

Policy Research on Children Deprived of Liberty in the Administration of Justice in South Asia



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POLICY RESEARCH ON CHILDREN DEPRIVED OF LIBERTY IN THE ADMINISTRATION OF JUSTICE IN SOUTH ASIA

Edited by

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Foreword by

MANFRED NOWAK AND YUBARAJ SANGROULA



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KATHMANDU
SCHOOL OF LAW

Published jointly by Kathmandu School of Law, Bhaktapur, Nepal

in collaboration with

Global Campus of Human Rights, Venice, Italy

The E-book is published and distributed by Ideas Kitab
(a not-for-profit initiative of Ideas Nepal Pvt. Ltd., Nepal)

First published in Kathmandu, Nepal

December 2022

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The front and back photos were taken in January 2012 by Ravi Prakash Vyas and Jon Cheung respectively in a research trip in Nepal.

ISBN: 978-9937-9553-0-0

E-ISBN: 978-9937-9553-3-1

First Edition

Printed in Nebula Printers, Kathmandu, Nepal

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FOREWORD

The detention of children is one of the most widespread and overlooked violations of children's rights. Article 37(b) of the UN Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Nevertheless, we know that millions of children are detained every year in all regions of the world. Since there were no reliable data available on the number of children behind bars, the UN General Assembly in 2014 invited the UN Secretary General to commission an in-depth Global Study on Children Deprived of Liberty. In 2016, I was appointed Independent Expert leading this Global Study, which became a joint effort of States, UN agencies, civil society and academia. As Secretary General of the Global Campus of Human Rights, a network of some 100 universities in seven world regions, I could also draw upon the rich expertise of our member universities. On the basis of responses to a questionnaire sent to States, UN agencies and civil society as well as many other sources of information and research, I could report to the UN General Assembly in 2019, when presenting the Global Study on Children Deprived of Liberty, a total number of more than 7 million children annually deprived of liberty in institutions, police custody, prisons, migration-related and other detention centers. This is, however, a conservative estimate as there are still major gaps in statistical data in many world regions, including in South Asia.

I am, therefore, very grateful to Ravi Prakash Vyas and his team at the Kathmandu School of Law for publishing the present book on *Policy Research on Children Deprived of Liberty in the Administration of Justice in South Asia*. This comprehensive research can be considered as a follow-up to the Global Study with a particular focus on the detention of children in the context of the administration of justice (police custody, pre-trial detention and imprisonment) in the South Asia region. In South Asia, the arrest and detention of children living and working on the streets by police officers are reported on the grounds such as vagrancy, indecent behavior or prostitution. Arrests on the grounds of being a public nuisance or exposed to moral danger are reported in nearly all countries in South Asia. Instead of prevention, States often rely on repressive and punitive policies that lead to excessive criminalization of children and young people. Children are often detained at a very young age, restraining their liberty and keeping them as an invisible and forgotten group in society. The estrangement from their social context makes it difficult for these children to be in contact with their families and to safeguard their basic human rights. They are often placed at high risk of violence and in violation of their human rights in a justice system that is structured to deal with adults.

This *Policy Research* book is the result of hard work and research carried out by the country researchers and editors in illuminating the condition of far too many children deprived of liberty in the context of the administration of justice in South Asia. It is a much-needed extension of the Global Study with a contextual focus on a region that is home to millions of children whose best interest should be the primary focus. This research is an important reference to all the stakeholders involved in the protection and promotion of children's rights in understanding the context of deprivation of liberty and how the rights of children in conflict with the law can be strengthened and improved in the future. The recommendations from these country-specific case studies are also a useful starting point to mobilize attention and action by Governments and other stakeholders aimed at improving the situation of some of the most invisible, marginalized and vulnerable children in South Asia.

Manfred Nowak

**Secretary General of the Global Campus
of Human Rights and**

**Independent Expert leading the UN Global Study on
Children Deprived of Liberty**

FOREWORD

The Policy Research on Children Deprived of Liberty in the Administration of Justice in South Asia is the first of its kind as comprehensive research on children deprived of liberty in South Asia. The research is conducted to assess the amplitude of the occurrence of children deprived of liberty and the administration of justice in South Asian countries. It was based on the UN Study on Children Deprived of Liberty that provides an overview of the situation of children deprived of liberty worldwide and sets out clear recommendations for change and includes positive examples from a range of countries.

Children can be in contact with the justice system as a victim, witness, or offender. Yet, the justice system is often structured to deal with adults, not allowing the necessary space for children to participate, and the systems are often not adapted to the specific needs and rights of children. In South Asia, the arrest and detention of children living and working on the streets by police officers reported on the grounds of being a public nuisance or exposed to moral danger are reported time and again. Instead of prevention, States often rely on repressive and punitive policies that lead to excessive criminalization of children. Despite the principle of deprivation of liberty to be used only as a last-resort measure and for the shortest appropriate time, it remains a common and pervasive form of punishment for juvenile offenders. The juvenile offenders are often detained for several years and, in some cases, for indeterminate periods. Conditions of detention are generally sub-standard, overcrowded, and deny children their rights, such as the right to appropriate health, education, and access to parents/guardians.

The Kathmandu School of Law (KSL) has continuously been involved in research activities related to children's rights. KSL conducted the first baseline survey on the juvenile justice system of Nepal in 2010 in collaboration with the Center for Legal Research and Resource Development (CeLRRD) that was supported by Danida HUGOU. The survey provided a fresh perspective on the multiple issues of the juvenile justice system in Nepal and acted as a reference for policy interventions to improve the overall standard of the juvenile justice system in the country.

Realizing the need for specific research focusing on children deprived of liberty in South Asia, KSL, with the support of the Global Campus of Human Rights and the UN Global Study on Children Deprived of Liberty, conducted this study on children deprived of liberty in South Asia, particularly in situations pertaining to the detention of children in the administration of justice.

The study successfully analyzes the situational and contextual practices of the deprivation of liberty of children in the South Asian region. The research is a critical analysis of the deprivation of children's liberty and has raised important questions and opens up a discourse that we truly need at this point of time to engage scholars, learners, advocates, and policymakers alike. It is a time for all the countries in the South Asia region to assess what has gone wrong and what needs to be urgently done to safeguard children's rights.

I believe this study has amplified the impact of the Global Study and has initiated a difference in stigmatizing attitudes and behaviors towards children at risk of being, or who are, deprived of liberty and providing legal and policy-level recommendations and practice to safeguard the children's human rights in the region. It is expected that the findings of this research will sensitize the Government's and other duty-bearers to take the necessary and immediate actions in the administration of justice when children are in conflict with the law. I am looking forward to further discourses that this study would stimulate in South Asian countries and would like to congratulate the researchers and the editors for having published the study in a timely manner.

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AFGHANISTAN

EXECUTIVE SUMMARY

This policy paper is an assessment of the situation of children deprived of liberty in the administration of justice in Afghanistan. It seeks to identify the policy objectives and priority areas where Afghanistan could invest and ensure the most beneficial outcomes, especially for the children deprived of liberty. One of the core objectives of the research is to initiate a difference in stigmatising attitudes and behaviour towards children at risk of being, or who are, deprived of liberty. It is significant to note that it is the first document in more than a decade that gives detailed, comprehensive findings regarding the administration of justice related to children in conflict with the law.

Primarily, this policy paper gives a brief on Juvenile Justice and its core principles relative to both the Afghans and the Non-Afghans living in Afghanistan. The section of 'Juvenile Offences' calls attention to some unusual reasons (eloping from home) a juvenile is incarcerated. Furthermore, it underscores the rights of juvenile offenders guaranteed by the Juvenile Code (2005) and gives a list of all the international human rights and ILO conventions ratified by the Afghanistan government. It is important to note that more than 15 national laws are related to child rights in the country's legal system.

This document features the role of the Afghanistan Independent Human Rights Commission (AIHRC) in supervising the plight of child detention centres. The experiences of juveniles in detention, both boys and girls, are also being highlighted. Moreover, key interventions and good practices of government and civil society organisations are brought to the fore.

Cognizant of the overall challenges and specific details being analysed in the document, it ultimately outlines a list of policy recommendations that could improve the prevailing situation of administration of justice relative to juveniles deprived of liberty.

INTRODUCTION

The juvenile justice system consists of laws, policies, and measures envisioned to set the dispensation and handling of juvenile offenders for law violations and provide legal

remedies that protect their interests in circumstances of conflict or abandonment.¹ It recognizes children's susceptibility to victimization, trials, and getting involved in delinquency and that the complications experienced in youth or adolescence can have lifetime repercussions.² The vast majority of juveniles coming into conflict with the law are subjects of exploitation, neglect, and social and economic hardship.³ Among them, many children, particularly in Afghanistan, may be found in a cruel cycle of diverse conditions of deprivation of liberty throughout their childhood, which may perhaps start in an orphanage, migrant centers, religious seminaries followed by several institutions for educational supervision and drug rehabilitation and end up in detention and re-offending. In line with the report of the Afghanistan Independent Human Rights Commission (AIHRC), the juvenile justice system of Afghanistan presents a picture of a "tethered toddler." Juveniles are charged with ambiguous and vaguely worded "terrorism offenses" and face up to a prison sentence of 15 years according to a UN Secretary General's report on children in armed conflict (2020).⁴ Depriving juveniles of liberty is like taking away their childhood.⁵

The precise tools for directing juvenile justice have changed over time among societies and even among jurisdictions within countries. Considering the regional context, juveniles experience arbitrary arrest, abuse, and torture while in detention in South Asia despite the States' obligations and assurances.⁶ Frequently, juveniles are deprived of liberty for non-violent offenses, minor offenses, or even without committing any crime. Keeping in view the special requirements of juveniles in conflict with the law, distinct systems as well as precise data are missing owing to the non-maintenance of records.⁷ For the fifth consecutive year, Afghanistan was declared as the deadliest country for children in conflict considering 927 child killings and 2,135 child injuries.⁸ The situation for children has become particularly deadly owing to gross human rights violations such as

1 Shoemaker, Donald J. and Jensen, Gary. "Juvenile Justice." Encyclopedia Britannica, 4 Jun. 2021, <https://www.britannica.com/topic/juvenile-justice> [accessed 20 August 2021].

2 Afghanistan Independent Human Rights Commission (AIHRC), Justice for children. The situation of children in conflict with the law in Afghanistan, 26 June 2008, available at: <https://www.refworld.org/docid/47fdfae50.html> [accessed 20 August 2021].

3 Ibid.

4 Human Rights Watch, "Forgotten Children" Children detained in Afghanistan for alleged association with armed groups, June 2021.

5 United Nations, The United Nations Study on Children Deprived of Liberty, October 2019, available at: <https://www.refworld.org/docid/5ee761384.html> [accessed 21 January 2022].

6 UNICEF & Inter-Parliamentary Union, Improving the Protection of Children in Conflict with the Law in South Asia: A regional parliamentary guide on juvenile justice, 2007, p. 25, Available at http://archive.ipu.org/PDF/publications/chil_law_en.pdf [accessed 21 January 2022].

7 Ibid.

8 UN Children's Fund (UNICEF), Situation Analysis of Children and Women in Afghanistan 2021, August 2021

honor killings, forced and underage marriages, sexual exploitation, human trafficking, recruitment of child soldiers, and prevention of access to humanitarian aid.⁹

DETERMINATION OF JUVENILE

Who is a Juvenile?

