

CHILDREN DEPRIVED OF LIBERTY

WHAT DOES IT MEAN IN THE INDIAN CONTEXT



A Report By:



HAQ: Centre for Child Rights

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LIST OF ACRONYMS

AIIMS	All India Institute of Medical Sciences
CCI	Child Care Institution
CCL	Centre for Child and the Law
CICL	Child(ren) in conflict with the law
CNCP	Child(ren) in need of care and protection
CRC	Convention on the Rights of the Child
CRPD	Convention of the Rights of Persons with Disabilities
CWC	Child Welfare Committee
DISE	District Information System for Education
DSLISA	Delhi State Legal Services Authority
DWCD	Department of Women and Child Development
JJA	Juvenile Justice Act
JJB	Juvenile Justice Board
ICCPR	International Covenant on Civil and Political Rights
ICDS	Integrated Child Development Services
ICP	Individual care plan
ICPS	Integrated Child Protection Scheme
IPC	Indian Penal Code
IHBAS	Institute of Human Behaviour and Allied Sciences
JJMR	Juvenile Justice Model Rules
NALSA	National Legal Aid Services Authority
NCRB	National Crime Records Bureau
NCPCR	National Commission for Protection of Child Rights
NFHS	National Family Health Survey
NIMHANS	National Institute of Mental Health and Neuro Sciences
NIPCCD	National Institute for Public Co-operation and Child Development
NLUA	National Law University Assam
NLSIU	National Law School of Indian University
NMHP	National Mental Health Policy
NSDC	National Skills Development Council
POCSO	Protection of Children from Sexual Offences Act
RCI	Rehabilitation Council of India
SIR	Social investigation report
SJPU	Special Juvenile Police Unit
SPYM	Society for the Promotion of Youth and Masses
TISS	Tata Institute of Social Sciences
UNCRC	United Nations Convention on the Rights of the Child
UNGACC	UN Guidelines for the Alternative Care of Children
VIMHANS	Vidya Sagar Institute of Mental Health and Neurosciences

CHAPTER 1:

INTRODUCTION

“In my opinion, places of detention constitute settings of structural violence. At the same time, the conditions in places of detention are very little known to the outside world. Prison walls serve two distinct functions: to lock people away from society, and to keep society out. Only very few members of our societies have been inside prisons, police jails, migration detention centres, psychiatric hospitals, orphanages, children’s homes, drug rehabilitation centres, institutions for children with disabilities or any other places of detention, and most people have no desire to know what the reality of life behind bars looks like. There is very little interest, let alone empathy, for detainees in general, and for children detainees in particular.”

---United Nations Global Study on Children Deprived of Liberty, Manfred NOWAK

The United Nations General Assembly in December 2014 took a decision to invite the Secretary-General to commission an in-depth global study on children deprived of liberty. In October 2016, Manfred Nowak (Austria) was appointed as Independent Expert leading the study. This was the first scientific attempt, on the basis of global data, to comprehend the magnitude of the situation of children deprived of liberty, its possible justifications and root causes, as well as conditions of detention and their harmful impact on the health and development of children.

The aim of this study was to assess, on the basis of scientific data, the magnitude of the global number of children deprived of liberty in six different situations that children consistently face around the world:¹

- Children deprived of liberty in the administration of justice
- Children living in prisons with their primary caregiver
- Children deprived of liberty for migration-related reasons
- Children deprived of liberty in institutions
- Children deprived of liberty in the context of armed conflict
- Children deprived of liberty on national security grounds.

HAQ: Centre for child rights had made contributed to the submission made for this study from India.²

¹ Global Study on Children Deprived of Liberty; [A/74/136 - E - A/74/136 -Desktop \(undocs.org\)](https://undocs.org/A/74/136-E-A/74/136-Desktop)

² The submission contained contributions made by two civil society organizations – i.e. HAQ Centre for Child Rights based in New Delhi and Prayas based in Mumbai; and three individuals - Ms. Swagata Raha, Senior Legal Researcher and independent Consultant; Ms. Arlene Manoharan – independent Child Rights Consultant; and Shruthi Ramakrishnan – Legal Researcher and independent Consultant – with assistance from Ms. Aishwarya Birla, IV Year, B.A.LLB (Hons), NALSAR. Credits for each of the Sections are also given.

² Ms. Swagata Raha, Senior Legal Researcher and independent Consultant; Ms. Arlene Manoharan – Independent Child Rights Consultant, Ms. Shruthi Ramakrishnan - Legal Researcher and independent Consultant contributed to this section, with assistance from Ms. Aishwarya Birla, IV Year, B.A.LLB (Hons), NALSAR (except the answer to question 15, which was provided by Prayas).

About the Global Study

The Global Study on Children Deprived of Liberty was released in 2019. It was presented to the UN General Assembly by the Secretary General on 11 July 2019 at the Seventy Fourth Session (submitted pursuant to General Assembly resolution 72/245.)³ It maps the root causes and pathways that lead to deprivation of liberty of children, along with documenting the good practices of States that have developed for non-custodial solutions instead of detention. It also documents the conditions of detention, taking into account the personal views and experiences of children and assesses possible justifications for and limits of deprivation of liberty of children in light of all relevant provisions of international law, especially the Convention on the Rights of the Child (CRC). The global study is a big milestone in the building of understanding on the situation of children in detention across the world.

The Global Study shows that the vast majority of children detained around the world today have been deprived of liberty in violation of these principles. In almost all cases, there would have been non-custodial solutions available, which should have been applied in order to meet the high legal standard of detention as a measure of last resort. The main message of the Global Study is to urge State Parties to better respect and protect the rights of children by drastically reducing the number of children deprived of liberty.

The rule that children in principle, shall not be deprived of liberty goes beyond the context of child justice and applies to all situations in which children are at risk of being detained, including in the child welfare system and when children are placed in institutions.⁴ But there may be situations when detentions become necessary or in the “Best Interest”. The Study followed the broad definition of deprivation of liberty and places of detention as set out in article 11 (b) of the Havana Rules of 1990⁵ and article 4 of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002⁶. Hence, for the purpose of the Global Study, “the term “places of detention” covers all places where children may be deprived of liberty, such as prisons, police lock-ups, pre-trial detention centres, military camps, social care facilities, institutions for persons with disabilities or for persons addicted to drugs or alcohol, “orphanages”, children’s homes, institutions for the educational supervision of children, psychiatric hospitals, mental health centres or migration detention centres. The study does not, however, cover deprivation of liberty within the family and by private criminal actors, such as organised or unorganised groups involved in trafficking or sale of children.”⁷

³ Global study on children deprived of liberty. Note by the Secretary-General. A/74/136

⁴ <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/101>

⁵ The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.; The Havana Rules;

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>

⁶ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

⁷ Global study on children deprived of liberty. Seventy-fourth session Item 68 (a) of the preliminary list* Promotion and protection of the rights of children: promotion and protection of the rights of children. 11 July 2019. <https://undocs.org/A/74/136>

Even while covering such wide range of institutions, it was specified that the study would not be covering deprivation of liberty within the family setting or ones caused by private criminal actors leading to trafficking or sale of children.⁸ The study, presented by an Independent Expert, states, *“Many children may find themselves in a vicious cycle of different situations of deprivation of liberty throughout their childhood, which might start in an “orphanage”, followed by various institutions for educational supervision and drug rehabilitation until culminating in imprisonment and reoffending. Deprivation of liberty means deprivation of rights, agency, visibility, opportunities and love. Depriving children of liberty is depriving them of their childhood.”*⁹

“Data collected for the study and well-grounded scientific approximations indicate that, altogether, a minimum of between 1.3 and 1.5 million children are deprived of liberty per year. Of those, the largest number are in institutions (430,000–680,000), followed by those in the administration of justice (410,000), migration-related detention (330,000), in armed conflict situations (35,000) and for national security reasons (1,500). An additional 19,000 children are living with their primary caregivers in prisons.”

Source: Global Study on Children Deprived of Liberty Press Conference;
<https://canadaopcatproject.ca/2019/11/18/global-study-children-deprived-of-liberty/>

The test of whether deprivation of liberty as an absolutely exceptional measure is permissible under Articles 3 and 37(b) of the UNCRC must be applied on a case-by-case basis and might lead to different results with respect to the different situations of deprivation of liberty outlined above. While detention of migrant or refugee children is never permissible and children should, in principle, not be deprived of liberty in institutions, there might be cases in the context of armed conflict, the administration of justice or in the context of national security where no suitable alternative measures are available.¹⁰ Nevertheless, even in such truly exceptional cases, detention must be restricted for the shortest appropriate period of time.¹¹

There are some strong messages that the Global Report puts out. The first is that detention of children can be avoided by means of diversion, de-institutionalisation, eradicating migration related detention and applying other non-custodial solutions. The second message is to urge States to give higher recognition to the value of the family as the fundamental group unit of society and, accordingly, invest much more resources in supporting families for their role as primary caregivers for children. The third message is to urge States to adopt a systemic approach to strengthen child justice and child welfare systems and encourage inter-agency cooperation between different stakeholders. For this, police, prosecutors and judges need to strengthen their cooperation with parents, social workers, teachers, health professionals and all persons involved in the child welfare system with the common aim of assisting children in their personal development, all the while taking into account their agency and

⁸ Ibid.

⁹ Ibid

¹⁰ UN General Assembly, UN Guidelines for the Alternative Care of Children, A/RES/64/142, 24 February 2010, paras. 3 & 23.

¹¹ <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/104>

right to participate. Together, they should try to avoid, as much as possible, any situation which may finally lead to the deprivation of liberty of children.¹²

well established both in Indian legal framework¹³ as well as in international law¹⁴ that institutionalisation must be a last resort. As per the Juvenile Justice (Care and Protection of Children) Act 2015 (hereinafter referred as JJ Act), decisions regarding children must be based on the primary consideration that they are in their “best interest” and enables them to develop to their full potential.¹⁵ The law is also very categorical that a “A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry”.¹⁶ As per Article 3 of the UNCRC, all decisions that deprive children of liberty in whatever setting must meet the highest standards of the best interests of the child and Article 37(b) CRC, states that children may only be detained only as a measure of last resort and for the shortest appropriate period of time. The same principle has been reiterated in India’s National Plan of Action for Children, 2016.¹⁷

Children deprived of their liberty are at a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment. Even very short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development. Children deprived of liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.

---- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
A/HRC/28/68; 5 March, 2015

However, what has been evident over the years is that despite these guiding principles, legal and policy frameworks, the implementation of the laws meant to protect children sometimes end up depriving children of their liberty in the name of their welfare and protection. In the common understanding of children deprived of liberty in India, it would often be the children who come in conflict with law (CICLs) and seen as ‘detained’ and deliberately deprived of liberty while the others would be seen to be in child care institutions for their own ‘protection and care’. In fact, that is how the law is also envisaged. However, experiences of children living and growing up in child care institutions, most of which are ‘lock and key’ facilities, tell a different story.¹⁸ So it is perhaps time for

¹² <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/>

¹³ Section 3 of the Juvenile Justice (Care & Protection of Children) Act, 2015

¹⁴ UNCRC

UN Guidelines for the Alternative Care of Children

¹⁵ Section 3(iv) of the Juvenile Justice (Care & Protection of Children) Act, 2015

¹⁶ Section 3(xii) of the Juvenile Justice (Care & Protection of Children) Act, 2015

¹⁷ To secure the rights of children temporarily or permanently deprived of parental care, the State shall endeavour to ensure family and community-based care arrangements including sponsorship, kinship, foster care and adoption, with institutionalisation as a measure of last resort, with due regard to the best interests of the child and guaranteeing quality standards of care and protection.

¹⁸ Singh, Malvika. All’s not well with child care institutions

<https://www.tribuneindia.com/news/comment/all-s-not-well-with-child-care-institutions/767862.html>

us to change our narrative and also examine how children in institutional care, whatever be the reason, are deprived of liberty. What are the impacts of such deprivation on children and what can be the solutions?



Besides administration of justice being a reason for depriving children of their liberty, India faces numerous situations that allow such deprivation, these being illegal migration or statelessness, refugee influx from neighbouring countries, domestic conflicts in north-eastern parts of the country, anti-State armed groups in central and eastern parts of India and armed conflict in the region of Jammu and Kashmir. Imposition of legislations like the National Security Act (NSA) and Armed Forces Special Powers Act (AFSPA) in the conflict zones or areas facing political unrest give unparalleled impunity to the security forces and there are multiple evidences where these legislations have been misused, victimising children in different ways, particularly curtailing their liberty.

“In most special homes or observation homes, around 12 to 20 children share a room. The rooms are usually small and feel cramped due to overcrowding. There is no privacy, and as the spaces are cramped, levels of irritation and annoyance are high, because someone or the other is always around to create a certain level of disturbance. Overcrowding often leads to violent fights over trivial issues.”

-----Source: “Understaffed and overcrowded, juvenile homes are hell holes rather than reform centres”;
Srivastava Divya; June 19, 2016; FirstPost;
<https://www.firstpost.com/living/understaffed-and-overcrowded-juvenile-homes-are-hell-holes-rather-than-reform-centres-2842894.html>

The Global Study on Children Deprived of Liberty was designed to capture information at global level and it was more data centric. The narrative nuances of diverse circumstances which cause deprivation of children’s liberty in the context of India could not be captured in the Global Study. Thus, a need was felt to examine and include such narratives of circumstances and legal framework which cause the deprivation of liberty in the form of country specific report.

At this stage it is important to begin with a caveat. While HAQ: Centre for Child Rights believes in institutionalisation as a last resort, it is deeply concerned about the sudden global fetish for complete de-institutionalisation, which involves dismantling of all institutional care. This is especially true of a hierarchical and stratified society such as India, where communities and sometimes families can be extremely cruel to those at the bottom of the pile. So, there is need for the existence of some institutions that provide quality care in an environment that is safe. So, while institutionalisation must not be the norm (as they had been prone to become in the past), those who run institutions must not suddenly be all turned into villains and treated as pariahs.

Structure of the Present Report

This study is divided into five different sections that cover children's deprivation of liberty in different contexts. Each section details various laws and provisions which address or allow deprivation of liberty in different contexts followed by case studies that concretely highlight such deprivation of liberty. The five thematic areas are:

- **Children deprived of liberty as a result of administration of justice:** This section deals with children who are classified as Children in Conflict with Law (CICL) and how through different mechanisms their rights are curtailed.
- **Children deprived of liberty in institutions:** This section looks at children who are in need of care and protection and thus kept in child care institutions due to their vulnerabilities arising out of circumstances such as victims or witnesses of offences or as unaccompanied migrants. Although, institutionalisation of children is not a new phenomenon, this section examines the various dimensions of deprivation of liberty even inside the institutions.
- **Children deprived of liberty due to migration related issues:** This section deals with deprivation of liberty caused due to illegal migration or Statelessness of children. Although children, irrespective of their legal status in India, are entitled to safeguards under the Juvenile Justice Act, but their treatment and trauma is not the same. The report looks particularly at cases of children from the Rohingya community and Bangladeshi migrants, who are treated as illegal immigrants.
- **Children deprived of liberty in Armed Conflict Zones:** This last section deals with children who find themselves stuck in situations of armed conflict. This section will particularly document the incidents of deprivation of liberty of children in conflict zones and will present examples of interplay between various laws enabling such deprivation.
- **Children living in places of detention with their parents:** This section deals with deprivation of liberty of children who are forced to live in captivity with their parents and not provided proper care and protection in the jail premises.

The conclusion and recommendations attempt to list out the actions that are needed to address the gaps in the law as well as the implementation.

Data and Methodology

The report is majorly based on secondary information with few documented narratives of children being subjected to deprivation of liberty. It draws upon existing quantitative and qualitative information. This includes data and information put out by government, reports by non-government organizations, newspaper and magazine articles, academic papers.

The report is challenged by the limited availability of reliable data and statistics on children deprived of liberty, especially in the context of wider understanding that the report tries to accomplish. The most regular source of data is the National Crime Records Bureau (NCRB), which only provides crime statistics and prison statistics. It provides annual data on crimes committed by juveniles, juveniles apprehended and institutionalised when in conflict with the law, children living in prison with their parents etc. and crimes against children. These have been used to get estimates of children deprived of liberty for committing crimes or for being detained by law enforcement agencies. In 2018, Child Line in partnership with the Ministry of Women and Child Development (MWCD) published a report on children in need of care and protection residing in various Child Care Institutions. Data from this source has also used while discussing children deprived of liberty through institutional care.

Qualitative information is collected from different sources – relevant reports by government and non-government bodies and child rights organizations, studies conducted by various national and international organizations, newspaper and journal articles and academic papers.

Along with quantitative and qualitative information, the legal provisions for children and laws which can affect the liberty of children are examined thoroughly. Besides the Juvenile Justice (Care and Protection of Children) Act, 2015 that allows detention in the form of institutional care, there are other state specific and special laws, particularly in conflict affected areas, that also come into picture. The provisions and actions taken under these laws may not always follow the principles of juvenile justice and child rights and have hence been discussed under the relevant sections of the report.

CHAPTER 2

The International and National Legal Landscape

The Right to Liberty

The right to personal liberty is recognised as one of the oldest human rights. But has been pointed out in the Global Report on Children Deprived of Liberty, the term ‘personal liberty’ is often confused with ‘liberty’ or ‘freedom’ in a much broader sense, including freedom of movement, expression, religion or the liberal freedom to do whatever one likes as long as one does not interfere with the freedom of others.¹⁹ Interference with personal liberty results only from the forceful detention of a person at a certain, narrowly bounded location, such as a prison or other detention facility. A person is deprived of personal liberty if he or she is confined to such a narrowly bounded location, which he or she cannot leave at will.²⁰ The right to personal liberty is not an absolute right. On the contrary, all societies use deprivation of liberty as a punishment for serious crimes or as a measure to maintain public order, morals, health or security.²¹

International Legal Standards

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 prohibits arbitrary and unlawful arrest and detention, thereby leaving States with a fairly broad discretionary power to define in their laws cases in which persons may be deprived of their right to personal liberty. The UN Human Rights Committee made it clear from the outset that Article 9 ICCPR ‘is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.’²²

The early traces of discussion on children deprived of liberty can be located to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as ‘Beijing Rules’) in 1985.

The Beijing Rules²³ specifically dealt with children in conflict with law and while addressing juvenile delinquency, mandated that unless a juvenile was to be adjudicated for involvement in serious offence, including violence, they could not be subjected to conditions which, in any possible way, would deprive them of liberty.²⁴

Four years after the Beijing Rules, in 1989, the UN Convention on the Rights of the Child (UNCRC) established this principle of ‘liberty’ in the very ethics of its approach to Child Rights. The article also laid down practical aspects such as right to maintain contact with family, save in exceptional

¹⁹ <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/93>

²⁰ <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/93>

²¹ <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/93>

²² <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/94>

²³ <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

²⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) Adopted by General Assembly resolution 40/33 of 29 November 1985

circumstance, and prompt access to legal, and other similar, assistance that would help in preserving the liberty of juvenile offender.²⁵

In December 1990, following the adoption of the CRC, two new guidelines were adopted- the Riyadh Guidelines in 1990²⁶ and the Tokyo Rules²⁷ in 1997.²⁸ All these address children in situations of delinquency. The Tokyo Rules build upon the non-custodial measures in the CRC.

