an expert investigation if deemed fit.²⁸⁵ The investigations including the questioning of the witnesses should record the statements. The investigations should be completed in a month and it cannot exceed more than two months even if the crime had been heinous.²⁸⁶ This section assist to conduct the proceedings expeditiously and investigate the matter without delay. The CCPAB states that detention pending adjudication shall be for the shortest period of time and used as a measure of last resort.²⁸⁷ These are basic guarantees pending judicial adjudication. If the child is under detention, detention shall be replaced by other alternatives measures if it is possible.²⁸⁸ A child in conflict with the law shall be produced before the court of law within twenty four hours. The course of procedure of justice is handled by the [Judge] during the formal adjudication processes. The following components of judicial apparatus characterise the Bhutanese modality of child justice.

6.1.1 The [Child Bench]

To fulfil the mandates of the CCPAB and other laws, Specialised Benches were established in Thimphu recently.²⁸⁹ During the inauguration, Chief Justice Lyonpo Tshering Wangchuk stated:

‘This reform was initiated to expedite and facilitate a process of speedy, fair and just adjudication of justice by bringing in uniformity, accuracy, precision and informed interpretation of laws’.

However, the Child [Bench] which was instituted very recently²⁹⁰ have the exclusive power to deal with [proceedings] related to children. The jurisdiction of the [Court] is

²⁸⁴ *ibid.*, s 92

²⁸⁵ *ibid.*, s 94

²⁸⁶ *ibid.*, s 98

²⁸⁷ *ibid.*, s5

²⁸⁸ *ibid.*, s101

²⁸⁹ T. Palden, ‘Specialised Benches established at Thimphu Court’, *Kuensel*, 22 December 2016, <http://www.kuenselonline.com/specialised-benches-established-at-thimphu-court/>, (accessed 7 July 2017).

determined based on the cause of action and the place of the residence of the plaintiff.²⁹¹ This is the first initial concrete step taken in the field of administration of child justice in Bhutan.

6.1.2 The Child Court Procedure

The judiciary of Bhutan followed the Civil and Criminal Procedure Code of Bhutan till the CCPAB in 2011. After the enactment of the [Act], the [Act] became the procedural guideline for cases involving CICLs in Bhutan. The CCPAB provides for expeditious judicial proceedings, but do not elaborate extensively on the judicial processes. This leaves room for judges to follow the normal judicial processes.²⁹² In fact many of the judicial processes are interrupted and over passed by absence relevant officials who are yet to be appointed.²⁹³

6.1.3 Separate Child Judge [Child Bench Drangpon]

The most important person presiding the Child Bench is the Child Judge nominated as Child Bench Drangpon.²⁹⁴ A separate Child Bench Judge will help to bring passion, commitment and skills to the job.²⁹⁵ Aside normal duties carried on, the [judge] carries many non-traditional functions, which are both judicial, administrative and most importantly, to make children in conflict with the laws to understand his or her wrong actions. A charismatic [judge] can make their Chamber into a solace of advice and tenderness. This can, uplift the dignity and self esteem of the child and can help to realise his or her own worth. This is the beginning step to rehabilitate a child offender. In Bhutan, it was established that female judge was more apposite to deal with children when compared to a male judge.²⁹⁶ It can be believed that a soft judge was more preferable. In this matter, an appointment of a separate female Child Bench Drangpon is an achievement. A new judge in a new child landscape will help to shed off the traditional roles of a judge and assume a more advanced role. This is expected to bring

²⁹⁰ Business Bhutan, 'Family and Child Bench Inaugurated', 5 July 2017. Available from <http://www.businessbhutan.bt/businessbhutan/family-and-child-bench-inaugurated/>, (accessed 7 July 2017).

²⁹¹ *The Child Care and Protection Act* s 44

²⁹² Need Assessment Survey on Child Justice System, *Child Justice System in Bhutan*, p.11.

²⁹³ Probation Officers and Child Welfare Officers are yet to be appointed.

²⁹⁴ Drangpon [judge] Passang Wangmo is the present Child Bench Judge.

²⁹⁵ E.Cassimatis, *The Juvenile Court Judge*, p.1, <http://www.jcjc.pa.gov/Publications/Documents> (accessed 25 May 2017).

²⁹⁶ Need Assessment Survey, p.13.

changes to the atmosphere of the court by bringing in new expertise and competence within the judiciary.

6.1.4 [Friendliness] of the Court

Traditionally, courts in Bhutan were rigid and tough in their stand. However, with requirement for modern outlook and thinking, friendliness of the courts took a shift.²⁹⁷ For fair administration of child justice, the Beijing Rules enumerates that contact between the law enforcement officials should engender respect for the legal status of the juvenile and promote their well being by avoiding harm.²⁹⁸ In this way, a child friendly court is an essential element to help the child to reform through inclusion, appreciation and motivation. However, a change in judicial character, disposition and strategy involve attitude and mentality changes. From the child friendly court perspective, the children want [judges] to be more frank, polite, with detailed case investigation and free expression of their views.²⁹⁹ This reflects the desire and hinderances for children in consuming justice. Bhutan initiates to implement child rights based approaches in various organisations working with children including the judiciary. In this pursuit, it is necessary to implement and assess the friendliness of the courts with children.

6.1.5 [Judges] sensitised on Child Issues

It is said that:

*‘Judges must in their own hearts and minds have compassion towards the children in their charge, a strong sense of urgency to meet their family needs in a timely way, and a relentless insistence that all involved in the process serve the children well’.*³⁰⁰

Judges who knows about the issues of children and their difficulties [may] be more sensitive to children. As part of the continuing judicial education, children’s rights and issues of child protection for the judges are topical. This was born out of necessity to cultivate a culture of respect for children and provide a [rights] based view, treatment and care. Any judge seating with a child’s case should apply caution and deal the case

²⁹⁷ People friendly court has been stressed as a method to expedite justice.

²⁹⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985, Rule 10.3

²⁹⁹ Need Assessment Survey, p.52.

³⁰⁰ Thomas C. et al., *Judicial Leadership to Ensure Sound Permanency Decisions for Children in Foster Care: Practical Guidelines for Juvenile and Family Court*, National Council for Adoption, 2006, p.2, https://www.adoptioncouncil.org/images/stories/NCFA_ADOPTION_ADVOCATE_NO2.pdf, (accessed 20 June 2017)

more humanely. To fulfil the role of the courts to protect and promote children's rights more effectively, judges should be conversant with children's rights which are fundamental. Aside, normal procedural rights of children, [judges] should be aware of children's civil, economic, social and cultural rights among others. Presently, the right to be treated fairly before the [courts] of law can be said as a most important right. Child Bench, for this matter dwell on the obligation of the State to uphold the rights of CICLs. Sensitisation programmes on [child rights] and [justice] has been an ongoing calibre development program in judiciary. For the judiciary catch up with the international standards and norms on administration of child justice, professionalism of [judges] should intensify rigorously.

Chapter Seven

7.1. Rights of Children in Conflict with Law before the Bhutanese Justice System – A Legislative Achievement?

Children coming in conflict with the law in Bhutan is on rise. Although no comprehensive study is done on children in conflict with the laws, police grapples with the issue every day.³⁰¹ It is affirmed that Bhutanese children commit crimes forced by socio-economic conditions, family relationships, unemployment and peer factors. It was also found out that most children in conflict with the law comes from broken families and uneducated parents. Many of them does not understand the gravity of the offence.³⁰² If children has crossed the age of twelve years, and has committed an offence, courts become the final arbiter of the law.³⁰³ [General] rights of children are expanding today and so are the rights of children in conflict with the law. This has necessitated changes both in the legislations and outlooks. Among many other legislations, the CCPCB, CCPAB and the Child Court Procedure are the main legal instruments that enumerates various procedural and substantive rights of CICLs. For this matter, the rights of CICLs are divided into pre-trial rights, rights during the trial and post-trial rights.³⁰⁴ These are basic rights for any offenders, but more categorically important for a child. The CRC mentions that the child by reason of their physical and

³⁰¹ Youth Development Fund, 'Tracer Study on Children in Conflict with the Law', *Youth Development Fund Report*, 2013, <http://www.bhutanyouth.org>, (accessed 26 May 2017).

³⁰² Youth Development Fund, 'Tracer Study on Children in Conflict with the Law'.

³⁰³ Placement of children under the YDRC takes place only with the Order of the Court.

³⁰⁴ These rights are specified as three bundles of rights in the Child Court Procedure.

mental immaturity needs adequate safeguards including appropriate legal protections.³⁰⁵ The Beijing Rules mentions that basic safeguards should be guaranteed in all stages of judicial proceedings.³⁰⁶ These bundle of rights offer protection against [arbitrary] actions and unreasonable [dealings] from different [justice] agencies that handle CICLs. These rights encapsulate the principle of the ‘best interest of the child’ as a mandatory legal requirement in the ‘due process’.

7.1.1 Pre-Trial Rights of CICLs

Pre-trial rights are basic human rights before the beginning of the judicial proceedings. Obviously, pre-trial rights has to be understood as a ‘protection’ from law enforcement agencies - to treat the CICLs with appropriate care and assistance. So these rights form the basic ‘criminal law enforcement standards’ in the administration of child justice. Among other safeguards, these rights ensures child safety, curtail violence and harsh treatment from law enforcement personnel including [arbitrary arrests]. Arbitrary arrests as prohibited in other child rights instruments, is outlawed by the Constitution and other laws in the Kingdom of Bhutan.³⁰⁷ These [provisions] reflect the protection of basic human and child rights in the country. Most importantly, no child can be subjected to arbitrary arrests, detention and deprivation of liberty.³⁰⁸ Informing them on the grounds of arrest is another right. These seemed to have been generally followed.³⁰⁹ However, CICLs [were] not explained on various other pre-trial rights by the police. If arrest, detention and deprivation of liberty of CICLs are necessary, the law requires it to be used as a method of [last resort] and for the [shortest possible time].³¹⁰ Such rights curtails the possible abuse of power by law enforcement officials and help to uphold the respect for basic human rights of CICLs. The police personnel are sometimes [least] careful to strictly comply with these rights. In addition, privacy of children during inquiry and investigation are of fundamental importance.³¹¹ This is reflected both in the CCPAB and the Child Court Procedure. To uphold privacy, frisking and searching are

³⁰⁵ *The Convention on the Rights of the Child*, Preamble, para.9.

³⁰⁶ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, Rule 7

³⁰⁷ *Child Court Procedure 2015*, p.16.

³⁰⁸ *ibid.*, s10.1

³⁰⁹ Child Justice Needs Assessment Survey.

³¹⁰ *Child Court Procedure* s10.1.1, *Child Care and Protection Act* s.5

³¹¹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, Rule 8

carried out by persons of the same sex.³¹² There are instances of arrest by the police without warrants with police officials having no knowledge about the rights of the accused.³¹³ Low legal literacy of police personnel, little information about basic [rights] and non - exercise of due diligence are other attributable factors. Another elementary condition for prevalence of pre-trial rights CICLs is the absence of torture, cruel, inhuman or degrading treatment or punishment.³¹⁴ However, policing methods such as hard physical exercises, use of filthy languages and canning are derogatory methods of disciplines [action] in Bhutanese detention facilities.³¹⁵ Pre-trial rights of CICLs are not very pervasive. Legal assistance and contact with the family are precondition for fair trial and just treatment in the detentions. While contact with the family promotes wholesome development of the child, legal assistance through a legal counsel ensure fair legal representation. This is guaranteed as the ‘Principles of State Policy’ under the Constitution of Bhutan.³¹⁶ However, many children are not represented by a legal counsel. Legal representation is a personal choice of the accused.³¹⁷ No studies are carried on the Rights of Children in Conflict with the Laws. Many children may not be aware about the right to ‘remain silent’. The Beijing Rules uses the term ‘avoid harm’ to mean that CICLs should be protected from all possible harms at the first instance.³¹⁸ Such initial contact may influence the attitude of the juvenile very profoundly. In order to treat them well, presence of compassion and kindness are important at the initial contact of children with the law enforcement agencies.³¹⁹

7.1.2 Rights of CICLs during the [Trial]

The legal procedural norms dictate that any [person] accused of a crime shall be produced before the court within twenty four hours after arrest.³²⁰ This ensure speedy justice and, if the grounds of arrest are trivial, the CICL has the scope for release. The right to produce the CICL within the stipulated time is not seriously observed. Many

³¹² *Child Court Procedure*, s 10.1.7

³¹³ Child Justice Needs Assessment Survey, p.60.