Article 4 of the Juvenile Law (Juvenile Code), 2005 (Procedural law for dealing with children in conflict with the law) of Afghanistan states that a juvenile is anyone between 7 and 12 years.¹⁰

Determination of Age

To determine a person's age, under Article 6 of the Juvenile Code, his/her citizenship identification (ID) card is viewed first.¹¹ In case of absence of an ID card or when the physical appearance specifies altered age than one stated in the ID card, a forensic doctor's opinion shall be sought. Thus, if the forensic doctor's opinion contradicts the background of the case or the child's appearance, in such a case, a medical team, not less than three doctors, shall be constituted to find out the factual age.¹²

Criminal Responsibility of a Juvenile

Fixing the minimum age of criminal responsibility too low also has unfavorable consequences on children. With the exclusion of Afghanistan and Bhutan, the minimum age of criminal responsibility in South Asian countries is below international standards, ranging from 7 (Pakistan, India), 8 (Sri Lanka), 9 (Bangladesh), 10 (Maldives, Nepal), to 12 (Afghanistan, Bhutan).

Article 5 of the "Juvenile Code" exempts a person who has not yet attained the age of 12 years of criminal responsibility. If a crime has caused material losses due to the parents' negligence of such a person, the parents are liable to compensate for such losses.¹³

9 Ibid.

10 Afghanistan: Juvenile Law (Juvenile Code), 2005 [Afghanistan], 23 March 2005, available at: <https://www.refworld.org/docid/5b0ffbe4.html> [accessed 5 September 2021].

11 Ibid.

12 Ibid.

13 Ibid.

Factors that Determine the Indictment of the Juvenile

While investigating crimes related to children, under Article 17 of the Juvenile Code, a prosecutor shall consider the following factors for the formal indictment of the juvenile¹⁴:

- Age
- Psychological maturation
- Character and aptitude
- Education
- Environment and circumstances of their life
- Details and grounds for the commission of the offense
- Previous criminal record
- Circumstances of their behavior at the moment of the offense and after that
- Harms caused to the victim
- Any other circumstances that can affect determining the punishment.

JUVENILE JUSTICE RELATIVE TO NON-AFGHANS (IN AFGHANISTAN)

Owing to the verification and monitoring constraints related to sensitivities regarding child rights abuses, very little information can be found on the juvenile justice of non-Afghan children in Afghanistan. According to the UN Secretary-General's report on the "Children and armed conflict in Afghanistan(2021)," the country's task force faced access limitations due to concerns for the safety of the victims, families, and sources.¹⁵ This does not mean that there is no violation of the human rights of non-Afghan children. For instance, a report published by Human Rights Watch (HRW) in June 2021 regarding "children detained in Afghanistan for alleged association with armed groups" witnesses detained women, non-Afghan in particular, giving birth to their children in prison without access to proper care.¹⁶

¹⁴ Ibid.

¹⁵ UNSC 'Report of the Secretary General on Children and armed conflict in Afghanistan (2021)' S/2021/662 Available at https://www.un.org/ga/search/view_doc.asp?symbol=S/2021/662&Lang=E&Area=UNDOC [accessed 21 January 2021].

¹⁶ Human Rights Watch, "Forgotten Children" Children detained in Afghanistan for alleged association with armed groups, June 2021

CORE PRINCIPLES OF JUVENILE JUSTICE SYSTEM IN AFGHANISTAN

Afghanistan's juvenile justice system can be best understood from a report prepared by Dr. Martin Lau, "Afghanistan's Legal System and Its Compatibility with International Human Rights Standards" (2002).¹⁷ In his report, he says that a child under seven years cannot be guilty of any criminal offense. A child, though assumed to be incapable of committing a crime, between the ages of 7 and 13, will be considered a juvenile offender and may be held in a detention centre or put under the observation and probation of parents or close family. Nevertheless, for persons between the ages of 13 and 18, punishment of confinement in a correctional institution can be imposed. The rationale behind this is the provision for juvenile justice under the 1976 Penal Code. It is essential to note that the Penal Code, 2017, has repealed the 1976 Penal Code. The latter combines ten former separate criminal laws and combines the penal provisions of 33 laws of other scopes. In an interview with a female judge in Kabul's special juvenile court, Ms. Justice Anisa Rasoli, Dr. Martin quotes her: *"procedures in the juvenile court were always in camera, and that juveniles used to be taken to a 'punitive school' rather than prison. A punitive school for male children was opened in 1970, and a female section became functional in 1974. However, all juvenile delinquents are currently confined in ordinary prisons."*¹⁸

JUVENILE OFFENCES

Most juvenile offenses tend to be less severe and are related to the property rather than crimes of serious nature, that is, rape and murder.¹⁹ In 2008, detailed research was conducted by Afghanistan Independent Human Rights Commission (AIHRC) in collaboration with UNICEF called "Justice for children. The situation of children in conflict with the law in Afghanistan" in the center of operations of provinces where there were children rehabilitation centers. Overall, it was found out that cases of serious nature appeared more in number as they were more probable to be referred to the formal justice system and the provincial headquarters. Offenses of a less severe nature are more often handled outside of the formal justice system and in the vicinity of where the offenses were committed.

For males, 34% of cases were related to robbery/theft, while 27% were related to murder or kidnapping. Conversely, the child may not have been the sole or prime

17 International Commission of Jurists (ICJ), Afghanistan – Final Report on Afghanistan's Legal System and Its Compatibility with International Human Rights Standards, 7 February 2003, available at: <https://www.refworld.org/docid/48a3f02c0.html> [accessed 1 September 2021].

18 Ibid.

19 Afghanistan Independent Human Rights Commission (AIHRC), "Justice for children. The situation of children in conflict with the law in Afghanistan," 26 June 2008, available at: <https://www.refworld.org/docid/47fdfae50.html> [accessed 5 September 2021].

perpetrator in many of these cases. About 12% of cases were related to drinking or adultery, while only 2% of cases were related to rape or sexual abuse. Around 8% of male defendants had been charged with fighting, whereas a further 2% of cases were of boys who had eloped from home. Several children charged with adultery or male to male sex were as young as 13 years of age, and even in one case listed in the Ministry of Justice data as old as 11 years old and thus below the age of criminal responsibility. In various such cases, it appears that the juveniles are victims of child abuse and exploitation rather than having committed an offense. They are detained and imprisoned as criminals instead of being provided with the safety and sustenance that they need.

Cases of prosecution of female children were significantly different than prosecution of boys in terms of the ways they were charged for a crime. As per the research conducted by AIHRC (“Justice for children. The situation of children in conflict with the law in Afghanistan,” 2008), 56% of females were charged with so-called ‘moral offenses’ including eloping from home or sodomy/adultery – these comprised cases where the girl was a prey of abuse.²⁰ Less than 30% of females were charged with a severe crime where they posed a danger to others – 11% with trafficking of kids, 8% with homicide or abduction, and another 11% with a range of cases from fighting to forgery. An additional 14% of girls were incarcerated as they were lost or without shelter rather than committing a crime.²¹ In these cases, detention appears to be a tool for protection and social control – no boys reported being in detention due to being without shelter or being lost. Running away from home is not a crime under Afghan statutory law and is based on customary practice. According to Medica Mondiale’s report²², in most reported cases, the accused female tried to run away from an abusive family environment or avoid being married in contradiction to her will. Under the law, it is forbidden to force a woman to marry against her will, and therefore, such cases should not be prosecuted. Due to the flawed criminal justice system, there is a greater emphasis on prosecuting girls for crimes, such as adultery or running away from home, as opposed to boys.

RIGHTS OF JUVENILE OFFENDERS

Rights during Trial

Under Article 22 of the Juvenile Code, a juvenile has a right to defense counsel and interpreter during every stage of investigation and trial. The juvenile court can appoint

20 Ibid.

21 Ibid.

22 Medica Mondiale (2010, July) “We are hopeful of a better future...” Position paper by Medica Mondiale on the situation of women in Afghanistan. Cologne: Medica Mondiale. http://www.medicamondiale.org/fileadmin/content/07_Infothek/Positionspapiere/Position_paper_Afghanistan_-_medica_mondiale_-_English_-_J-205.pdf

a defense counsel and interpreter at government costs if the child's legal representative or parents cannot afford to do so.

Under Article 32 of the Juvenile Code, the court shall hear the case behind closed doors, and only the judgment shall be pronounced in public regarding the right to privacy. Furthermore, the details of the proceedings (investigation/trial) shall be kept confidential, and any details about the child's personality that can lead to his identification in public are entirely prohibited.

The child has the right to appeal against the primary court's decision through his counsel or legal representative under Article 42 of the Juvenile Code.

Rights Guaranteed under the Convention on the Rights of the Child (CRC)

The following general principle relating to children in detention primarily applies to children who are not detained at all. CRC provides specific international legal obligations concerning children and sets out several guiding principles regarding the protection of children:

- The well-being of the child (Article 3 in conjunction with Article 22, CRC)
- No discrimination under any circumstances (Article 2, CRC)
- Right to life, survival, and development (Article 6, CRC)
- Right to express their views freely (Article 12, CRC)
- Family unity (among other things, Articles 5, 8 and 16, CRC) and the right not to be parted from their parents contrary to their will (Article 9, CRC)
- Alternative care for a child if necessary, for example, foster care (Article 20(2) and (3), CRC)
- Appropriate protection and assistance (Article 22, CRC)
- Imprisonment of juveniles be used only as a measure of last resort and for the shortest appropriate time (Article 37, CRC).

The Government of Afghanistan is obliged to follow the above-mentioned guidelines to ensure the safety of children under detention and in general as well since it is a party to the UN Convention on the Rights of the Child.

RATIFIED INTERNATIONAL HUMAN RIGHTS CONVENTIONS

Afghanistan has ratified most of the core international human rights treaties that include the International Convention on the Elimination of all Forms of Racial Discrimination

(1983), International Covenant on Economics, Social and Cultural Rights (1983), International Covenant on Civil and Political Rights (1983), Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1987), Convention on the Rights of the Child (1994), Optional Protocol of the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography (2002), Convention on the Elimination of all Forms of Discrimination against Women (2003), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2003), Convention on the Rights of Persons with Disabilities (2012) and Optional Protocol to the Convention on the Rights of Persons with Disabilities (2012). These accords content ideals that form the cornerstone of the UN human rights system and are a part of international law. Article 7 of the Constitution of Afghanistan states that “the State shall abide by the UN Charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.” Thus, Afghanistan is legally obliged to abide by the international human rights treaties considering the mentioned Article of its Constitution. It is also important to note here that Afghanistan has not signed any regional human rights treaties or agreements in SAARC.

Ratified ILO Conventions

1. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 2011
2. Minimum Age Convention 2010
3. Discrimination (Employment and Occupation) Convention 1969
4. Equal Remuneration Convention 1969
5. Abolition of Forced Labour Convention 1963.

NATIONAL LAWS

The Juvenile Code – 2005

Afghanistan has ratified the UN Convention on the Rights of the Child, and in 2005 a national Juvenile Code was enacted, which is deemed to be compliant with international conventions. It incorporates the basic principles of juvenile justice as expressed in the 1989 Convention on the Rights of Child, such as non-discrimination (Article 2), participation (Article 12), and reintegration (Article 6).