United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)

The present Standard Minimum Rules provide a set of basic principles to promote the use of noncustodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

The Rules are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society.

The Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system. When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.

Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

Saving clause: Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment or any other human rights instruments and standards recognized by the international community and relating to the treatment of offenders and the protection of their basic human rights.

On completion of 25-years of the UNCRC, in December 2014, the UN General Assembly adopted resolution no. 69/157 on the “Rights of the Child”, wherein it was reiterated that the deprivation of liberty of children should be used only as a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pre-trial detention for children.²⁹ The resolution also encouraged the State Parties to frame juvenile justice policy in a manner that addressed needs of children in conflict with law and focused more on crime prevention programmes.³⁰

²⁵ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

²⁶ United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) Adopted and proclaimed by General Assembly resolution 45/112 of 14 December 1990

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/PreventionOfJuvenileDelinquency.aspx>

²⁷ <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

²⁸ Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997.

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CriminalJusticeSystem.aspx>

²⁹Resolution adopted by the General Assembly on 18 December 2014;
https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_157.pdf

³⁰ Time to time, various reports had also highlighted on the violence on children and deprivation of their liberty due to being in conflict with the juvenile justice system. A report on Violence against Children within Juvenile Justice System carried out by mapped the violence on children within juvenile justice system due to psycho-social reason and demanded proper implementation of UN Convention – that mentions detention as an option

As for the measures of rehabilitation and reformation of the juvenile offenders, the resolution pushed for developing community-based programmes.³¹

Article 37 of the Convention on the Rights of the Child (CRC) combines aspects of the right to life, the right to personal integrity and dignity and the right to personal liberty in one provision. Article 37(a) prohibits torture and other forms of ill-treatment, capital punishment and life imprisonment without possibility of release. Article 37(b) prohibits unlawful or arbitrary deprivation of personal liberty of children. Article 37(c) defines minimum conditions of detention in line with the right to humanity and respect for the inherent dignity of the human person, and Article 37(d) provides every child deprived of liberty with the right to legal assistance in order to challenge the legality of the deprivation of liberty. In the ICCPR, these rights are covered in different provisions, namely Articles 6, 7, 9 and 10.

In General Comment No. 24 on **Children's Rights in the Child Justice System**³², the CRC-Committee has specified certain time limits. For instance, it recommends to States Parties that no child in conflict with the law below the age of 16 years should be deprived of liberty;³³ every child arrested and deprived of his or her liberty should be brought before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation³⁴ and pre-trial detention should not last longer than 30 days.³⁵

Article 37 of the UNCRC

States Parties shall ensure that:

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- b) 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;
- c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

of 'last resort' – and actively seek alternatives ways for dealing with juvenile offenders. The report was titled *Prevention of and responses to violence against children within the juvenile justice system* brought out by United Nations in 2006.

https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/expert_consultations/harmful_practices/prevention_jjs_2016_web.pdf.

³¹https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_157.pdf

³²<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqkirKQZLK2M58RF%2f5F0vEnG3QGKUXfivhToQfjGxYjV05tUAlgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2bf0RPR9UMtGkA4>

³³General Comment No. 24; Procedural Rights [Art. 37(d)]; para 89

³⁴General Comment No. 24; Procedural Rights [Art. 37(d)]; para 90

³⁵General Comment No. 24; Procedural Rights [Art. 37(d)]; para 90

However, the Committee has not yet specified a maximum duration of imprisonment of children after conviction by a criminal court. Article 37(a) of the UNCRC only prohibits life imprisonment without possibility of release, although the CRC-Committee has observed that life imprisonment with the possibility of release can be regarded on strained terms with the objectives of child justice in Article 40(1) and the best interests of the child in Article 3(1) CRC.

Indeed, it is for the first time that the Global Report has recognised other forms of institutionalisation than just as incarceration following a punishment order for an offence committed by a child.

Almost similar to the larger historical movement at the international level of protecting children, steps have been taken frequently in the Indian context too to vanguard rights of children through the Constitutional framework, National Policies and enactment of various child centric legislations.

National Legal & Policy Framework

In the national context, specific provisions in the Constitution exhibit an added concern for protecting rights of children, following the principle of affirmative action and protective discrimination for the most vulnerable. Keeping the mandate forwarded by the Constitution in view and the principles of UNCRC, different legislations and policies like the Juvenile Justice (Care and Protection of Children) Act 2015 (JJ Act, 2015), Prohibition of Child Marriage Act 2006, Protection of Children from Sexual Offences Act, 2012 (POCSO), Child and Adolescent Labour (Prohibition and Regulation) Act 1986, National Policy for Children, 2013, National Plan of Action for Children, 2016 etc. have been formulated by the State. Although these legislations and policies are meant for welfare of children. It is important that the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) covers both Children in Conflict with the Law (CICL) and Children in Need of Care and Protection (CNCP), who may end up in institutional settings.

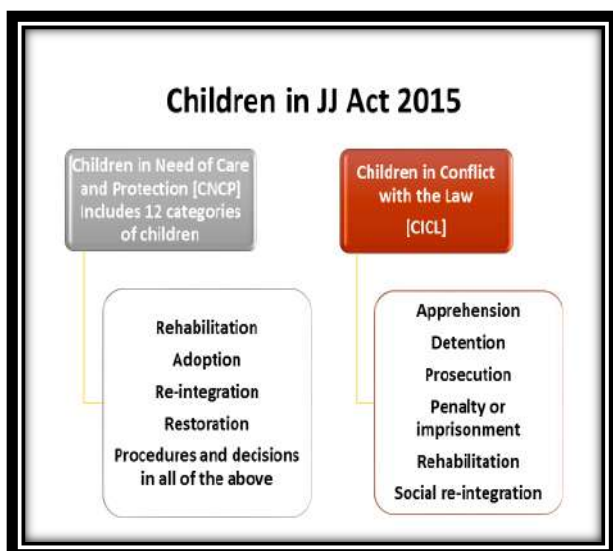
Constitutional Guarantees impacting Child Rights	
Article 14	Right to equality
Article 15	Right against discrimination and duty of the state to take to special measures for children
Article 20	Right of convicts against being subjected to double jeopardy
Article 21	Right to personal liberty and due process of law
Article 21 A	Right to free and compulsory elementary education for all children in the 6-14 year age group
Article 22	Right against illegal arrest and detention and right to legal representation
Article 23	Right to being protected from being trafficked and forced into bonded labour
Article 24	Right to be protected from any hazardous employment till the age of 14 years
Article 29	Right of minorities for protection of their interests
Article 39(e)	Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength
Article 39 (f)	Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment
Article 45	Right to early childhood care and education to all children until they complete the age of six years
Article 46	Right of weaker sections of the people to be protected from social injustice and all forms of exploitation
Article 47	Right to nutrition and standard of living and improved public health

India has always adopted a welfarist model of juvenile justice that has both preventive and curative aspect to it. That is why it deals with both children in conflict with the law (that is children who have allegedly committed an offence) as well children who are in need of care and protection- i.e children who may be vulnerable to offending because of their circumstances. In the 1986 Juvenile Justice Act, the terms used for the two categories of children addressed in law were *Delinquent juvenile* and *Neglected Juvenile*, reflecting a clear understanding of the term 'juvenile' as 'child'. However, in 2000, even as a shift was made to a more rights-based approach, the connotation made a distinction between the 'juvenile' and the 'child', the former being associated with children who allegedly commit an offence, requiring reform more than care and protection. In 2000 the term *Juvenile in Conflict with the Law* was used to describe "a child who is alleged to have committed an offence (Juvenile Justice (Care and Protection) Act 2000 Section 2 (I))³⁶. Hence, its implementation has always intersected with several other laws- dealing with child labour, child marriage, child sexual abuse etc. as well as adoption.

Child Related Legislations	
S. No	Legislations related to children deprived of liberty
1.	The Bonded Labour System (Abolition) Act, 1976
2.	The Commission For Protection of Child Rights Rules, 2006
3.	The Immoral Traffic (Prevention) Act, 1956
4.	The Medical Termination of Pregnancy Act, 1971
5.	The Mines Act, 1952
6.	The National Food Security Act, 2013
7.	The Orphanages and other charitable Homes (Supervision and control) Act 1960
8.	The Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994
9.	The Prohibition of Child Marriage Act 2006
10.	The Protection of Children from Sexual Offences Act, 2012
11.	The Right of Children to Free and Compulsory Education Act 2009
12.	The Juvenile Justice (Care and Protection of Children) Act 2015
13.	The Probation of Offenders Act 1958
14.	The Women's and Children's Institution (Licensing) Act 1956
15.	Young Persons (Harmful Publication) Act, 1956
16.	Persons with Disabilities (Equal Protection of Rights and Full participation) Act 1996
17.	Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act -1989,

In the context of children in conflict with the law (or juvenile in conflict with the law or juvenile delinquents), The minimum age of criminal responsibility in India is 7 years under Section 82 of Indian Penal Code, 1860 which states "*Nothing is an offence which is done by a child under seven years of age*" (The Indian Penal Code, 1860). The children between age of 7 and 18 are considered to have criminal responsibility and they can be subject to detention. However, the presumption of *doli incapax* is recognized in Section 83, Indian Penal Code in respect of children over the age of seven years but under Almost similar to the larger historical movement at the international level of protecting children, steps have been taken frequently in the Indian context too to vanguard rights of children through the enactment of the age of 12 years. It states "*Nothing is an offence which is done by a child*

³⁶ This has been corrected in 2015 version of the JJ Act.



above seven years of age and under twelve, who has not attained sufficient maturity of understanding to be judge of the nature and consequences of his conduct on that occasion” (The Indian Penal Code, 1860).

The children in need of care and protection as housed in what is called ‘Children’s Homes’. Although they may, indeed, have some children without parents, they mostly house all categories of children listed in Section 2 (14).

All special laws for children that are on the statute books also apply to CNCPs residing in institutions- of course depending what the

nature if the case is.

Children are mostly housed in institutions that are recognised by the JJ Act. As will be discussing in detail in the following chapters, there are different categories of institutions depending on whether the child is a CICL or a CNCP. For a very long time no one was able to say exactly how many such children exist in India. In 2018, the Ministry of women and Child Development, in partnership with Child Line India Foundation decided to undertake a nationwide survey of institutions in India. They mapped 9589 Child Care Institutions across the country.³⁷ Prior to the exercise, data base available with the ministry was of only 2135 homes. They are both state run and privately run Institutions by CSOS and even corporates.

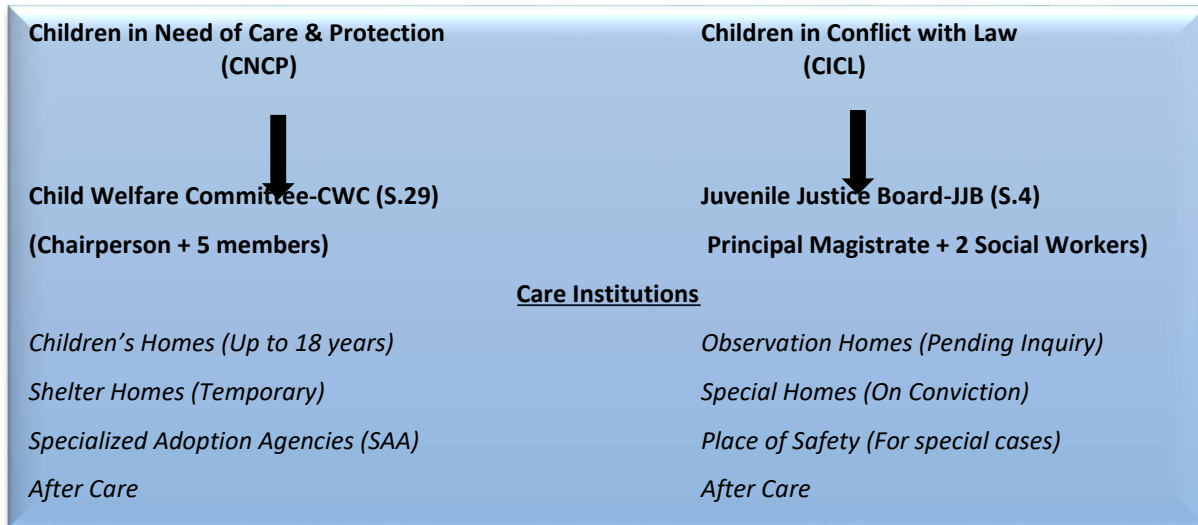
National Snapshot

S.No.		Number	Percentage
1	Total number of States/UTs covered	36	100
2	Total number of district	678	100
3	Number of States/UTs have no home	3	10
4	Total number of district with no homes	98	14.5
5	Total number of homes covered	9589	99
Type of homes			
1	Children Home	6368	66.4
2	Shelter Home	373	3.9
3	Observation Home	278	2.9
4	Special Home	52	0.5
5	Place of Safety	8	0.1
6	Swadhar Home	185	1.9
7	Ujjwala Home	110	1.1
8	SAA	336	3.5
9	Combination Homes	10	0.1
10	Any other Home	1869	19.5
Registration of homes			
1	Number of registered homes under JJ Act	3071	32.03
2	Number of homes applied for registration under JJ Act	1487	15.51
3	Registered under any other Act or scheme	1585	16.53
4	Not legal*	3215	33.53
Category of children			
1	Total number of Children (as per records)**	3,77,649	
2	Children of Single Parent	1,20,118	31.81
3	Orphan	41,730	11.0
4	Abandoned	76,77	2.0
5	Surrendered	67,91	1.8
6	Sexually Abused	15,75	0.4
7	Victim of Child Pornography	189	0.1
8	Children Trafficked for Domestic Work	857	0.2
9	Children Trafficked for Labour/Rescued from Labour	1,827	0.5
10	Children Trafficked for Commercial Sexual Exploitation	489	0.1
11	Victim of Child Marriage	469	0.1
12	Homeless Children	85,73	2.3
13	Runaway/Missing Children	3,780	1.0
14	Mentally Challenged Children	1,07,94	2.9
15	Physically Challenged Children	9,040	2.4

Note: *231 CCI/Homes responded NA (Not Applicable); **A Child has been grouped into more than one category

³⁷ “The Report of the Committee for Analysing & Exercise of Child Care Institutions under the JJ Act, 2015 and Other Homes; Vol. I, Main Report; Ministry of Women and Child Development; GoI; September 2018 https://wcd.nic.in/sites/default/files/CIF%20Report%201_0_0.pdf

Children are taken to the facilities for CICLs mostly by the police. In the case of CNCPs the children land up in ‘homes’, brought there both by state agencies as well as parents themselves on the pretext that they are unable to look after their own child. All of these ‘homes’ / institutions have to be registered under Section 27 of the JJ Act.



The MWCD found that of the 9589 homes surveyed, in the year 2016, about 32% (3071) CCIs/Homes were registered under the JJ Act; 15% (1,487) had applied for registration; 16.5% (1,585) were registered under any other scheme. The survey highlighted that about 33 % child care institutions were functional without valid registration under the JJ Act.

CCIs/Homes which were not registered under the JJ Act.	
Institutions for children	Percentage of Institutions
Children Homes	66.4% (6368)
Shelter Homes	3.9% (373),
Specialised Adoption Agency	3.5% (336 SAA)
Observation Homes	2.9% (278)
Special Homes	0.5% (52)
Swadhar Homes	1.9% (185)
Ujjawala	1% 110)
Place of Safety	1% (8)
Combination Homes	0.1% (10)
https://wcd.nic.in/sites/default/files/CIF%20Report%201_0_0.pdf	

CHAPTER 3

Children in Conflict with Law

Children who have alleged to have committed an offence are referred to in the JJ Act as child in conflict with the law (CICL).³⁸ While as per the law, this includes all children up to the age of 18 years, no child below the age of 7 years can be arrested³⁹. In other words, the age of criminal responsibility in India is 7 years, which is one of the lowest in the world and has come up for discussion in the Committee of the Rights of the Child. This was one of the observations in the last concluding observations in response to India's submission of its third and fourth country reports.⁴⁰

Children between age of 7 and 18 are considered to have criminal responsibility and they can be subject to detention. However, the IPC (Section 83) also states *"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to be judge of the nature and consequences of his conduct on that occasion"*.

Till 2015, all children between the age or 7-18 years were treated as one group for determining 'treatment' under the law. However, the law was amended in 2015, to introduce the possibility of transfer of children between the ages of 16-18 years into the adult system following the massive public outcry following the 'Nirbhaya case'. On 1st January 2016, the Juvenile Justice (Care and Protection of Children) Act (2000) was repealed and the Juvenile Justice (Care and Protection of Children) Act (2015) came into force which made provisions some children between 16 and 18 years accused of heinous offences to be tried as adults. According to Section 2(33) *"heinous offences"* includes the offences for which the minimum punishment under the Indian Penal Code is imprisonment for seven years or more.

Because of the opposition to this demand for children to be not just tried as adults but also placed in adult jails, the government decided to include some special provisions- such children will not be tried in Children's Courts,⁴¹ which were set up to deal with crimes against children, will not be awarded death penalty or life without possibility of release.⁴² It also lays down that such a child will not be sent to adult prison till 21 years of age⁴³. Till then he or she will remain in a facility for children known as Place of Safety⁴⁴. Children can be kept in a place of safety during the pendency of inquiry and after having been found guilty.⁴⁵

³⁸ Children in conflict with the law (Section 2 (13)): *A child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of offence.*

³⁹ Section 82 of Indian Penal Code, 1860 which states *"Nothing is an offence which is done by a child under seven years of age"*

⁴⁰ UN Committee on the Rights of the Child (CRC), Concluding observations on the consolidated third and fourth periodic reports of India, 13 June 2014, CRC/C/IND/CO/3-4, available at: <https://www.refworld.org/docid/541bee3e4.html> [accessed 25 August 2020]

⁴¹ JJ Act Section 18 (3)

⁴² JJ Act Section 21

⁴³ JJ Act Section 19 (3)

⁴⁴ JJ Act Section 2(46)

⁴⁵ JJ Act, 2015, Section 2(46).

Separate juvenile justice processes and facilities exist in India for children in conflict with law under the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) and the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (JJ MR, 2016). This includes separate courts for children, separate police system, correctional facilities and administrative structures.

Key Differences between the Juvenile Justice System and Criminal Justice System in India

Some of the key differences between the Juvenile Justice System and the Criminal Justice System were highlighted by the Supreme Court in *Dr. Subramanian Swamy v. Raju* [(2014) 8 SCC 390]. This judgment was in the context of the Juvenile Justice (Care and Protection of Children) Act, 2000. The relevant provisions in the JJ Act, 2015 and JJ Model Rules, 2016 are indicated in blue.