³¹⁴ *The Child Care and Protection Act* s73

³¹⁵ Child Justice Needs Assessment Survey, p.64.

³¹⁶ *The Constitution of Bhutan, 2008* Article 9(6)

³¹⁷ Child Justice Needs Assessment Survey, p.61.

³¹⁸ Commentary to the Beijing Rules, p.6.

³¹⁹ *ibid.*

³²⁰ *The Child Care and Protection Act* s77

CICL detainees were left beyond the stipulated procedural time frame.³²¹ Bhutan follows the criminal legal doctrine of ‘presumed innocent until proven guilty’. This presupposes the prosecution to prove the case beyond reasonable doubt. A person can be only sentenced after exhausting the due process of the law, the case is proved beyond reasonable doubt and the suspect is pronounced guilty by a competent court. This represent the element of ‘fair trial’ and ‘fair’ judicial process. The CCPCB states that no person shall be tried before the ‘ad hoc tribunals’. All citizens are entitled to be tried by ‘ordinary courts’ of law.³²² The Beijing Rules under [Rule 20] speaks of ‘undue delay’ of the judicial proceedings: that matters should be solved expeditiously. In this light, the right to have the matter determined without delay by a competent, independent and impartial judicial authority is a right of the CICLs. The privacy of the CICLs are maintained by hearing their cases *in-camera* in the Chamber of the judges.³²³ *In-camera* trials helps to allow maximum participation from the child. ‘Fear’ of CICLs to appear before the courts coupled by other barriers still remains in the Bhutanese justice system.³²⁴ But these barriers are partly removed in the Child Bench. The absence of masks in the court room is one.³²⁵ In Bhutan, all courts follow Dzongkha³²⁶ as the medium of written and spoken communication. Different regions in the country speaks different dialects. And moreover, the process of the court, and the languages used are complex. This is compounded by presence of ‘legal jargons’ and ‘legal terminologies’ that complicate the matter further. A right to interpreter is simply enshrined in the laws.³²⁷ This right is mostly unemployed. When it comes to conveyance, it states that a child should be transported in separate conveyance.³²⁸ This give safety and security to the child during transportation. Legal aid and legal counsel are cardinal element in any legal system. This is also resonated in our justice system. It states that a child shall be

³²¹ Child Justice Needs Assessment Survey, p.62.

³²² *The Civil and Criminal Procedure Code* s 3.1, p.2.

³²³ In the absence of separate Child Justice Court, the normal courts normally hears the case of the child in the Chambers of the Judges.

³²⁴ The structure of the normal courts are commanding: that induce obedience and fear.

³²⁵ Business Bhutan, ‘Family and Child Bench Inaugurated’, 5 July 2017. Available from <http://www.businessbhutan.bt/businessbhutan/family-and-child-bench-inaugurated/>, (accessed 7 July 2017).

³²⁶ Dzongkha is the national language of Bhutan.

³²⁷ *The Child Care and Protection Act* s 144

³²⁸ *Child Court Procedure* s11.1.6

provided with legal aid from the State if the child or the parents/guardian of the child is an ‘*indigent*’ person.³²⁹ The word ‘*indigent*’ is not defined in any of the laws. General legal conscience are applied. When the child attends the judicial proceedings, they are normally accompanied by their parents, member of the family, legal guardian or a legal representative. Official information on the stages of the hearings are provided to the person accompanying the child. The judge, during the judicial proceedings normally assess their age, mental and emotional maturity, antecedents and circumstances.³³⁰ It also states that if it is in the best interest of the child, the court may conduct *in-situ* proceedings.³³¹ This right depend on the seriousness of the case; the court need to record the reasons in writing.³³² Identity of the child is an important personal matter. The courts are generally not permitted to publish any of the judicial proceedings in any newspaper, magazine or transmitted through audio-visual, electronic medium in any form which may disclose the identity of the child.³³³ When it comes to Reports of any inquiry regarding the child, they do not reveal the name and address of the child to avoid identification. This, moreover protect the best interest and the privacy of the child.³³⁴ Mass media is not encouraged to publish negative news on any judicial proceedings and they are required to assist in disseminating the rights of children in the country. During the judicial process, the courts are encouraged to decriminalise children.³³⁵ And the trial shall be conducted in an atmosphere of understanding which allows the child to participate.³³⁶ The judge must help to achieve these rights of the child during the trial by providing them information, and assisting the child during the judicial processes.

7.1.3 Post-Trial Rights

Post-trial rights are those rights of CICLs that arise after the trial. These rights are drawn from various child rights instruments and reflected in the CCPAB and the Child Court Procedure. Post-trial rights are mostly substantive rights intended to promote their

³²⁹ *The Child Care and Protection Act* s180

³³⁰ *Child Court Procedure*, p.6.

³³¹ In-situ proceedings are hearings initiated out of the Court premises. These are not generally carried out.

³³² *The Child Care and Protection Act* s 45, p.13.

³³³ *ibid.*, s 29

³³⁴ *ibid.*, s 30

³³⁵ *ibid.*, s 20

³³⁶ *The Beijing Rules* 14.2.

well being and encourage them to reintegrate into the society as productive citizens. These are means of support and welfare for children in conflict with the laws. Post-trial rights of CICLs arises after the court has given a judgment in the matter. Their rights generally associate with the the follow up of the court's verdict. It is normally about rehabilitation and social reintegration of the child. Social reintegration through rehabilitation programs is the ultimate aim of the Bhutanese child justice system. Post-trial rights aims to achieve decriminalisation and reduce social stigma of the child in the society. After disposition, a child who is a recidivist or who has been convicted of a very serious offence, is mandated to be placed in closed facilities.³³⁷ These measures indicate that, placement of children in various homes and rehabilitation apparatus are necessary end of the law. Alternative sentences and non-custodial measures are used only if the cases are trivial and non-harming.³³⁸ In such instances, post-trial rights appear as vital matter. Conclusively, post-trial rights serve as the foundation of legal protections to facilitate proper care, treatment, education, training and rehabilitation as the ultimate goal. Most of the rights are facility centred, and endeavours to provide standard treatment and care. Study has found out that children are re-arrested after serving the rehabilitation facilities.³³⁹ If the court issues an Order to rehabilitate the child in the YDRC, the children are placed in YDR Centre in Tsimasham in Chukkha. The YDRC was established in 1999.³⁴⁰ The Tracer Study has been the only comprehensive Study on the rehabilitative and reformatory services provided to children after the trial. The report portrays about how post-trial rights are guaranteed in the rehabilitation centres. Recently, a dormitory for girls was inaugurated in 2016 for the girl residents.³⁴¹ Interestingly, post-trial rights of children in conflict with the law are categorically managed by the Royal Bhutan Police (RBP). Most services are corrective than preventive.³⁴² The rights provided in the CCPAB are general legal requirements in any

³³⁷ *ibid.*, s 226

³³⁸ *ibid.*, s 162

³³⁹ Youth Development Fund, 'Tracer Study on Children in Conflict with the Law' p.5.

³⁴⁰ *ibid.*, p.5.

³⁴¹ Save the Children, 'Rehabilitation facility for Girl's at Youth Development and Rehabilitation Centre (YDRC) opened', *Thimphu*, 2016, <https://bhutan.savethechildren.net> (accessed 28 May 2017).

³⁴² Youth Development Fund, 'A Strategic Plan for the Child Protection and Care Services (CPCS) for Youth Development Fund' *Thimphu, Bhutan*, 2014, <http://www.bhutanyouth.org/>, (accessed 28 May 2017).

residential facility. Aside CCPAB, the CCPRR 2015 states about various residential rights for children in conflict with the laws.³⁴³ It resembles almost all the principles reflected in the norms and standards of administration of juvenile justice. The foremost post-trial right is the right to appeal. As per the law, any child who has been sentenced have the right to appeal within ten days. If the right is not used within the time frame, the judgement of the court become final and binding.³⁴⁴ Other rights are generally attached with treatment of children in the residential premises. Separate facilities for children are a necessary legal requirement. Keeping the male and female in separate facilities, adequate medical care, general counselling to the children residents are commands of the law. Parents and legal guardians have right to access the child. It also mandates that when the child is in the residential facilities, the child should be treated with no cruelty; harsh and degrading treatment. Invasion of children's privacy is an offence under the law.³⁴⁵ These rights provides a systemic protection from stigmatisation of the child after the children completes their residential terms. Regrettably the residents opined that services are acceptable, yet not typically excellent.³⁴⁶ It needs more effort, and mainstreamed collaborative approaches. Many of these rights are still echoed among the law books and are yet to be implemented.

Chapter Eight

8.1 Judicial Process for the Administration of Child Justice in Bhutan. [How are Rights of Children in Conflict with the Law Enforced through a Judicial Process]

The pursuit of justice calls for vision, unity of thought, humanism and constant vigilance.³⁴⁷ The judiciary of Bhutan believes that administration of justice should constantly evolve to suit the changing times. It has to continue reviewing its judicial processes to ensure that the process of delivery of justice are through equitable and simple judicial remedies.³⁴⁸ His Majesty has constantly reminded that Bhutan should improve its legal system with appropriate reforms and proactive initiatives. However, he

³⁴³ *The Child Care and Protection Rules and Regulations 2015*, p. 44.

³⁴⁴ *Child Care and Protection Act* s176

³⁴⁵ *ibid.*, s219

³⁴⁶ *The Child Justice Needs Assessment Survey*, p. 45.

³⁴⁷ The Judiciary of Kingdom of Bhutan, 'Annual Report', *Royal Court of Justice, Thimphu*, 2016, <http://www.judiciary.gov.bt/publication/ar2016.pdf>, (accessed 29 May 2017).

³⁴⁸ *ibid.*

emphasised that essence must remain traditional and Bhutanese.³⁴⁹ With the vision to improve the judicial services to serve the society more effectively, the [Child Bench] was instituted with other Specialised Benches in Thimphu.³⁵⁰ Statistically, the Royal Courts of Justice received over 49 family and child related cases in 2016.³⁵¹ At present, child cases are not as frequent as other cases are. However, to deal with child cases separately with improved judicial approach, the Child Bench was put in place. As said, this is aimed at bringing uniformity, accuracy, predictability of the judgment, and the interpretation of the laws. The judiciary believes that justice requires efficient judicial process to serve the cause of justice.³⁵² The judges are expected to carry out their roles and duties as per their established laws and procedures.³⁵³ They are also accountable and answerable. With the advancement of the society, the judiciary has carried out procedural reforms, improved access to justice, expedited the judicial processes to avoid unwarranted delays. To improve the competency of judges, judges are trained on child friendly court procedures. The training gives new dimensions and an out of the box thinking for the judges. This would help the judge to understand the psychological, social, emotional and cognitive situations of the child more better.

The Civil and Criminal Procedure Code, the CCPAB, and the Child Court Procedure are three main legal instruments on the administration of child justice. These legal instruments elaborate on the judicial processes on the administration of child justice. Therefore, the judicial processes on the administration of child justice is an amalgamation of the processes reflected in the CCPAB, the Civil and Criminal Procedure Code and the Child Court Procedure.

8.1.1 The Registration of the Case

The registration of the case is looked after by the Registry of the Court headed by a Court Registrar.³⁵⁴ The Registry is open to register the cases from 0930 hours to 1030 hours in the morning.³⁵⁵ The complaints are usually recorded from 0900 hours to 0100 hours. This is normally in a civil case. In cases involving children in conflict with the

³⁴⁹ *ibid.*

³⁵⁰ The Specialised Benches were inaugurated on 21 December, 2016 in Thimphu.

³⁵¹ The Judiciary of Kingdom of Bhutan, 'Annual Report'.