Following the passing of this legislation, training, capacity-building, and awareness-raising programs were embarked on with judicial and law enforcement bodies and other

stakeholders. On the other hand, observation visits by AIHRC have underlined that several provisions deliberated in the legislation have not been executed. Two years after embracing the Juvenile Code, various authorities in charge of its execution are even ignorant of the rules specified. In the lack of an appropriate system, there is very slight information accessible on how legal values are being applied to children in conflict with the law all over the country.

Law of Prisons and Detention Centers – 2007

The Law of Prisons and Detention Centers was passed to safeguard the rights of those incarcerated or confined, mend their treatment in reformatories and prisons, and control the issues supplementary to the conditions in these places. According to Article 1, Clause 2 of the law, the aim of a verdict of incarceration is merely to re-educate prisoners and help them grow respect for the law, society's ethical standards, shared behavioral standards, and in addition to prepare them for valuable work in the community, and to help them not replicate their crimes. In the same way, regarding suspected persons and accused, the Constitution of Afghanistan evidently states: *"Innocence is the original state. The accused shall be innocent until proven guilty by order of an authoritative court."*

Other National Legislation

Keeping in view the above-mentioned national legislation, Afghanistan has a list of vital legislation to safeguard the rights of people, specifically children in conflict with the law. These include the National Return and Reintegration Strategy (2002), The Comprehensive National Disability Policy (2002), The Constitution of Afghanistan (2004), National Plan of Action against Trafficking and Kidnapping of Children (2004), National Strategy of Children at Risk (2004), The Afghanistan HIV/AIDS Strategic Framework (2006), Labour Code (2007), Afghan National Development Strategy (ANDS) (2008), Law on Counter Abduction and Human Trafficking (2008), National Strategy for Children with Disabilities (2008), National Justice Sector Strategy (2008), National Law for the Rights and Privileges of Persons with Disability (2009), Shia Personal Family Law (2009/10), Elimination of Violence Against Women (EVAW) 2010, Action Plan for the prevention of underage recruitment into the Afghan National Security Forces (2011) and National Strategy for Street Working Children (2011–2014) 2011.

Prisons and Detention Centers

Article 7 of the 'Law of Prisons and Detention Centers – 2007'²³ defines a detention center as a "dwelling where the suspects that are waiting for trial are detained, while prison is a place where persons, termed convicts on the final judgment of a court, are kept."

23 Article 6 – Law of Prisons and Detention Centers, 1386 (2007)

Who Supervises the Plight of Detention Centers and Prisons in the Country?

The operations of detention centers and prisons must be continuously monitored and inspected to evaluate whether the places' events are consistent with the law to ensure they are accomplishing their aim. Thus, Afghanistan Independent Human Rights Commission (AIHRC) was established in 2002 under Article 58 of the National Constitution of Afghanistan with a solid mandate to shield, uphold, and monitor the human rights of Afghan citizens in the country. The importance of observing places of custody, principally prisons, is exemplified in the Commission's core objective. Between 2010 and 2011, AIHRC steered 337 observing missions to child correction centers throughout Afghanistan, resulting in the identification and freedom of 114 children (102 boys, 12 girls) who had been wrongfully detained. About the uncertain political environment, further independent observing missions could not be sent to the correction centers to update the data by AIHRC. Furthermore, in the lack of an appropriate system, there is very slight information accessible on how legal values are being applied to children in conflict with the law all over the country.

According to the 2008 report by AIHRC, juvenile rehabilitation centers were present in all the provinces covered in the study, but 59% of the children experienced police detention before being relocated to the rehabilitation centers. Of all the cases studied, 21% of children were moved directly into rehabilitation centers.²⁴

Treatment of the Juvenile Detainees/Experiences during Detention

The detention centers provide social, educational, vocational, psychological, and health services under Article 12 of Afghanistan's Juvenile Code. Lack of finance and resources does little to prepare juveniles for reintegration into society, even though the majority of them are expected to be freed from prison. In the more swish detention centers, juveniles are given up to 40 minutes, if they are fortunate, outside per day where they can hang out with other inmates and basically stand around. According to many judges, juveniles get about 0.60 USD per day instead of being allotted USD 1.25 or 75 Afghanis per day for meals, practically eliminating fruits, vegetables, and meat from their diets. Furthermore, within the centers, children every so often attend as prison guards to other juveniles who are also locked up. These children, as guards, familiarize the newcomers into the facility. They have specified the right to do searches of other kids and accommodations, and in some instances, are even given the authority to regulate penances for

24 Afghanistan Independent Human Rights Commission (AIHRC), Justice for children. The situation of children in conflict with the law in Afghanistan, 26 June 2008, available at: <https://www.refworld.org/docid/47fdfae50.html> [accessed 5 September 2021].

delinquent juveniles. The overcrowded bedrooms' dismal environment, which often has more juveniles than beds allotted, offers anything but a rehabilitative atmosphere²⁵.

In its report on the human rights situation for juveniles (2019), AIHRC stated that 101 (17.1%) out of the total 591 children interviewed by the Commission in correction centres were abused.²⁶ In 2020, out of the 598 children interviewed, 112 (18.7%) allegedly faced torture and mistreatment during their custody.²⁷

Afghanistan's courts and prisons are chockfull of juveniles who are indicted and sentenced for crimes – often wrongly, while their civil rights go nearly unchallenged and overlooked. Due to the non-existence of witness testimony, lack of a defense counsel to represent their benefits, little to no palpable or impalpable evidence, and minus their right to put forth their defense, for many, their convictions are upheld. With little international support, the juvenile justice system has little hope for progress.

As stated by a study founded on interviews with 40% of all those now imprisoned in the country's juvenile justice system, approximately two out of every three boys detained in Afghanistan are physically mistreated.²⁸ The study, undertaken by U.S. defense attorney Kimberly Motley for the international children's rights organization *Terre des Hommes*, discloses a justice system that subjects children to torture, distress, forced confessions, and blatant abuse of their rights in court.²⁹ The author individually interviewed 250 of the 600 juveniles in prisons and rehabilitation centers across the country.

Those statistics (2010) correspond to the outcomes of a study published by the UNICEF and the AIHRC in 2008, which found that 55% of boys and 11% of girls testified having been beaten upon their arrest. About 24% of all the children interrogated expressed to Motley that they had signed confessions written by police without comprehending it until they had gone to court. In some cases, they were misled into signing a blank sheet of paper which was then used for the confession.

Alternative to Detention Centers

The Juvenile Code is rehabilitative and allows for judges to provide the following alternatives to sentencing a child for detention, under Article 35³⁰:

25 Ibid.

26 AIHRC, Summary Report on the Human Rights Situation of Children in Afghanistan, 23 March 2020

27 AIHRC, "The Human Rights Situation of Children in 1399 (2020)," February 2021.

28 Kimberley Cy. Motley, *An Assessment of Juvenile Justice in Afghanistan*, January 2010, available at: https://archive.crin.org/en/docs/Tdh_Juvenile_justice_web.pdf [accessed 6 September 2021].

29 Ibid.

30 Afghanistan: Juvenile Law (Juvenile Code), 2005 [Afghanistan], 23 March 2005, available at: <https://www.refworld.org/docid/5b0ffbe4.html> [accessed 6 September 2021].

- Performing social services
- Sending the child to particular social services institutions
- Issuance of a warning
- Postponement of trial
- Conditional suspension of punishment
- Home confinement
- Surrender of a child to his/her parents or those who have guardianship rights.

The Dilemma of Girls in the Juvenile Justice System

Article 22 of Afghanistan's Constitution states that men and women have the same rights before the law. In spite of this fact, girls are regularly prosecuted for moral and ethical misconducts at a higher rate than boys, such as eloping from home and adultery – both delinquencies do not come underneath the codified laws, but whose prosecution is acceptable grounded on customary law. Additionally, the vast majority of girls are unschooled and uneducated. A good percentage are young mothers, and many are married to men twice their age. Preceding their stay in prisons, many of the girls recount particulars of being required to beg on the roads during the day and being subjected to abuse at home by their husbands at night. By and large, girls are being represented in court, though, more often than not, the girls do not entreat their right to testify almost certainly because of the deferential position that they are culturally familiar with having.

A study by AIHRC in 2008 specifies that compared with the number of boys, the extent of girl children in conflict with the law is ever so often reasonably small. Of the total 247 children interrogated, only 37 (15%) were female compared to 201 (85%) males. Nevertheless, it was observed by the field workers, and it must also be taken into account that girls are more likely to be imprisoned with adult female inmates as, in many districts, juvenile facilities happen only for boys. Another issue may be that girls may face being imprisoned in adult female prisons as they feel safer with female prisoners rather than in mixed juvenile rehabilitation centers where they do exist. It is clear that girls are often treated devoid of any attention to their definite requirements in the justice system, given the relatively small number of girls (compared with boys). It is repeatedly the case that girls are not held in a separate part of the detention center when they are detained with female adult prisoners. However, it is observed that children detained with adult prisoners are more prone to a higher risk of exploitation. Furthermore, girls lack the same access to rights as boys in custody have in children's

facilities. Mainly, they do not have access to the same instructive or occupational training or other institutional sustenance that boys may have access to³¹.

Rehabilitation of the Juvenile Offenders

The legal reaction to juvenile delinquency is enduring revolutionary change, and its eventual shape is indeterminate.³² The customary juvenile court, stuck in sanguinity about the potential for rehabilitation of young delinquents, has long been the object of criticism, and even its defenders have been required to concede that it has failed to meet its objectives.³³ In the 32nd United Nations General Assembly, the Secretary-General of United Nations voiced concerns of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and United Nations Assistance Mission in Afghanistan (UNAMA) about the adequate security arrangements, dearth of support staff, psychosocial support, access to legal representatives, and educational and health facilities at juvenile rehabilitation centers, which ought to muddle the reintegration procedure following the release of detainees³⁴.

KEY INTERVENTIONS AND GOOD PRACTICES

Significant progress has been made by the Government of Afghanistan since 2008 to bring into line its legal framework with international commitments on child rights. These include the Law on the Protection of Child Rights, 2019 (passed by Presidential Decree) awaiting parliamentary ratification and completion of the first draft of the new Family Law (2020) by the Ministry of Women's Affairs.³⁵ As of March 2021, the government was working on the National Child Protection policy focusing on communities and families as principal agents for the upkeep and protection of children. Furthermore, the penal code was revised to outlaw the recruitment of juveniles by armed forces and sexual exploitation.³⁶ The Department of Gender, with UNFPA support, has launched operations of 37 family support centers in 26 provinces in Afghanistan, thus, so far, providing support to 30000 victims of GBV, women, and children.³⁷

31 Afghanistan Independent Human Rights Commission (AIHRC), Justice for children. The situation of children in conflict with the law in Afghanistan, 26 June 2008, available at: <https://www.refworld.org/docid/47fdfae50.html> [accessed 10 September 2021].

32 Irene Merker Rosenberg, Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists, 1993 Wis. L. Rev. 163, 165-66.

33 Ibid.

34 A/72/888-S/2018/539, para 62, OHCHR/UNAMA submission, p. 3 and UNAMA, Protection of Civilians in Armed Conflict, Annual report 2017 (Kabul, Afghanistan, February 2018), p. 13

35 UN Children's Fund (UNICEF), Situation Analysis of Children and Women in Afghanistan 2021, August 2021

36 Ibid.

37 Ibid.

The withdrawal of Western powers from Afghanistan poses grave concerns about human rights for children particularly due to mass migrations from Afghanistan. The RRP (Regional Refugee Preparedness) inter-agency partners (UNHCR, UNICEF, WHO, WFP, IOM, RI, etc.) has appealed for a total of \$299.2 million to cover the emergency response and preparedness.³⁸ To help protect child rights amid conflict and the COVID-19 pandemic, UNAMA is backing the broadcasting of radio programs to raise awareness around the issue.³⁹ These programs bring together local influential people, civil society, tribal leaders, religious scholars, and government officials.