1. FIR and charge-sheet in respect of juvenile offenders is filed only in 'heinous offences', where the punishment is for seven years or more. [Rule 8(1), JJ Model Rules, 2016]
2. A child alleged to be in conflict with the law is not "arrested", but "apprehended," and that too only in case of allegations of a serious offence. The JJ Act, 2015 has replaced "juvenile in conflict with the law" with "child in conflict with the law."
3. Once apprehended, the police must immediately place such child under the care of a Child Welfare Police Officer, whose duty is to produce the child before the Juvenile Justice Board (JJB). Thus, the police do not retain custody over the child alleged to be in conflict with law. [Section 10(1), JJ Act, 2015]
4. Under no circumstances is the child alleged to be in conflict with law to be detained in a jail or police lock-up, whether before, during or after the Board inquiry. [Section 10(1), JJ Act, 2015]
5. All children alleged to be in conflict with the law are entitled to bail irrespective of whether the offence is bailable or non-bailable. Grant of bail to children alleged to be in conflict with the law is the Rule. Bail can be denied only if the JJB has reasonable grounds to believe that the release would bring the child into association with any known criminal or expose the person to moral, physical or psychological danger or the child's release would defeat the ends of justice. [Section 12, JJ Act, 2015]
6. The JJB conducts a child-friendly "inquiry" and not an adversarial "trial". This is not to say that the nature of the inquiry is non-adversarial, since both prosecution and defence submit their cases. Instead, the nature of the proceedings acquires a child-friendly colour. Section 7(1), JJ Act, 2015 requires the JJB to ensure that procedures are child-friendly and Rule 9(7), JJ Model Rules, 2016 requires that when witnesses are for examination, inquiries are "not conducted in the spirit of strict adversarial proceedings".
7. The emphasis of criminal trials is to record a finding on the guilt or innocence of the accused. In case of established guilt, the prime object of sentencing is to punish a guilty offender. The emphasis of the 'inquiry' conducted by the JJB is to find the guilt/innocence of the child and to investigate the underlying social or familial causes of the alleged crime, and to pass orders to enable the child's rehabilitation and re-integration into the community. Thus, the aim of juvenile sentencing is to reform and rehabilitate the child alleged to be in conflict with law. Under Section 8(3)(h), final orders passed by the JJB when the matter is disposed, should include an Individual Care Plan for the child's rehabilitation and follow-up by the Probation Officer, DCPU, or an NGO.
8. The adult criminal system does not regulate the activities of the offender once s/he has served the sentence. Since the JJ system seeks to reform and rehabilitate the child in conflict with law, it also establishes avenues for the child to make an honest living.

The JJ Act in the very beginning lays down guiding principles, which govern the proceedings in relation to the children in conflict with law.⁴⁶ These include *Principle of Innocence*, *Principle of Institutionalisation as a measure of last resort*, among several others, the truth is that the most common order passed by the Juvenile Justice Board⁴⁷ is that of sending the child to an institution. The nature of institution differs according to the stage of the inquiry. While the inquiry is pending and the child has not been awarded bail, such children are placed in Observation Homes,⁴⁸ and thereafter, if convicted in a Special Home or Place of Safety (as the case may be).⁴⁹ However, most State Governments have not established a separate Place of Safety. When the Place of Safety and the Special Home are not established in district where a child’s family lives or in district where concerned JJB/Children’s Court has jurisdiction in a child’s case, this results in denial of the child’s right to contact the family and/or being present before the JJB or Children’s Court on a regular basis as often escorts and/or transport may be unavailable to bring the child to the JJB or the Children’s Court.

In the light of the fact that children find themselves institutionalised even before they have been proven guilty, what becomes a matter of concern in the pendency of the cases because of the backlog that each JJB carries.

Reported offences by children

Each year a significant number of children, especially boys, are apprehended for committing various crimes – both petty and serious. Following table gives the account for five years for which Juveniles apprehended for committing offences.

No. of Juveniles Apprehended for Commission of IPC* & SLL** Offences					
Age Group	2015	2016	2017	2018	2019
Below 12 Years	602	637	514	382	467
12-15 Years	11088	10957	10712	9007	9134
16-18 Years	29731	32577	29194	28867	29084
Total	41421	44171	40420	38256	38685
*Indian Penal Code					
**Special Local Laws					
Source: Table 5A.4; Crime In India Report (2015-2019), National Crime Records Bureau					

What happens to children who are apprehended?

When a child has allegedly committed an offence and is apprehended, their punishment and sentencing are carried out by JJB or the Children’s Court. Once the inquiry by JJB is completed and if the child is found to be involved in the commission of alleged “petty” or “serious” offence or if the child below the age of 16 years has committed “heinous” offence, the child can be either sent to home after advice or admonition, or be ordered to participate in group counselling or be released on

⁴⁶ JJ Act Chapter II (Section3). General Principles to be followed in Administration of the Act

⁴⁷ JJ Act Section 4

S. 4. (1) stipulates that “Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the State Government shall, constitute for every district, one or more Juvenile Justice Boards for exercising the powers and discharging its functions relating to children in conflict with law under this Act.”

⁴⁸ JJ Act Section 13 (2)

⁴⁹ JJ Act Section 18 (g)

probation or be placed in Special Home or place of safety⁵⁰ depending upon the case. There are six situations in which a person can be ordered to be sent to a place of safety by the JJB or Children's Court:

- (a) for children in the age group of 16 to 18 years alleged to have committed heinous offence pending inquiry⁵¹;
- (b) for children in the age group of 16 to 18 years found to be involved in heinous offence upon completion of inquiry⁵²;
- (c) for persons above 18 years alleged to have committed offence when they were below the age of 18 years pending inquiry⁵³;
- (d) for persons above 18 years found to be involved in offence upon completion of inquiry;⁵⁴
- (e) for children as per the orders of the Board under clause (g) of sub-section (1) of Section 18 of the Act whose conduct and behaviour is such that in the JJB's opinion it would not be in the child's interest, or the interest of other children to keep the child in a Special Home⁵⁵;
- (f) for a person whose claim of being a child is being inquired into and is required to be kept in protective custody.⁵⁶

The JJ Act has provision for a "Fit Facility"⁵⁷ which is run by a government organisation or a registered voluntary or non-government organisation, prepared to temporarily own the responsibility of a particular child for a specific purpose or need and is recognised as fit for the said purpose by the Child Welfare Committee (CWC)⁵⁸ or the Juvenile Justice Board.⁵⁹ The JJB, after due inquiry into the suitability of the facility and the organization to take care of a child, can recognize the facility as a fit facility.⁶⁰ Recognition can also be withdrawn by them for reasons recorded in writing.⁶¹ Based on the JJB's recommendation and bearing the child's best interest, the State Government can transfer a child from the Special Home or fit facility to a fit facility or Home within the State with prior intimation to the concerned JJB.⁶² A child can be transferred outside the State only after consultation with the concerned State Government.⁶³ The total duration of the child's stay cannot be increased by such transfer.⁶⁴

⁵⁰ Section 18 of the JJ Act, 2015

⁵¹ JJ Act, 2015, Sections 19(3) and 49(1); JJ MR, 2016, Rule 29(1)(iii)(a)

⁵² JJ Act, 2015, Sections 19(3) and 49(1); JJ MR, 2016, Rule 29(1)(iii)(b)

⁵³ JJ Act, 2015, Section 6(2); JJ MR, 2016, Rule 29(1)(iii)(c)

⁵⁴ JJ Act, 2015, Section 49(1); JJ MR, 2016, Rule 29(1)(iii)(d)

⁵⁵ JJ Act, 2015, Section 18(1)(g) proviso; JJ MR, 2016, Rule 29(1)(iii)(e)

⁵⁶ JJ Act, 2015, Section 9(4)

⁵⁷ JJ Act, 2015, Section 2(27)

⁵⁸ The Child Welfare Committee is the authority constituted in pursuance to Section 27 of the JJ Act, 2015 - vested with the power of a judicial magistrate of the First Class, and empowered to pass orders as to whether a child is a child in need of care and protection by the State or not, and also on what kind of care and protection would be in the child's best interest. The CWC is also empowered to recognize facilities as fit facilities for children in need of care and protection.

⁵⁹ JJ Act, 2015, Section 51(1)

⁶⁰ JJ Act, 2015, Section 51(1).

⁶¹ JJ Act, 2015, Section 51(2).

⁶² JJ Act, 2015, Section 96(1).

⁶³ JJ Act, 2015, Section 96(2).

⁶⁴ JJ Act, 2015, Section 96(3).

The JJB has enormous powers by which it can provide support to children in numerous ways. For example, if the child requires therapeutic treatment, an advocate can request for a list of recognized/registered organizations providing such therapeutic services in the district from the District Child Protection Unit (DCPU), and move an application before the JJB for an order to send the child to such a facility. If such facility has not been registered or recognized as a fit facility, the advocate could even request the JJB to recognize one as a fit facility.⁶⁵

The following table gives an account of juveniles in conflict with law across Indian states and union territories in 2018 the year for which latest data is available.

State/UTs	No. of Juveniles Apprehended	Juveniles Released as cases unoccurred/ quashed/ Discharged by courts	Juveniles sent home After advice or admonition	Juveniles Sent to Special Home or Fit Institute	Juveniles dealt with fine	Juveniles awarded Imprisonment	Juveniles Acquitted or Discharged	Percentage of Juveniles held Guilty
Andhra Pradesh	2026	301	363	162	80	63	205	76.5
Arunachal Pradesh	139	6	21	8	2	0	0	100
Assam	378	1	79	46	5	0	19	87.2
Bihar	2496	64	472	455	55	1	63	94
Chhattisgarh	5270	115	670	507	273	35	285	83.9
Goa	131	4	18	8	0	0	23	53.1
Gujarat	4933	94	1215	1670	49	0	147	95.2
Haryana	3259	144	322	441	191	113	434	71.1
Himachal Pradesh	435	25	219	38	17	11	22	92.8
Jammu & Kashmir	772	1	198	46	15	0	59	81.4
Jharkhand	123	0	0	12	0	0	0	100
Karnataka	1382	26	525	118	53	2	58	92.3
Kerala	1161	71	476	168	40	0	79	89.6
Madhya Pradesh	13989	320	2971	846	1535	101	912	85.7
Maharashtra	13924	656	4237	1004	268	60	719	88.6
Manipur	15	0	9	0	0	0	0	100
Meghalaya	183	0	16	27	6	0	18	73.1
Mizoram	68	5	23	39	0	0	0	100
Nagaland	27	0	20	0	0	0	0	100
Odisha	1498	0	24	1425	0	0	0	100
Punjab	660	13	76	55	26	63	71	75.6
Rajasthan	4157	163	646	1249	175	30	137	93.9
Sikkim	26	0	0	6	0	0	1	85.7
TamilNadu	6767	115	2099	448	124	21	968	73.6

⁶⁵JJ Act, 2015, Section 2(27), read with 51(1).

State/UTs	No. of Juveniles Apprehended	Juveniles Released as cases unoccurred/ quashed/ Discharged by courts	Juveniles sent home After advice or admonition	Juveniles Sent to Special Home or Fit Institute	Juveniles dealt with fine	Juveniles awarded Imprisonment	Juveniles Acquitted or Discharged	Percentage of Juveniles held Guilty
Telangana	2922	8	877	303	162	38	252	84.6
Tripura	104	0	27	3	0	0	0	100
Uttar Pradesh	2945	333	379	576	109	20	133	89.1
Uttrakhand	325	0	120	68	18	0	14	93.6
West Bengal	2216	211	236	73	19	12	131	72.2
Andaman & Nicobar Island	149	0	1	0	7	0	1	88.9
Chandigarh	364	2	12	8	4	82	129	45.1
Dadara & Nagar Haveli	53	22	0	0	0	0	0	--
Daman & Diu	24	0	6	3	0	0	0	100
Delhi	7352	658	2408	528	44	6	156	95.0
Lakshadweep	0	0	0	0	0	0	0	--
Pondicherry	317	0	0	0	0	0	0	--
TOTAL	80590	3358	18765	10340	3277	658	5036	86.8

Source: Crime In India, 2019; Table 5A.5

Disposal of Cases: Contrary to popular belief, children who offend do not walk away free

In 2016, a new and amended juvenile justice law came into force in India introducing judicial waiver that allows children aged 16 to 18 years old alleged to have committed a heinous offence to be tried as adults. This change was a result of a populist demand based on the public perception that the law of 2000 (as amended in 2006), was lenient towards children even when they were committing heinous crimes. However, in 2006, 91.4% children alleged to be in conflict with the law were held guilty. In 2016, this figure came down to 86% and reduced further to 83.6% in 2017, while pendency of cases against children increased by almost 25 percentage points during this period. The year 2018 again witnessed an increase with 87% children being held guilty. Although pendency declined by 8.5 percentage points between 2017 and 2018, it was still higher than in 2006.

The National Crimes Record Bureau (NCRB) does not provide data on children kept in institutions during pendency of inquiry, but release of children on bail is not easy and many children languish in institutions for years till their cases are pending disposal. This is more common in cases of children who allegedly have committed “heinous offences” and whose cases have been transferred to Children’s Court from JJB to be tried as adult. The shift towards a retributive approach is evident both in law and data on children in conflict with the law, including the manner in which data is presented.

Since the year 2000, the juvenile justice law has provided for children to be released on orders of counselling or community service, but the National Crimes Record Bureau (NCRB) has never provided data on such dispositional alternatives.

Post 2016, no data is available on children released on probation and placed under care of parents/guardians. What is more, **children “awarded imprisonment” is added as a new form of disposal 2017 onwards.** Interestingly, no child held guilty for committing a heinous offence can be sent to a prison meant for adults until the age of 21 years. Even on attaining the age of 21 years, the child in conflict with the law has an opportunity to be released instead of being sent to jail for the remaining period of sentence. Yet, the NCRB chose to use the term “imprisonment” while presenting data on type of disposal.

High pendency of cases leads to longer periods of deprivation of liberty

High pendency in the cases of juvenile crimes also contribute to the deprivation of liberty for the children who allegedly are in conflict with law. The average pendency of juveniles whose cases are pending disposal in last five years (2015 to 2019) reaches upto 49.09%.⁶⁶ As per the table below, in 2019 (the last report available), there were 39156 juveniles whose cases pending for disposal.

Year	No. of Juveniles Apprehended	Number of Juveniles whose Cases are Pending Disposal	Percentage of Juveniles whose Cases are Pending Disposal
2015	56501	21562	38.16%
2016	65659	25226	63.09%
2017	65485	41425	63.25%
2018	76185	41709	54.74%
2019	80590	39156	48.58%

Source: Crime In India Report (2015 to 2019); National Crimes Record Bureau

Although, finds no mention in the JJ Act, the NCRB mentions borstal intuitions, The primary objective of borstal schools is to ensure care, welfare and rehabilitation of young offenders in a different environment suitable for children and keep them away from contaminating atmosphere of the prison. The young offenders in conflict with law detained in borstal schools are provided various vocational trainings. They are also given education with the help of trained teachers. Tamil Nadu has 12 borstal schools and 7 States namely, Himachal Pradesh, Jharkhand, Kerala, Maharashtra, Punjab, Rajasthan & Telangana (1 each) have reported borstal schools in their respective jurisdiction⁶⁷

The JJ Act, 2015 under Section 47(4) states that: “Every child alleged to be in conflict with law who is not placed under the charge of parent or guardian and is sent to an observation home shall be segregated according to the child’s age and gender, after giving due consideration to physical and mental status of the child and degree of the offence committed.”

⁶⁶ Crime in India Report (2015 to 2019); National Crimes Record Bureau

⁶⁷ Prison Statistics in India. 2018. <https://ncrb.gov.in/sites/default/files/PSI-2018.pdf>

In 2018, there were 26398 (NCRB 2019. Table 5A.4) children between the ages of 16-18 years who were apprehended. There is no data as yet that tells us how many of them were transferred into the adult system.

Twenty-five juveniles were tried as adults in 2017, about 22% of the 114 apprehended by the Gurugram police that year. The number has increased to 38 (of 132) in 2018 so far. Seven such suspects have already been convicted this year, and a trial is underway in 31 other cases, a JJB member said on condition of anonymity. In 2016, 13 juveniles were tried as adults, 15.47% of the total 84 who were apprehended.

Source: *Number of juveniles being tried as adults in Gurugram surges*; Hindustan Times; September 8, 2018
<https://www.hindustantimes.com/gurgaon/number-of-juveniles-being-tried-as-adults-in-gurugram-surges/story-sHtUg2yPnO5Mh2QxZwphAP.html#:~:text=In%202016%2C%2013%20juveniles%20were,took%20effect%20in%20January%202016>

16-18 year old Juveniles Apprehended for Heinous Offences as Percentage of Total Juveniles Apprehended				
	2014	2015	2016	2019
IPC Crimes				
Murder	72.6	72.9	76.6	76.9
Dowry Deaths	74.5	61.1	NA	89.7
Kidnapping and Abduction	84.6	80.2	87.8	77.4
Human Trafficking	70.0	100.0	100.0	100.0
Rape	69.4	72.6	76.0	73.8
Robbery	75.3	75.4	75.4	79.5
Dacoity & Attempt to Commit Dacoity/Robbery	81.4	85.0	83.5	86.9
Total Cognizable Heinous Offences	75.8	75.5	78.8	87.2
SLL Crimes				
The Immoral Traffic (Prevention) Act	85.0	100.0	NA	100.0
The Protection of Children from Sexual Offences Act	NA	68.4	NA	70.0
Scheduled Castes and Scheduled Tribes – Related Acts	75.8	73.2	36.8	45.5
The Unlawful Activities (P) Act	25.0	20.0	100.0	33.3
The Arms Act	75.7	84.3	86.0	86.0
The Narcotic Drugs & Psychotropic Substances Act	78.2	80.8	82.6	82.3
The Food Safety & Standards Act	NA	NA	NA	100.0
MACOCA/Control of Organised Crimes	NA	NA	NA	0.0
Total Heinous SLL Offences	76.5	74.2	82.5	75.2

Source: *National Crime Records Bureau*

Process regarding transfer of child into adult system

The JJB is mandated to undertake a preliminary assessment to decide within three months whether a person between 16 and 18 years alleged to have committed a heinous offence, should be transferred to a Children’s Court for trial as an adult.⁶⁸ The assistance of psychologists, psycho-social workers or other experts can be taken by the JJB. The preliminary

⁶⁸ JJ Act, 2015, Section 15(1).

assessment should be conducted with respect to the child’s mental and physical capacity to commit the offence, ability to understand the consequences of the offence and the circumstances in which the child allegedly committed the offence. The JJB can transfer children to the Children’s Court for their trial as adults, based on the preliminary assessment under Section 15, or decide to retain the children and deal with them under the juvenile justice system. The purpose of the preliminary assessment is to enable the JJB to decide whether the matter should be disposed by the JJB or the child should be transferred to the Children’s Court for trial of the child as an adult.⁶⁹

According to the JJ Act 2015, a preliminary assessment is not a trial. Its purpose is not to determine guilt, but to “assess the capacity of ...child to commit and understand the consequences of the alleged offence.”⁷⁰

Upon the conclusion of the preliminary assessment, the JJB can pass either of two following orders:

- It can decide to hear and dispose the matter and follow the procedure for trial in summons case,⁷¹ or
- It can decide that there is a need for trial of the child as an adult and order transfer of the trial of the case to the Children’s Court.⁷²

The JJB must provide reasons for its order and provide a copy of the order to the child immediately.⁷³

The Children’s Court is required to decide whether there is a need for trial of the child as an adult as per provisions of the Criminal Procedure Code, 1973 (Cr.P.C).⁷⁴ If it decides that there is no need for trial as an adult, it can conduct the inquiry as a JJB and pass orders under Section 18(1).⁷⁵

If the Children’s Court decides that the child needs to be tried as an adult, the following procedures should be followed:

- **Procedure:** The Children’s Court should follow the procedure for trial by sessions under the CrPC if it decides to try the child like an adult.⁷⁶

⁶⁹ JJ Act, 2015, Section 19(1).

