

Challenges of the Procedural Part of the Juvenile Justice System

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1. Introduction

1.1. Background

All the legal systems are different from one another. Some certain characteristics found in one legal system may not be found in another legal system and hence, the differences occur in those aspects. While going through the Nepalese legal system, it can be pointed out that at first Nepalese legal system was totally under the influence of the Hindu religion and was guided by the Hindu beliefs and values. The crimes were not regarded as crimes, but were taken as serious sinful acts. And the offenders were not punished as they are punished now for their crimes but were punished in such a way that they were to go through such processes of regretting, i.e. doing '*Praayaschitta*' to be rescued from the curse. Hence, it was a completely different system than what exists today.

Only after the promulgation of the codified laws in the form of *Muluki Ain* in 1910 B.S., the modern era of Nepalese legal system started. The new *Muluki Ain*, however, could not be free from those traditional Hindu beliefs and values. It still followed the inquisitorial system in its practices and even accepted the criminal responsibility at lower age without any consideration to the age and the act of the children, for the immediate correction. The courts and judges treated children as adults and in many instances they even received the same punishment as per the adults. Though they were not punished as severely as adults, they were held equally liable for any offence as per the adults.

When the Nepalese legal system started to go through the dynamism by accepting the adversarial system, this new change gave space to the concept of Juvenile Justice System. And this approach in the Nepalese legal system has been helpful in promoting the role of state as a parent towards a child and also to protect and promote the child rights.

Juvenile justice system is a necessity of the state because the children are immature and they have not developed the same amount of intent as adults. And, also, they can be more easily rehabilitated. Though the concept of the juvenile justice system has helped in the different treatment of the children in conflict with laws, still there are many instances which show that the procedural implementation of juvenile justice system is still complicated. And, furthermore, it is creating more problems to the juvenile delinquents because till today juvenile justice is still treated as a section of criminal justice system.

*The 15-year-old Min Chhettri (name changed) has been having experiences in traveling from one jail to another. Along with three other friends, he was charged with being an accomplice to the murder of a common friend. He has already spent more than a month in two different adult prisons and now at the Reformation Home, he lives in constant fear of the prospect of being sent to adult prisons once he reaches seventeen. "I don't know what my fate will be as I have no lawyer to fight my case in court. I may have to grow-up in jail till the court decides my case", says Min.*¹

In the above mentioned instance, it shows that the boy has been jailed with the adults, which is against the juvenile justice system. This is just a single instance and there are many other instances that show that still more serious actions are to be taken for the proper procedural implementation of juvenile justice. Hence, this term paper tries to be focused on those procedural parts of the juvenile justice system that are actually being challenged at the time of implementation.

2. Meaning and Definition

2.1. Meaning and Definition of Procedural Law

Procedural law comprises those rules by which the cases are heard and determined by the court and those rules are designed to ensure a fair and consistent application of due process to all cases that come before a court.² Hence, the procedural law is that sect of the law which guides the people towards the way to achieve the remedy of their rights which are encroached or violated.

¹ Sudha Shrestha, 'Justice System needs Emotional Approach' in *The Kathmandu Post* dated 19th January, 2008 A.D.

² Wkipedia, The Free Encyclopedia

2.2. Meaning and Definition of Juvenile

Juvenile is any individual within a certain age range and is subject to the jurisdiction of the juvenile court.³ It means that a person under certain age group as prescribed by the law of the state and does not fall under the age of an adult is a juvenile.

2.3. Meaning and Definition of Juvenile Delinquency

Juvenile delinquency has been defined as any behaviour that is prohibited by the juvenile law of a state.⁴ Juvenile delinquency is the wrong act against law and society committed by children. So, the juvenile justice is that justice system related to the juvenile delinquents.

2.4. Meaning and Definition of Juvenile Justice System

Juvenile justice system is defined as a socio-legal process having responsibility and authority for public reaction to current juvenile delinquency and deterrence of future juvenile delinquency. It is not a part of criminal justice system but a separate justice system. It is so because an adult commits a crime but juvenile does not commit crime and also, it is different in the sense to give the better treatment to juvenile justice system.

3. Analysis and Findings of the Study on Procedural Part of Juvenile Justice System

The Interim Constitution has incorporated several provisions encompassed in part three, called Fundamental Rights. It has guaranteed the right to freedom, right regarding the criminal justice and rights against preventive detention. Similarly, Article 22 guarantees the fundamental rights of the children. However, there is no provision like that of Article 26 (8) of the Constitution of 2047 which had guaranteed the safe guarding the rights and interest of the children.

³ Robert W. Taylor, Eric J. Fritsch & Tory J. Caeti, *Juvenile Justice*, Mc-Graw Hill Companies, 2002, pg- 7.