CHALLENGES TO CHILDREN'S HUMAN RIGHTS-BASED DETENTION/CORRECTIONAL CENTRES

AIHRC is empowered, to observe the human rights situation of prisoners as well as juvenile detainees in juvenile correction centers, under Article 52 of the Law on the Regulation of Prison Affairs and Article 58 of the Constitution of Afghanistan.⁴⁰ According to the Commission report published in 2021, there is no distinct meal plan for children living in most detention centers and prisons and juveniles living in custody with their mothers. It was also found out that, except in Herat, Kabul, and Kandahar, school-age juveniles had no access to education in schools and kindergartens.⁴¹ The Commission's monitoring team was also denied access to the Kabul NDS custody. It is important to note down here that correction centers for children have been recognized as a subgroup of prisons.⁴²

According to the Civil Society Alternative Report to the Combined State Party Report (The Second to Fifth Periodic Report) for Afghanistan on the Convention on the Rights of the Child (July 2019), juveniles between the ages of 7 and 12 are still arrested and detained, which is in contravention to the legal minimum age for criminal liability, that is, 12 years.⁴³ Regardless of the legal condition of special units for both boys and girls specializing in handling children, findings reveal the presence of only

38 UNHCR, Afghanistan Situation: Regional Refugee Preparedness and Response Plan – Summary and Inter-agency Funding Requirements (July–December 2021) Available at: [<https://reliefweb.int/report/pakistan/afghanistan-situation-regional-refugee-preparedness-and-response-plan-summary-and>] [accessed on 22nd January 2022]

39 UN Assistance Mission in Afghanistan, Helping Protect Children's Rights In Southeastern Afghanistan, 29th June 2021, Available at: <https://unama.unmissions.org/helping-protect-children%E2%80%99s-rights-southeastern-afghanistan>, [accessed on 22nd January 2022]

40 AIHRC, Human Rights Situation in Prisons 1399, June 2021, available at: https://www.aihrc.org.af/home/research_report/9145#, [accessed 23 January 2022].

41 Ibid.

42 Ibid.

43 Save the Children, Civil Society Alternative Report to the Combined State Party Report (The Second to Fifth Periodic Report) for Afghanistan on the Convention on the Rights of the Child, July 2019, available at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AFG/INT_CRC_NGO_AFG_40859_E.pdf, [accessed 24 January 2022].

one department concerning children at the police headquarters.⁴⁴ Furthermore, Article 38(2) of the Juvenile Code does not accurately outline the frequency of report submission on the conduct of children in correctional centers. Additionally, the Committee report found maladministration and poor oversight of the children's correctional centers resulting in re-offense of the children once they are released.⁴⁵

A report⁴⁶ was launched by Integrity Watch Afghanistan in collaboration with Afghanistan Justice Organization (AJO) and Afghanistan Independent Bar Association (AIBA). It is focused on the findings of site visits to prison facilities in Baghlan (November 2015), Pul-i-Charkhi (March 2016), and Wardak (2017), undertaken by inspection teams of Integrity Watch Afghanistan. The report's findings showed the prison system's dismal conditions, such as poor healthcare facilities, absence of food for the detainees, clean drinking water, shortage of power, and so forth. The key factors behind the violations of these fundamental rights of the inmates include mismanagement, negligence, corruption, and embezzlement. For instance, it was found that 1030 items and portions were not constructed/installed regardless of being evident in the contracts. The management of prisons by the Afghan government was found to be of deep concern. For example, only one addressed after two years was out of the 10 significant defaults highlighted in Pul-i-Charkhi prison by Special Inspector General for Afghanistan Reconstruction (SIGAR) in 2014.⁴⁷ Other hindrances to a human rights-based prison system include lack of resources, incompetency of staff, insufficient pay, lack of training, the dismal physical structure of the prison, poor sanitation system, overcrowding, improper rehabilitation, and reintegration system, and many more.

POLICY RECOMMENDATIONS

1. As urged by the reports submitted by State Parties of the Committee on the Rights of the Child (2011), Afghanistan should incorporate the key provisions of the Convention on the Rights of Child in domestic legal order in true letter and spirit.⁴⁸
2. It is also recommended that Afghanistan enact a specific Child Act – including a National Plan of Action and allocation of an adequate budget – as well as ensure

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Integrity Watch Afghanistan, *Behind The Bars: A Labyrinth of Challenges in Prisons in Afghanistan – 2017*, available at: <https://reliefweb.int/report/afghanistan/behind-bars-labyrinth-challenges-prisons-afghanistan>, [accessed 25 September 2021].

⁴⁷ Ibid.

⁴⁸ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under Article 44 of the Convention: Convention on the Rights of the Child: concluding observations: Afghanistan*, 8 April 2011, CRC/C/AFG/CO/1, available at: <https://www.refworld.org/docid/4dc7bd492.html> [accessed 23 January 2022].

implementation of the Convention to a single national mechanism that has oversight over all ministries.

3. Considering children deprived of liberty, the Government of the Islamic Republic of Afghanistan (GoIRA) must support the funding of resources for the training of competent social workers and the formation of public-based observing systems to upkeep the execution of Article 35 of the Juvenile Code; particularly the facilitation of oversight by social workers and parents.⁴⁹
4. Under Article 130 of the Constitution of Afghanistan 2004, the GoIRA must immediately stop the prosecution of moral/ethical violations and “running away” as criminal offenses.
5. In compliance with Article 34 of the UNCRC and the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crimes, the GoIRA must also direct the law enforcers and prosecutors that juvenile victims of any form of mistreatment or cruelty are measured and treated as victims and not charged and imprisoned as criminals.
6. Consider the recommendations outlined in the Alternative CRC Report⁵⁰ by the civil society organizations:
 - I. Dedicate law enforcement units to children in all police stations
 - II. Revise the Juvenile Code to guarantee that probation officers present regular reports every month on the behavior of children.
 - III. Modify the Juvenile Code to ensure that children below the age of 12 years are not exposed to any proceedings before the juvenile court.
 - IV. Allocate sufficient budget to children’s rehabilitation centers.
 - V. Amend Articles 97 and 98 of the Penal Code to increase the safety of children in conflict with the law.
 - VI. Train police on child-friendly policing and safeguarding human rights.

49 UN Human Rights Council, Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Afghanistan, 8 November 2013, A/HRC/WG.6/12/AFG/3, available at: <https://www.refworld.org/docid/52ea4dad4.html> [accessed 1 December 2021].

50 Save the Children, Civil Society Alternative Report to the Combined State Party Report (The Second to Fifth Periodic Report) for Afghanistan on the Convention on the Rights of the Child, July 2019, available at: https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AFG/INT_CRC_NGO_AFG_40859_E.pdf, [accessed 24 January 2022].

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BANGLADESH

EXECUTIVE SUMMARY

According to the United Nations Global Study on Children Deprived of Liberty 2019, the number of children deprived of liberty in pre-trial detention and prison is at least 410,000 each year.¹ In every stage of the administration of justice beginning with the arrest and police custody, going through pre-trial detention and detention after sentencing, children have had horrible experiences in many nations. This is severely reflected in their health and personal development. Such treatments violate the obligation of States under the International Convention on the Rights of the Child 1989 (CRC), and other international human rights instruments.

Bangladesh adopted the National Child Policy 2011 and the Children Act 2013 (2013 Act) in compliance with the CRC. The research reveals that the 2013 Act is a fairly standard piece of legislation to provide child liberties in the administration of justice. Unfortunately, the full and effective implementation of the Children Act is still an illusion. The mandate of making rules under Section 95 of the 2013 Act is yet to happen. The existing three Child Development Centres (CDCs) of Bangladesh with 600 capacity (450 male and 150 female children of different ages) appear to be insufficient to facilitate children of a country with approximately 167 million people. Moreover, tragic incidences that occurred in CDCs coupled with its ambience are quite alarming to ensure the liberty of children. The 2013 Act provides for the establishment of a separate Children's Court in each district and metropolitan area. The continuation of the trial by the Nari O Shishu Nirjatan Daman Tribunal (literally translated as Women and Children Repression Prevention Tribunal) makes the court overburdened. It results in the prolongation of the trial duration. The authors strongly advise that the standards recommended in the United Nations Global Study on Children Deprived of Liberty 2019 are followed.

INTRODUCTION

Deprivation of liberty in the administration of justice is a serious global concern. Administration of justice involves arrest and police custody, pre-trial detention and detention after sentencing. Ensuring standards to deal with a child in all these stages as

1 United Nations Global Study on Children Deprived of Liberty 2019, p. 249.

provided in international instruments is vital to ensure the physical and mental development of the child. In Bangladesh, as of 2018, 716 children have been in detention centres.² The basic framework at the international level to bestow protection of children is the CRC. It provides standards for ensuring the rights of children. Bangladesh ratified the CRC and its two Optional Protocols as one of the first South Asian nations.³ Within the domestic sphere, the Constitution of Bangladesh confers utmost power to the State to make provisions in favour of children to offer better protection. The Government of Bangladesh (GoB) adopted several measures on different occasions to ensure the best interest of the child. The promulgation of the Children Act 1974 (1974 Act) long before the adoption of the CRC reflects the commitment of a newly independent State to bestow protection to its children. Upon the ratification of the CRC, the GoB adopted the National Child Policy 1994. But both the Children Act 1974 and Policy of 1994 lacked certain standards articulated in the CRC. Thus, the GoB framed the National Child Policy 2011 as an aspirational document to achieve the goal.⁴ The innate limitation of the Policy required the adoption of law with the revised standard of the CRC. Finally, the 2013 Act was enacted. The long title of the 2013 Act reveals that it was enacted due to the obligation accrued under the CRC and to incorporate the standards provided in CRC. The 2013 Act contains certain basic features among which ensuring child liberty in the administration of justice is noteworthy. The 2013 Act substantially reformed the child justice system and endorsed provisions for child-friendly children's courts and child-oriented practices in a number of settings.⁵ The main challenge is the effective implementation of these standards. The present study will examine laws relating to the deprivation of child liberty in the administration of justice in Bangladesh. The study will offer recommendations in this regard after analyzing existing standards, policies and implementation.

SITUATIONAL DESCRIPTION

The 2013 Act is the primary instrument to ensure liberty of children in the administration of justice. Ensuring liberty involves compliance with international standards in the process of arrest and police custody, pre-trial detention and detention after sentencing.

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- 2 Justice Audit Bangladesh 2018, Child Development Centers (CDC), <https://bangladesh.justiceaudit.org/national-data/regional-services/child-development-centers/> (last accessed 16 February 2022)
 - 3 Bangladesh signed and ratified CRC on 26 January 1990 and 3 August 1990, respectively. It signed and ratified both the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict on 6 September 2000.
 - 4 Amanda Adamcheck *et al*, The Implementation of the Convention on the Rights of Children in Seven South Asian Countries, *Institutionalised Children Explorations and Beyond* 7(1), p. 39.
 - 5 UN Report 305; Nahid Ferdousi, 'The establishment of children's courts in Bangladesh: from principle to practice', *Oxford University Commonwealth Law Journal*, 15(2), 2016.