³⁵² *ibid.*

³⁵³ Judicial Responsibility and Accountability Regulation, 2017, s 2(e)

³⁵⁴ Registry of the Court act as one stop contact points for complaints.

³⁵⁵ The Royal Courts of Justice, [website] <http://www.judiciary.gov.bt>, (accessed 29 May 2017).

law, based on the merit of the case, the police registers the case. If the case is a very serious one, the Office of the Attorney General (OAG) of Bhutan normally prosecute it. The OAG Act states that the office would prosecute the criminal cases as per their mandates when referred to by the agency.³⁵⁶ The police normally refers the case to the OAG if the case is a serious one; which is above the mandate of the police to prosecute.³⁵⁷

8.1.2 Arrest of a Child

Upon obtaining an arrest warrant from the court, every police person has the power to arrest. However, the police can also arrest without a warrant if there is a reasonable ground that the person has just committed or is committing an offence or is wanted for a criminal offence.³⁵⁸ In case of arrest of a child, abiding by various international norms and standards and provisions under the national laws, arrest of a child is [used] as a measure of last resort. The police are mandated to work with the child without affecting arrest. As per the law, a child can be only arrested if it is in the interest of justice and security. The broad scope of ‘interest of justice and security’ [can] include many things. This gives a scope for wide interpretation of the ‘terms’. In the broadest of terms, handcuffings [are] allowed for a child above 12 years of age.³⁵⁹ The handcuffs [can] be used in ‘exceptional circumstances’. ‘Exceptional circumstances’ as mentioned in the CCPAB is not very defined. In one way or the other, if the person arresting the child, finds any circumstances which in his opinion is exceptional, it can lead to handcuffing. As per the mandates stated in the CCPAB, a child soon after arrest, should be placed with the Probation Officer for assessment. After the assessment, the [Probation Officer] should determine if the child can be diverted, released into parental care, bailed, or if the child should be placed in the facility.³⁶⁰ The parent[s] of the child shall be informed about the assessment. This is a legal requirement. After the assessment, the Assessment Report will indicate if formal prosecution of the CICL has to take place.³⁶¹ The copy of the Report is also forwarded to the Court.

³⁵⁶ *The Office of the Attorney General Act of Bhutan, 2015* s 16

³⁵⁷ *The Royal Bhutan Police Act* s71

³⁵⁸ *ibid.*, s 69

³⁵⁹ *Child Care and Protection Act* s113

³⁶⁰ *ibid.*, s 86

³⁶¹ *ibid.*, s 92

8.1.3 [Investigation] of the Child

If in the interest of justice, any investigation is required, it is carried by a Police Officer or any Investigating Officer. Investigations are carried on based on ‘reasonable suspicion of an actual or possible commission of an offence’.³⁶² For a credible investigation, logical sequence of collection of physical evidence and questioning of witnesses has to be complete.³⁶³ Criminal investigation should complete in one month. If the investigation cannot be completed in a month, the Investigating Officer shall produce the child before the Court and obtain additional time for investigation. The additional time should not exceed one month.³⁶⁴

8.1.4 [Detention] of CICL before the Trial

The Havana Rules states that detention before the trial should be avoided to the ‘extent possible’. It allows detention before trial to be limited to ‘exceptional circumstances’.³⁶⁵ However, the [Rules] does not forbid the use of detention before the trial, but mentions that measures should be exhausted to replace detention by alternative means.³⁶⁶ Detention before the trial occurs when the child under arrest is not released on bail and is kept in the ‘remand home’ or the place of safety during the inquiry or the adjudication.³⁶⁷ However, detention is only allowed upon the authorisation from a court of competent jurisdiction.

8.1.5 Production of CICL before the [Court]

It is extremely important for every CICL to obtain judgment within a reasonable period of time for the good administration of justice.³⁶⁸ Based on the principle of ‘expeditious judicial proceedings’ and avoidance of ‘undue delay’, the child has to be produced before the Court within twenty-four hours after the arrest. This is procedural requirement for any arrests under the Bhutanese procedural and criminal law. However, this excludes the time taken for the journey from the place of arrest and [government

³⁶² *The Police Act of Bhutan* s 91

³⁶³ K.Wangdi, ‘Investigation of criminal offences in Bhutan’, p.46.

³⁶⁴ *The Child Care and Protection Act* s 98(b)

³⁶⁵ The Havana Rules, Rule 17.

³⁶⁶ *ibid.*

³⁶⁷ *The Child Care and Protection Act* s122

³⁶⁸ The European Court of Human Rights, *Guincho v. Portugal*, judgment, 8990/80, 10/7/84 as cited in E. Dinjens and W. Henning, *Undue Delay in the case-law of the European Court of Human Rights*.

holidays].³⁶⁹ With this provision, the [time] to produce the child before the court of law may still remain stretchable with the [amount] time taken during the journeys. By law, the Court is mandated to convene the [Preliminary Hearing] within ten days from the registration in a criminal case.³⁷⁰ The CRC states that every child deprived of liberty shall have right to prompt access to legal and other appropriate assistance.³⁷¹ So proceedings before the court should be considered as assistance rather than hearing to start a prosecution against a child. This is certainly an important aspect of protecting children's rights in the administration of child justice. In this pursuit, the court begin with the preliminary inquiry before the formal judicial proceedings. The inquiry assist the court to assess if the child can be possibly diverted; see if the case merit judicial proceedings or if the child can be released.³⁷² This also help to establish sufficient guilt. If there is more than one child suspect, the court may carry out a Joint Preliminary Inquiry or Separate Inquiry if the co-accused is not a child.³⁷³

8.1.6 Formal Court Proceedings

As a matter of fact, formal adjudication proceedings begin only after the court complete the inquiries. Adjudication marks the transition of the case into a formal legal process. The adjudication proceedings normally are [informal]. Trials are held *in-camera*. The judges uses their official Chambers as the trial room.³⁷⁴ This allow maximum participation from the child. The Chambers of judges provide an amicable and ambient atmosphere. Proceedings normally begins with the judge informing the children about the nature of the allegations, their rights and the process of the courts during the miscellaneous hearing.³⁷⁵ Conventionally, the hearings go uninterrupted unless a motion for adjournment is moved by any of the parties. If the child pleads guilty, and the prosecution proves the case beyond reasonable doubt, the hearings may conclude summarily. This is called as summary adjudication.³⁷⁶ If the child do not accept the

³⁶⁹ *The Civil and Criminal Procedure Code* s 188.1

³⁷⁰ *ibid.*, s 81.2

³⁷¹ *The Convention on the Rights of the Child*, Article 37(d)

³⁷² *The Child Care and Protection Act* s 124

³⁷³ *ibid.*, s 131

³⁷⁴ This method was followed in adjudication processes.

³⁷⁵ *The Judiciary of Kingdom of Bhutan*, [website], <http://www.judiciary.gov.bt/publication/judiciary.pdf>. (accessed 9 July 2017).

³⁷⁶ *The Child Care and Protection Act* s 147

charge, the case cannot be summarily adjudicated. Parents, legal guardian or the legal representative are generally expected to accompany the child. If the judge is satisfied that attendance of the child is unnecessary, the judge can dispense with the attendance of the child. Police are mandated to dress in the national dress instead of the regular uniform.³⁷⁷ This informal apparatus is designed to achieve a child friendly court process. The Child Court Procedure states that formal court processes include:³⁷⁸

- a) The Preliminary Hearing,
- b) Rebuttal Hearing,
- c) Submission of Evidence,
- d) The Closing Argument and
- e) The Award of the Judgement.

8.1.7 Separate Hearings

If there are two accused, which one is not a child, for the purpose of fair and just trial, the Court has to conduct a Separate Hearing for the child. This can be also based on the well being of the juvenile as the paramount factor in consideration of his or her case.³⁷⁹ Unlike adults, absence of separate hearings and child friendly features can be intimidating for children. Such features can enable children to freely participate in the judicial proceedings.³⁸⁰

8.1.8 Legal Representation and [Legal Aid]

The commentary to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice mentions that legal counsel should be seen as a general physiological and emotional assistance to the child.³⁸¹ Legal representation and legal aid are an important procedural right to enable the child to enjoy his or her right to be heard.³⁸² Bhutanese legislations also complies with child's right to representation and legal aid. The right to legal representation is generally exercised by the child through the legal

³⁷⁷ *Child Court Procedure* s 23.2.5

³⁷⁸ *ibid.*, p.26-29.

³⁷⁹ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, 1986, Rule 17(d).

³⁸⁰ European Union Agency for Fundamental Rights, *Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, Luxembourg, 2015, p.32.

³⁸¹ Commentary to Rule 15.1 of the UN Minimum Standard Rules for the Administration of Juvenile Justice.

³⁸² European Union Agency for Fundamental Rights, *Child -friendly justice*, p.21.

guardian, or through the his or her parents. However, legal aid as a constitutional guarantee to secure justice is in infancy. Although legal aid is seen as an inalienable element for ‘fair’ and ‘just’ legal process, absence of these basic legal amenities will deprive children the opportunity to secure justice.³⁸³ In most criminal cases, although the law states about the the provision of legal aid, most parties carry on a *prose* legal representation before the courts. In the similar way, most children are unrepresented by their legal counsels.³⁸⁴ This leaves a serious gap between the written law and the discharge of the legal mandates under the law.

8.1.9 [Disposition]

The guiding principles in adjudication and dispositions mandates that the authorities making the decisions shall weigh between the gravity of the case; the needs of the juvenile and the interest of the society. It states that the well-being of the child should be the paramount interest.³⁸⁵ Based on the accepted international standards and norms, the roles of [judge] in the administration of child justice are expanding. The judge has to take into account any information on the age, that include emotional, mental and intellectual maturity of the child. It has to consider the antecedents and circumstances to decide in ‘the best interest’ of the child. This can help to reduce the sentence, and offer alternative sentencing methods.³⁸⁶ Bhutan has also reflected the guiding principles of adjudication and dispositions similar to the UN Standard Minimum Rules for the Administration of Juvenile Justice.³⁸⁷

8.2 Award of judgement

The judgement serves as final expression of the law with a detailed information of the parties, background of the case, charges, date, number of hearings conducted, court findings including evidences, detailed arguments of the parties, summary of the court findings, ratio decidendi and the Order of the Court.³⁸⁸ No judgement can be passed

³⁸³ J. Norbu, ‘Specific Justice Needs of the Under-privileged People: Legal Services and Legal Aid interventions’, <http://www.saarclaw.org/uploads-saarc/publications-images/1018-FILE.pdf>, (accessed 30 May 2017).

³⁸⁴ The Child Justice Need Assessment Survey, p.61.

³⁸⁵ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, Rule 17.

³⁸⁶ *The Child Care and Protection Act* s157

³⁸⁷ *ibid.*, s 176

³⁸⁸ The Judiciary of Kingdom of Bhutan, ‘*Annual Report*’, 2016, p.22.

<http://www.judiciary.gov.bt/publication/ar2016.pdf>, (accessed 30 May 2017).

without reasons.³⁸⁹ Based on the operative part of the judgement, judgement is expected to be enforced. Non-enforcement of the judgement may invite ‘contempt of the court’ proceedings.³⁹⁰ If so, it carries penal sanctions as per the Penal Code. However, the judgement from the lower courts can be appealed to the higher courts within ten days from the date of award of the judgement. The appeal can be made by the child himself or by any person or institutions on the behalf of the child.³⁹¹ If the appeal is not done within this time frame, the judgement stands final.³⁹² So in this context, it takes a very formative legal ruling.