⁷⁰ JJ Act, 2015, Section 15(1), Explanation.

⁷¹ JJ Act, 2015, Section 15(2).

⁷² JJ Act, 2015, Section 18(3).

⁷³ JJ MR, 2016, Rule 10A(4).

⁷⁴ JJ Act, 2015, Section 19(1)(a); JJ MR, 2016, Rule 13(1).

⁷⁵ JJ Act, 2015, Section 19(1)(b).

⁷⁶ JJ MR, 2016, Rule 13(8)(i).

- **Prohibition on joint trials:** The Children’s Court should ensure that a child alleged to be in conflict with the law is not jointly tried with a person who is not a child.⁷⁷
- **Considerations:** The Children’s Court should consider the special needs of the child, the tenets of fair trial and maintain a child friendly atmosphere while trying a child as an adult.⁷⁸
- **Orders that cannot be passed:** Children’s Court cannot impose death penalty or life imprisonment without the possibility of release for any offence.⁷⁹
- **Individual Care Plan (ICP):** An Individual Care Plan prepared by the PO, CWO or recognized voluntary organization based on interactions with the child and family wherever possible, should form part of the final order passed by the Children’s Court.⁸⁰
- **Placement and Reformatory Services:** If the child is found to be involved in the offence, the child could be sent to the Place of Safety till the child attains 21 years.⁸¹ Reformatory services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support should be provided to the child during the period of stay in the Place of Safety.⁸²

A child found to be in conflict with law alleged to have committed a heinous offence, tried by the Children’s Court as an adult and found to have committed the said offence after a trial, cannot be sent to jail directly. The child will have to be sent to a Place of Safety till the child attains 21 years of age.⁸³ Or as per Section 20(2)(ii) direct the child to complete the remainder of the term in jail. When the child attains the age of 21 years, the Children’s Court will have to provide for a follow up by the PO, DCPU or a social worker or by itself, to evaluate if the child has undergone reformatory changes and if the child can be a contributing member of the society.⁸⁴ Children aged 16-18 years, who alleged to have committed heinous offence and whose cases are adjudicated by either the JJB or the Children’s Court, can be detained in a Place of Safety while under inquiry.⁸⁵ Further, if it is found that such a child has committed the heinous crime alleged, then the child will be detained in the same Place of Safety till the age of 21 years.⁸⁶

After that age, the Children’s Court will have to evaluate if the child has undergone reformatory changes and if the child can be a contributing member of the society.⁸⁷ The progress records of the child and evaluation by experts should be taken into consideration

⁷⁷ JJ Act, 2015, Section 23.

⁷⁸ JJ Act, 2015, Section 19(1)(a).

⁷⁹ JJ Act, 2015, Section 21.

⁸⁰ JJ MR, 2016, Rule 13(8)(ii).

⁸¹ JJ MR, 2016, Rule 13(8)(iii).

⁸² JJ Act, 2015, Section 19(3) proviso.

⁸³ JJ Act, 2015, Section 19(3).

⁸⁴ JJ Act, 2015, Section 20(1).

⁸⁵ JJ Act, 2015, Sections 19(3) and 49(1); JJ MR, 2016, Rule 29(1)(iii)(a).

⁸⁶ JJ Act, 2015, Section 19(3).

⁸⁷ JJ Act, 2015, Section 20(1).

and based on this the Children's Court could decide whether the child should be released or whether the child should complete the remainder of the term in jail.⁸⁸

Despite this procedure, there are several instances where children are kept in prison before they reach the age of 21 years. The following table gives an account of juveniles in prison and in Borstal school, which are used as a place of safety for juvenile offenders, during 2016. The table shows while the no minors are kept in prison after conviction, they are indeed kept there during the trial (before they are declared minors).

In every culture children's maturity, capability and responsibility are considered based on their age; it is universally accepted that younger children are physically and emotionally more vulnerable and therefore, they need a separate system of 'treatment'.⁸⁹ The bottom line is that children who have offended must be made to recognise what they did wrong, but given their age and hence capacity to make a fresh start, the JJ Act builds on this philosophy. Hence contrary to public perception, hyped up by the media, children who commit offences do not go unpunished as is clear from the statistics of inmates under detention.

According to MWCD (2018) study on CCIs, there are 278 Observation Homes, 52 Special Homes and 8 Places of Safety in the country; 7422 children (76% boys and 24% girls) who are in conflict with the law are placed in these CCIs. Unlike Children's Homes and Shelter Homes, the CCIs which are designated for children in conflict with the law are mostly run by the government - 76% of the Observation Homes and 77% of the Special Homes.

The 2007 study of MWCD found that the children in conflict with law reported higher level of physical abuse compared to the children in need of care and protection.

In the case of children in need of care and protection, the homes are not correctional centres and neither are they meant to keep children in confinement; whereas in case of children in conflict with the law, although the home is not a jail, there is an element of confinement and these homes are meant to run as correctional institutions. The aim is to reform the child so that he/she becomes a responsible citizen of the nation. Thus, it is significant that the highest percentage of physical abuse was reported from special homes and observation homes, which together came to 70.21%. The psychosocial needs of these children are greater and physical abuse within these homes puts a lot of trauma and stress on them, thus defeating the very purpose of these institutions. Moreover, the abuse faced by them in institutions may antagonize them further and their attitude towards society might become more hostile, making their rehabilitation more difficult.

Source: MWCD, 2007, p. 55

⁸⁸ JJ Act, 2015, Section 19(3) proviso.

⁸⁹ <http://www.lexpress.in/criminal-justice/age-of-criminal-responsibility-in-india>

A UNICEF report focusing on the Juvenile Justice system in Assam highlights the social discrimination faced by the accused due to delay in the working of judicial system. Recounting experience of an 18-year old hailing from Goalpara, the report shows a structural disadvantage faced by juvenile in terms of being denied proper access to education along with a perpetual fear of being ostracised by the peer-group in schools if ever the case details were to be exposed. The distress caused during period of trial also continues after the trial ends due to improper reintegration of the child in the society which also throws light upon lack of macro-level – engaging on the Act with people – and micro-level – working with families and community specific to particular child – interventions to be taken up the concerned authorities. Along similar lines, according to the report, lengthy time periods of trials in Juvenile courts sees the child being admitted to observation homes which, more often than not, is not able to provide proper education and health services to the child. It also happens that the stay period of child in observation homes becomes the contingent factor for providing proper education to the child. The local level observation of the UNICEF report is also seconded by the NCPCR report titled *Availability of Quality Education and Vocational Training in Observational Homes in India* that raised demand for proper tutorials to be held in observation homes for easing out the process of recuperation of the child in mainstream educational setup once they get out from the observational home.⁹⁰

Post implementation of amended JJ Act of 2015, individuals concerned with Child Rights have also raised concerns with respect to provision of treating children in the age-group of 16-18 years as adults in certain cases and allowing for them to be kept in prisons for adults. The point made by them relates to externalities of keeping children of this age-group in a company that increases vulnerability of the child to be drawn into economy of crime activities. The impact of this on children is already visible through the higher rates of recidivism among children who were convicted.

Illegal Detention of Children

Often data for children deprived of liberty for various reasons is scarce and not available in the public domain. Only the National Crime Records Bureau provides data for children who enter into the criminal justice system. But, in the cases where children are subjected to atrocities by State machineries or illegally detained, no paper work is created for the very reason of not getting such atrocities recorded as they are not in accordance with the law of the land.

The India Torture Report, 2020 has documented few such cases where children were subjected to violence by State authorities and in few cases children have even lost their lives. Illegal detention and torture of children in gross violations of the Juvenile Justice (Care and Protection of Children) Act, 2015 were reported while the NCAT documented the death of

⁹⁰ <https://www.deccanherald.com/national/children-observation-homes-702487.html>

four children due to torture in police custody. The NCAT also documented two cases of death of minors due to alleged torture in juvenile homes and five cases of custodial torture of children.⁹¹

Death of 16-year-old boy due to alleged torture in a remand home, Karnataka

On 14 June 2020, a 16-year-old boy died due to alleged torture by the home guard volunteers at remand home in Devinagar area under Kaul Bazar police station of Bellari district in Karnataka. The deceased minor, a resident of Koppal district, was reportedly admitted into a remand home at Devinagar on 14 June in connection with a case registered against him under the provisions of Protection of Children from Sexual Offences Act. On the same day, within a short period the deceased was allegedly beaten to death by the home guard volunteers. [NHRC Case No. 459/10/3/2020-DH]

---Source: India: Annual Report on Torture, 2020; Pg. 76

Illegal detention of a 14-year-old minor boy, Delhi

On 25 February 2020, a 14-year-old minor boy, son of Sarwar Ali was arrested and lodged at Mandoli jail in Delhi as of 6 March 2020. The victim, a resident of Chandbagh neighborhood of North-east Delhi had ventured out of his home on the morning of 25 February to look out for his 10-year-old younger brother during the Delhi riot. While the younger brother returned on his own, the 14-year-old boy did not return home. The family later discovered that the minor was arrested and detained under 11 sections of the IPC and also the Prevention of Damage to Public Property Act. According to court records, the minor was produced in the Karkardooma district courts on 28 February after which he was remanded to judicial custody and was lodged in Mandoli jail. The family of the minor claimed that he was born on 21 November 2006, and was therefore a minor and the same was established by the minor's Aadhaar card. The victim's family alleged that the police did not even inform them about the arrest and detention of the minor as is mandated by Section 41 of the CrPC and they came to know about their son's arrest only on 28 February after a lawyer informed them over a phone call.

---Source: India: Annual Report on Torture, 2020; Pg. 76

On the other hand, the Citizenship (Amendment) Act, 2019 was signed into Law On 12th December 2019, leading to widespread protests across the country. Citizen protests against a fundamentally discriminatory law have been met with severe repression and criminalization at the hands of the police, particularly in the state of Uttar Pradesh. The severity of police action in Uttar Pradesh is most visible in the abuse of children. Despite national and

⁹¹ "India: Annual Report on Torture, 2020"; para 1; pg 8; National Campaign Against Torture; <http://www.uncat.org/wp-content/uploads/2021/03/IndiaTortureReport2020.pdf>

international legislations, and the respect accorded to *jus cogens* norms even in times of war, close to 41 minors have been detained and subjected to custodial torture, criminalization and post custodial coercion in Uttar Pradesh.⁹²

Five minors who were released in Nagina area of Bijnor (a district in Uttar Pradesh) testified that, from the time they were picked up to when they were released, they were beaten every two-three hours. In Muzaffarnagar (another district in Uttar Pradesh) too, despite denial of UP police, all the released students said that they had been subjected to beatings by police batons and lathis in the jail. A 15-year-old, physically challenged, minor was also detained and beaten up in Muzaffarnagar said:⁹³

“I kept telling them that I am physically challenged. But they wouldn’t listen. They put me in a police van and started beating me up nonstop.” ‘S’ said, sitting in the district hospital to change the bandages on his fractured hand. (Bijnor)

A 17-year-old Y, also from Nagina, was kept in detention for two days and subjected to torture. Y was scared to speak upiv and merely said that:

“Mostly they beat us on the lower parts of our body. I was not able to walk properly for 15 days. The police detained me on Friday and released on Sunday night. Till then I was in custody where they beat me brutally.” (Bijnor)

Recalling what her son shared with her after he returned, Y’s mother expressed her anguish as follows:

“At last, Y came home after two days with his toes crushed and bruises on his body. He was barely walking and his lower part of the body had turned blue due to beatings by the police.... They were given severe beatings during their period of detention. They were first taken to Bijnor Police Lines and then shifted to a farmhouse owned by a BJP MLA. During their illegal detention, Y and others were beaten up mercilessly by the local police officials and were not even given blankets in the spine-chilling cold winter night.... It was the most shocking thing to hear the account of those two days from Y”. (Bijnor)

The UP police told the detained children of Bijnor that the reason for their detention and abuse by police was in order to *“teach them to never attend a public demonstration again”*. All five minors confirmed that they were not only detained along with adults but also made to witness them being tortured.⁹⁴

⁹² *“Brutalizing Innocence: Detention, Torture & Criminalization of Minors by UP Police to Quell Anti-CAA Protests”*; HAQ: Centre for Child Rights, Quill Foundation & Citizens Against Hate; <https://www.haqcrc.org/wp-content/uploads/2020/02/brutalizing-innocence-report.pdf>

⁹³ Ibid

⁹⁴ Ibid

“At one point, they made an adult prisoner strip naked and show us his bruises.” E said, a statement two other children confirmed. (Bijnor)

Detention of every minor that took place in the two districts is a violation of the JJ Act and the Rules made under the Central Government and the U.P. State Government. Under chapter four, section 10 of the Juvenile Justice Act, 2015, it is elaborated that if a child is apprehended, the Child Welfare Police Officer/Special Juvenile Police Unit is responsible for producing the child before the Juvenile Justice Board within a period of 24 hours excluding the time necessary for the journey from the place where the child was apprehended. As mentioned in the testimonies, no minor was produced before any Board and instead all of them were held for longer than 24 hours without any accountability. Neither were any of the children placed under any Child Welfare Police Officer. This means that under no circumstances, should a child be placed in a police lockup or lodged in a jail. All minors detained in UP were not only detained in police lock ups but also tortured and made to witness police torture.⁹⁵

Over the years many more actors have joined in providing similar services and newer initiatives are being tried by the JJBs that believe in possibility of reform and are creative and innovative in their approach to juvenile justice. Unfortunately, in the public mind however, the contempt for children in conflict with the law has only grown in recent years as they are made out to be monsters who deserve strictest of punishments. So much so that neither governments nor other grant making agencies are taking interest in supporting programmes that can go a long way in bringing a change, both in the lives of these children and the society at large. And none realise that it is only wishful to think that long periods of incarceration will make the society a better place and teach them a lesson, while we as a nation fail to learn our lessons from countries where stricter laws and far better implementation of laws has not yielded any significant achievements.

The new Act has allowed the children of the age of 16-18 years, who are accused of heinous offences, to be treated as an adult under the legal system because of this very notion of children who offend. In the public perception, they should be locked away so that ‘society is safe’. Here the questions arise: “Are some children beyond repair? Who decides and how? ... Is there any other treatment required for children declared as beyond repair? Does it help in juvenile crime prevention? Has it reduced recidivism?”⁹⁶ The answers to these questions so far are not clear.

⁹⁵ Ibid

⁹⁶ “Juvenile Justice in India: Understanding Non- Adversarial Nature of the System from Human Rights and Constitutional Perspectives”; National Judicial Academy; Ali Bharti; http://www.nja.nic.in/Concluded_Programmes/2018-19/P-1112_PPTs/7.Juvenile%20Justice%20in%20India.pdf

CHAPTER 4

Children in Need of Care & Protection Deprived of Liberty in Institutions

A significant portion of the children in India are placed each year in various institutions under varied circumstances. They are broadly referred to as child care institutions or CCIs. While some of these institutions are managed by the government, others by private organizations and religious communities. In many cases government supports the latter groups through financial and technical assistance. They are meant to have a license and be registered under Section 41 of the JJ Act.

State as well as the families of the children, both are responsible for putting children in these child care institutions, like orphanage, special schools, reform schools, shelter homes, and various correctional units.

The horror story inside an Indian children's home

Soutik Biswas; India correspondent; Published 10 August 2018

"The sun rose very slowly for us every morning," a girl rescued from a shelter home in India's Bihar state told an investigator recently. She had cupped her hands together forming a small bowl shape and smiled wanly. Daylight bled easily into dusk outside, but inside the dank, windowless home, the nights seemed to be without end. Unknown visitors, she said, would often appear in the dark and sexually assault her.

She was one of 44 girls aged between seven and 17 who lived in a three-storey house in a fetid lane in Muzaffarpur, a grubby town better known for cheap clothes, lacquered bangles and organised crime. They were orphans, runaways, trafficked and the destitute from one of India's poorest states, where 46% of the population is below 17 years of age.

On the afternoon of 30 May, officials arrived at the house and asked the girls to leave. They marched silently into police vans, which drove them to three other homes elsewhere.

Alarm bells had begun ringing in March when officials received a 100-page report about the condition of shelter homes in Bihar by Tata Institute of Social Sciences (TISS), one of India's top social science schools.

Eight researchers from the Mumbai-based school had spent six months in 38 districts, visiting 110 shelter homes, the majority - 71- of them housing children. (They had also visited old age homes, short-stay homes for distressed women and adoption centres.)

The confidential report, parts of which this correspondent has seen, said the conditions at the Muzaffarpur home, run by a local newspaper owner, Brajesh Thakur, were "deplorable", and that it was being run in a "highly questionable manner".

<https://www.bbc.com/news/world-asia-india-45124802>

While these institutions are responsible to look after the welfare of the children, in many cases they neglect to provide even the basic necessities for survival. Every now and then media represents some horror stories of children being forced to live in prison like conditions, being denied minimum requirement of nutrition or hygiene facilities, and routinely being subjected to violence and sexual abuse within the institutions.

This Section will discuss the provisions under the existing laws and reality for the children who are placed in institutional facilities by the State or their families.

Children in Need of Care and Protection

Children in need of care and protection have been defined under Section 2(14) of the JJ Act and such children are dealt by the Child Welfare Committees (CWCs). As per Section 2(14) of the JJ Act. Those children who are found to be in need of care and protection are produced before the Child Welfare Committees (CWCs) set up under Section 27 of the JJ Act.

During the inquiry by the CWC, and even after such children are placed under child care institutions, which include the following:

Children’s Home: means a Children’s Home, established or maintained, in every district or group of districts, by the State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered under the JJ Act.

Open Shelter: means a community-based facility for children in need of residential support on short term basis, with the objective of protecting them from abuse or weaning them or keeping them, away from a life on the streets. These institutions are established and maintained by the State Government, either by itself, or through a voluntary or non-governmental organization.

The study of the 9589 homes across the country by the Ministry of Women and Child Development (MWCD) shows that significant number of Children’s Homes exist for children in need of care and protection. These homes house 370,227 CNCP of which 199,760 are boys, 170,375 are girls and 92 are transgender children (all of whom are in Maharashtra and are orphans). These numbers being particularly high for Tamil Nadu (1598) and Maharashtra (1137).⁹⁷ ‘Children Homes’ are the highest in number at 6368, there are lesser number of ‘Shelter Homes’ (373 CCIs), ‘SAAs’ (336 CCIs).