The 2013 Act offers somewhat better protection. Despite the standard legal provisions for the protection of children in the administration of justice, the actual practices of the relevant stakeholders are quite disappointing. The major obstacle is the implementation of the 2013 Act. Under Section 59 of the 2013 Act, the establishment of CDCs is mandated. Till date, only three CDCs under the Ministry of Social Welfare (MoSW) have been established in Tongi and Konabari of Gazipur District and in Jashore District.⁶ In a survey conducted about detained boys in Tongi CDC, it was revealed that they came from diverse family backgrounds although the majority were found from lower-middle and lower-class economic backgrounds.⁷ The alleged offences are diverse but largely include theft, murder, rape, drug trafficking, goods trafficking, robbery, causing grievous hurt to playmates and friends. Allegations were brought that some crimes were committed in a group and others in an individual capacity.⁸ According to the Justice Audit Bangladesh 2018, Tongi CDC accommodates 384 children of which 379 were under trial and 5 were convicted. Of these children, 7.9% were aged between 9 years to 11 years and 92.1% were aged between 12 years and 18 years. Of these children, 64.6% have been there for less than 6 months, 19.5% from 6 months to 1 year, 12.9% from 1 year to 2 years and the rest 2.9% for more than 2 years. Of these children, 19.8% have been accused of murder, 10.8% have been accused of drug offences, 15.0% have been accused of theft, 21.4% have been accused of violence against women and children, 0.5% were in safe custody, 4.0% were victims and 28.5% have been accused of other crimes. Jashore CDC accommodates 213 children of which 204 were under trial and 9 were convicted. Of these children, 6.1% were aged between 9 years to 11 years and 93.9% were aged between 12 years and 18 years. Of these children, 71.4% have been there for less than 6 months, 17.4% from 6 months to 1 year, 8.9% from 1 year to 2 years and the rest 2.3% for more than 2 years. Of these children, 21.1% have been accused of murder, 12.3% have been accused of drug offences, 15.7% have been accused of theft, 25.0% have been accused of violence against women and children, 3.4% were in safe custody and 21.6% have been accused of other crimes. Konabari CDC accommodates 121 children of which 120 were under trial and 1 was convicted. Of these children, 13.0% were aged between 9 years to 11 years and 87.0% were aged between 12 years and 18 years. Of these children, 29.2% have been there for less than 6 months, 28.3% from 6 months to 1 year, 28.3% from 1 year to 2 years and the rest 14.2% for more than 2 years. Of these children, 1.6% have been accused of murder, 1.2% have been accused

6 The Tongi CDC was established in 1978 with a capacity of 300 boys. It is the first CDC in Bangladesh. The Konabari CDC was established in 2003 with a capacity of accommodating 150 girls. This is the only CDC for female children. Another one was established for boys in 1995 in the district of Jessore with a capacity of 150.

7 Razina Sultana and Shilpi Rani Dey, *Children of the Tongi Child Development Centre (CDC): Their Experiences before Detention*, Dhaka University Studies, Part-D, Volume 37, No. 1, June 2020, p. 262.

8 Ibid.

of theft, 42.5% have been accused of kidnapping, 47.2% were in safe custody and 7.1% have been accused of other crimes.⁹

Police custody is a brutal experience for many children as reflected in their narratives. Their experience includes physical torture, beating with sticks, keeping their hands under handcuffs, using electric shocks, using slang and so forth. One detainee named Iqbal Hossain said that the Border Guard Bangladesh Force detained him in the border area and asked him to confess that he was a gang member of traffickers. According to Iqbal,

*“It was winter and they did not give any blanket to protect me from severe cold as well. I slept over floor of a tiny room without anything. They only beat me and recorded my voice. Finally, they forced me to put my signature in a paper and produced me before court”.*¹⁰

Children living in these CDCs encounter many problems that are a hindrance to their liberty. It was reported last year that in spite of the capacity to accommodate 600 children, the CDCs are accommodating more than 900 hundred children.¹¹ Amidst such crowded accommodation, it will not be practically possible to ensure minimum standards in detention. Many instances occurred in CDCs which are evidence of deprivation of children's liberty. It was published that three children were killed and another 15 were severely injured by the employees in Jessore CDC on 13 August 2020.¹² In the aftermath of this incident, a Daily Star correspondent took an interview of a detainee unwilling to reveal his name and who stated, “It is a jail, isn't it? have you ever heard that a person lived happily in a jail?”¹³ Another report revealed that 15 youth of the same Jessore CDC protested against the system of oppression by scratching their body using broken glasses, which resulted in severe bleeding. Similarly, five youth of Tongi CDC caused severe injury to themselves as a form of protest in 2014. They were hospitalized to stop their bleeding. The instances of fleeing from Jashore CDC happened as well.¹⁴ Very recently on 22 January 2021, a dead body was found hanging in the bathroom of Tongi CDC.¹⁵ It raises more concern about the protection of children in CDCs. Raids by seniors in CDCs are common. Sifat, a pseudo-name who stayed in Toni CDC for four months, said:

9 Justice Audit Bangladesh 2018.

10 Razina Sultana and Shilpi Rani Dey, Children of the Tongi Child Development Centre (CDC), p. 266.

11 26 August 2020, Daily Prothom Alo, published from Dhaka.

12 29 August 2020, Daily Jugantor, published from Dhaka; 19 August, 2020, Murder of 3 boys: Jashore CDC officials sent to jail after remand, the *Daily Observer*, <https://www.observerbd.com/news.php?id=270867>

13 Md. Shahnawaz Khan, Abu Bakar Siddique, No better than a jail, 30 September 2020, available at <https://www.thedailystar.net/frontpage/news/no-better-than-jail-1969733>

14 26 August 2020, Daily Prothom Alo, published from Dhaka.

15 Teen found dead in Tongi Child Development Center, *The Business Standard*, 22 January 2021, <https://www.tbsnews.net/bangladesh/teen-found-dead-tongi-child-development-center-189745>

“Our senior inmates were our leaders and we had to obey them strictly. The slightest mistake- for example, failing to greet them would result in punishments like 100–200 sit-ups or standing on one leg for an hour.”¹⁶

EXISTING LAWS AND LEGISLATION

The criminal justice system of Bangladesh is based on two primary pieces of legislation. First, the Penal Code 1860 provides the general substantive framework of criminal laws in Bangladesh. Second, the Code of Criminal Procedure 1898 (CrPC) provides the procedural framework of the criminal justice system in Bangladesh. The Evidence Act 1872 supplements the criminal procedures by providing rules of evidence. The Constitution of Bangladesh guarantees a number of fundamental rights applicable to the criminal justice system. Especially, Article 33 provides certain protections related to arrest and detention and Article 35 provides certain protections related to crime and punishment. Though the Penal Code 1860 and the CrPC 1898 provide a general framework of the criminal justice system in Bangladesh, they do not provide a uniform criminal justice framework. The legal system of Bangladesh accommodates special criminal legislation to deal with specific crimes (e.g., The Prevention and Suppression of Human Trafficking Act 2012), victims (e.g., The Suppression of Violence Against Women and Children Act 2000), and offenders (e.g., The 2013 Act).

As Bangladesh follows the common law tradition, case law is considered as a source of law in Bangladesh. Article 111 of the Constitution of Bangladesh states that “[t]he law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.” The Supreme Court of Bangladesh decided a number of landmark decisions on the criminal justice system, and those decisions are a very important source of criminal law in Bangladesh.

Both the Penal Code 1860 and the CrPC 1898 contain provisions related to the freedom of children in the administration of criminal justice. Chapter IV of the Penal Code 1860 enumerates the general exceptions to the crimes. Sections 82 and 83 of the Penal Code 1860 mention the minimum age of culpability. Section 82 states that “Nothing is an offence which is done by a child under nine years of age.” Section 83 provides an exception by stating that “[n]othing is an offence which is done by a child above nine years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.” It is pertinent to note that minimum age of culpability was changed from seven years to nine years through an amendment of the Penal Code 1860 in 2004.

16 Md. Shah Nawaz Khan, Abu Bakar Siddique, No better than a jail, 30 September 2020, available at <https://www.thedailystar.net/frontpage/news/no-better-than-jail-1969733>

However, the phrase “sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion” has not been defined in the law and it leaves rooms of discretion for the criminal justice actors. Chapter XXXIX of the CrPC 1898 provides the rules related to the granting of bail. Generally, the persons who are believed to have been guilty of an offence punishable with death or imprisonment for life on a reasonable basis do not benefit from the granting of bail. However, the proviso of Section 497(1) of the Code of Criminal Procedure 1898 provides an exception stating that “the Court may direct that any person under the age of sixteen years [...] accused of such an offence be released on bail.” It appears that the juvenile offenders in Bangladesh have been benefitting from special protections even before the enactment of the 1974 Act. First, the 1974 Act and subsequently the 2013 Act provide additional special protection for children in the administration of justice.

The 2013 Act provides a number of special rules related to the trial and prosecution of children and the protection of child victims of crimes. According to Section 3 of the 2013 Act, provisions of this enactment will prevail over other laws. Thus, the 2013 Act will exclusively deal with the trial and prosecution of children and the protection of child victims of crimes in Bangladesh. According to Section 4 of the 2013 Act, all persons up to 18 years are considered as children. The 2013 Act has established several institutions; these include: Probation Officer, Children’s Court, CDC, Child Welfare Board, Child Affairs Desk, Child Affairs Police Officer, and so forth. This Act enumerates special rules related to arrest and detention, and punishment. As regards the arrest and detention of the children, the 2013 Act has taken the sensitive nature of the children and the purpose of the criminal justice system. A detailed account of the rules related to the arrest and detention of children will be discussed in the next chapter.

In addition to domestic law obligations and apart from CRC as discussed earlier, Bangladesh has obligations also under a number of international laws. Bangladesh is a party to the International Covenant on Civil and Political Rights 1966, and the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984. As a dualist country, the Bangladeshi courts are not bound to apply international law; the Supreme Court of Bangladesh has taken the notes of different international instruments as an aid of interpretation. Moreover, several international law instruments impose an obligation on the State parties to implement the conventions by domestication. For example, the Government of Bangladesh re-enacted the 2013 Act to implement the provisions of the CRC.

There are a number of soft law instruments as standards to deal with the deprivation of liberty of children in the criminal justice system. These are the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the

Protection of Juveniles Deprived of their Liberty (the Havana Rules), United Nations Standard Minimum Rules for Noncustodial Measures (the Tokyo Rules) and the Vienna Guidelines for Action on Children in the Criminal Justice System. The General Comment No. 10 on the CRC (2007) that interpreted the rights of the child in juvenile justice is also relevant here. Though these are not legally binding on Bangladesh, the Committee on the Rights of the Child (Committee), the treaty body supervising the implementation of the CRC of the State parties, recommended the GoB to bring the juvenile justice system of Bangladesh in conformity with these soft law instruments and the General Comment No. 10 on several occasions. The Government of Bangladesh should reconsider the recurrent recommendation of the Committee.