8.2.1 Alternative Sentencing

Progressive criminal law advocates for the use of non-institutional treatment over institutional treatments. It is believed that children are more vulnerable to negative influences; the influences are more acute compared to adults.³⁹³ The philosophy reflected in the ‘Minimum Rules and Standards for the Administration of Juvenile Justice’ mentions that a child cannot be incarcerated unless there is an appropriate response. In the similar way, Bhutan has also kept the open space for alternative sanctions prior to the judgement.³⁹⁴ ‘Alternative sentencing’ gives way to apply non-custodial measures and restrict institutionalisation as a measure of last resort. Typically, alternative sentencing methods in Bhutanese child justice system include the payment of compensation, community service, and diversion among others. Interestingly, the objectives of the child justice system is to provide diversion and alternative sentencing in lieu of arrest, prosecution, conviction and imprisonment wherever it is appropriate.³⁹⁵ Community service is a classical sentencing method reflected in the CCPAB. In community service, it is to be implemented by involving a child to carry a community service. This sentencing methods are available for few categorical offences only.³⁹⁶ The CCPAB however, does not specify the ‘duration of the service’ nor what ‘work’ would

³⁸⁹ The Judiciary of Kingdom of Bhutan, ‘*Annual Report*’, p.22.

³⁹⁰ *The Penal Code of Bhutan* s 368

³⁹¹ *ibid.*, s176

³⁹² *ibid.*, s 177

³⁹³ Commentary to Rule 19 of the UN Standard Minimum Rules for the Administration of Juvenile Justice.

³⁹⁴ *The Child Care and Protection Act* s 174(d)

³⁹⁵ *ibid.*, s 15(d)

³⁹⁶ If the child has committed a heinous crime of third degree and above, he cannot do community service.

constitute the community service. If the child in conflict with the law is not a habitual offender nor a recidivist, and the offence he has committed is fourth degree and below, then child can alternatively pay *Thrimthue*.³⁹⁷ This is a yellow line between protecting the society on one hand and implementing the flexible non-institutional methods on the other. If the child has damaged the properties, the child, the parents or the guardian may have to restitute the property.³⁹⁸ [Cautioning] the child offender by allowing the child to offer an apology to victim is another alternative sanctioning method. In this offer of apology, both the parties should agree to adopt this reconciliation means.³⁹⁹ These alternative practices enumerated in the laws are ‘promising options’ to help the child to reform through application of non-custodial approaches. These judicial but non-custodial interventions help to secure justice for children through alternative measures that are oriented to positive culture and child revitalisation.

8.2.2 Appeal

The Judiciary of Bhutan rest on the noble edifice of the Rule of Law and unwavering commitment to render justice. The institution takes paramount duty to ensure that falsehood do not prevail over truth and justice. Thus justice cannot be denied.⁴⁰⁰ Article 23 of the Constitution of Kingdom of Bhutan states that all persons have right to initiate appropriate proceedings in the Supreme Court or High Court for the enforcement of the rights. In the same line, the child has the right of appeal within ten days. After appeal, the case has to be reviewed without undue delay.⁴⁰¹ With a progressive judiciary, it is the perpetual quest of the judiciary to dispense justice more swiftly, fairly and transparently.⁴⁰² However, to avoid unnecessary litigations and uphold the legitimacy of the appeal system, appeals are streamlined.⁴⁰³ If no appeal is made within ten days, then the judgement becomes final and binding.⁴⁰⁴ The appellate court, after a judicious study

³⁹⁷ *Thrimthue* is the colloquial term for the compensation paid in lieu of the sentence.

³⁹⁸ *The Child Care and Protection Act* s173

³⁹⁹ *ibid.*, s184

⁴⁰⁰ The Judiciary of Bhutan publication [website], <http://www.judiciary.gov.bt/publication/jrhm.pdf>, (accessed 24 June 2017).

⁴⁰¹ *The Child Court Procedure* s 41

⁴⁰² Royal Courts of Justice Bhutan, [website], <http://www.judiciary.gov.bt/index.php>, (accessed 24 June 2017).

⁴⁰³ The Judiciary of Kingdom of Bhutan, ‘*Annual Report*’, 2014, <http://www.judiciary.gov.bt/publication/ar2014.pdf>, (accessed 30 May 2017).

⁴⁰⁴ *The Civil and Criminal Procedure Code of Bhutan* s 96.5

of the case may reverse part of the the judgement, order a new proceeding, remand it to the lower court with instructions, or uphold the judgement *in toto*.⁴⁰⁵ When the case reaches to the High Court and the Supreme Court, they only review the legality of the case and does not entertain fresh evidence and submissions. However, it was resolved that it has become necessary to put out an exception to the general principle of procedure which states that no fresh evidence on appeal can be submitted. The judiciary being aware of the current scenario of *pro se* litigants allow evidences to be submitted on appeal with a minor change in procedure as hearing of the case de-novo by the first appeal court.⁴⁰⁶ While the case is on appeal, the court put on hold any payment of damages and compensations. As a matter of judicial principle, once the case has been appealed to the higher court, there cannot be recourse to the lower court. Recourse to the lower court can occur only if the appellate court remands the case back to the lower court.⁴⁰⁷ The Supreme Court is the highest court of appeal. As a matter of special importance, cases involving children should merit respect and committment from the Prosecution, the Royal Courts of Justice and the Royal Bhutan Police to uphold the human dignity and rights of children in conflict with the laws.

Chapter Nine

9.1 The concept of Restorative Justice for Children in Bhutan [The understanding of child crime and justice]. How Restorative Practices are enforced as component of administration of child justice.

Internationally, customary methods of dispute resolutions have transpired into alternative responses to crime and social disorder.⁴⁰⁸ This method is called as restorative justice. In 2002, the United Nations Economic and Social Council adopted a resolution containing a set of *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.⁴⁰⁹ These principles provides guidance and important insights to policy makers and criminal justice officials in making restorative justice a response to crimes

⁴⁰⁵ *ibid.*, s 111

⁴⁰⁶ 'Annual Report', 2015, <http://www.judiciary.gov.bt/publication/ar2015.pdf>, (accessed 25 June 2017).

⁴⁰⁷ *The Civil and Criminal Procedure Code.*, s 109.4

⁴⁰⁸ *Handbook for Restorative Justice Programmes*, UNODC, Vienna, United Nations Publication, 2006, p.5.

⁴⁰⁹ *ibid.*, p.2.

in the society.⁴¹⁰ As per these *Basic Principles*, ‘restorative justice’ is defined as *any programme that uses restorative processes and seeks to achieve restorative outcomes*. While restorative *processes* are any process in which the victim and the offender, with other individuals or community members, where appropriate, participate to resolve the matters arising out of the crime.⁴¹¹ It is stated in the Annual Report of the Judiciary of Bhutan, that courts consider the innovative interpretation and application of laws to reduce prison and detention centre populations. It also implores that courts must periodically explore to find alternatives to imprisonment and innovative application of enhanced sentencing.⁴¹² Traditionally, restorative justice revolves around the ‘parties’ and the community in large. It helped to restore relationships, build trust and credence in the community. Bhutan is rich in traditions. Our traditions, legal norms and customary decision making practices are engraved and crafted in our society. This reflects the steeped practice of trust, community vitality and relationship building. These practices are reinforced by revitalising mediation,⁴¹³ and emphasising on restorative justice practices for children in the criminal justice system. Conclusively, based on accepted international norms and traditional practices, ‘*Restorative Justice*’ can be alternatively defined as a process of resolving an issue by redressing the needs of the victims, holding the offender accountable by engaging the community.⁴¹⁴ In Bhutan, children as receiver of rights are on change. Particularly, child justice in Bhutan has received utmost attention in recent years. This has led to changes in judicial procedures and adopting child friendly justice methods to incorporate international principles.⁴¹⁵ The CCPAB enumerates various restorative justice practices to offer an offender directed and victim-centred justice. It endeavours to decriminalise children and invoke restorative justice practices by allowing all institutions working for children to be guided by principles of decriminalisation, diversion and restorative justice. Restorative justice practices reflected in the laws mainly includes victim-offender mediation, community services, family group conferencing, payment of compensation, restitution

⁴¹⁰ *ibid.*

⁴¹¹ *ibid.*

⁴¹² ‘*Annual Report*’, 2016, <http://www.judiciary.gov.bt/publication/ar2016.pdf>, (accessed 25 June 2017).

⁴¹³ Training on mediation practices has covered all local leaders in the country.

⁴¹⁴ *Handbook for Restorative Justice Programme*, 2006, p.5.

⁴¹⁵ *The Child Care and Protection Act and the Child Court Procedure* are two most important legislative changes.

of property and apology to the victim. Among them, peer mediation methods are also encouraged in Bhutanese schools.⁴¹⁶ These practices are considerably helpful in non-serious criminal cases. Aside that, family and community relationships are still a deep social bond in Bhutanese society. These relationships positively influence the capacity to negotiate and employ restorative methods of justice. Practically, restorative justice approaches are carried out, in most cases with the order of the courts.⁴¹⁷ Among them, following are notable restorative justice methods in Bhutan.

9.1.1 Victim - Offender Mediation

Bhutan has established development principles in pursuit of values with Bhutanese culture, institutions and spiritual values than values external to Bhutanese society and culture.⁴¹⁸ Mediation is one of them. Simon and Whitecross had observed that mediation in Bhutan were mostly carried out by local officials or respected persons.⁴¹⁹ Mediation is an age old practice in Bhutan. It has existed since time immemorial.⁴²⁰ Still today, mediation serves as a vital dispute resolution method in the communities. In many minor civil cases, links between the parties are normally bridged by mediation. This culture of relationship building and peace making are normally facilitated by a person called as '*Barmi*'.⁴²¹ Victim-offender mediation as practiced in other jurisdictions is not very prevalent within the ambit of the laws. Mediation of 'minor civil cases' delimits victim-offender mediation in the administration of child justice. It is not formally established with the aid of the laws. A careful study of the Alternative Dispute Resolution Act (ADR) does not show mediation in the fore front, keep aside victim - offender mediation. This is impeded by the reason that civil case and criminal cases are considered as a different matter. Crime is an offence punishable by the state while civil case is a wrong between the parties. The law rest on the premise that the state is

⁴¹⁶ As a component of mediation training, peer mediation training are carried out in twenty four schools across Bhutan.

⁴¹⁷ The courts involve restorative justice method as a socialisation process. These approaches are not conducive in very serious and heinous crimes. Completing the judicial processes are necessary in heinous crimes committed by children above twelve years of age.

⁴¹⁸ J. Duffy, 'Nangkha Nangdrik in the land of the Thunder Dragon : psychology, religion and the potential of mediation in the Kingdom of Bhutan', *Asian Journal of Comparative Law*, 2012, <https://eprints.qut.edu.au/53925/2/53925.pdf>, (accessed 26 June 2017).

⁴¹⁹ *ibid*.

⁴²⁰ Mediation is traced back to Eighth Century in Bhutan.

⁴²¹ Barmi is the middle man that shuttles between the offender and the victim.

responsible to prosecute the crime and failure to report it is an offence in the country.⁴²² Because of these barriers, mediators are not encouraged to settle criminal disputes.⁴²³ Mediation of disputes of criminal nature is inconsistent with mediation principles in Bhutan and can invite legally enforceable penal sanctions against the mediator.⁴²⁴ To introduce victim-offender mediation, especially in the arena of administration of child justice, it still needs a drastic paradigm shift in the judiciary. However, in the communities, victim - offender mediation normally takes place in minor civil and trivial criminal cases without reaching the courts. These practices are mutually reinforced by level of relationship between the parent[s] of the offender and the victim. In such cases, parents play a decisive role. They either act as barriers to the mediation, or help to facilitate it on the behalf of the child.⁴²⁵ Generally, the informal victim-offender mediation is punctuated by compensations of kind or cash and considering that actions of children as fallible.⁴²⁶ Nowadays, as ends of justice changes to meet the 'best interest of the child' coupled with international standards and norms, victim- offender mediation is a critical constituent of child justice. Dialogue driven methods such as victim-offender mediation offer a new paradigm of interpersonal communication. However, Bhutan still needs to root the practice into our justice system, more explicitly - into the administration of child justice.

9.1.2 Family Group Conferencing

Family as a social unit is a place to repose hope and warmth. In many societies world over, family has been established as the first contact point for help.⁴²⁷ They give formal and informal supports to reconcile differences to bring reassurance and comfort. Differences may occur within the members of the same family or with others. However, family is a source of unconditional support. Today, the formal service systems have tried to emulate the role family with partial success. Professionalised services assume to

⁴²² *The Penal Code of Bhutan* s 430

⁴²³ To minimise the risk of self - incrimination, mediators are advised to avoid resolving criminal cases.