⁹⁷ Government of India Ministry of Women and child Development. THE REPORT OF THE COMMITTEE (Main Report: Volume I) For Analysing Data of Mapping and Review Exercise of Child Care Institutions under the Juvenile Justice (Care and Protection of Children) Act, 2015 and Other Homes Constituted by the Ministry of Women and Child Development, on 2nd May 2017 Vide Communication No. CW-II/13/2015-CW-II. https://wcd.nic.in/sites/default/files/CIFF%20Report%201_0_0.pdf

Category-wise Distribution of CCIs/Homes for Children in Need of Care and Protection		
Type of CCIs/Homes	Number of CCIs/Homes	Percentage in Total CCIs/Homes
Children's Home	6368	66.41
Shelter Home	373	3.89

Source: "The Report of the Committee for Analysing Data of Mapping & Review Exercise of Child Care Institutions under JJ Act, 2015 and Other Homes"; September 2018; Ministry of Women and Child Development; Gol; <https://wcd.nic.in/sites/default/files/CIF%20Report%201.pdf>

The state which institutionalizes highest number of children in need of care and protection is Tamil Nadu (87618), followed by Maharashtra (57022), Kerala (41499), Andhra Pradesh (37340) and Karnataka (30112).

How did shelter homes in India become criminal hotspots?

Preksha Malu; 01 Oct 2018At

Boys Children Home in Motihari run by NGO "Nirdesh", one of the staff members was reported to be involved in severe physical violence wherein he hit the children with a "thick pipe". Similarly, at Boy's children home in Munger run by NGO "Panaah" the children were found living in a "barrack like infrastructure". "The boys reported being forced to work for the superintendent whose residential quarter was in the same premises...they were made to cook and clean for him and one of the older boys, suffering from hearing and speech impairment who was supposedly a good cook, showed us a three-inch-long scar across his chest as he was hit by the superintendent when he refused to cook for him", said the report.

Source: Preksha Malu, 2018; <https://www.sabrangindia.in/article/how-did-shelter-homes-india-become-criminal-hotspots>

Most of the Children's Homes and Shelter Homes in India are managed by non-governmental institutions - 93.2% of the Children's Homes and 89.3% of the Shelter Homes (MWCD, 2018). While these institutions are tasked with care and protection of the children and receive funds from the government for carrying out these tasks, very few of them follow the mandates. The MWCD study (2018) found that most of the CCIs are under-staffed. Many do not have written Child Protection Policy, grievance redressal mechanisms, appropriate nutrition/diet plan, proper sanitation facility or sufficient water, and required educational facilities or toys for children. Furthermore, in many CCIs the *caregivers* resort to corporal punishment to discipline children. This is a corroboration of MWCD's findings in 2007 covering over 12247 child respondents, selected from different geographical zones of India. The study revealed that 52.86% of the children who were in need of care and protection were subjected to physical abuse in institutions. ⁹⁸

⁹⁸Ministry of Women and Child Development.2007. Study on Child Abuse INDIA 2007 <http://www.indianet.nl/pdf/childabuseIndia.pdf>

...The report further said that a short-stay home in Patna run by "IKARD" was being managed in a "severely custodial and violent manner that unable to cope with the violent atmosphere one girl had committed suicide about a year ago while another had lost her mental balance from the trauma she suffered there". The girls reported that they got no clothes, medicines, toiletries etc," the report said.

.. "Similar disturbing instances and patterns of physical violence and sexual abuse were also revealed by the residents of Sewa Kutir at Muzaffarpur run by the NGO "Om Sai Foundation". "People had bruises and broken bones; they reported being sexually assaulted by the caretakers and receiving severe beatings if they protested", said the report. "There were no ceiling fans or lights in the rooms...and the residents had no access to drinking water...they were forced to drink from the toilets", the report said further.

Source: Preksha Malu, 2018; <https://www.sabrangindia.in/article/how-did-shelter-homes-india-become-criminal-hotspots>

Tata Institute of Social Science (TISS) had conducted a social audit of 110 shelter and short-stay homes across 35 districts of Bihar after being commissioned by the state government. The report based on this audit depicts a horrible picture of living situation of children in these institutions as they routinely experience physical violence, sexual abuse and mental harassment.⁹⁹

After the social audit by TISS, The Supreme Court ordered a nationwide audit of shelter homes. This new audit, carried out by National Commission for Protection of Child Rights (NCPCR) found that any positive review could be given to only 54 out of 2,874 children's homes surveyed across India. It is also pertinent to highlight that some of the States were also reluctant in conducting the social audit. As per the NCPCR, apart from Bihar and Uttar Pradesh; Himachal Pradesh, Manipur, Meghalaya, Kerala, West Bengal, Chhattisgarh and Delhi have been resisting social audits at their child care institutions.¹⁰⁰

While the incidents of rampant abuse and poor condition of child care homes have been reported frequently in various newspapers recently, it is significant to highlight that often these facilities lack even basic infrastructure and adequate resources. While there has been a consistent increase in the funds released by the central government over the years, the state governments haven't really been able to effectively utilise it. WCD Ministry released Rs. 43,893.1 lakhs during 2015-16 for the Integrated Child Protection Scheme, a program which

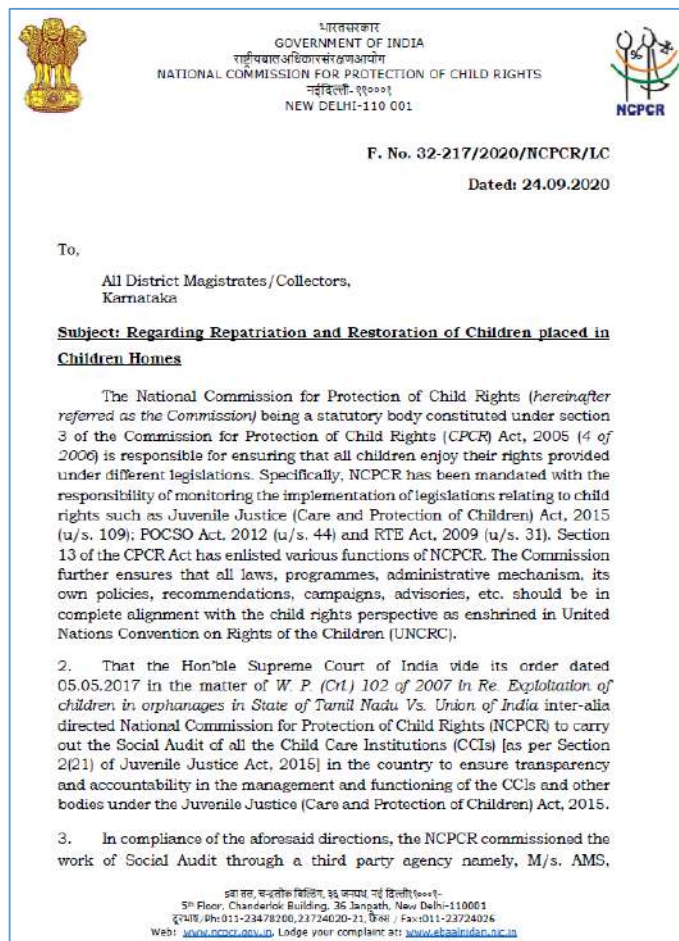
⁹⁹ "Bihar child rapes: Regular social audits must in shelters, says professor whose report exposed case"; Johari Aarefa; July 30, 2018; <https://scroll.in/article/888474/bihar-child-rapes-regular-social-audits-must-in-shelters-says-professor-whose-report-exposed-case>

¹⁰⁰ "UP, Bihar among states resisting audits at child care institutions: Official"; August 9, 2018; <https://www.deccanchronicle.com/nation/current-affairs/090818/up-bihar-among-states-resisting-audits-at-child-care-homes-official.html>

helps secure the abandoned, rescued, or orphaned children. This was an increase of 10.5 per cent from Rs 39,716.41 lakhs during 2014-15.¹⁰¹

However, on average more than one-fourth the amount of fund couldn't be utilised by the state governments for the development of shelter homes for children. Uttar Pradesh and Gujarat are the worst performers with Rs 1,901.86 lakh and Rs 1,887.8 lakh of the unutilised funds respectively.¹⁰²

Sometimes parents and families voluntarily place their children into the care of private institutions which are not licensed or contracted by the state. This may happen when the parents or families are too poor to feed, clothe and shelter the children. Children also may end up in institutions under various other scenarios which include the children being physically or mentally disabled, children with severe or chronic illness, children born outside marriage, abandonment of female children etc. Not just that, sometimes children are placed inside the child care institutions due to their vulnerable condition and circumstances. For example, a child victim of sexual abuse by her close relative or family member may put the child in a very vulnerable situation where often such child victims do not find the adequate support within the family which they require. Such circumstances do call for an immediate support from the State and thus, children are kept in the institutions following the principle "Best Interest". Although, the placement of such children inside the institutions may amount to deprivation of liberty, but these are done to provide adequate support and required intervention where the family has expressed the desire or the family has failed to provide the adequate support.



¹⁰¹ <https://www.news18.com/news/india/no-inspection-unutilised-funds-the-state-has-failed-its-child-shelter-homes-1843525.html>

¹⁰² "No Inspection, Unutilised Funds: The State has Failed its Child Shelter Homes"; <https://www.news18.com/news/india/no-inspection-unutilised-funds-the-state-has-failed-its-child-shelter-homes-1843525.html>

In September, 2020, the National Commission for Protection of Child Rights (NCPCR), amidst the pandemic outbreak, directed the District Magistrates to initiate the process of restoration and repatriation of all children staying inside the child care institutions.¹⁰³ The direction from the NCPCR was issued to the District Magistrates, which clearly stated that:

*“...It is therefore requested to your good office to immediately produce all the CNCP staying in these CCI before the concerned Child Welfare Committee (CWC) for their immediate repatriation and restoration and provide soft copy of detailed list of all the children who have been so repatriated by you in this process along with soft copies of order passed by CWC in respect of each child so repatriated, to the Commission. Further, the Commission strongly recommends that the repatriation and restoration of these children shall be conducted while ensuring strict adherence to the Guidelines issued by the Ministry of Home Affairs and Ministry of Health and Family Welfare from time to time to contain the spread of COVID-19 and the same are available at <https://www.mha.gov.in/notifications/circulars-covid-19> and <https://www.mohfw.gov.in/> respectively. The Commission also recommends that while repatriating and restoring these children, concerned officials are duty bound to ensure strict adherence to the Guidelines issued from time to time by the respective State Government to contain the spread of COVID-19. Thus these CNCPs shall be produced virtually before the concerned CWC for their repatriation and restoration, wherever it is suitable and needed.”*¹⁰⁴

The letter further mentioned that this exercise will be conducted in phase wise manner, starting from all districts of Tamil Nadu, Karnataka, Telangana, Maharashtra, Andhra Pradesh, Kerala, Meghalaya and Mizoram in first phase, where these CCIs are found more in concentration as compared to other States. The Commission has planned to then take this monitoring exercise further in other parts of the Country.

The abovementioned directive by the NCPCR involves many issues and ignored the very safety of children living inside the child care institutions. While de-institutionalisation is an important intervention for children living in CCIs and must be taken with careful planning and utmost care through an individualized approach, the NCPCR violated the objectives of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) and failed to consider the other fundamental principles of best interest of children, safety and participation. While non-institutional care is an important objective, blanket recommendations by the NCPCR to release and restore all children residing in CCIs ignores the need for and recognition of institutional care as a disposition available under law, especially when restoration to the family is not in the child’s best interest. Many children are placed in CCIs for long term care based on orders passed by Child Welfare Committees (CWCs) after due inquiry, and therefore not all can be restored to their biological families or placed in alternative care. Such decisions cannot be made without taking into consideration

¹⁰³ Letter issued by the NCPCR vide letter no. F. No. 32-217/2020/NCPCR/LC; Dated: 24.09.2020

¹⁰⁴ Letter issued by the NCPCR vide letter no. F. No. 32-217/2020/NCPCR/LC; Dated: 24.09.2020; Para 11

children's views and it is imperative that children who do not wish to return to their families for any reason are not sent back to show compliance with such recommendations.¹⁰⁵

In most cases, almost nil or very poor record is kept for these abandoned children. The quality of childcare provided to children in these institutions is also of extremely poor quality. Most of the times no special care or attention is given to the children with disability and illness who require extensive care, have reduced communication capacity and are unable to protect themselves from abuse and violence inflicted on them.

Alternatives to the Deprivation of Liberty of Children in Institutions

The Juvenile Justice (Care and Protection of Children) Act, 2015 specifies institutionalization as a measure of last resort and tries to explore ways to provide family based care to a child by "*restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care*".¹⁰⁶

Sponsorship: Sponsorship could be provided to families to care for their children within the family as an alternative to institutionalization. Sponsorship can also enable children living in Child Care Institutions to be restored to their families along with the financial support such children may need to improve their quality of life.¹⁰⁷

Foster Care: While Section 39(1) of JJ Act prescribes foster care for children, children alleged or found to be in conflict with law are not eligible for foster care services as Section 44(1) restricts foster care for only children in need of care and protection dealt with by the Child Welfare Committee. Foster care is lauded by some as a better option for the safety and well-being of the children.

However, there is no consensus on introduction of non-institutional care measures, like foster care, in India due to poor follow-up mechanisms. Besides, group foster care homes are yet to find acceptance.

¹⁰⁵ Statement from Civil Society Organisations and Individuals on NCPCR's Blanket Recommendation for Restoration of Children in Child Care Institutions; <https://www.hagcrc.org/wp-content/uploads/2020/10/ncpcr-final-statement-with-endorsements-2.pdf>

¹⁰⁶ JJ Act, Section 39(1)

¹⁰⁷ JJ Act, 2015, Sections 2(58) and 45(4)

CHAPTER 5

Children Deprived of Liberty for Migration Related Reasons

The phenomenon of child migration is not an uncommon feature in our country but enormity of its magnitude can be captured from statistics provided on it by the 2011 Census. The Census data records almost 63 million child migrants in 2011 who migrated due to various reasons – moved after birth, education, work, business, marriage etcetera. While on one hand it is possible to read adult-migration as voluntary and involuntary, migration of children often takes place as an involuntary act. The circumstances in which children, especially belonging to the underprivileged section of the society, migrate are multifarious such as migration of their parents in search of jobs, on their own in search of jobs, after displacement due to various developmental projects, natural calamities or land loss etc. Children also migrate as part of refugee groups from other countries.

The migrant in general and migrant children in particular remain outside the gamut of development discourse in India. Children experience some form of deprivation of liberty in each of these situations. Source:

Table D-5, Census 2011.

Reasons for child migration in India 2011

	Male	Female
Others	13,468,359	12,649,310
Moved after Birth	10,661,719	9,800,058
Moved with household	8,202,630	7,283,255
Education	768,002	596,324
Work	98,618	66,011
Marriage	3,328	129,183
Business	16,696	13,120

Legal Provisions related to issues arising from Child Migration

Various laws and policies that try to cover insecurities for child resulting from their migration have managed to lay down a proper framework towards child protection and their development. These laws and policies cover aspects of child labour, proper nutrition, education, health and other aspects that children who migrate find difficult to access. Being deprived of these things not only prohibits the liberty of child during the period of migration but also inhibit the potentiality of realizing liberty as they grow up.

Employment of children below 14 years in particular hazardous industries was banned by Article 24 of the Constitution of India. Building upon it, *The Child Labour (Prohibition and Regulation) Act of 1986* elaborated on workspaces where children could be employed but added to it stricter rules in-order to prevent any exploitation of child who lands into such labour processes. The act made it binding that no child should be made to work beyond six-

hours with at least an hour break after three-hours and also made it compulsory for the employer to give an entire day-off in a week to the child. Taking care of health and safety of child labourer was also ensured by the act by making compulsory proper cleanliness, adequate lighting, proper ventilation, disposal of wastes, and precaution against fire etcetera at the site of work. The guidelines embedded in the act came under criticism as any form of labour that a child had to perform would *de facto* result in deprivation of liberty. Examples where the conditions of rule were being flouted and children were forced to work as bonded labour, demanded for re-looking into the act resulting in its subsequent amendment in 2016. The amended act prevented the employment of any child below 14-years and restricted employment of children between 14 and 18-years to specific workspaces. The amended act still continues to allow for children to be engaged with family business or enterprises, a provision that has made it difficult to implement the law in its full scope as in lot of cases the production process is divided into small production chains that are carried out by smaller producing unit including instances of production taking place at the level of family unit. The wide gap between promises of the act and its implementation, allows for a significant number of child migrants to be absorbed into labour of precarious nature.

To address educational rights of children, *The Right to Education Act 2005* (amended in 2011) was formulated by the government. The act makes providing education compulsory for children between the age of 6 and 16 constituting it as a fundamental right of every child. The provisions of the act had a direct bearing on access to decent education for children that have to migrate to different states and even for children who stay back when their parents migrate. Along with the state-funded schools, the act made it mandatory for the private school to reserve 25 per cent of its seats for the children coming from economically backward strata. The onus of guaranteeing that every eligible child under the scheme gets covered lies on the Government, as instituted in the act, which has to be carried out by a continuous monitoring of neighbourhoods to identify children who are deprived of this fundamental right.

...A 2013 survey by the NGO Aide et Action and Bernard van Leer Foundation, had found that 80% among migrant children living in worksites don't go to school. The survey was held among 3500 migrant households across seven cities – Delhi, Chennai, Hyderabad, Jaipur, Guwahati, Patna and Bhopal. The study also found 40% of the children working in hazardous occupations like construction and stone crushing. 90% were excluded from benefits available under the government's Integrated Child Development Services scheme (ICDS).

The GEM (Global Education Monitoring) report cites another study which found that only 55% of children in Delhi's slums attended primary school. In comparison, 90% children attended primary school in the city as a whole.

As per the 2013 UNESCO report, migrant children drop out because the academic year overlaps with the seasonal migration cycle from November to June. Because of this, children who enrol in school in their hometowns in June, tend to drop out by start of the migration season in November. If the child enrolls in a different school in her host city, she may have learning difficulties because of differences in curriculum and language. Add to this, requirements like Aadhaar or residence proof for enrolment.