POLICY OPTIONS

In any event of the commission of a penal offence by persons above 9 years (in certain cases 12 years) and up to 18 years, the 2013 Act provides a number of possible legal trajectories described as follows:

(1) Arrest

Section 44 of the 2013 Act details the provisions related to arrest of child accused. The 2013 Act bars the arrest or detention of any child below nine years¹⁷ and under any law related to preventive detention.¹⁸ At the time of the arrest, a child cannot be hand-cuffed, tied up with rope or cord around the waist.¹⁹ After the arrest, the concerned police officer shall inform the Child Affairs Police Officer of the reason and place of the arrest, and the subject matter of the allegation.²⁰ A Child Affairs Police Officer is the police officer in charge of the Child Affairs Desk established by the Ministry of Home Affairs, who will not be below the rank of a Sub-Inspector and will preferably be a female Sub-Inspector.²¹ A Child Affairs Police Officer has certain responsibilities concerning the child accused under the 2013 Act.²² At the same time, the police officer shall determine the age of the accused child by verifying different documentary evidence, and in case of failure to determine the age, the presumption that the accused is a child shall prevail.²³ The arrested child shall be detained in a safe place of the police station and in case of a lack of a safe place therein, s/he shall be placed in a Safe Home established under this Act and separate from adult offenders and convicted

17 The 2013 Act, S. 44(1)

18 Ibid., S. 44(2)

19 Ibid., S. 44(3)

20 Ibid., S. 44(3)

21 Ibid., S. 13

22 Ibid., S. 14

23 Ibid., S. 44(4)

offenders.²⁴ After bringing the arrested child to the Police Station, the Child Affairs Police Officer shall inform the particulars of the arrest to the parents of the child, or in absence of both of them, to the caregiver or the authority in the supervision of the child or legal or lawful guardian of the child, or, where relevant, the members of the extended family, the Probation Officer, and the nearest Child Welfare Board established under this Act.²⁵

(2) Release with Warning

Upon the arrest, the Child Affairs Police Officer shall record of the statement of the child in the presence of the parents of the child, or in absence of both of them, the caregiver or the authority in supervision of the child or legal or lawful guardian of the child, or, where relevant, the members of the extended family and the Probation Officer or the Social Worker.²⁶ After considering the nature of the allegation brought against the children and his/her mental and socio-economic condition, the Child Affairs Police Officer may warn the child in writing or verbally in front of the parents of the child, or in absence of both of them, the caregiver or the authority in the supervision of the child or legal or lawful guardian of the child, or, where relevant, the members of the extended family and the Probation Officer or the Social Worker and lease him/her.²⁷ In this case, there will be no criminal record against the child.²⁸

(3) Diversion and Family Conference

After recording the statement of the child under Section 47(1) of the 2013 Act, the Child Affairs Police Officer shall send him/her for diversion instead of release.²⁹ The Diversion may take place at any stage of the proceedings instead of a formal trial and its purpose is to ensure the best interest of the child by taking into consideration his/her familial, social, cultural, financial, ethnic, psychological and educational background or to resolve the dispute.³⁰ In an appropriate case, the Child Affairs Police Officer or Children's Court may send the matter to the Probation Officer for diversion.³¹ The Probation Officer shall monitor whether the concerned child and the parents of the child, caregiver, legal or lawful guardian, or members of the extended family are complying with the conditions of the diversion and shall report the matter to the Child Affairs Police Officer or Children's Court from time to time.³² In case of a violation of any con-

24 Ibid., S. 44(5)

25 Ibid., S. 45

26 Ibid., S. 47(1)

27 Ibid., S. 47(2)(a)

28 Ibid

29 Ibid., S. 47(2)(b)

30 Ibid., S. 48(1)

31 Ibid., S. 48(2)

32 Ibid., S. 48(3)

dition of diversion by the concerned child and the parents of the child, caregiver, legal or lawful guardian, or members of the extended family, the Probation officer notifies the Child Affairs Police Officer or Children's Court immediately.³³ The duration of the diversion shall be specified by the Children's Court or the Child Affairs Police Officer.

Where the diversion has been undertaken, the Probation Officer may take measures to resolve the disputes on a priority basis by convening a family conference.³⁴ It is pertinent to mention that the Children's Court may direct the Probation Officer to take steps to resolve disputes involving offences of lesser gravity between the victims and offenders by following the provisions of Section 49. At the family conference, the participants will undertake the plans to ensure the best interest of the child by consensus. The outcome of the conference will be reported to the Child Affairs Police Officer or the Children's Court.³⁵ The Child Affairs Police Officer or the Children's Court may determine the procedures to be followed in the family conference and the Probation Officer will organize the family conference by following such procedures.³⁶ If the participants of the family conference fail to reach any decision by consensus, the Probation Officer, upon cancellation of such family conference, shall return the matter to the Child Affairs Police Officer or the Children's Court for taking another form of diversion.³⁷ However, the proceedings of the family conference will be considered confidential and the statements made during the family conference shall have no legal value in the court proceedings.³⁸

In an event of violation or failure to comply with any condition of the decision of the family conference by the concerned child and the parents of the child, caregiver, legal or lawful guardian, or members of the extended family, the Probation Officer will inform the matter in writing to the Child Affairs Police Officer or the Children's Court.³⁹ In case of the Probation Officer's report of a violation or failure to comply with any condition of diversion by the concerned child and the parents of the child, caregiver, legal or lawful guardian, or members of the extended family, the Child Affairs Police Officer or the Children's Court, upon verifying the matters, may (a) pass a similar order with different condition, (b) issue warrant for the arrest of the child, (c) send a written notice to the child for appearing before the Children's Court or the Police Station, (d) send the case record to the Public Prosecutor for initiating the trial process, (e) pass an order to send the child to a certified institute, or (f) pass any other order under this Act.⁴⁰

33 Ibid., S. 48(4)

34 Ibid., S. 49(1)

35 Ibid., S. 49(2)

36 Ibid., S. 49(3)

37 Ibid., S. 49(5)

38 Ibid., S. 49(6)

39 Ibid., S. 49(4)

40 Ibid., S. 51

(4) *Bail*

Section 52 of the 2013 Act provides special rules relating to the bail of children. If it appears to the Child Affairs Police Officer that it is not possible to release the child, send him/her on diversion, produce before the Court, s/he may release the concerned child on bail, with or without any condition or surety, to the parents of the child, or in absence of both of them, the caregiver or the authority in supervision of the child or legal or lawful guardian of the child, or, where relevant, the members of the extended family, the Probation Officer.⁴¹ In this case, the nature of the crime (bailable or non-bailable) is irrelevant.⁴² However, Section 52(3) of the 2013 Act provides four exceptions to the rules. An arrested child does not benefit from the grant of bail or release if (i) s/he is accused of committing a heinous offence, (ii) the release is contrary to the best interest of the child, (iii) if there is the likelihood that the concerned child will come in contact with any notorious criminal or moral risks upon bail or release, and (iv) if the grant of bail affects the interest of justice.⁴³ In case of non-release of an arrested child, the Child Affairs Police Officer shall produce the arrested child before the nearest Children's Court within 24 hours excluding the travel time. However, the Children's Court, upon the production of the arrested child before it, may either release him/her on bail or pass an order to detain him/her in a Safe House or CDC.⁴⁴

POLICY RECOMMENDATIONS

The UN Global Study on Children Deprived of Liberty 2019 reiterates that even very short periods of deprivation of liberty can have detrimental effects on a child's psychological and physical well-being which will have a long-lasting impact.⁴⁵ Thus, deprivation of liberty must not be compromised even for the slightest duration. In the context of Bangladesh, the letters of the 2013 Act contain fairly compatible standards of CRC but effective implementation of those standards remains as the foremost challenge. The legislation must not be seen as an end in itself but as the first step in a continuous process toward ensuring children's rights and guaranteeing proper protection of children in Bangladesh.⁴⁶

The barriers to the effective implementation include the lack of coordination among related ministries, absence of institutional accountability and a regular monitoring

41 Ibid., S. 52(1)

42 Ibid., S. 52(2)

43 Ibid., S. 52(3)

44 Ibid., S. 52(5)

45 United Nations Global Study on Children Deprived of Liberty 2019, p. 265

46 The Children Act 2013: A Commentary by Justice Imman Ali, Bangladesh Legal Aid and Services Trust, 2013, p. 6

system.⁴⁷ Additionally, disproportionate capacities of CDCs vis-à-vis the population of Bangladesh, insufficient human resources, and lack of financial assistance and shortage in the budgets pose significant challenges in the effective implementation of rights of children in detention. To that end, the following measures are strongly recommended:

Policy/Legal Reform

1. Develop a strategy on detention and crime prevention as a key priority. Such a strategy should include replacing the detention system and availing options of non-custodial nature which will nuance the administration of the justice system to ensure child liberty. Non-custodial measures at the pre-trial stage include pre-trial dispositions and avoidance of pre-trial detention. At the trial and sentencing stage, such measures are following social inquiry reports and sentencing dispositions. Sentencing disposition includes verbal sanctions, conditional discharge, status penalties, monetary penalties, probation and judicial supervision, community service order and house order. During post-sentencing stage, the non-custodial measures encompass work or education release, parole, remission or pardon. In this regard, we recommend adopting UN Standard Minimum Rules for Non-Custodial Measures.
2. Clarify doubts and interpret relevant jargons of the 2013 Act. Within the 2013 Act, the following issue should be revisited to prevent the possible abuse of the process. According to section 32 (4) of the 2013 Act, if the trial is not concluded by 360 days from the date of first appearance or within another 60 days, then the concerned child shall be discharged from allegations except for heinous, hateful or serious offences and so forth. No clarity is found on what are heinous, hateful or serious offences.
3. Make rules as soon as possible under the Act. Most notably, the Act of 2013 requires making rules under it in order to specify and clarify the procedures. Rules have not been made there under even after the lapse of eight years. This is the most notable impediment to the implementation of the Act. Hence, making the rule is highly recommended.
4. Adopt diverse measures to focus on the development of children particularly where accused children are destitute and street children or were living in slums. They will specially require facilities like education, creative activities and other opportunities as per their age and other requirements. Besides, they should be protected from being indoctrinated into further criminal

47 Nahid Ferdousi, Justice for Children in Bangladesh: Leal and Ethical Issues, *Bangladesh Journal of Bioethics* 2020; 11 (1): p. 36.

instincts by senior CDCs detainees. This will ultimately help in preventing further commission of crimes.

Implementation

5. Establish specialized child justice system according to the mandate of the 2013 Act. It is imperative for the government of Bangladesh, section 16 of the 2013 Act, to establish one Children Court in every district headquarter and in every metropolitan area. Currently, three Children Courts are functioning in the development centres. A change is brought in 2018 to empower Women and Children Repression Prevention Tribunal as children court. It is recommended that the purpose of juvenile delinquency will not be achieved and complete justice will not be served to the children if special courts are not established. Women and Children Repression Prevention Tribunals are overburdened with the cases accruing under the respective law. The Italian child justice system as an example, in the best interests of the child, provides him/her with an individualized programme for rehabilitation and reintegration.⁴⁸
6. Ensure protection of children and prevent them from being traumatized. The whole process of the administration of justice kicks off with the intervention of the police in most circumstances. Involvement of the police in dealing with children from arrest and so on has a serious impact on the child. It is suggested that such police officers must have the capacity and training to deal with such a situation in an appropriate manner. It should ensure to refer the case to child protection authorities.⁴⁹
7. Deliver justice timely and complete judicial process without delay. The length of the proceedings also has an impact on a child's experience of the justice system. From the time between the commission of the offence and the actual disposition of the case, if it takes long, it becomes increasingly difficult for the children to accept such an outcome. If proceedings turn lengthy, justice is undermined.⁵⁰ In Bangladesh, the Act requires to complete the trial within 360 days from the date of first appearance or within another 60 days.⁵¹ Practically, in most cases the trials are not duly completed within the time.⁵²

48 The system is based on six guiding principles provided by the law:

a. Minimum harmfulness of the proceedings; b. Detention only ever as a last resort; c. Criminal liability for 14 years old and above, but the ability to understand and take action is always to be ascertained; d. Tailor-made proceedings; e. De-stigmatization; f. Priority of educational needs in proceedings.