⁴²⁴ The sanctions carry even criminal penalties against the mediator[s].

⁴²⁵ These are past practices, no studies are carried on victim- offender mediation in Bhutan.

⁴²⁶ These practices are in rural pockets of Bhutan, which are remote and isolated.

⁴²⁷ J. Hawthorne et al., *Supporting Children through Family Change*, Centre for Family Research, University of Cambridge 2003, p.9, <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/1842630857.pdf>, (accessed on 2 June 2017).

replace family interactions, responses and informal supports.⁴²⁸ Family Group Conferencing is one of them. The idea of Family Group Conferencing was developed in New Zealand in 1989. With globalisation and societies opting for small families, the traditional role of family is on decline. The Family Group Conferencing attempts to provide an opportunity to the parents and their families to take a decision making role.⁴²⁹ In a similar way, family is still a strong source for bond, help and support in Bhutan. Ideally, they help to resolve problems and children look to their parents as source of hope in any adversity. To cherish such values, even in formal settings, Family Group Conferencing has been incorporated in the CCPAB.⁴³⁰ Introducing Family Group Conference attempts to expand the traditional roles of family in Bhutan to include international best practices. Bhutan considers socialisation and participation of families as positive influence to facilitate child's reintegration. It urges the families to participate in various programmes.⁴³¹ This help to utilise the dynamics of emotional and moral strengths of a family. Conceptually, Family Group Conferencing in Bhutan as reflected in the CCPAB is very formal.⁴³² For Family Group Conference to happen, it requires the Order of the court directing the Family Group Conference. Referring the child to the Conference depends on the serious nature of the case; ability of the child to accept the offence and the opinion of the judge if the child can be reformed.⁴³³ The Conference is very conditional; it is available to children who have committed first time offences only. This has, on one condition, exterminated the purpose and aim of the Conference. Ideally, the Conference should take place in the presence of the parent[s], the legal guardian, the police, the Probation Officer, representative of the community and the victim, or his parents.⁴³⁴ This offers a circle of people who are formally required by the law to be present during the Conference. The presence of police is a very typical formal way of Conference operation. It resembles an inflexible, rigid, and tightly formal

⁴²⁸ The Child welfare and Policy Group: Family Team Conferencing, p.2, http://www.childwelfaregroup.org/documents/FTC_History.pdf, (accessed 2 June 2017).

⁴²⁹ M.Hanson et al., *Family Group Conference Facilitator's Manual*, MSW, 2004, p.6, <http://www.nrcpfc.org/webcasts/archives/05/trainingmanualnov04.pdf>, (accessed 2 June 2017).

⁴³⁰ *The Child Care and protection Act* s 196

⁴³¹ *The Child Care and Protection Act* s 31

⁴³² The Family Group Conferencing is a new concept in Bhutan. This was not heard before the CCPAB was enacted.

⁴³³ *The Child Care and Protection Act* s 197 (a)(b)(d)

⁴³⁴ *ibid.*, s 198 (a)(b)(c)(d)(e)(f)

approach. However, the Family Group Conference itself is a very rigid approach. In this method, the parents of the child decide on the issue and record it in an agreement. The details of the Conference are supposed to be noted by the Police Officer or the Probation Officer. A copy of the agreement is to be forwarded to the judge. The judge sits as the final arbiter to reject or accept the agreement.⁴³⁵ If the judge feels that the agreement would benefit the child, the judge can make the order accordingly. However, in making the Order, the judge has to see the participation of the child, the agreement and the report filed by the police or the Probation Officer.⁴³⁶ The Court can, after including all or any of the terms of the agreement in the disposition order, impose some requirement on the part of the child. If the child cannot comply, the police will inform the court in writing about the failure. The court will consider the matter for further necessary action.⁴³⁷ Basically, this is an imported principle of restorative justice measure in Bhutan. So here, the role of family is very nominal but formal. The role of police as the intermediary between the court and the family is huge, and action of the judge is considerable. Family Group Conferencing is a rigid and formal legal concept unaccustomed to Bhutanese jurisprudence.

9.1.3 Community Service

Traditionally, Bhutan is steeped in rich ‘helping hands’ culture.⁴³⁸ Occasionally, offering of services like working for the owner of the damaged crop to retribute the damages to crops by cattles were offered. This was a typical method of damage restitution service. It was intended to restore the damages through service. However, ‘community services’ were generally non-renumerative obligatory community contribution. Such practices have percolated into the concept of ‘justice oriented community service’. ‘Community Service’ for CICLs within the definition given in the legislation refers to the work carried out by the child for the community. Within this definition, it also includes ‘other work of value’ to the community.⁴³⁹ This is a very expansive legal definition. The open ended definition of ‘other work of value’ offers an extensive array of work. This is

⁴³⁵ *ibid.*, s 200

⁴³⁶ *The Child Care and Protection Act* s 201

⁴³⁷ *ibid.*, s 203

⁴³⁸ Helping hand culture existed in rural areas of Bhutan. It mostly entailed helping the neighbours in constructions without remuneration.

⁴³⁹ *ibid.*, s 243(b)

similar to concept of Open Air Prisons for adults in Bhutan.⁴⁴⁰ In Open Air Prison sentences, it engages prisoners to support the reconstructions and assists in renovation of different monasteries. In the similar way, community services by children in conflict with the laws are aligned with the concept of restorative justice practices. This is allowed by the Penal Code and the Labour and the Employment Act of Bhutan. While the Penal Code allows the child to do non-hazardous works, the Labour and Employment Act spells that a child cannot work in difficult conditions which may harm the health, safety and morale of the child.⁴⁴¹ So the ‘community service’ by children is both allowed by the Penal Code and the Labour Act of Bhutan. Ocassionally, children in conflict with the law carries out gardening, painting, grass cutting and campus cleaning works.⁴⁴² No extensive research and studies are carried about the ‘community services’ as part of children’s restorative justice in Bhutan.

9.1.4 Peer Mediation

As an offshoot of mediation program, peer mediation has been promoted among the students in different Bhutanese schools.⁴⁴³ Peer mediation rest on the ideals of peaceful coexistence, harmony and respect for rule of law. It offers a platform to use mediation as a tool to resolve minor disputes and promote amity among students. Peer mediation is ideally used before the case reaches the legal authorities. This enables a minor case to be settled informally among the friends. Peer mediations in schools were funded by the UNDP. The training was carried out by by Professor Melinda Edwards and Colin McCowan from Queensland University of Technology, Australia.⁴⁴⁴ This practice is slowly permeating systematically. However, peer mediation as in other national jurisdictions, is not formally recognised as a restorative measure before the courts of law.⁴⁴⁵ Peer mediation is mostly employed, if possible, by students in the schools. This can summate to build social, emotional intelligence, and skills to make the schools more

⁴⁴⁰ Royal Bhutan Police, [website], 2017, <http://www.rbp.gov.bt>, (accessed 2 June 2017).

⁴⁴¹ *The Labour and Employment Act 2007* s 9(d)

⁴⁴² The Child Justice Need Assessment Survey, p.49.

⁴⁴³ Bhutan Broadcasting Service,[website], 2017, <http://www.bbs.bt/news>, (accessed 2 June 2017).

⁴⁴⁴ MeWise, [website], 2017, <http://mewise.com.au/pro-bono-projects>, (accessed 2 June 2017).

⁴⁴⁵ As peer mediation occur among the friends and between children, they are not formally accepted in criminal cases.

safe and just.⁴⁴⁶ As a matter of principle, peer mediation to reinforce positive relationships, replenishes the healthy growth of relationships, empowers children to develop values, attitudes and skills to prevent and transform conflicts into possible relationship building avenues.⁴⁴⁷ Peer mediation, like normal mediation is facilitated by a neutral person. The neutral person acts as a facilitator by refraining from imposing his decisions. The parties are asked to tell their stories, narrating their needs and interests. If a win-win situation is created, the parties agree to resolve the issue.⁴⁴⁸ The restorative nature helps children to achieve self determination and resolving the issues at first hand. This method of dispute resolution is not very popular and is not invoked in the courts as part of the restorative justice measure.

9.1.5 Apology to the [Victim]

Bhutan is consisted of closed networking societies. Good relationship among neighbours and communities is a valuable social asset. These cherished and fundamental traditional values have reassured coexistence of society and community harmony. Unlike in the west, where societies are going apart and personal lives are more defined with individual interests, Bhutan still possess rich cohesion and social bonds. Such cardinal virtues have helped the practice of forgiveness to blossom in Bhutanese societies. This is reinforced by shared Buddhist beliefs and similar cultural ethos.⁴⁴⁹ Presently, crimes in Bhutan are not negotiable between the parties. However, the scope of apology to the victim has not dwindled altogether. This is noteworthy especially for children in conflict with the law. The provision of apology to the victim is reflected in the CCPAB. It is based on the principle of decriminalisation and the idea of restorative justice. The CCPAB mentions about the procedure of cautioning a child accompanied by possible apology to the victim.⁴⁵⁰ It is a general notion that crime and criminal activity degrades, diminishes and dishonours the victim directly or indirectly.

⁴⁴⁶ G. Johnstone , D.W Van Ness(eds.), *Handbook on Restorative Justice*, Newyork,Willan, 2007, p.326.

⁴⁴⁷ IREX Conflict Resolution and Peer Mediation Toolkit, 2013, p.7,
<https://www.irex.org/sites/default/files/node/resource/conflict-resolution-and-peer-mediation-toolkit.pdf>
 (accessed 4 June 2017).

⁴⁴⁸ Mediation in Bhutan generally aligns with international mediation best practices. Most of the trainers adopts the internationally accepted mediation processes.

⁴⁴⁹ K.Galay, 'Bhutanese Context of Civil Societies', *Journal of Bhutan Studies*, p.200,
http://www.thlib.org/static/reprints/jbs/JBS_03_01_07.pdf, (accessed 4 June 2017).

⁴⁵⁰ *The Child Care and Protection Act* s184

Victims undergo mental trauma, shame and humiliation as part of the offence. In such instances, the role of victim and the offender after the offence is a critical. Seeing the other person as a ‘human being’ is critical component of appreciation and forgiveness. More interestingly, the offender may appreciate his or her mistake. In Bhutanese parlance of apology to the victim, legally, it involves the value of apology and remorse as precondition to emotional reparations.⁴⁵¹ Apology and forgiveness follow a formal approach in Bhutanese Child Justice System. For apology to the victim to happen, it initially has to identify series of actions. First, it has to identify the wrong action, secondly, the ability and willingness of the offender to apologise to the victim, and the promise to not repeat the act in the future by offering to repair.⁴⁵² Apology has the ability to remove the present and future threats to the victim. In one way, apology can remove the psychological barriers that exist between the victim and the offender. However, the CCPAB only allows a conditional apology to happen to the victim. It is termed ‘conditional’ as the apology can be used in certain criminal cases only. It cannot be used in serious criminal cases. Even for petty crimes, the process is determined by the police based on the willingness of the victim and the offender to participate in it.⁴⁵³ As a matter of concern, it remains unclear on how an apology should take place. There are no procedural guidelines for that.

9.1.6 Payment of Compensation and Restitution of [property]

Payment of compensation is another form of reparation. Generally in Bhutanese legal settings, compensations are paid in criminal, matrimonial and civil cases in addition to other punitive sanctions of the law. In criminal cases including death of a person, compensations are normally paid to the relatives or to the survivors of the deceased.⁴⁵⁴ The compensations [if any] are paid in addition to serving the sentence. As a restorative and compensatory measure for children in conflict with law, the payment of compensation is mirrored in the CCPAB. It states that the court may allow the child to

⁴⁵¹ E.A Hara, ‘Victims and criminal punishment’, p.10, http://www1.law.umn.edu/uploads/mP/IA/mPIAgBdDt90T3Yk3B-INOA/OHara_article_07.pdf, (accessed 4 June 2017).