Source: Navya, 2019

Deprivation of Liberty in Instances of Forced Migration

In recent years, Rohingya refugees who fled from Myanmar to India and other neighbouring countries because of ethnic cleansing carried out by the Myanmar military, are forced to live in condition of gross human rights violation. Described “as the most persecuted minorities of the world”¹⁰⁸, the Rohingyas have faced discrimination and persecution ever since the Burmese independence in 1947 and are today the world’s largest stateless community. From 2018, Rohingyas have sought shelter from persecution by taking refuge in India. Obtaining precise number of Rohingyas currently in India is a difficult task as no official data has been presented by the India state. A sense of Rohingya presence can be gauged from an affidavit submitted to the Supreme Court by the government that registers approximately 40000 Rohingyas presently in India. Currently, Rohingyas are spread across eight states, including Delhi, Uttar Pradesh, Haryana, West Bengal, Tamil Nadu, Punjab, Telangana and Jammu & Kashmir. The largest population of Rohingyas are concentrated in the conflict-ridden state of Jammu and Kashmir, followed by Hyderabad.¹⁰⁹ With no support from government, Rohingya community face different barriers in accessing decent livelihoods, healthcare, education and proper shelter that has resulted to children in Rohingya community being deprived of liberty. Instances have been reported from Rohingya refugee shelter in different part of the country about hostile behaviour expressed by local communities around the camps. These hostilities have often led to putting campsites on fire by the non-state local actors leaving children of families homeless.¹¹⁰

Even in places where the state has officially rehabilitated the Rohingya communities, adequate space for putting gup shelter is hardly provided thus leading to overcrowding and improper provisions to run a household. From a fact-finding report carried out by Human Rights Law Network (HRLN) on Rohingya Refugee Camps in Delhi, it was revealed that during winters families had to use wood stoves to heat their rooms and without proper ventilation in these houses the newborn infants, children and pregnant women keep damaging their

¹⁰⁸ <https://www.unrefugees.org/emergencies/rohingya/>

¹⁰⁹ ‘NOBODY’S CHILDREN, OWNERS OF NOTHING’: *Analysing the Indian State’s Policy Response to the Rohingya Refugee Crisis*; Mudasir Amin; Policy Report No. 24; The Hindu Centre for Politics and Public Policy; https://www.thehinducentre.com/incoming/article24811444.ece/BINARY/Policy%20Report%2024%20Mudasir_a5.pdf

¹¹⁰ “We have lost everything’: *Pre-dawn blaze destroys Delhi’s only camp for Rohingya refugees*”; Abhishek Dey; <https://scroll.in/article/875759/we-have-lost-everything-pre-dawn-blaze-destroys-delhis-only-camp-for-rohingya-refugees>

“Shelters of Rohingyas gutted in mysterious fire”; Mohit Kandhari;

<https://www.dailypioneer.com/2017/india/shelters-of-rohingyas-gutted-in-mysterious-fire.html>

“Fire breaks out in Rohingya refugee camp in Haryana’s Nuh district; 55 families rendered homeless”;

<https://www.firstpost.com/india/fire-breaks-out-in-rohingya-refugee-camp-in-haryanas-nuh-district-55-families-rendered-homeless-4484891.html>

BJYM leader ‘admits’ to burning Rohingya refugee camp in Delhi;

<https://timesofindia.indiatimes.com/india/bjym-leader-admits-to-burning-rohingya-refugee-camp-in-delhi-complaint-filed/articleshow/63840127.cms>

lungs and throats.¹¹¹ The water in these camps is generally supplied through tubewells, which is generally dirty and foul-smelling, leading to children becoming victim of diseases such as dengue and swine flu.¹¹² Proper healthcare in case a child is diagnosed with such diseases is not made available to them. The pre-natal care required for pregnant-women is also absent from these refugee camps. The HRLN report narrates that most residents in these camps were unaware of ASHA workers and Anganwadi workers. In a camp where the Anganwadi had been setup it was completely dysfunctional.¹¹³ Report also points out that authorities have denied from issuing birth-certificates for new-born babies, unless high amount of money is paid to them, which also leads to denial of accessing healthcare services after birth. The Rohingya communities that sought refuge due to persecution continue to exist in deplorable condition and in particular the children are not provided proper care and protection which they are entitled for as per convention on Child Rights.

UNHCR's position regarding the detention of refugee and migrant children in the migration context

As affirmed by Art. 3 of the CRC, the best interest of the child shall be a primary consideration in all the measures affecting the child, overall an ethic of care, and not an enforcement, needs to govern the actions taken, since the extreme vulnerability of minors. A best interests' assessment procedure should be conducted, which may be in the context of the existing child protection system of the States, where applicable. The principles of minimal intervention and the best interest of the child should govern any measures taken by States. Consequently, unaccompanied or separated children should not be detained; instead, appropriate care arrangements remain the best measure, as liberty and freedom of movement of children should be always the preferred solution.

Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Furthermore, children should never be criminalised or subject to punitive measures because of their parents' migration status. Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities.

In the recent wake of National Register of Citizen(s), conducted in Assam with its final list published in August 2019, a fresh crisis has appeared that is witnessing large group of individuals being moved from different parts of India to states of Assam and West Bengal with a motive to be either 'pushed back' into Bangladesh or shifted into detention centres in Assam. In such situations, different reports have come out pointing to deprivation of liberty, and future possibilities of it, for children who are tagged as 'illegal' immigrant along with their family members. On 25th October 2019, around fifty-nine migrant labourers, identified as 'illegal' Bangladeshi migrants, were picked up by Bengaluru Police and detained for 26-days after which they were boarded onto train for Kolkata with a purpose to be deported back to

¹¹¹ <https://hrln.org/wp-content/uploads/2018/02/Rohingya-FF-report.pdf>. Pp 26.

¹¹² <https://www.youthkiawaaz.com/2018/02/rohingyas-refugee-in-new-delhi/>

¹¹³ <https://hrln.org/wp-content/uploads/2018/02/Rohingya-FF-report.pdf>. Pp 27.

Bangladesh.¹¹⁴ The group consisted of almost 20 children, most of who were travelling with their parents to Kolkata. As per the same report, women and children were forced to different degrees of brutality, while kept forcibly at detention centre in Bengaluru, from their heads being shaved for easy identification to being continuously guarded.¹¹⁵ Cases where children were separated from their families are also not uncommon in such instances. Two possible future scenarios await such children who are picked up under the category of ‘illegal’ immigrant in recent times – kept in detention centre and forced to cross border by the armed forces. In both scenarios, deprivation of liberty, on top of whatever takes places as part of such identification and picking up process, of children is pushed to its uppermost limits.

In response to a Rajya Sabha question on number of deaths in detention centres of Assam and their conditions, Minister Nityanand Rai gave the ‘official’ count of 28 detainees that had died either within detention centre or in hospitals where these detainees were admitted. The minister assured that proper healthcare services and basic services were provided in the detention centres.¹¹⁶ No breakup of victims, in terms of how many children and women had died, was provided by the Minister in his response. Reports that have covered situation that detainees face in detention centres give a completely different account with respect to assurances provided by the Minister. One such report talks about death of 45-days old child in detention centre in Kokrajhar district of Assam.¹¹⁷ The report narrates how mother of this child was picked up, two-weeks after giving birth, by authorities leading to shifting her and her newborn twins to the detention centre. The child who died started developing respiratory problems to which proper attention was not paid by the detention centre authorities.

Finally, as the case became severe, the child was taken to a local hospital in Bhangagarh district where the doctor said that the child’s condition was severe and making child travel a distance of 500-km had made his condition further worse. The child died five-days after the check-up in the detention centre and after sometime it was proved that child’s mother was a ‘legal’ citizen, in a manner NRC guidelines defined, and should have never been put in a detention centre in the first instance. Such a fate awaits children who languish in detention centres of Assam, some of which are Rohingya Muslim as well, where no proper care and protection has been ensured for any child. Many children who are forced to move into such detention centre often accompany their widowed mothers. Request put up by Assam State Commission for Protection of Child Rights for making shelter/observation homes for such children, ensuring proper availability of basic services and amenities are yet to be acknowledged and acted upon by the State Government of Assam.¹¹⁸

¹¹⁴ <https://thewire.in/rights/ground-report-taken-from-bengaluru-to-kolkata-59-bangladeshis-wait-to-be-pushed-back>

¹¹⁵ <https://www.thenewsminute.com/article/uncertain-future-bangladeshi-immigrants-taken-bengaluru-kolkata-113172>

¹¹⁶ <https://pqars.nic.in/annex/250/AS103.docx>

¹¹⁷ <https://scroll.in/article/935337/detention-in-assam-a-baby-and-old-man-died-despite-their-families-having-proof-of-citizenship>

¹¹⁸ <https://www.deccanherald.com/national/east-and-northeast/children-foreigners-719353.html>

The second option where children in such instances are forced to cross-over into Bangladesh territory has led to horrific accounts. In cases where children manage to cross-over, they are captured and arrested by Bangladesh armed forces. The Bangladesh government has time and again denied accepting such individuals as their official citizens and continues to keep them under arrest in Bangladesh prisons. From November 1st to November 10th, after final list of NRC was out, the Bangladesh armed forces arrested over 300 individuals that attempted to cross the border out of which 67 were minors.¹¹⁹ Cases in which the individuals are caught in the process of crossing border, they become victims of crossfire as well. Reports have pointed out to cases such as where a 15-year old was shot dead by the BSF security personnel while crossing border after which the body was brought down by armed forces.¹²⁰ Cross-border migration from Bangladesh to India and back to Bangladesh has led to catastrophic results on the liberty of children. A continued rebuttal by the State to identify and capture the 'illegal' migrant, be it the Indian or Bangladesh state, forces children into situations where gross acts of devaluing their access to fundamental rights are conducted. Deprived of proper access to shelter, nutrition, education, health and in some cases right to life highlights the conditions in which children are pushed into. In today's political crisis, it will not be an overstatement that risks associated with migration.

Impact of Deprivation of Liberty Due to Migration Related Reasons on Children

Poverty induced migration, displacement or forced immigration frequently put children in a deleterious condition. In India it is a common practice among rural, poor families to make seasonal migration in search of work. Oftentimes the adults are employed by urban contractors in various construction sites. In most cases the contractors arrange the shelters for the workers. The living conditions in these shelters are appalling and they normally lack the basic amenities like water or sanitation facilities.¹²¹

Children who live in such conditions are especially vulnerable to various kinds of diseases. The overcrowded living arrangement along with unknown people also means children are vulnerable to various abuses and sexual predation by their neighbours. Children, especially in the case of seasonal migration, are generally not re-enrolled in school in the place of their destination location. As a result, their education is greatly hampered. Sometimes, in construction sites or in small firms, a family is employed as a unit. In such cases, even young children are forced to work in hazardous and dangerous environments. Children from refugee communities or displaced communities, living in various temporary camps across India, also face similar problems. Children from refugee communities further suffer from political barriers and social prejudices which restrict their access to education or movement outside their camps.

¹¹⁹ <https://www.thedailystar.net/backpage/news/bgb-detains-over-300-intruders-india-1830355>

¹²⁰ <https://thewire.in/rights/ground-report-taken-from-bengaluru-to-kolkata-59-bangladeshis-wait-to-be-pushed-back>

¹²¹ http://planningcommission.nic.in/reports/sereport/ser/ser_mig.pdf

Children who are forced to migrate on their own are among the most vulnerable groups of children. While poverty is one of the major driving forces behind their migration, domestic abuse or abandonment by family are also important reasons. These children are extremely vulnerable to different types of abuse in the hands of their employers. They are also regularly exploited by various anti-social elements and driven to commit unlawful or criminal activities.¹²²

UNHCR's position is in accordance with international standards:

- UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005 (CRC/GC/2005/6)–paragraph 61 “Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”
- UN Committee on the Rights of the Child (CRC), Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration–paragraph 78 “Children should not be criminalized or subject to punitive measures because of their or their parents’ migration status. The detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”
- UN Special Rapporteur on Torture, Thematic Report on torture and ill-treatment of children deprived of their liberty, 5 March 2015 (A/HRC/28/68) –paragraph 80 “Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children[...] The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.

Source: <https://www.refworld.org/pdfid/5885c2434.pdf>

¹²² https://eprints.lancs.ac.uk/id/eprint/125072/1/MIGRATION_AND_POVERTY.pdf

CHAPTER 6

Children Deprived of Liberty in the Context of Armed Conflict

“I remain concerned by grave violations against children in Jammu and Kashmir and call upon the Government to take preventive measures to protect children, including by ending the use of pellets against children, ensuring that children are not associated in any way to security forces, and endorsing the Safe Schools Declaration and the Vancouver Principles. I am alarmed at the detention and torture of children and concerned by the military use of schools. I urge the Government to ensure that children are detained as a measure of last resort and for the shortest appropriate period of time, and to prevent all forms of ill-treatment in detention. I also urge the Government to ensure the implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015, to address the use of children for illegal activities and the situation of detained children.”

-----Report of the Secretary-General on children and armed conflict (A/75/873–S/2021/437) issued on 21 June 2021

Children in conflict affected areas often become victims in the hands of both government and the militants. Through coercion and application of force, both parties compel children to join their cause and punish them if they go against that. Even when children do not get directly involved in the armed conflict, their rights are grossly violated. Their education is disrupted; their freedom of movement is curtailed. Children also become victims of different types of violence, including sexual violence.

... The United Nations continued to receive reports of the recruitment and use of children, including by the Naxalites, particularly in Chhattisgarh and Jharkhand. Naxalites reportedly resorted to the use of a lottery system to conscript children in Jharkhand. In addition, three incidents of the recruitment and use of children were reported in Jammu and Kashmir in the context of clashes with national security forces. One case was attributed to Jaish-i-Mohammed and two to Hizbul Mujahideen. Unverified reports also indicate the use of children as informants and spies by national security forces.

----Source: United Nations, 2018a; pp. 30-31

In the conflict affected areas, children are often forced to join non-state armed groups. Children, who are alleged or suspected to be involved with these groups, are detained by the State Security Forces under the following legal provisions:

1. Arms Act, 1959;
2. Unlawful Activities Prevention Act, 1967; and
3. National Security Act, 1980.

Further, in Jammu & Kashmir, administrative detention appears to be used by the Jammu and Kashmir authorities to circumvent the protections of ordinary criminal procedure. Introduced in 1978 to primarily deal with timber smugglers, the Jammu and Kashmir Public Safety Act, 1978 (PSA) is the most commonly used law for the purpose of administrative detention. PSA authorizes the authorities to impose an administrative detention order for a broad range of activities that are vaguely defined, including “acting in any manner prejudicial to the security of the State” or for “acting in any manner prejudicial to the maintenance of public order”. PSA allows for detention without charge or trial for up to two years in some cases. PSA has reportedly been widely used by the authorities in Jammu and Kashmir to stifle dissent. It has been used to target human rights defenders, journalists, separatist political leaders, suspected members of armed opposition groups and people involved in protests. In 2012, the Jammu and Kashmir State Assembly amended PSA to prohibit the detention of people under 18 years of age. However, during the 2016 unrest, there were multiple cases of children under 18 years being detained under PSA.¹²³

On the other hand, in the state of Chhattisgarh, which is a heavily Left Wing Extremist affected area has also witnessed children suspected to be a part of such non-state armed group, being detained by the State authorities. Such detentions are completely in contravention with the National and International child safeguarding standards. According to a study conducted by the Human Rights Watch in Chhattisgarh in the year 2008, Government security forces have detained and tortured children suspected of being Naxalites, recruited former Naxalites to work as police informers and Special Police Officers (SPOs) while still children, and failed to develop a scheme for the identification, rescue, demobilization, and rehabilitation of child Naxalites¹²⁴.

North-Eastern part of India has witnessed a long stride of tussle between the various non-state armed groups and the State government security forces. The presence of much controversial **Armed Forces Special Powers Act (AFSPA)** has given the unprecedented impunity to the security forces and such unparalleled impunity has resulted in great amount of Human Rights violations, including the rights of children. Children in Manipur have been denied justice under the Juvenile Justice (Care and Protection) Act. Children have been regularly apprehended, detained and subjected to torture while many were killed in fake encounters. Others were abused in fake surrender ceremonies organized by State Armed Forces. In these events children are being lured to attend and are detained as fake members of insurgent groups¹²⁵.

¹²³ OHCHR Report on the Situation of Human Rights in Kashmir;

<https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>

¹²⁴ “Dangerous Duty: Children and Chhattisgarh Conflict”; Human Rights Watch;

<https://www.hrw.org/report/2008/09/05/dangerous-duty/children-and-chhattisgarh-conflict>

¹²⁵ “Impact of Conflict on Children in Assam and Manipur States of India”; The Northeast Research & Social Work Networking, Kokrajhar;

Children who are detained and charged under these Acts and/or other security legislation due to associations with non-state armed groups, are most often considered as “Children in Conflict with Law” and the law prescribes different treatment for them. Section 18 of the JJ Act directs Juvenile Justice Board to send such a child to a Special Home for a period not exceeding three years. The child is to be provided reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the Special Home. But if the conduct and behaviour of the child has been such that, it would not be in the child’s interest or in the interest of other children housed in a Special Home, the Board may send such child to the Place of Safety. The Act also stipulates that children, in conflict with the law and aged between 16-18 years, who have committed “heinous offences” may be tried as adults if so directed by a JJB. This may include children who are detained under the Unlawful Activities (Prevention) Act for association with non-state armed groups.

On the other hand, children who are considered to be in need of care and protection in the context of armed conflict are sent to Children’s Home for rehabilitation. For these children, the CWC may pass following orders:

- (a) Declaration that a child is in need of care and protection;
- (b) Restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;
- (c) Placement of the child in Children’s Home or Fit Facility or Specialised Adoption Agency for the purpose of adoption. Children are placed in such institutions either after reaching the conclusion that the family of a child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;
- (d) Placement of the child with a fit person for long term or temporary care;
- (e) Foster care orders;
- (f) Sponsorship orders;
- (g) Directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;
- (h) Declaration that the child is legally free for adoption.

Situation across States

As the situation of conflict varies significantly from one region to another, children from different states, regions or religious and ethnic groups experience different levels of hardship due to conflict. Most of the times, it is very difficult to measure how conflicts affect children due to lack of reliable or official data for variables which are not related to law enforcement.

Limited data, however, is available on the involvement of children in armed conflict. Children in armed conflict are generally detained under Arms Act (1959), Unlawful Activities Prevention Act (1967) and National Security Act (1980). However, statistics of children detained and crimes committed under National Security Act are not available as no FIRs are registered under this Act. However, many states detain children under National Security Act and other similar Acts which avoid keeping official account of the number of children in detention.

“On 16 September 2016, 16-year-old Rayees Ahmad Mir from Delina area of Baramulla district of Kashmir was arrested by J&K police under charges of throwing stones at armed forces and two days later, he was booked under PSA. The PSA order stated that Rayees was 18-year-old, which was incorrect according to his school records. The order was challenged by Rayees’s family in Jammu and Kashmir High Court, and the family produced documents proving he was 16 years old. Even though High Court ordered on 7 October 2016 that Rayees be treated as a juvenile under Juvenile Justice Act Rules, as prima facie evidence suggested that he was a minor – and he should be transferred to a juvenile home. However, Rayees spent his entire detention period 360 kilometres away from his hometown in Kot Bhalwal jail in Jammu before he was released in January 2017. Rayees was released three after weeks after the High Court quashed his PSA on 6 December 2016. Before being released, Rayees was taken to Joint Interrogation Centre (JIC) Jammu where he was detained for some days before he was sent to Baramulla police station where he was kept for few weeks before being released.”