49 Ibid, 301.

50 Ibid, 298

51 Section 32 of the 2013 Act.

52 The author confirmed this after interacting with one judge of the Women and Children Repression Prevention Tribunal.

8. Facilitate Alternative Court Proceedings in special and emergency situations. In March and April 2020, court proceedings in Bangladesh were postponed due to the pandemic. The consequence was the increase of detainees three times the capacity of the detention centres.⁵³ Virtual court proceedings must be made available if the regular process is postponed. The Law Ministry in consultation with the Supreme Court should collaborate and facilitate in this regard.
9. Prohibit all forms of violence against children while in detention. As mentioned above from the reports of CDCs in Bangladesh, staff were accused of torturing children on several occasions. Thus, compliance with staffing standards under CRC and protocols to prevent all forms of violence during all stages of proceedings is recommended.⁵⁴

Monitoring and Evaluation

10. Monitor and maintain data as well as keep records of the children. Many of the cases are lost from attention due to non-availability of proper information and records of the concerned child. CDCs should keep updated records of each child and the Ministry of Social Welfare should monitor.

Capacity/Expertise/Training

11. Establish more institutions including CDCs in important regions. No CDCs in important divisions like Chittagong, Sylhet, Rajshahi and Barisal are available. Currently, child detainees are kept in safe homes in the respective districts under the Ministry of Social Welfare. But such safe homes are not available in all districts with the minimum standard accommodation. As long as it takes to ensure CDCs for all children detainees, safe home with standard accommodation and facility should be available in all districts.
12. Facilitate special training to all involved in the whole process of administration of justice. Starting with police, concerned officials in detention centre, judges and prosecutors all require training to exclusively focus on child delinquency.

Partnerships

13. Build partnerships with INGOs and local NGOs for the overall development of children in CDCs. CDCs must bridge partnerships with the above-mentioned

⁵³ UNICEF Press Release, 15 November 2021, <https://www.unicef.org/bangladesh/en/press-releases/more-45000-children-released-detention-during-covid-19-pandemic-evidence-child>

⁵⁴ United Nations Global Study on Children Deprived of Liberty 2019, p. 338

bodies. The Ministry of Social Welfare must play the role of facilitator to allow these bodies to contribute in different aspects of child detainees' development. For example, UNICEF collaborated with the Department of Social Service to reunite released children, provide safe reintegration and so forth.

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BHUTAN

EXECUTIVE SUMMARY

Bhutan, despite being a small developing country with numerous constraints notably financial and human resources to mention a few, has made commitments at par with the international standards when it comes to child justice. While it has achieved significant achievements within the realm of the child justice system bringing in a lot of reforms and changes, it still has many possibilities to develop for the better.

The paper examines the administration of child justice in Bhutan, notably in the implementation of relevant legislation and policies, the role of different stakeholders that are paramount in child protection and in the administration of holistic child justice. National policies and laws will be referred to with references to international conventions on the administration of child justice in Bhutan, which will look into the consistency of the state's obligation to enforce child rights.

While the child justice system is given due consideration and importance, the paper finds that Bhutan still lags behind in different areas mainly due to limited human and financial resources along with lapses in coordination amongst the stakeholders. The need for separate child courts, separate conveyances for children to not mix them with adult convicts, and separate detention centres are constrained by financial implications which have hindered the implementation of policies in place. As a result of these findings, it is clear that Bhutan still requires additional resources and human capital to adequately standardize the country's child justice system.

The findings and recommendations of this study will assist policymakers in reflecting on and refining existing policies, as well as designing initiatives and allocating resources to alleviate the child justice system in Bhutan.

INTRODUCTION

Child justice is one amongst other matters which is of utmost importance to the Government of Bhutan. Bhutan has seen many encouraging developments in terms of child rights, out of which a few of the foremost imperative highlights have been the ratification of or accession to international instruments like the United Nations Convention on the Rights of the Child (UNCRC ratified in 1990)¹, the ratification in 2009 of the Optional Protocol to

1 United Nations Convention on the Rights of the Child, General Assembly of the United Nations, 1990,

the Convention on the Sale of Children², the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict³ and the Optional Protocol to the Convention on Child Prostitution and Child Pornography.⁴ Subsequently, it bears the international obligation to pursue the objectives envisaged under them by establishing laws, procedures, and organizations to look after the rights of the children. In the execution of its international obligations, Bhutan's legislation related to children has drawn reference to these international conventions for an efficient and responsive child justice system.

As recognized by Article 1 of the UNCRC, Bhutan also treats any person who is below the age of 18 years as a child.⁵ UNCRC also requires States Parties to establish a minimum age below which children shall not be made criminally liable for penal sanctions.⁶ In Bhutan, a child in conflict with the law (CICL) is a child who is above 12 years and who is found to have committed an offence.⁷

This paper will review the existing legislative frameworks, policies, and regulations in place to analyze the situation of children in Bhutan in order to assess the occurrence of children deprived of liberty in the administration of justice in the country. It will also review the status of children's rights in Bhutan in comparison to international standards by referring to relevant reports submitted to the United Nations and various reports published by relevant institutions such as National Commission for Women and Children (NCWC), Save the Children and United Nations Children's Fund (UNICEF). The paper will then provide recommendations centred on child protection, children's engagement, and some of the measures that can be incorporated into all relevant agencies' sectoral plans.

SITUATIONAL DESCRIPTION

Causes for the Child in Conflict with the Law

With a population of 259,000, children in Bhutan constitute almost a third of its total 7 billion population.⁸ Due to free education provided by the Government, the youth literacy rate at 86.1% is better compared to the general literacy rate of 63%.⁹

2 The Optional Protocol to the Convention on the Sale of Children, General Assembly of the United Nations, 2009.

3 The Optional Protocol to the Convention on the Involvement of Children in Armed Conflict, General Assembly of the United Nations, 2009.

4 The Optional Protocol to the Convention on the Child Prostitution and Child Pornography, General Assembly of the United Nations, 2009.

5 The Child Care and Protection Act of Bhutan (CCPA), 2011, Bhutan, s. 16 (evidenced by an official record maintained by the Government, birth certificate or any other document proving the age of the Child) and United Nations Convention on the Rights of the Child, General Assembly of the United Nations, 1990, art. 1.

6 UNCRC (n 1), art. 40 s. 3(a).

7 CCPA (n 5), s. 72.

8 RENEW and ECPAT International, *Sexual Exploitation of Children in Bhutan Submission for the Universal Periodic Review of the Human Rights Situation in Bhutan*, 2008, p.2.

9 Lham Dorji et al, *Crime and Mental Health Issues among Young Bhutanese People*, National Statistics Bureau, 2015, p.1.

Two broad factors make a great impact on the development of the child and on their attitude towards the crime, namely socioeconomic factors (family, poverty, education, environment, etc.) and psychological development factors (biological and psychological characteristics).¹⁰

According to a study by the Royal Bhutan Police (RBP) in the year 2019, it was found that the offences related to controlled substances were the highest, constituting 46% of the total offences, followed by battery, larceny, burglary, and auto-stripping.¹¹ Substance abuse offences involving school-going children and youth have been increasing annually, and it is concentrated in urban areas.¹² Youth, including minors, have been identified as most vulnerable and susceptible to substance abuse.¹³

It was also found that these five offences are common offences reported more in the Thimphu Dzongkhag.¹⁴ From the offences, it can be concluded that the children are driven by their circumstances (socio-economic factors) to commit crimes such as larceny, burglary, and auto-stripping. This inference is supported by the recent data from the National Statistical Bureau, which found that lack of education, family conditions, and physical environment are some of the root causes of CICL in Bhutan.¹⁵ Challenges from the existing and evolving societal norms such as urbanization and consumerism, rising levels of unemployment, changes in the traditional family structure, and a changing social and cultural environment are emerging causes of youth crimes in the country.¹⁶

On the other hand, biological and psychological characteristics also have an impact on deviant behavior.¹⁷ Children are in their growing stage, which makes them vulnerable to many things. The National Statistical Bureau also found that peer pressure is one of the reasons which bring them in conflict with the law.¹⁸ As per the Police's Statistical Yearbook 2019, 515 children ranging between the ages of 13 and 18 were arrested, out of which 477 were male and 88 were female children.¹⁹

10 Ibid, p. 33.

11 Dechen Tshomo, 'Students top offences related to controlled substances in Thimphu,' *Kuensel*, Thimphu, 21 March 2019, available at <https://kuenselonline.com/students-top-offences-related-to-controlled-substances-in-thimphu/>.

12 Ibid.

13 Bhutan Narcotic Control Agency and United Nations Office on Drugs and Crime, 'Drug and Controlled Substance Use in Bhutan: At a glance', United Nations Office on Drugs and Crime, 2009, Thimphu.

14 Ibid.

15 Mirmala Pokhrel, Peer pressure leading youth to crime, *Kuensel*, Thimphu, 28 August 2015, available at <https://kuenselonline.com/peer-pressure-leading-youth-to-crime/>.

16 UNICEF, Adolescent Development and Participation, <https://www.unicef.org/bhutan/adolescent-development-and-participation>

17 Milana Todorovic, *International Instruments on Juvenile Delinquency, Reactions to Juvenile Offenses, and Harmonization with National Legislations: The Case Studies of Serbia and Slovenia*, European Master's Degree in Human Rights and Democratization, University of Ljubljana, 2017, p.33

18 Pokhrel (n 15).

19 Royal Bhutan Police, Police's Statistical Yearbook, *Royal Bhutan Police*, 2019, Thimphu.

Institutional Framework

The NCWC has been established as the official competent authority in any matters related to children.²⁰ The NCWC has jurisdiction to exercise powers within the territory of the Kingdom of Bhutan in relation to the promotion and protection of the rights of children in their best interests.²¹

The primary legislation governing child rights is the Child Care and Protection Act (CCPA) of 2011²² and subsequently, the Regulation of the Act which was adopted in 2015.²³ As per section 38 of CCPA, the Child Justice Court or Bench may be established as the Court of first instance in matters relating to children.²⁴ However, this provision is yet to be implemented in its entirety as currently only the Family and Child Bench has been established in the Dzongkhag Court of Thimphu which also looks after child-related matters in the Dzongkhag.²⁵

In Bhutan, the responsibility for child protection flows down from the highest levels of central government to the lowest levels of local government. As per section 25 of the Child Care and Protection Rules and Regulation (CCPRR), a Child Welfare Committee in each Dzongkhag and Thromde is established, which functions to protect and promote the rights of children in difficult circumstances and children in conflict with the law under their respective administration.²⁶

Bhutan also adopted the National Plan of Action for Child Protection as part of the 11th Five Year Plan (2013–2018) and also regularly allocates a substantial amount of budgetary resources to children's rights, in particular in the field of education and health.²⁷

In 2005, the National Consultation on Women and Child-Friendly Police Procedures organized by the NCWC drew 16 recommendations, out of which one of the recommendations was to establish a Woman and Child Protection Unit (WCPU) under the Royal Bhutan Police (RBP) in Thimphu as a pilot project.²⁸ To treat cases of

20 CCPA (n 5), s. 54.

21 The Child Care and Protection Rules and Regulation (CCPRR), 2015, Bhutan, s. 12.

22 CCPA (n 5).

23 CCPRR (n 21), s.1.

24 CCPA (n 5), ss. 38 & 42.

25 Changa Dorji, Thimphu District Court will now have Family and Child Bench, *Bhutan Broadcasting Service*, Thimphu, 29 June 2017, available at <http://www.bbs.bt/news/?p=75130#:~:text=Her%20Royal%20Highness%20Princess%20Sonam,the%20Thimphu%20District%20Court%2C%20yesterday>. (Dzongkhags are the primary subdivisions of Bhutan. There are 20 Dzongkhags in Bhutan.)