⁴⁵² *The Child Care and Protection Act* s 184 (a)(b)(c)

⁴⁵³ *ibid.*

⁴⁵⁴ *The Penal Code* s 37

pay compensation as part of the sentence or in lieu of it.⁴⁵⁵ As a matter of fact, compensation[s] can only be waived by the victim and by the Court through an Order. It cannot be waived by other persons.⁴⁵⁶ In the similar way, if the offender has caused any material damages or caused loss of properties to the victim, the same may be restituted to the victim. This normally occurs in cases of larceny by the child.⁴⁵⁷ In such cases, the Court normally requests the parents or the guardian of the child to retribute the property. In payment of compensation, if the offender is unable to pay in cash, the same may be paid in kind or possessions.⁴⁵⁸ In payment of damages to the other party, the court also determines if the victim is responsible. Compensations are mostly calculated based on the existing Daily Minimum National Wage Rate at the commission of the offence.⁴⁵⁹ Based on such determinants under the criminal law, the compensatory damages or compensations are paid in lump sum.⁴⁶⁰ Therefore, in the interest of justice, determinants for compensations and rate of compensation cited in the PCB are used as calculative framework by the judges. These are formal means of compensation and restitution. However, juxtaposing such formal matters, matters are treated little differently in rural areas. These are informal justice mechanisms- that settles minor cases informally; with payment of compensations by the parents. The acceptance for compensation depends on the strength of relationship between the parents of the victim and the offender. A pitcher of 'Ara',⁴⁶¹ with some other items like eggs, butter and cheese are presented to the victim and the family members. These items were usually given to aid the recovery of the victim. With the coming of various penal legislations, such practices are soon replaced by more legal and formal alternatives. The Penal Code has, made non-reporting of a crime as an offence. Moreover, criminal cases are non-mediabile, and such matters of payment of compensations are only dealt by the courts. Therefore, the payments of compensations to victims are guided by very formal court processes.

⁴⁵⁵ *The Child Care and protection Act* s 159

⁴⁵⁶ *ibid.*, s 160

⁴⁵⁷ In cases of larceny, the stolen properties are seized by the police, produced before the Court and handed over to the real owner by the court. The police also hand over the seized properties.

⁴⁵⁸ *The Penal Code of Bhutan* s 41

⁴⁵⁹ *ibid.*, s 39

⁴⁶⁰ *ibid.*, s 40

⁴⁶¹ Ara is locally brewed liquor in Bhutan.

Informal methods of compensation may [not] exist even in deep rural pockets of Bhutan.

Chapter Ten

10.1 [Rehabilitation and Reintegration of CICLs] - the final administration of justice

Bhutan recognises the strengths of children as the holders of Bhutan's destiny. They are considered as responsible citizens for positive change and progress of the country. As society transpires and social changes creep in inadvertently, children of today reflect the future generations, leaders and administrators who can steer the country. Therefore, positive growth and nurturing of our children has become more urgent than it was in the past. As society moves forward with globalisation, easy sharing of information coupled with ever changing lifestyles has brought children of today a large array of choices. These changes offer them both challenges and optimism.

10.1.1 Rehabilitation as a Panacea [Why Do We Rehabilitate a Child]

The UN Standard Minimum Rules for the Administration of Juvenile Justice states that services in the juvenile justice system has to be planned, systematic and implemented as part of the national development efforts.⁴⁶² CICLs need diverse range of facilities and services designed to meet their different needs and provide them with guidance and structural support to reintegrate them into the society.⁴⁶³ As children coming in conflict with the laws are on rise, treating them with respect and dignity has become a part of responsible governance. Rehabilitation of children reflects the commitment to transform the society with positive culture.

In the quest to apply best international practices in the administration of child justice in Bhutan, rehabilitation and reintegration of children in conflict with the law has become a part of machinery of administration of child justice. As the party to the CRC, Bhutan has adopted the policy of decriminalisation, socialisation, welfare and best interest of the child as the primary consideration in the administration of child justice. Socialisation through family, community, schools, and skills development through vocational training institutions and Civil Society Organisations (CSO) are recognised as

⁴⁶² Commentary Rule 30.4, *UN Standard Minimum Rules for the Administration of Juvenile Justice*, <https://www.ncjrs.gov/pdffiles1/digitization/145271ncjrs.pdf>, (accessed 5 June 2017).

⁴⁶³ *ibid.*

possible positive inlets for holistic development of the child.⁴⁶⁴ These inlets allow children in conflict with the laws to develop as positive members of the society with adequate social values. Studies have shown that it is not a constructive way to simply consider children as delinquents; considering them as a human being is a first step to recognise and acknowledge them.⁴⁶⁵ It generates hope, trust and encouragement to be in the society. The feeling of inclusion, appreciation and positivity influences them to be a constructive member of the society. Rehabilitative approaches sharpen their innate skills; and broaden their perspectives. These positive outlooks enable them to join the society and lead a normal life. Children in conflict with the laws mostly come from poor section of the society.⁴⁶⁶ They are children in difficult circumstances affected by low socio-economic backgrounds. These situations make them more vulnerable. In the effort to counter such effects on children, Bhutan has considered rehabilitation programmes for children. In this pursuit, it takes rehabilitation programmes as a necessary component of an effective child justice system.

10.1.2 [Apparatus] for Rehabilitation in Bhutan

Like elsewhere, rehabilitation in Bhutan is a state responsibility.⁴⁶⁷ The state is imposed with the onus to establish institutions and facilities to rehabilitate children in conflict with the laws.⁴⁶⁸ Considering the changing economic, cultural and social patterns in the country, it has become necessary to establish appropriate child protection mechanisms for progressive administration of justice. Among them, one aim is to enhance progressive development of institutional rehabilitative apparatus in the country with the mandate to protect the society and achieve the aims of rehabilitation.⁴⁶⁹ Rehabilitation Centres in Bhutan were built under the Youth Development Fund (YDF) and the Royal Bhutan Police. The Rehabilitation Programmes under the YDF is called as the Drug Education and Rehabilitation Services (DEARS).⁴⁷⁰ These are services given to young

⁴⁶⁴ *The Child Care and Protection Act* s 37

⁴⁶⁵ Rehabilitation of children in conflict with the law, possibilities and opportunities, <http://www.wcd.nic.in/sites/default/files/pdf>, (accessed 5 June 2017).

⁴⁶⁶ Youth Development Fund, 'Tracer Study on Children in Conflict with the Law', p.36.

⁴⁶⁷ *The Child Care and Protection Act* s15

⁴⁶⁸ *ibid.*, s15(h)

⁴⁶⁹ *ibid.*, s 9

⁴⁷⁰ Youth Development Fund,[website],2014, <http://www.bhutanyouth.org/drug-education-rehabilitation>, (accessed 5 June 2017).

people at risk. These Centres act as drug treatment and recovery units. The Treatment and Rehabilitation Centre for Drug and Alcohol Dependence is in Serbithang. This caters only to men. The Bhutan Narcotic Control Agency (BNCA) has established Rehabilitation Centres.⁴⁷¹ These Centres mostly treat persons who abuse drugs and alcohol. The YDRC under the Royal Bhutan Police caters separately for children in conflict with the law. This Rehabilitation Centre was established in 1999 under the command of His Majesty the Fourth Druk Gyalpo. The Centre is presently managed as per the Prison Act of Bhutan, 2009.⁴⁷² A year ago, Girls' Hostels were also established on 24 June, 2016.⁴⁷³ Previously, it did not have [amenities] for female CICLs. As part of administrative set up, the Centre is usually managed by Officer Incharge from the police, a teacher who looks after educational needs, Vocational Instructors, Physical Trainers, office clerks and supporting staff.⁴⁷⁴ The Centre provides shelter for those children who come in conflict with the law. By housing them, the centre strives to reshape the attitudes and behaviours of the children residents by helping them to develop their characters holistically and channel them to participate in the mainstream of the society.⁴⁷⁵ In addition, the Centre also house children in conflict with the law, who have potential to cause self harm and suicide.⁴⁷⁶ Therefore, the Centre offers protection for children from debilitating circumstances. For institutional treatment, the UN Minimum Standard Rules for the Administration of Juvenile Justice states that the purpose of institutionalisation is to provide care, protection, education and vocational skills to assist CICLs to assume positive roles in the society.⁴⁷⁷ Institutional treatment of children is qualified by the need to provide special attention to the various requirements of children. For a right based institutional approach, it is essential to assess how these needs are practically fulfilled.

⁴⁷¹ Royal Bhutan Police, [website], 2017, <http://www.rbp.gov.bt>, (accessed 5 June 2017).

⁴⁷² *Prison Act of Bhutan 2009* s 140

⁴⁷³ Royal Bhutan Police, [website], 2017.

⁴⁷⁴ Child Justice Needs Assessment Survey, p.27.

⁴⁷⁵ Royal Bhutan Police, [website].

⁴⁷⁶ Royal Government of Bhutan, *Suicide Prevention in Bhutan- A Three Year Action Plan (2015-2018)*, Thimphu, Bhutan, 2015, p.9.

⁴⁷⁷ *The UN Standard Minimum Rules for the Administration of Juvenile Justice*, Rule 26.1.

10.1.3 Facilities in the Centre- [A Rights Based Approach]

As per the Standard Minimum Rules for the Administration of Juvenile Justice, it mentions that centres should provide care, protection and all necessary assistance in the interest of wholesome development of the child.⁴⁷⁸ It is important to study the centres to assess how facilities are provided in comparison to the international requirements. Presently, no extensive studies had been carried out on the Rehabilitation Centres in Bhutan. The Tracer Study and Child Justice Needs Assessment Survey also do not give a complete picture of the Centres. This is evidenced by lack of objective criteria and the nominal number of inmates who participated in the study. The study about the rehabilitative approaches in the centre would determine on the various rights and obligations imposed to qualify as a 'Centre'. Most obligations of the Centres arise out of their duty to provide care, protection and all necessary assistance to aid the development of the child. In Bhutan, these continuums of rights arise as an offshoot of a judicial intervention[s]. Among international standards and norms, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty states that facilities in the centres should achieve the aim of rehabilitation.⁴⁷⁹ A similar aim is reflected in the CCPAB.⁴⁸⁰ The aim of the centre should be fulfilled by adequate physical environment with good accommodation, adequate sleeping materials, and sanitary installations among others. The need to allow the use of personal clothing by the residents in the centre is one basic right. However, the YDRC is a small institution. The Centre was intended to accommodate only [about] twenty children.⁴⁸¹ Moreover, in pursuant to the signing and ratifying of the CRC, it strives to provide standardised facilities and care. Complying with international standards has become both a requirement and a necessity in Bhutan. It was studied that the centre strives to provide all basic necessities in line with the rights of the child. However, food and access to personal clothing were rated satisfactory by most residents.⁴⁸² The YDRC still strives to provide reformatory services and safe environment within the existing facilities.⁴⁸³ Most of this information is derived from the

⁴⁷⁸ *ibid*, Rule 26.2

⁴⁷⁹ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* s 30

⁴⁸⁰ *The Child Care and Protection Act* s 9

⁴⁸¹ Child Justice Needs assessment Survey, p.41.

⁴⁸² 'Tracer Study on Children in Conflict with the Law', p.6.

⁴⁸³ *ibid.*, p.18.

statements collected from YDRC residents. This is reinforced by the CCPAB when it mentions that homes established under the Act should be safe and conducive to living.⁴⁸⁴ In this context, the residents shared that they felt safe.⁴⁸⁵ Comparatively, there were no separate facilities for children and adults. Few children, who crossed eighteen years of age has to be kept together as there were no transition centres.⁴⁸⁶ Therefore, the Centres in Bhutan strive to uplift their services - but it still needs to improve them.