⁴ Ibid. pg- 5.

Though the Children's Act, 2048 has given a complete legal recognition of childhood and adolescence in its preamble, the children are often treated as adults in many cases. Section 15 of the same Act has prohibited the use of handcuffs and fetters, solitary confinements and keeping children together in prison with adult prisoners. However the scenario is not so and it is proved by the following instances:

Shyam Rai (name changed) was brought to the Reform Home after spending two months in the district jail amongst adult prisoners. He was brought to the home upon the Home's own initiation and when he reached the Home, then after only he was freed from the handcuffs.⁵ However, he is free now after the Saptari District Court of Appeal dismissed the wrong charge of the rape.

Min Chhetri's instance in the first chapter also proves that though the Act has incorporated several child friendly provisions, they are not being implemented properly.

Similarly, Section 42 of the Act has a provision for the establishment of the Children Rehabilitation Home, however, there is only one Reform Home in the whole country at Sano Thimi. And, in Section 50 has given room to the concerned authority who hears the cases of juveniles to use alternative measures in place of police custody or imprisonment; but the children are kept mostly in the custody with the fear that they would run away and also due to the lack of place at the police station to keep the children separately.

Section 49 has prohibited the act of publishing the news of the juvenile's cases without the permission being granted by the related authority but our media has uncontrolled access to the children's case and their identity is easily accessible.

The part of investigation also is faulty in the practice, though the arrest warrants are available in the case files, the details are not mentioned properly. And, it can be best seen in the instance given below:

⁵ Sudha Shrestha, 'Justice System needs Emotional Approach' in The Kathmandu Post dated 19th January, 2008.

According to Shyam Rai (name changed), the youngest son in the family, he was implicated in the criminal case by his neighbours, following a dispute over a piece of land.⁶

In some cases, the age of the juvenile has been increased. They are interrogated in such abusive way that they are mentally as well as physically tortured. And, it violates the provision mentioned in the Section 7 of the Children's Act. And such interrogation takes place in absence of defense lawyer, solely in the presence of the police investigators.

According to the Children's Act, 2048, the children's cases should have hearing in the juvenile court i.e. closed camera court. The juvenile court has not yet been established, though there are some juvenile benches established they are almost functionless as it was observed in the Lalitpur District Court.

The personnel involved in the juvenile cases do lack the adequate knowledge regarding the psychology of the children and their proper treatment and are creating more problems to the juveniles. Not a single personnel has got the formal specialized training regarding the juveniles and do practice the traditional ways of the criminal justice system while dealing the cases of the juveniles also. And it is proved by the following instance:

On 9 September 2004, Jhurri Teli (16 years), resident of Belhiya VDC-7 Banke district was reportedly arrested by the plain-cloths security personnel from the Nepagunj Municipality-16, was detained in different detention centres and prisons till 28 September 2004 when the Appellate Court of Nepalgunj ordered his release. However, the next day at about 2.00 pm, in the presence of lawyers and several representatives of human rights organizations, a police team under the command of Police Inspector Rajendra Prasad Bhatta from the Banke District Police Office, re-arrested him⁷.

Such instances may keep on taking place, if the related governmental body or the judicial system does not become more sensitive towards the juvenile's cases.

⁶ Sudha Shrestha, 'Justice System needs Emotional Approach' in The Kathmandu Post dated 19th January, 2008.

⁷ 'The Maoist's Conflict and Impact on the Rights of the Children.' A report by Asian Center for Human Rights posted on 20th May, 2005.

Hence, it can be remarked that only the making of laws is not enough to provide the juveniles with the proper justice but the implementation of such laws at its best must be achieved to protect and promote the best interest and rights of the children.

4. Recommendations and Conclusion

After the study, here are some recommendations mentioned as the followings:

- 1) Juvenile Justice System is not to be treated as a sect of the criminal justice system but is to be understood as a completely different sect of the justice system.
- 2) The Children's Act, 2048 needs to be amended with new child friendly provisions and more major changes in the processes and jurisdiction applicable to the investigation, remand, bail, judicial custody, re-arrest, etc. that will protect and promote the best interest of the children. It is also necessary to bring conformity with obligations under the Convention on the Rights of the Child as Nepal has also ratified it.
- 3) There must be training programmes on relevant international standards for all professionals involved with the juvenile justice system.
- 4) The rehabilitation and reintegration programmes must be strengthened to help children live their life in proper way after their cases are over.

Hence, with these recommendations, it can be concluded that every thing does take time to become progressive and fruitful. And, if there is some lacking in the Children's Act, it must be taken as challenge and then more careful serious steps must be taken to make it more children friendly. With the forthcoming time, it can be expected that the new amendment in the Act will promote a child friendly justice system in Nepal.

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