Source: “Terrorized: Impact of Violence on the Children in Jammu & Kashmir”; 2018; Jammu & Kashmir Coalition of Civil Society

In Jammu & Kashmir, administrative detention is used by the government to circumvent the protections of ordinary criminal procedure. Jammu and Kashmir Public Safety Act, 1978 (PSA), which is the most commonly used law for the purpose of administrative detention, allows the authorities to impose an administrative detention order for a broad range of activities that are vaguely defined, including “acting in any manner prejudicial to the security of the State” or for “acting in any manner prejudicial to the maintenance of public order”. PSA allows for detention without charge or trial for up to two years in some cases. PSA has reportedly been widely used by the authorities in Jammu and Kashmir to stifle dissent and to target human rights defenders, journalists, separatist political leaders, suspected members of armed opposition groups and people involved in protests. In 2012, the Jammu and Kashmir State Assembly amended PSA to prohibit the detention of people less than 18 years of age. However, there were multiple cases of children under 18 years being detained under PSA

(OHCHR, 2018). In many cases the detained children are also kept in jails, thus going completely against national and international safeguarding standards. To arrive at an exact number of detentions of children under PSA in Jammu and Kashmir is not readily possible as government hasn't maintained any such data because all arrests under PSA, whether of children, youth or old people, are carried out in a fashion that the age of the detainee, in case of minors, is almost always deliberately kept to be above 18 years of age on the 17 dossier prepared by police. This ensures that in the government records, the age of the detainee is always above 18 years of age.¹²⁶ Many cases of illegal detention highlight the fact that the police and district administration deliberately do not take into account the age of the detainee, especially children and routinely book them under false, arbitrary and punitive charges under PSA. Assigning wrong age on PSA dossiers, especially in cases of children is done to prevent any possibility of staying their arrest. The closer analysis of the patterns of use of PSA to arrest children reveals that the arrests of children are done to punish and persecute them.¹²⁷

Torture inflicted by Indian State on the children of Jammu & Kashmir

.....Children and young adults who are profiled as 'stone pelters' are often routinely rounded up in neighbourhood sweeps or nocturnal raids, or required to report to the police station on certain dates due to security considerations such as Indian Independence and Republic Day. They are kept in over-crowded, poorly-ventilated cells, routinely assaulted and subjected to coercive interrogation and torture techniques including stripping, pulling out of nails, and beating on the feet to restrict mobility. Besides being the direct victims of conflict, children often become indirect victims of violence.

Children (below the age of 18 years) have been forced to witness assault, torture or killings of their family members, which has left chronic impacts on their mental health. According to a study by Dr. Akash Y. Khan and Dr. Mushtaq A. Margoob from the Department of Psychiatry, GMC Srinagar, 49% of the children suffering from PTSD in Kashmir have been witness to a killing of a close relative while 15% of these children have witnessed the arrest or torture of a family member..... 11% had witnessed night raids, 14% had been caught up in cross firing, 4% had been beaten up / tortured and 7% had heard about killing of a close relative. Female children and adolescents are often subjected to brutal torture and/or sexual violence.....

On July 3, 2004, 17-year old victim was allegedly picked up from Zachaldara Higher Secondary School at noon, by Jammu & Kashmir Police Dy.S.P. and two female constables. They accused her of helping an unidentified gunman..... She repeatedly pleaded her innocence, but they did not listen to her.... The Dy.S.P. gagged her mouth and tied her hands, and while two female constables held her down, he kicked her until she fainted. When she regained consciousness, the victim was told to name any neighbours; otherwise she would be sent to SOG camp, Handwara and tortured. She asked the Dy.S.P. for evidence, but he said there was no need for proof. With that, he kicked her hard in the abdomen, and she began bleeding profusely. She asked for water, and was instead given water with chilli powder mixed into it. Later, after much ordeal when it was clear that the victim did not have any connection with the militants, she was instructed by the DI6 to remain quiet about the incident.

(Source: APDP and JKCCS, 2010)

¹²⁶ "Terrorized: Impact of Violence on the Children in Jammu & Kashmir"; 2018; Jammu & Kashmir Coalition of Civil Society; <https://www.jkccs.net/wp-content/uploads/2018/03/2018-Impact-of-Violence-on-Children-of-JK-JKCCS.pdf>

¹²⁷ Ibid

In August 5, 2019, the Articles 370 and 35A of the Constitution pertaining to the State of Jammu and Kashmir were abrogated by the Central Government and the State was bifurcated in two Union Territories. The mainstream Indian media initially reported normalcy and general acceptance of the Government's decision by the local Kashmiri population. A four-member team, consisting of Jean Drèze (Economist), Kavita Krishnan (Communist Party of India (Marxist-Leninist) and All India Progressive Women's Association), Maimoona Mollah (All India Democratic Women's Association) and Vimal Bhai (National Alliance of People's Movements), visited Kashmir during 9-13 August. The group witnessed various oppressive measures taken against the Kashmiri population by the Government of India. These include imposition of curfew, restraining national and international media, cutting off communication with outside world, restricting movement and keeping people in a situation like home arrest. Children also continued to suffer. Schools were closed. Young boys and teens were routinely picked up for interrogation and tortured.

"We met people in villages all over Kashmir, where little kids have been... there is no other word to use... they have been abducted by the police. They have been picked up from their homes in the middle of the night from their beds and they are held indefinitely, illegally, either in army camps or in police stations. They are being beaten up. Their parents have no way of ascertaining whether their children will disappear or be returned. There is no case that is registered, no FIR. I can say that to every village we went, there were arrests that had happened."¹²⁸ "...We have video documentation of family members and of a child who had been released one day before. We do have documentation.....One video is of a 11-year-old child who was released one day before Eid and he is saying that he was kept in custody from fifth onwards and beaten up, and there were children younger than him in custody. Then, we have video of family members, we are not identifying them because they are scared, but their teenage boy has been picked up in the middle of the night from his bed and he is being kept illegally. They have gone to the thana but they keep taaloing them, saying it is not in our hands, we cannot do anything. They are really afraid because there is no record of their arrest. Tomorrow, if something happens to him or he just vanishes, there is no record that he was arrested at all."¹²⁹

¹²⁸ "Govt. Arresting Children In Kashmir, Says Activist Kavita Krishnan After Fact Finding Mission"; https://www.huffpost.com/archive/in/entry/kashmir-government-arresting-children-article-370_in_5d5388c3e4b05fa9df0696fd?m5m&fbclid=IwAR0UdtRDAUq6scb_WHQZUtoFUvUZiusN-XIXI2mMSNgf5JZdXqHCm5MogQ

¹²⁹ Ibid

Situation after Abrogation of Article 370 and 35A

.....we did not meet a single person who supported the Indian government's decision to abrogate Article 370. On the contrary, most people were extremely angry, both at the abrogation of Article 370 (and 35A) and at the manner in which it had been done.There is intense and virtually unanimous anger in Kashmir against the Indian government's decision to abrogate Articles 370 and 35A, and also about the way this has been done.

In every village we visited, as well as in downtown Srinagar, there were very young schoolboys and teenagers who had been arbitrarily picked up by police or army/paramilitary and held in illegal detention. We met an 11-year-old boy in Pampore who had been held in a police station between 5 August and 11 August. He had been beaten up, and he said there were boys even younger than him in custody, from nearby villages.

Hundreds of boys and teens are being picked up from their beds in midnight raids. The only purpose of these raids is to create fear. Women and girls told us of molestation by armed forces during these raids. Parents feared meeting us and telling us about the "arrests" (abductions) of their boys. They are afraid of Public Security Act cases being filed. The other fear is that the boys may be "disappeared" – i.e killed in custody and dumped in mass graves of which Kashmir has a grim history. As one neighbour of an arrested boy said, "There is no record of these arrests. It is illegal detention. So if the boy "disappears" – i.e is killed in custody – the police/army can just say they never had him in custody in the first place."

Source: Kashmir Caged: Fact Finding Report (<https://countercurrents.org/2019/08/kashmir-caged-fact-finding-report>)

The state of Chhattisgarh, which is a heavily Left Wing Extremist (LWE) affected region, has also witnessed children suspected to be part of non-state armed group being detained and tortured by the State authorities. Again such detentions are completely in violation with the national and international child safeguarding standards. According to a study conducted by the Human Rights Watch in Chhattisgarh in 2008, children who desert Naxalite (LWE) ranks and surrender to police seeking protection find themselves in a vicious cycle. Not only are they subjected to brutal reprisals by Naxalites, but they may be re-recruited to work as police informers and Special Police Officers (SPOs) by the Chhattisgarh police, under the garb of "rehabilitation for surrendered Naxalites" (HRW, 2008a; HRW, 2008b).

In armed conflict, children often suffer immensely in the hands of anti-state bodies. A study conducted by HAQ: Centre for Child Rights and Child Soldiers International in Jharkhand shows that left-wing extremist groups like CPI (Maoist) and People's Liberation Front of India (PLFI) regularly abduct children, often younger than ten years in age, and commit grave crimes against them by killing, maiming, recruiting them in armed conflict or exploiting them according to their needs. If their families try to prevent the abduction and forcible recruitment, they are punished severely or killed. Girl children are regularly raped and sexually abused by their commanders or cadre. There are evidences that girl children specifically are recruited as source of entertainment and to lure young boys and men; they

are used for sexual gratification, apart from being forced to cook, doing chores, fighting in the front line and being used as shield.¹³⁰

North-Eastern part of India has witnessed a long stride of tussle between the various non-state armed groups and the state government security forces. The presence of much controversial Armed Forces (Special Powers) Act (AFSPA) has given unprecedented impunity to security forces and such unparalleled impunity has resulted in great amount of human rights violations, including violation of the rights of children. For a long time, children in Manipur have been denied justice under the JJ Act. Children have been regularly apprehended, detained and subjected to torture while many of them were also killed in fake encounters. Others were abused in fake surrender ceremonies organized by State Armed Forces. Children are lured or forced to attend these events, where they are falsely presented as members of insurgent groups (Northeast Research & Social Work Networking, 2014).

According to Indian Criminal Justice System, in cases of illegal detention of children their families can appeal against it in the High Court of their respective states, as well as in the Supreme Court. The Code of Criminal Procedure provides for the provision for such appeal under Section 482, which talks about the inherent powers of the High Court and empowers the High Court to pass any such necessary order to prevent the abuse of law.

Also, in case of illegal detention of such children, the Constitution of India provides the families to file the writ of 'Habeas Corpus'¹³¹ in the High Courts. This provision becomes more crucial in context of children who have been detained under Public Safety Act. The PSA does not include a provision granting the detainee a right to judicial review of the grounds of detention or the right to appeal against their detention. On the other hand, the Constitution of India ensures that all persons have the right to seek remedy for violation of their rights via the extraordinary process of petitioning to the High Court of the state or the Supreme Court of India.

Impact on Children of Being Deprived of Liberty in the Context of Armed Conflict

Children are increasingly being used and made targets during armed conflicts through deliberate actions of both governments and anti-state bodies. Globally, as well as in India, thousands of children are kidnapped, recruited, maimed, raped or murdered during armed conflicts.

¹³⁰ <http://haqrc.org/publication/lost-childhood-caught-armed-violence-jharkhand/>

¹³¹ The writ of Habeas Corpus is issued in case of an illegal detention of a person. It is an order to produce before the Court the person who has been detained and the Court examines the issue. If the detention is found illegal, the Court sets the person free, hence protects the fundamental right to liberty of the person which was infringed by the illegal detention.

Militants and other extremist groups often use children as shields or even in direct encounters. In many cases, they torture these children and/or their families to engage them to work in this capacity. Girl children are often recruited for sexual gratification and are routinely raped and subjected to sexual violence; they are also forced to abort if they become pregnant. If a child tries to escape this situation, they are hunted down and killed, often along with their entire family.

On the other hand, in conflict affected areas, governments frequently use children as informers or props to further their agenda. Even when children are not directly involved in conflict, they are routinely picked up by military and armed forces under the slightest suspicion and kept in illegal detention. Children are viciously tortured, sexually abused and even murdered in these detentions. As these detentions are not recorded officially, the families of these children have very little means to make any official complaint. Many children also lose their family or close relatives during armed conflicts, which often results in losing shelter and protection. Institutionalization also fails to provide proper environment for the wellbeing and development of children, sometimes these institutions become the centres of various kinds of abuse. The environment of terror and violence during armed conflicts severely affects children's mental and physical development and they often develop PTSD and other cognitive diseases.

The impact of armed conflict has a direct bearing on basic requirements of children such as education, healthcare, movement etcetera. Many children, caught in the crossfire of state and non-state organizations, are forced to drop-out of schools either from injuries sustained as a result of conflict – pellet guns or tear gas shelling – or by labelling that follows the child on being taken by the any organization. Giving example of children's access to education the book *Growing Up in a Conflict Zone* narrates, lived experience of a child stuck in Naga-Kuki conflict of 1992. The child on getting directly injured during the conflict was initially thought to be dead, only to be later discovered as alive and brought to Regional Institute of Medical Sciences in Imphal for treatment. The child had to forego schooling during the period he was getting the treatment as well as after coming out of hospital as a result of being forced to migrate with his family who had lost all their arable land in the conflict.¹³² Such experiences are droplets into the huge and varied types of experiences that children in conflict zone face on a day-to-day basis. The limiting of educational opportunities is not only present in areas that children come from but rather accessing it becomes a difficult task on migrating to other places as a result of 'othering'. While schools in these areas should ideally be delivering hands-on approach to children along variegated themes, such as survival, personal safety and health, for the children to see connection between what is being taught and the way it translates into actual capabilities, following mainstream themes and methods of pedagogy prevents in developing such scope of actual capabilities in children. The life of children, more often than not in these areas, weaved through the vocabulary of 'picked up', 'missing', 'disappearance',

¹³² Growing Up in a Conflict Zone. Pp.81

'curfew', 'camps' leaves an everlasting impression of societal relations and how should one behave in such structuring. Such habitus inculcates experiences of a constant feeling of being watched or living in fear and other such psychologically traumatic experiences.

Way back during the 1979 Iranian Revolution, in which conservative Ayatollah Ruhollah Khomeini came to power, the Iranian filmmakers, such as Asghar Farhadi, decided to raise their voices against oppressive regimes through the most vulnerable section of the society – its children. Filmmaking in Kashmir today has a similar ring to it. Movies like Inshallah Football – capturing the experiences of a Kashmiri boy in his interaction with state authorities in detention centers and his disappointments when he fails to get an Indian passport robbing him of his dreams of playing club football in Brazil – or No Fathers in Kashmir – a coming-of-age story about children looking out for their father who has 'disappeared' and in that process experiences the despotic structures placed at large in Kashmir – attempt to capture the impact of silenced Azaans, empty streets, militarized schools, broken telephone wires and closed hospitals on Kashmiris through the eyes and experiences of children. The pain and agony inflicted on children from all different parties in the conflict creates a necessary disturbance in its audiences. It triggers the audience to ask how do children exercise their very fundamental liberty of dreaming or hoping in cities that have been, like prisons, already fenced.

Children Deprived of Liberty on National Security Grounds

In India, armed force and other law enforcement agencies are in charge of apprehending individuals, including children who are considered to be a threat to national security. According to NCPCR, there are three different set-ups in which children can be considered as a national security threat by these agencies:

- i) *first, in the "disturbed areas", where the Armed Forces (Special Powers) Act, 1958 is in force and the armed forces of the Union of India have been deployed with special powers ("Disturbed Areas");*
- ii) *second, in the districts/regions affected by Left Wing Extremism ("LWE"), with no special legislation is in place; and*
- iii) *third, the rest of the country, where no special legislation or situation is in place, however, vulnerabilities exist in the treatment of children by the law enforcement agencies as part of the normal law and order enforcement regime. (NCPCR, p. 6)*

According to child rights activists, in all the above scenarios the children should be considered as victims of circumstances and social background. Various factors – including poverty, atrocities committed by police and armed forces, as well as kidnapping and bribing by the insurgent groups lead to children joining the ranks of the militants.

A report by Time (2014) on Northeast India, focusing on Manipur, states:

.....In 2012, 10 boys were forcefully taken to insurgent training camps in Burma. Three were lucky — pressure from local rights groups forced their release.

Nineteen children were recruited in 2008. That year, a video was circulated by PREPAK (People's Revolutionary Party of Kangleipak) depicting armed child soldiers parading in front of the cameras at a training camp in Burma.

Today, the numbers have soared dramatically. The Asian Centre for Human Rights says there are at least 500 child soldiers now in the Northeast — a region that comprises seven states ethnically, geographically and culturally distinct from the rest of India. "If they are convinced and thrilled by the guns and the life, it is very difficult to get them back," says Annie Mangsatabam, who chairs a child-welfare committee in Manipur. "Even if they come back, they and their families are always at risk from the rebels."

.....According to a petition submitted to India's Supreme Court in October 2012 by Manipur's Extrajudicial Execution Victim Families' Association and other NGOs, 1,528 civilians, including 98 children, were killed by security forces in Manipur between 1979 and 2012. Unsurprisingly, such brutality has alienated the locals, aggravated the conflicts and formed a ready pool of would-be insurgents

Poverty also plays a role. The seven states of Northeast India rank lowest in terms of infrastructure development, and most of the child soldiers are recruited from very poor families. "I was promised a cell phone," says one of the boys recruited with Tomba.

Source: Sen, 2014.

In India, children, who are allegedly found to be involved in terrorist activities or any such activity punished under the National Security Act, will be governed by the JJ Act, 2015. As per the provisions of the JJ Act, the JJB can transfer such matters to the Children's Court. But at the same time, the JJ Act also provides that no child in conflict with law can be awarded life imprisonment or capital punishment.

Children, who are convicted of terrorism/national security offences by Children's Court upon transfer by the JJB, can be sentenced for the maximum period of jail term prescribed for that particular offence. Once these children are awarded the sentences, they are placed at Place of Safety till they complete 21 years of age. If after attaining 21 years, they are yet to complete the term of stay, their sentencing period is reviewed by the appropriate authority. If it is found that such a child has been reformed and the child is ready to contribute to the society in positive manner, then the child will be released or else, the child will be shifted to the jail for remainder of the sentencing period [S. 20(1) of JJ Act].

However, when children are apprehended/arrested by the armed forces and other law enforcement agencies in the above-mentioned circumstances (where they are considered as threat to national security), the rhetoric of defending national security is so compelling that

children are often treated as adults, allegedly waging war against the State, and the protection of their inherent rights by virtue of them being children, is, more often than not, compromised. (NCPCR, Page 6)

Besides, often in the “disturbed areas” and in LWE affected areas, institutional and statutory mechanisms such as Juvenile Justice Boards, Children’s Court, Child Welfare Committees, Observation Homes, Children’s Homes, Special Juvenile Police Units, etc. either do not exist or are not fully operational. As a result, children are recurrently presented before Magistrates who are not empowered to exercise the power of a Juvenile Justice Board or Children’s Court, and deal with the cases without referring to these statutory bodies (NCPCR).

Additionally, the Children are also subjected to various cruelties. Their right to information about the reason(s) of their detention or arrest is denied. Their right of establishing communication with their families and friends is denied. Often they are even deprived of their basic right to get food, water, personal hygiene and sanitation facilities (NCPCR).

Impact of Children Deprived of Liberty on National Security Grounds

Like during armed conflict, children are often used as pawn in terrorist activities breaching national security. Children are impressionable. In areas of disturbance or state-inflicted oppression, they are easily affected by their surroundings and often join willingly in anti-state activities. Many times development is stalled in “disturbed areas” or LWE affected areas, leaving the population residing in those places impoverished. Children from these populations, not having much to lose, are easily lured by anti-state bodies with the promise of some kind of gain. Once joined in anti-state groups, these children have very little scope to return or escape. They also become targets for the state machinery. The law (JJ Act, 2015) dictates that if captured these children should not be treated as adults or punished like adults. However, in areas of disturbances, law and order are often in dismal conditions; children are subjected to various kinds of cruelty and their rights are frequently compromised. Even if a child survives this harrowing situation, their experiences mar their future and leave them severely traumatised.