10.1.4 Treatment of the [Residents]

The CCPAB states that establishment of institutions and facilities are required for the purpose of care, treatment, education, training and rehabilitation of the CICLs.⁴⁸⁷ Rule 26.2 of the UN Standard Minimum Rules for the Administration of Juvenile Justice states that juveniles in the institutions should receive care and protection. It also mention about other ‘necessary assistance’ which should include social, educational, vocational, psychological, medical and physical assistance. These treatments should assist the child to take up better roles in the society as a productive citizenry. Humane treatment with respects to privacy, dignity and personal needs of the child demand separate facility for male and female children.⁴⁸⁸ They have to be handled separately by the personnel of the same sex. Female residents cannot receive less care for the purpose of fair treatment. Parental access into the centre is also a part of fair treatment and care. It also helps them to emotionally bond with their families through comfort and inclusion. To support the residents through right education, and vocational training, the residents in the YDRC are given all adequate treatment including skills development oriented labour. Another hall mark of institutionalisation is the presence of legal protections in conditions of peace, freedom dignity and security.⁴⁸⁹ However, there is no complete absence of fear in the YDRC.⁴⁹⁰ Requirements by the laws and practices differ. This is significantly retarded by human resource gaps, inadequate awareness and financial limitations.

⁴⁸⁴ *The Child Care and Protection Act* s 12

⁴⁸⁵ *ibid.*

⁴⁸⁶ ‘Tracer Study’, p.18.

⁴⁸⁷ *The Child Care and Protection Act* s15(h)

⁴⁸⁸ *The UN Standard Minimum Rules for Administration of Juvenile Justice*, Rule 26.4

⁴⁸⁹ *UN Standard Minimum Rules for Administration of Juvenile Justice.*

⁴⁹⁰ Child Justice Needs Assessment Survey, p.48.

10.1.5 [Reformative] Programmes

Change in behaviour and reformation is the ultimate aim of any Centre. The UN Rules for the Protection of Juveniles Deprived of their Liberty states that children should get the ‘care best suited to their particular needs’ and also be protected from harmful influence and risk situations.⁴⁹¹ This subsist the need for reform and change. In the YDRC, this was evidenced by residents willing to offer apologies. This ability to show remorse is considered as the ability to come to terms with their past.⁴⁹² Reformation and change of mentality and behaviour of the child should remain as the ultimate aim of any reformative programme. In this light, calculable numbers of reformative programs are initiated in the Bhutanese context. These guarantees the rights based reformation programmes which aim to rehabilitate the residents after they complete their terms. Analysing the Studies⁴⁹³ carried on the programmes in the Centre, it is evident that socio-educational programmes are complementary to other activities carried out in the centre.

10.1.6. [Educational] Programmes

International standards states that any children deprived of their liberties, who are of compulsory school age has the right to receive education based on their needs.⁴⁹⁴ In this context, Bhutanese rehabilitation programmes rest on the belief that Rehabilitation Centres are not built as ‘Closed Centres’. It includes education as the means for positive social growth. Education is made compulsory; participation in the programmes is also considered mandatory. To elaborate on education programmes within the centres, such programmes essentially compose of classes. Apparently, many police personnel still head the skills development programmes. Interestingly, the programmes are neither accredited nor many of the instructors trained.⁴⁹⁵ We can anticipate, in one or the other situations, the exercise of basic policing habits in the centre. The centre has to still improve its educational strategies.

⁴⁹¹ *UN Rules for the Protection of Juveniles Deprived of their Liberty*, Rule 28.

⁴⁹² ‘Tracer Study’, p.39.

⁴⁹³ The Child Justice Needs Assessment Survey and the Tracer Study on the Children in Conflict with the Laws are two studies carried on the YDRC.

⁴⁹⁴ *UN Rules for the Protection of Juveniles Deprived of their Liberty*, Rule 38.

⁴⁹⁵ ‘Tracer Study’, p.26.

10.1.7 Vocational Training Programmes

International standards set out that every juvenile have right to carry on vocational training to prepare him or her for future employment.⁴⁹⁶ Vocational training is a component of reintegration by offering them new skills and expertise. Obtaining gainful employment can keep the child engaged with imposed duties thereby drastically reducing the chance of relapse. Lack of skills, workmanship and expertise can lead to low paid jobs which can possibly trigger a relapse. In Bhutan, this trend is further exacerbated by broken families and financial constraints. Moreover, vocational skills acquired at the Centre do not match the demands of the market.⁴⁹⁷ In such instances, such mismatches should allow re-modelling of the trainings to make it more effective. International standards also state that juveniles should be free to choose any vocations they prefer. This indicates that there should be an array of vocational works offered to them.⁴⁹⁸ Vocational trainings in the YDRC include like hair cutting, embroidery, tailoring, painting to name a few. Apparently, such vocational training need skills sharpened over a long period of time. A half baked experience would not meet the market expectations and changing demands. Therefore, YDRC vocational training in one [way] is a means to meaningfully engage the residents but it [seems] to not optimally build the expertise in the residents.

10.1.8 Recreation

Children coming in conflict with the laws are often coerced by bad circumstances and unscrupulous mentality. These, in most times can be evidenced by their personal character traits and mental dispositions. It is mentioned that games and recreational activities reduce self defeating and negative thoughts to bring in healthier habits.⁴⁹⁹ In this light, children are expected to get suitable amount of time for daily free exercises - for adequate recreational and physical training.⁵⁰⁰ The YDRC recreational activities include games and television screening programs on Wednesdays, weekends and on

⁴⁹⁶ UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 38.

⁴⁹⁷ 'Tracer Study', p.6.

⁴⁹⁸ Supra note, Rule 38.

⁴⁹⁹ *Addiction Help Centre*, [website], <http://www.addictionhelpcenter.com/benefits-recreation-rehab/>, (accessed 7 July 2017).

⁵⁰⁰ Supra note, Rule 47.

government holidays.⁵⁰¹ Volleyball, Cricket, Basketball, Table Tennis, Badminton and Chess are few games played in the centre. These provide them with recreation and physical exercise. Moreover, recreational facilities help them to achieve fun, keep them active and develop basic sporting skills. Ultimately, it also keeps them away from boredom. These are basic rights of children to leisure and play. They serve as an ideal vehicle for recovery.⁵⁰² Recreational facilities need to be expanded to meet the requirements of all children in the centre.

10.1.9 Child Appropriate Counselling

Counselling intrigues the mind, and builds positivism. It is a mode of communication for change. Crime is a series of continuum of experiences. Such experiences may overwhelm their entire lives. This can result in cascading and demoralising effects, ultimately leading to self rejection and self disrespect. Child appropriate counselling enables the child to receive appropriate assistance to encourage children to think positively. The CCPAB states that the authorities of ‘closed facilities’ shall arrange various counselling programs. Therefore, ‘closed facilities’ are meant for children in conflict with the law who has committed serious crimes. This indicates that Counselling programs are available for children who committed serious crimes. It states that the counselling programmes should include issues on health, abuse of substances, life skills, behavioural education and others.⁵⁰³ However, in contradiction to counselling services entitled under the present legislations, the qualities of the counsellors are not extremely good.⁵⁰⁴ Counselling is a recent phenomenon in Bhutan. The western concept of counselling has, now at least, permeated into Bhutanese mindset. Methodologically, the Bhutanese concept of counselling is soul or nature focussed, experiential and story oriented. Bhutanese counsellors, whether lay or professional engages in intentional interpersonal relationships to help address both personal and social concerns.⁵⁰⁵ Counselling in general has an important role in Bhutan.

⁵⁰¹Child Justice Needs Assessment Survey, p. 45.

⁵⁰² C. Brackenridge, T. Kay and D. Rhind (ed.), *Sport, Children's Rights and Violence Prevention*, London, Brunel University, 2012, p.15.

⁵⁰³ *Child Care and Protection Act*, s 232

⁵⁰⁴ ‘Tracer Study’, p.44.

⁵⁰⁵ S.V. Lester, ‘Bhutanese Counselors’ Experiences with Western Counseling: A Qualitative Study’, Dissertation Paper, Old Dominion University, 2015, p.9. Available from: <http://digitalcommons.odu.edu> (accessed 8 June 2017).

It is implemented to be distinctly Bhutanese by adapting to western methods. Counselling addresses beliefs on karma and strives to treat every person as part of the collectivist society. Buddhist principles mostly guide the counselling modes.⁵⁰⁶ Professional counselling, in general seems to be absent. It is affirmed that most children in conflict with the laws have committed serious crimes; professional psychiatric counselling and peer counselling services are essential in the centre.⁵⁰⁷

10.2 Reintegration

The presence of social stigma, lack of working experiences forced by poor economic backgrounds makes children in conflict with the law more vulnerable.⁵⁰⁸ Deprivation of liberty harms the harmonious development of the child and impedes reintegration of the child into the society. Any deprivation of liberty of children should result in positive development in children. Positivity will increase the ability of children to assume more productive roles in the society.⁵⁰⁹ The rehabilitation programs should be a bridge to the future of children. Rehabilitation is defined as *‘the process of making permanent transition of a separated child into his or her family and community’*.⁵¹⁰ Rehabilitation and reintegration are inseparable terms that coexist and support each other. In Bhutan, the law accepts that criminalisation generally results in victimisation and stigmatisation of the child. To break that social facade, the role of family and community are considered as essential part of reintegration of the child. Conceptually, reintegration is putting back the child into the ‘society’. It acknowledges the role of community and its resources as effective contributors to the rehabilitation of children in conflict with law.⁵¹¹ Policies to prevent crimes and relapse of the child should include socialisation and reintegration as a major component encompassing of families, communities,

⁵⁰⁶ Lester, ‘Bhutanese Counselors’ Experiences with Western Counseling’, p.11.

⁵⁰⁷ ‘Tracer Study’, p.50.

⁵⁰⁸ RENEW, Study on Status of Vulnerable Children, p.51.

⁵⁰⁹ United Nations, General Comment No. 10, Children’s rights in juvenile justice, Convention on the Rights of the Child, Geneva, 2007.

⁵¹⁰ Guidelines on Children’s Integration, Inter-agency group on children’s reintegration, http://www.familyforeverychild.org/wp-content/uploads/2016/08/RG_Digital_DC.pdf, (accessed 8 June 2017).

⁵¹¹ *The Child Care and Protection Act* s 34

schools and Civil Society Organisations.⁵¹² These are policy and legal requirements only. In the past, serious concerns were raised about the lack of effective resources to promote rehabilitation and reintegration.⁵¹³ Children are emotionally fragile. Unless a child friendly environment is created to categorically uphold them emotionally, feeling of lack of love can be a ground for relapse. Survey indicates that absence of love and humiliation has mostly resulted in emotional violence for children in Bhutan.⁵¹⁴ It also shows that adolescent friendships and social networks are key factors in the lives of children. Children in same - sex groupings facilitate more closeness. On the contrary, the dynamics of the environment also disintegrate children's lives. Poverty, lack of parental care and structural violence possibly exacerbate the reintegration efforts.⁵¹⁵ Therefore, it has to be understood that many factors are interlinked that either help or inhibit reintegration. Expectedly, children feel more happy when they are valued in their family and the community.⁵¹⁶ The interdependence between the surroundings and children's mental and emotional wellbeing is noteworthy. To help the reintegration efforts, creating a conducive and child friendly environment is a first priority. Giving them personal skills, and opportunities by addressing the structural causes of vulnerability like stigma, poverty, social exclusion and discrimination are fundamental for growth of children in conflict with the law. One of the prominent drawbacks of rehabilitation programme in Bhutan is the absence of transition activities. In most cases, the rehabilitation services end when the child attains the age of eighteen.⁵¹⁷ If the 'term' of do not end when the child becomes a major, the resident is expected to be transferred to a normal prison.⁵¹⁸ This jeopardises the whole intention of rehabilitation and reintegration programmes. The use of word 'shall' in the Prison Act indicate that transfer to normal prisons are mandatory. The power to divert from the normal prison

⁵¹² *ibid.*

⁵¹³ UNICEF, 'Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law', Kathmandu, 2006, [https://www.unicef.org/rosa/Juvenile Justice in South Asia.pdf](https://www.unicef.org/rosa/Juvenile%20Justice%20in%20South%20Asia.pdf), (accessed 8 June 2017).

⁵¹⁴ NCWC, 'Study of violence against children in Bhutan', Thimphu, 2016, [http://www.ncwc.gov.bt/en/files/publication/consolidate report of the three phases.pdf](http://www.ncwc.gov.bt/en/files/publication/consolidate%20report%20of%20the%20three%20phases.pdf), (accessed 9 June 2017).

⁵¹⁵ *ibid.*

⁵¹⁶ *ibid.*

⁵¹⁷ There are no transition activities. The children are sent back to their families.

⁵¹⁸ *The Prison Act of Bhutan, 2009* s 146

lies mostly with the Chief of Police and the Additional Chief of Police. Therefore, if the CICL, attains the age of eighteen, he or she is definitely sent back to normal prisons, defeating all the ends of 'justice' and 'reintegration'. Moreover, the management of the Centre by the police and the absence of transitional activities, make children to reoffend and susceptible to rearrest. This is a profound drawback of the system. Multi-sectoral coordination is essential to reintegrate children and enable them to get reasonable employment if possible.

Chapter Eleven

11.1 Rooms for Improvements and Recommendations

Rights of CICLs and administration of child justice is a special arena of judicial function and responsibility. The noble intention to improve the administration of child justice represent the commitment to respect, protect and fulfil the rights of children and uphold nation's international obligations. A full functioning Child Justice System requires a strong national commitment, and an unwavering supply of financial resources with a well-equipped human capital. As development takes place, it strains national resources and put on newer expectations. A well functioning child justice system in particular, requires efforts from all sectors. A single handed effort is unsustainable and not viable. After analysis of the present nascent administration of child justice, it shows that many efforts are still needed. It is notable that much progress has been made in the judicial sector. This helps to reaffirm the belief that a strong judiciary is an important part of good governance. The introduction of the Child Justice System is a remarkable feat. This is a huge leap in upholding the rights of children in conflict with the law more professionally through adequate measures of protection. However, improvements are part of any development process. The Royal Courts of Justice (RCJ) is considered as only one component of justice. The court is not only responsible for the administration of justice, but it is also seen as the step by step protector of the rights of CICLs in the judicial process. A holistical development of the child requires a collaborative approach; and child justice is a broad spectrum of many concerted efforts. The judiciary is only one legal arm in protecting the rights of CICLs. So as part of a collective effort to respect, protect and fulfil rights of CICLs and efficient administration of justice, following recommendations are mentioned for the better.

11.1.1 Recommendation One: The need to fill the ‘Gap’ between Legislative Mandates and Operationalisations of the Mandates

National legislations are, in many instances, passed in multitudes by the Parliament of Bhutan. While the efforts are creditable, it recalls the National Address of His Majesty the King when he mentioned that Bhutanese were good in writing plans, speaking well, and expounding ideas. But they fall short of their commitments. His Majesty also noted that there were gaps between the commitments and the output; Bhutanese were not able to deliver good quality results in a timely manner.⁵¹⁹ The CCPAB was enacted in 2011. Six years has passed then, yet many things are not in place. The Child Bench is in its infant stage. To implement the provisions of the CCPAB, especially in regard to fair administration of justice and upholding the rights of CICLs, Bhutan need to sooner or later appoint Probation Officers, among many other posts which are yet to be materialised. Probation Officers are essential human resource to make an unbiased assessment of children in conflict with the laws. Many such gaps are still prevalent. The Competent Authority should initiate ‘Critical Analysis Report’ and submit it to the relevant authorities for further action. Without a doable Critical Analysis on gaps between ‘Plans and Actions’, it will take so much time to realise the mismatches. A system of Progress Review in the implementation of the CCPAB should be seriously carried on.

11.1.2 Recommendation Two: Implement Child Friendly Policing

Policing methods in Bhutan are not very friendly. Personal dispositions generally characterises their policing methods. Use of force can be unrestrained in many circumstances. However, the CCPAB states that the police official shall endeavour to deal with the child without affecting arrest. But this does not outlaw arrest.⁵²⁰ Use of force has been acknowledged in the Studies.⁵²¹ Therefore, it should be understood that most rights of children can be violated by persons who should protect them. In this line, it is proposed to strictly implement child friendly policing methods through professional

⁵¹⁹ T. Choden, ‘Bhutan’s National Youth Policy: A Gap Between Commitment and Output?’, The Druk Journal, Winter Edition, 2016, <http://drukjournal.bt/bhutans-national-youth-policy-a-gap-between-commitment-and-output>, (accessed 10 June 2017).

⁵²⁰ *The Child Care and Protection Act* s 105

⁵²¹ Child Justice Needs Assessment Survey, p.53.

development of police department. Sensitising police officials on various rights of children alone can be ineffective and incomplete.

11.1.3 Recommendation Three: Inform CICLs about their procedural and substantive rights by the Police

Legal education of police personnel is an important component of police training. Educating police personnel on various laws and sensitisation on child rights is only a recent phenomenon in Bhutan. Owing to lack of awareness on various substantive and procedural rights of CICLs, it results in violation of their basic rights. Most evidently, police personnel have failed to inform children about their grounds of arrests.⁵²² In this regard, to execute their duties professionally, police should strive to inform CICLs on their various procedural and substantive rights- when they come in contact with law. This will assist them to make informed decision and legal defences by enabling a child friendly approach in the matter. It is recommended that police personnel should, during any arrests, when they process children through various stages of prosecution, explain them about their substantive and procedural rights. The police personnel shall strictly abide by section 112 of the CCPAB.

11.1.4 Recommendation Four: Establish Additional Child Friendly Detentions Centres

Children are detained in normal detention centres in many Police Stations in the country. Only few police centres have established Women and Child Protection Units (WCPUs). If in the interest of justice, detention has to be resorted for children, children should be kept separately in different child detentions centres. The RBP should explore more avenues to build child friendly detention centres in other parts of the country. Separate conveyances of children are also necessary.

11.1.5 Recommendation Five: Provide CICLs with [Legal Aid]

Absence of legal aid in Bhutan is obvious. Although legal aid is mirrored in the Constitution and other laws, but it is never assured that the State would provide it. Apparently, this has resulted in children defending their own cases. The Constitution only states that the '*state shall endeavour to provide legal aid to secure justice*'. '*Shall endeavour*' do not obligate the state directly. This makes it subjective to other

⁵²² *ibid.*, p.52.

conditions. Presently, legal aid from the state are meant for only *indigent persons*. There is no definition on what constitute an *indigent person*. In this regard, it is recommended to provide children with legal aid irrespective of their situations and economic conditions. The choice to employ legal aid should be with the children and not with the State. Bhutan should also ensure avenues for legal aid for fair administration of justice.

11.1.6 Recommendation Six: Construct More Child Friendly Judicial Apparatus

The Child Bench is centralised in the capital. Child Benches are yet to be replicated in other parts of the country. To improve access to justice for children, Child Benches should be established in other parts of the country, based on the frequency of child related cases. It is recommended that Bhutan should expedite the construction of Child Benches as a separate court infrastructure.

11.1.7 Recommendation Seven: Establish Transition Activities in the YDRC

The YDRC acts as the protective, reformative, rehabilitative and reintegrative centre for CICLs. However, lack of transitional activities in the Centre has resulted in reoffense and rearrests of children. In this regard, it is proposed to carefully study a variety of transitional activities; and implement them in the Centres to increase the efficiency of the Centre; and provide children with passage to their adult hood.

11.1.8 Recommendation Eight: Improve Inter-Agency Coordination

In most child related activities, a single handed approach is a trend. The role of judiciary is limited to dispensing justice, while other organisations fritter on various activities in their effort to sensitise rights of children. Therefore, different organisations should work in partnership and mutual coordination. Various advocacy programs on the laws and rights of children, prevention of juvenile crime, training on child friendly process to judicial and police personnel should be a concerted inter-agency effort. Different agencies with similar mandates should work together. An activity pitted against availability funds do not yields credible results. To avoid duplication of activities; maximise results on protection of CICLs and administration of justice, it is recommended to improve inter-agency coordination.

Conclusion

On the careful analysis of administration of child justice, and the protection of the rights of children coming in conflict with the laws, it is evident that Bhutan has come a long way. Protection of children and fair administration of justice has always been a national priority. However, with globalisation, and increased rates of children coming in conflict with the laws, has pitted Bhutan against many odds. The mandate to establish the Child Justice Court; training judicial and other officials working with children adequately and training law enforcement agencies on child justice, child rights and protection has increased the need for human and financial capital. It is realised that protection matters visavis the fair administration of justice do not achieve its ends with a single approach. Prevention of crime, improving the quality of lives of children and fighting the root causes of [juvenile] crime is an imminent national mandate. Different agencies like the Judiciary, the law enforcement and other agencies that work for children has to still work tirelessly in all spheres. Bhutan should consider that Child Justice and protection of children in conflict with the laws is an ever evolving subject. The vehicle to protection of children in the justice sector has just begun, and she has to travel many miles to realise the dream to make the children of Bhutan safe, protected and empowered.

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Abstract

‘Administration of Child Justice’ was then a duty of the ordinary courts of law in Bhutan. While the duty of the judiciary is to safeguard and administer justice fairly and independently, child justice as a separate judicial procedure and administration was only recently begun. Presently, the traditional administration of justice is counterpoised by newer obligations set in by recent laws and international norms and standards. This gave rise to the need for multi-dimensional and multitudinous administration of justice with new-fangled judicial and administrative approach and sharpened judicial responsibility. The upkeep of dynamism of judiciary in the administration of child justice depends on the ability to respect, protect and fulfil the rights of children in conflict with the law more professionally. The aims of justice should be to ‘reform a child’ than to ‘punish’. This Thesis reviews the ‘administration of child justice’ as enshrined in the Child Care and Protection Act of Bhutan and other laws in consonance with few international standards and norms on the administration of child justice. The goal of the study is to review and analyse the administration of justice for children in conflict with the law based on various legal provisions set in the national laws. This would help to educate and throw a small light on the administration of child justice for children in conflict with the laws in Bhutan. After this work, it was concluded that for efficient administration of child justice, it needs more infrastructural improvements; capacity building, and a culture of coordinated and informed workmanship among various institutions.

Key words: Child Justice, Children in Conflict with the Law, Child rights.

Zusammenfassung

“Die Verwaltung der Kinder- und Jugendjustiz” war seit jeher eine Pflicht der ordentlichen Gerichte in Bhutan. Während die Pflicht der Justiz allgemein darin besteht Menschen und Gesetze gerecht und unabhängig zu schützen und zu verwalten, wurde die Kinder- und Jugendjustiz als gesondertes gerichtliches administratives Verfahren erst vor kurzem etabliert. Derzeit wird die traditionelle Justiz durch neue staatliche Verpflichtungen, die in den jüngsten Gesetzen sowie internationalen Normen und Standards festgelegt sind, ergänzt. Dies führt zu der Notwendigkeit einer multidimensionalen und vielfältigen Justizverwaltung mit neu gebundenen gerichtlichen und administrativen Vorgehen und einer geschärften gerichtlichen Verantwortung. Die Aufrechterhaltung der Dynamik in der Justizverwaltung im Bereich Kinder und Jugend hängt vor allem von der Fähigkeit ab, die Rechte der Kinder im Fall eines Konflikts mit dem Gesetz zu respektieren, zu schützen und zu erfüllen. Ziel der Justiz sollte sein, “ein Kind zu reformieren”, anstatt zu „bestrafen“. Die vorliegende Arbeit untersucht dementsprechend die im Kinderbetreuungs- und Schutzgesetz von Bhutan und anderen Gesetzen verankerte Verwaltung der Kinder- und Jugendjustiz, hinsichtlich ihrer Vereinbarkeit mit internationalen Normen und Menschenrechtsstandards. Im Zuge der vorliegenden Arbeit wurde festgestellt, dass für eine effiziente Verwaltung von Kinder- und Jugendjustiz einerseits infrastrukturelle Verbesserungen sowie Kapazitätsaufbau und andererseits eine Kultur der koordinierten und informierten Zusammenarbeit verschiedener Institutionen erforderlich sind.

Schlüsselwörter: Kindergerechtigkeit, Kinder im Konflikt mit dem Gesetz, Kinderrechte.