CHAPTER 7

Children Detained with Parents

Children whose parents are detained or imprisoned are often become invisible in the criminal justice system and also within the chain of welfare and development. As per the 2018 report on prisoners, there were 1,732 women prisoners with 1,999 children as on 31st December, 2018. Among these women prisoners, 1,376 women prisoners were undertrial prisoners who were accompanied by 1,590 children and 355 convicted prisoners who were accompanied by 408 children.¹³³

Such children also become highly vulnerable and often their care and protection are either neglected or not adequately taken up. As a result, such children are more prone to fall through the crack. Children are confronted with a host of challenges when a parent or caregiver is in conflict with the law:¹³⁴

- They have to contend with the break-up of their family and may need to be placed in alternative care where they are more vulnerable to violence, abuse, neglect and exploitation.
- Losing their primary caregiver may result in financial hardship and make it difficult to access health services and education.
- They experience discrimination and stigma as a result of their parent's status as a suspect, defendant or convicted prisoner.
- They may end up living with their mother/ father in detention facilities.

International Framework w.r.t. Children of Incarcerated Parents

The 2010 UN Rules on the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (**the 'Bangkok Rules'**) are to date the only set of international standards which provide some safeguards for children imprisoned with their parent. While the Rules are designed for women offenders, their preliminary observations state that some Rules, including those relating to parental responsibilities, equally apply to offenders who are fathers.¹³⁵

The Rules stipulate that:

¹³³ <https://ncrb.gov.in/sites/default/files/PSI-2018.pdf>

¹³⁴ <https://www.penalreform.org/priorities/justice-for-children/what-were-doing/children-incarcerated-parents/>

¹³⁵ <https://www.penalreform.org/priorities/justice-for-children/what-were-doing/children-incarcerated-parents/>

- non-custodial alternatives to custody should be applied wherever possible if someone facing imprisonment has sole caring responsibilities.
- children must be taken into account at all stages of a parent’s contact with the criminal justice system.
- the decision as to whether a child is to be separated from its mother (or father) must be based on individual assessments and the best interests of the child.
- children in prison with their mother (or father) should never be treated as prisoners and their experience must be as close as possible to life for a child outside.
- mothers/ fathers must be allowed as many opportunities as possible to see the children who are imprisoned with them.

Further, in 2011, the UN Committee on the Rights of Child conducted a General Day of Discussion to article 9 of the Convention dealing with issues relating to the rights of children of incarcerated parents. The 2011 Day of General Discussion was intended to provide States and other actors with more comprehensive guidance as to their obligations to promote and protect the rights of children of incarcerated parents as outlined in the Convention on the Rights of the Child.¹³⁶

As a result of the Day of the General Discussion, the Committee of the Rights of the Child came out with several recommendations to the State Parties:¹³⁷

- ***Alternatives to detention***
 - While sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase.
 - Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).
- ***Effects of incarceration of parents on children***
 - States parties must ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process and at all its stages, including law enforcement, prison service professionals, and the judiciary.
 - States parties also need to identify best practices for arrest procedures that are compliant with human rights and the rights of the child. These should serve as the basis for establishing and implementing a protocol for law enforcement in situations

¹³⁶ <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>

¹³⁷ Report and Recommendations of The Day Of General Discussion On “Children Of Incarcerated Parents”; 30 September 2011; Committee On The Rights Of The Child; <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>

where the arrest of a parent(s) occurs in the presence of their child, and for suitably informing and supporting children not present at the arrest.

- ***Children's right to development and non-discrimination***
 - children of incarcerated parents have the same rights as other children.
 - Measures must be taken to ensure that children in such situations are protected from stigmatisation. These children have themselves not come into conflict with the law. Every child has the right to be with their parent as well as the right to family life and a social environment conducive to their development.
- ***For Children living with incarcerated parent(s)***
 - State parties to ensure the provision of sufficient social services at an adequate quality, including, health and educational facilities, to children living with incarcerated parent(s).
- ***For Children left outside when their parent is incarcerated***
 - State parties have the obligation under the Convention to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
- ***Right to privacy***
 - Recognising the stigmatisation to which children of incarcerated parents are often subject, particularly in the case of more serious offences, and the responsibility of the media in this regard; the Committee recommended that State parties enact and enforce privacy protection legislation that is in full compliance with the rights of children of incarcerated parents.
- ***Alternative care***
 - In situations where the incarceration or other involvement of a parent with the criminal justice system would result in the child(ren) changing home or carer, temporarily or permanently, the Committee recommends that the Guidelines for the Alternative Care of Children¹³⁸ be consulted and followed.

Indian Framework w.r.t. Children of Incarcerated Parents

There are a number of provisions in the form of laws, rules and guidelines that protect women from exploitation in prison and guarantee them basic services. However, the implementation

¹³⁸ U.N. General Assembly, 64th Session. Guidelines for the Alternative Care of Children (A/RES/64/142). 24 February 2010. <http://www.unicef.org/french/videoaudio/PDFs/100407-UNGA-Res-64-142.en.pdf>.

of these provisions is found to be largely lacking and women face a variety of problems while living in prison.¹³⁹ In India, rules laid down in the state prison manuals and state rules for women’s shelter homes allow women prisoners to have their children to stay with them if the children are below 6 years of age. This is a right for women in detention and there is no requirement of authorities deciding on it. However, unlike mothers, fathers in detention are not allowed to have their children with them.

Many women live in prison with their children (below 6 years of age) in cases where no other adequate arrangements can be made for their care. Spending their formative years in prison can have a huge negative impact on children and thus special care needs to be taken to ensure their physical and mental health, education and recreation. The health of pregnant women and mothers also needs to be taken care of.¹⁴⁰

The following tables give an account of number of children staying with their mothers in Indian prisons across states and union territories. The Table below shows during the period 2008 to 2016, around 2000 children stayed with their mothers in the places of detention.

Children Entering Places of Detention with Their Mothers, 2011-2019									
Year	2011	2012	2013	2014	2015	2016	2017	2018	2019
No. of Children	1760	1813	1933	1817	1866	1942	1681	1999	1779

Source: Prison Statistics India (2011-2019)

Number of Women Prisoners with Children as on 31 st December 2019										
State/ UT	Convict women prisoners with children	Children	Under-trial women prisoners with children	Children	Detenu es women prisoners with children	Childr en	Women prisoners with children	Childre n	Total no. of women prisone rs with childre n	Total No. of children
Andhra Pradesh	9	11	34	38	0	0	0	0	43	49
Arunachal Pradesh	0	0	0	0	0	0	0	0	0	0
Assam	1	1	33	41	0	0	0	0	34	42
Bihar	17	18	124	141	0	0	0	0	141	159
Chhattisgarh	18	18	38	40	0	0	0	0	56	58
Goa	0	0	0	0	0	0	0	0	0	0
Gujarat	3	3	25	30	2	2	0	0	30	35

¹³⁹ “Women In Prisons: 2018”; June 2018; Ministry pf Women and Child Development; <https://wcd.nic.in/sites/default/files/Prison%20Report%20Compiled.pdf>

¹⁴⁰ “Women In Prisons: 2018”; June 2018; Ministry pf Women and Child Development; <https://wcd.nic.in/sites/default/files/Prison%20Report%20Compiled.pdf>

Haryana	13	13	21	23	0	0	0	0	34	36
Himachal Pradesh	2	2	5	5	0	0	0	0	7	7
Jammu & Kashmir	0	0	4	4	4	5	0	0	8	9
Jharkhand	23	25	81	90	0	0	0	0	104	115
Karnataka	6	8	30	37	0	0	0	0	36	45
Kerala	0	0	0	0	0	0	0	0	0	0
Madhya Pradesh	43	50	105	127	0	0	0	0	148	177
Maharashtra	4	4	68	79	0	0	0	0	72	83
Manipur	0	0	18	21	0	0	0	0	18	21
Meghalaya	0	0	0	0	0	0	0	0	0	0
Mizoram	3	3	18	20	0	0	0	0	21	23
Nagaland	0	0	0	0	0	0	0	0	0	0
Odisha	3	3	24	25	0	0	0	0	27	28
Punjab	9	9	33	35	0	0	0	0	42	44
Rajasthan	6	8	37	42	0	0	0	0	43	50
Sikkim	0	0	1	1	0	0	0	0	1	1
Tamil Nadu	3	3	11	11	0	0	0	0	14	14
Telangana	7	7	24	27	0	0	0	0	31	34
Tripura	4	8	2	2	0	0	0	0	6	10
Uttar Pradesh	81	91	349	399	0	0	0	0	430	490
Uttarakhand	1	1	9	14	0	0	0	0	10	15
West Bengal	64	72	83	120	0	0	0	0	147	192
A & N Islands	0	0	0	0	0	0	0	0	0	0
Chandigarh	0	0	3	3	0	0	0	0	3	3
D & N Haveli	0	0	0	0	0	0	0	0	0	0
Daman & Diu	0	0	0	0		0	0	0	0	0
Delhi	5	5	32	34	0	0	0	0	37	39
Lakshadweep	0	0	0	0	0	0	0	0	0	0
Puducherry	0	0	0	0	0	0	0	0	0	0
Total (UTs)	5	5	35	37	0	0	0	0	40	42
Total (all-India)	325	363	1212	1409	6	7	0	0	1543	1779

Source: Table 2.17; Prison Statistics of India, 2019

Inside prisons, children live in barracks along with their mothers. In some prisons, there are separate barracks for women with children. According to the Model Prison Manual, 2003, a

crèche and nursery should be made available for all children staying with their mothers, in a separate enclosure. The Model Prison Manual prescribes that:¹⁴¹

“24.26. A child up to six years of age shall be admitted to prison with his mother if no other arrangements, for keeping him with relatives or otherwise, can be made. Children born in prison may remain with their mothers up to six years of age, if they cannot otherwise be suitably placed. The Medical Officer shall determine the age of children not born in prison for the purpose of this provision.”

However, guideline sets have not been addressed to their full potential in many cases and in some cases, not at all. Bhondsi prison is one among just a handful of jails in India that conforms to the Supreme Court directives on the treatment of children imprisoned with their parents.¹⁴²

Supreme Court of India’s Guidelines with Regard to Children of Prisoners

The Apex Court, in the case of R.D. Upadhyaya Vs. State of Andhra Pradesh [*W.P. (Civil) 559 of 1994*] emphasized the upholding of fundamental rights and formulated guidelines regarding pregnancy, child-birth, antenatal and post-natal care, and childcare in prisons. The Apex court has clearly stated the following, specifically with regard to childcare:

- Female prisoners shall be allowed to keep their children with them in jail until they attain the age of six years.
- After six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner.
- Expenses of food, clothing, medical care and shelter shall be borne by the respective state.
- There shall be a crèche and a nursery attached to the prison for women where the children of women prisoners will be looked after. Children below three years of age shall be allowed in the crèche and those between three and six years shall be looked after in the nursery. The prison authorities shall preferably run the said crèche and nursery outside the prison premises.
- A dietary scale prepared by the National Institute of Nutrition, Council of Medical Research, Hyderabad, provides guidelines for a balanced diet for infants and children up to the age of six.
- In this case, the state legal services authorities were directed to periodically inspect and see that the directions regarding mothers and children in jail were being followed. The court also directed that the central government, state governments and union territories file affidavits with respect to the judgment's implementation, within four months. Courts, however, do not have an independent machinery to crosscheck implementation.
- Jail manual and/or other relevant rules, regulations, instructions etc. were to be amended within three months of these directives in order to comply with the above directions.

¹⁴¹ Model Prison Manual For The Superintendence And Management Of Prisons In India; Prepared By Bureau of Police Research and Development; Ministry of Home Affairs; Government of India; New Delhi 2003; <http://bprd.nic.in/WriteReadData/userfiles/file/5230647148-Model%20Prison%20Manual.pdf>

¹⁴² Legal Protection of Children of Incarcerated Parents-A Modern Day Necessity; Devina Srivastava and Pradeep Kumar Singh-II; International Journal of Law and Legal Jurisprudence Studies: ISSN: 2348-8212: Volume 3 Issue 3; http://ijlls.in/wp-content/uploads/2016/07/children_of_incarcerated_parents.pdf

While inside the prison the children face utter lack of experience about outside world, their situation seldom becomes better once they attain the age of 6 years and are forced out of prison. Sometimes, when there is a relative/ guardian to take care of the child, the mother can hand over the custody of the child to them by writing an application to the prison superintendent informing them of her decision. In case there is no guardian or relative available or willing to take custody of the child, the prison authorities have to inform the Child Welfare Committee (CWC) of the district and hand over the child to the children's home. If a child has a sibling of different gender, they are sent to different institutions. As a result, not only are they suddenly deprived of maternal care and family bonding, but also end up in trauma of separation from their siblings.

The CWC takes a decision keeping in mind the wishes of the mother and the best interests of the child/children. Normally, the child would be kept in a child care institution till they complete 18 years of age or till the mother is released and requests for custody of the child.

As the lone tap fills the cracked cement tank, green algae float to the surface of the water. Munna (name changed to protect identity) splashes around in the tank, while women gather to fill small jugs with water that will later be used for both washing and drinking. Munna is three years old, and his life revolves around the sludgy water games and women in the enclosure of the Belgaum Central Prison in Karnataka.

Munna was born in this prison, and has lived here all his life. His mother is facing trial for alleged murder. Media debates have raged around harsher punishments for teenagers who commit serious crimes, but little attention is paid to this other category of children in prisons.

The three-year-old barely speaks. He recognises his mother as ammi and other women inmates as khala. The only men in his life are the police constables who occasionally visit the female barracks. He is a stranger to almost everything about the world outside. "It was only recently that he saw a dog for the first time during my court visit," his mother recalled. "He was startled."

(Source: Shantha, 2016)

Impact of Deprivation of Liberty on Children Who Are Living in Places of Detention with Their Parents

The precarity of children is a conveniently forgotten aspect whenever parents are sent to prisons whatever the reason maybe. The impact on children due to prison condition is still a relatively under-discussed aspect while working on child rights. Recent interventions in Odisha, made by a lawyer Biswapriya Kanungo, brings to notice the status of 46 children, between the ages of one-month to six-years, living with their mothers in prisons of Odisha.¹⁴³ The report mentions lack of basic understanding from prison officials about the 'innocence' of children forced to stay with their mothers that manifests into depriving them of their entitled rights – nutritious food, proper shelter, decent healthcare, educational and recreational facilities. While one should ideally recognise the importance for these children to be kept at par with the world they are isolated from, the reality of children growing up in

¹⁴³ <https://www.lowyinstitute.org/the-interpretor/india-guiltless-children-in-prison>

prisons is too far from this ideal vision on both cognitive and material manifestations. Children that are forced to live in jails that are already overcrowded are hardly given separate spaces to live with their mother. On top of this, Kanungo's report mentions, mother who are breastfeeding their children or are pregnant, never receive proper nutrition or baby care items that acts as major impediments during the growing years of the child. A similar report, published in The Dawn, presenting situation of children with mothers in prison, covering a wider network of prisons, resonated with Kanungo's report.¹⁴⁴ The situation in one of the better prisons, the Tihar jail in Delhi, provides evidence of the sad reality children face in under situations. Most of the times, according to the article, women with children cannot manage to find separate barrack resulting to being kept in the male section of the jail. Children were often found with boils, in Tihar as well as other prisons, being an outcome of crawling on cemented floors of the jail. Without a proper and clean facility of toilets, the children were prone to developing infections and diseases in their excretory systems. The children's right to play or even get a proper sleep are completely missing from the barracks of these jails. Narrating the story of a 4-year old, the report mentions, how the child finds herself bored in prison as she does not get to play enough and is continuously shouted down by other inmates, both women and men, whenever she expresses any desire that does not fit well within customs of prison. The ordeal of prison on these children is not limited to the prison spaces only, rather the social stigma of having spent time in prison, forgetting all social conditions that forced the child into such situation, is something that sticks with these children. As a mother narrates in the article, it is a boon for the children who are born in prison to not have a birth certificate that mentions the place of their birth.

Children, below the age of six, who are deprived of liberty because they are forced to live with their incarcerated mothers, are not a very visible group for formulation of public policies, except the ruling of R.D. Upadhyaya Vs. State of Andhra Pradesh (1994). Despite no crime of their own, these children are kept in confined places along with convicted criminals during the most formative period of their lives when cognitive, social and emotional development takes place. The confined environment of prison along with lack of normal life severely affects the mental health of the children. Most of the times, these children grow up being completely unaware about the outside world. So, when after the age of six, they have to be integrated with the society they remain completely unprepared for the change.

Besides, most prisons do not conform Supreme Court directives about the treatment of children who live with their parents. This also poses a problem to the already difficult situation. Children are frequently deprived of proper nutrition and health facilities, education and entertainment facilities. As a result, the physical as well as the intellectual development of these children suffer.

These reports and articles provoke us not only to demand for making available facilities that are mandated through the fundamental rights of children but also to ask ourselves a basic

¹⁴⁴ <https://www.dawn.com/news/353543>

question of how would these children sense the music of a bird chirping when they have not heard it properly for all this while or how would these children dance to any song when their movement was always resisted in these prisons. It should enable us to ask how would these children imagine when structurally – in both legal and social sense – their imagination always remains in captivity.

CONCLUSION

The UN Global Study on Children Deprived of Liberty has brought back the spotlight on treatment of children in the juvenile justice system and also highlighted the various factors which contribute to the deprivation of liberty for children. In many ways, the study has reiterated the various treaty bodies obligations starting from the International Covenant on the Civil, Political and Cultural Rights (ICCPR) and including the United Nations Convention on the Rights of the Child (UNCRC) and relevant General Comments. However, what is also poignant that the deprivation of liberty of children and various factors contributing to such deprivations cannot be generalised and therefore demands for a nuanced examination and understanding of the issue in the local context. While, the legal and policy framework provides for a robust safeguard for children in the criminal justice system, the poor implementation of these laws add to the victimization of children causing further deprivation of liberty. On the other hand, the recent regressive changes in the Juvenile Justice system amplifies the vulnerabilities of children who come in conflict with law by adding the provision of their treatment as ‘adults’ in cases of commission of ‘heinous’ offences. Lack of quality and affordable legal aid system has caused many children languishing in the protective custody for longer duration. The other problem which add to the deprivation of liberty for children is the non-recognition of the very ‘agency’ of children within the system. Often, children are considered as “soft targets” in cases of conflicts and thus, subjected to brutalities and illegalities. What is more, there is a dearth of adequate data to provide to reflect the vulnerabilities of children pushing them to the margins. There is no clear understanding of the systemic factors contributing towards the deprivation of liberty for children and how to resolve those. With the UN Global Study, one can hope that the issue of deprivation of liberty of children will remain alive and there will be a positive shift in understanding the deprivation in much more nuanced and local context.