26 CCPRR (n 21), ss. 25 & 29. (Thromde is a second-level administrative division in Bhutan. There are four Thromdes in Bhutan).

27 The Eleventh Five Year Plan, 2013–2018, Bhutan, pp. 8 & 74.

28 Justice Sector, Concept Paper on Child Justice System in Bhutan, *The Judiciary of Bhutan*, 2021, Thimphu, p. 8.

(The WCPU in Thimphu was formally established in May 2007 with the aim to provide a conducive environment for women and children. After the success of the WCPU in Thimphu, similar units were replicated in Phunt-

women and children separately and to accord more protection, the first Women and Children Protection Division (WCPD) in Thimphu was established in the year 2007 by the RBP.²⁹ It was established with financial assistance from Save the Children and the United Nations Children's Fund (UNICEF).³⁰ By 2018, 13 Dzongkhags (out of a total of 20 in Bhutan) provided child-friendly policing services, and there had been significant improvements in cross-sectoral coordination, case management, and making WCPD more child-friendly.³¹

Under the '*Strengthening Children Justice System*' project, Save the Children's Bhutan helped in the process of establishing a 'child bench' to promote children-friendly court procedures in collaboration with the Judiciary of Bhutan.³² To strengthen the child justice system and differentiate them from adults, the RBP, with support from Save the Children, has opened a pre-trial detention center in Thimphu for children and youth under 18 years with the further aim of establishing similar centers in other Dzongkhags as well.³³ Save the Children has also supported RBP with the Police Youth Partnership Program targeted at juvenile crime prevention.³⁴

To enhance the capacity of police – as they are the first point of contact – various training has been funded by Save the Children, and also many Standard Operating Procedures (SOPs) and manuals have been developed for the frontline officers while dealing with cases.³⁵ These procedures provide systematic and timely services in preventing and responding to protection issues faced by children in conflict with the law.³⁶

In 2018, the Government of Bhutan, with the help of UNICEF, drafted several policies and guidelines such as the National Child Policy, guidelines on Diversion of Children in Conflict with the Law, and the National Standard Operating Procedures on the Management of Cases of Women and Children in Difficult Circumstances.³⁷ Further, UNICEF, in collaboration with the Central Monastic Body, also helped in

sholing (2009) and Paro (2011); this was followed by the establishment of Woman and Child Protection Desks (WCP Desks) in Wangdue Phodrang, Mongar, Samdrup Jongkhar, Tsirang, Gelephu, Samtse, Trashigang, Trongsa, Punakha, Haa, and Sarpang.)

29 Ibid.

30 Damcho Pem, A separate detention center for children, *The Bhutanese*, Thimphu, 28 October 2017, available at <https://thebhutanese.bt/a-separate-detention-centre-for-children/#:~:text=The%20Royal%20Bhutan%20Police%20>.

31 Ibid.

32 Save the Children Bhutan, Bhutan Annual Review, *Save the Children*, 2015, Thimphu, p. 6.

33 Save the Children Bhutan, Bhutan Annual review, *Save the Children*, 2017, Thimphu.

34 Ibid.

35 Pem (n 30).

36 Ibid.

37 UNICEF Bhutan Country Office, Annual Report 2018 – Accelerating results for every child in Bhutan, *UNICEF*, 2018, Thimphu, p.11.

developing a national SOP on Child Protection for Children residing in Monastic institutions and nunneries.³⁸

Currently, Bhutan has only one youth detention centre – the Youth Development and Rehabilitation Centre (YDRC) established in 1999.³⁹ It has been established with the objective of providing reformatory and rehabilitative services for children in conflict with the law. Since its establishment, 372 CICL have been rehabilitated and reintegrated.⁴⁰

LEGAL FRAMEWORK

Bhutan's commitment to promoting and protecting child rights is reflected in its Constitution which provides that it is the fundamental duty of every citizen to take necessary steps to prevent acts of abuse of women, children or any other person and not to indulge in such activities.⁴¹ Furthermore, it can also be noted in legislations such as The Civil and Criminal Procedure Code of Bhutan (CCPC which came into force on 23 July 2001), Penal Code of Bhutan (PCB which came into force on 11 August 2004), and Prison Act (which came into force in 2009).⁴² These acts have incorporated provisions about how the justice system will respond in cases involving children.

CCPA as the specific legislation governing child rights is framed with the primary objectives to set up a system of administration of child justice that is in the best interest of the child and to establish norms and standards for the administration of child justice in terms of investigation, prosecution, adjudication, disposition, care, treatment, and rehabilitation.⁴³ It also aims to provide for diversion and alternative sentencing in lieu of arrest, prosecution, conviction, and imprisonment where it is appropriate⁴⁴ while preventing stigmatization, victimization, and criminalization of children and facilitating social reintegration.⁴⁵

38 Ibid.

39 Royal Bhutan Police, Inauguration of new girls' hostel at YDRC, Chukha, 27 June 2016 available at https://www.rbp.gov.bt/newsindex.php?mod_news_id=230

40 Concept Paper (n 28), p. 10. (The YDRC currently has 01 (girl) and 23 (boys))

41 The Constitution of the Kingdom of Bhutan, 2008, art. 8 s. 5.

42 Prison Act, 2009, Bhutan. The Prison Act deals with the rights and duties of prisoners in the country and covers the detention of children before conviction.

43 CCPA (n 5), s. 15.

44 Ibid.

45 Ibid.

RIGHTS OF CHILDREN IN THE JUSTICE SYSTEM OF BHUTAN

Pre-Trial Rights

The agency that is the first contact point is RBP, and it has the power to assess the crimes through investigation and make a decision whether to arrest children above the age of 12 years or not. In determining the gravity and the charges of the defendant, who is a child, the question which comes to light is whether a juvenile can be tried as an adult or not.

Article 37 (b) of UNCRC requires State Parties to ensure that no child be deprived of his or her liberty unlawfully or arbitrarily, and the arrest, detention, or imprisonment of a child to 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,⁴⁶ which resonates with section 5 of the CCPA in Bhutan.⁴⁷

In case of legal capacity to sue or to be sued, the child has to be represented by the parents/family member/guardian/Jabmi.⁴⁸ The CICL has the right to a legal representative,⁴⁹ as well as the right to challenge the legality of the arrest, detention, and to testify as a witness on one's own behalf.⁵⁰ The CICL has the right to minimum sentencing except if he/she is a recidivist or habitual offender.⁵¹ This has been reflected in Article 37(d) of UNCRC, whereby the state parties are required to ensure that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.⁵²

A child of 12 years and below is not held liable for any offence committed by them,⁵³ while the court may sentence the child to a minimum of half of the sentence prescribed for the offence if the defendant is a child of above 12 years and below 18 years.⁵⁴ If damages are payable under the law, the parents or the legal guardian of the juvenile are directed to pay damages.⁵⁵

46 UNCRC (n 1), art. 37 (b).

47 CCPA (n 5), s. 5.

48 The Civil and Criminal Procedure Code, 2001, Bhutan, s. 148 ("Jabmi" means a Bhutanese legal counsel who has been licensed to practice).

49 CCPA (n 5), s. 151.

50 Ibid, s. 78.

51 Ibid, s. 79.

52 UNCRC (n 1), art. 37 (d).

53 Penal Code of Bhutan, 2004, Bhutan, s. 114.

54 Ibid, s. 115.

55 Ibid, s.117.

Juvenile delinquents are defined as individuals convicted of any offence if they are under the age of eighteen years at the time of conviction.⁵⁶ CCPC has a separate chapter on matters related to juveniles where a juvenile arrested on a criminal charge is afforded with all the rights afforded to persons arrested on a criminal charge, if not more. The age, physical and mental health, living circumstances of the juvenile, reports made by the police, and other circumstances in the best interest and welfare of the juvenile are taken into consideration preceding sentencing of the juvenile.⁵⁷

Handcuffs and other means of restraint can be used only by considering conditions such as the severity of charges, the suspect's past criminal record, and if they are necessary to prevent a potential threat to the public or the suspect's safety or any other factors decided by the responsible police officers.⁵⁸ A child has the right not to be handcuffed if he/she is a child of 12 years and below, while handcuffs may only be used on a child above 12 years if there is an exceptional circumstance warranting such use.⁵⁹ Children involved in civil cases cannot be handcuffed.⁶⁰ It also provides that a child be only searched by a law enforcement officer of the same sex, respecting the privacy of the child at all times.⁶¹

Additionally, the Officer-In-Charge of the Police considers the CICL for a diversion program if it is in the best interest of the child and the offence committed by the child is not of serious nature.⁶²

Rights during Trial

The best interests of the child are the primary consideration for the determination of matters related to the children,⁶³ which is similarly reflected in Article 3 of UNCRC.⁶⁴ Protecting the privacy of the juvenile once he/she comes in contact or in conflict with the law is of utmost importance. It provides that any child should not be subjected to arrest or detention without a warrant from the court except in accordance with the CCPC and CCPA.⁶⁵

56 Prison Act (n 42), s. 141.

57 CCPC (n 49), s. 213.2.

58 Royal Bhutan Police Act, 2009, Bhutan, s. 85.

59 CCPA (n 5), s. 113.

60 RBPA (n 58), s. 85.

61 CCPA (n 5), s. 100.

62 CCPA (n 5), s. 83. Chapter 12 of the CCPA and Chapter 9 of the CCPRR provides guidelines to diversion for CICL

63 UNCRC (n 1), art. 3.

64 Ibid.

65 CCPA (n 5), s.74.

Further, any child detained or confined is required to be treated with respect and dignity, keeping them separate from adult offenders at all times.⁶⁶ They should not be subjected to torture or to cruel, inhuman, or degrading treatment or punishment⁶⁷ which is also reflected in Article 37 of UNCRC.⁶⁸

The police stations and outposts are required to have separate detention rooms for males, females, and children for custody and confinement of persons under investigation, awaiting trial, and for the purpose of preventive detention.⁶⁹ Additionally, when a child is taken to and from the court, they are required to be transported in a separate conveyance from that of adult offenders.⁷⁰

Section 4 of the CCPC illustrates that the press and the public should be excluded from any part of the trial and other proceedings in the interest of the child.⁷¹ Any proceedings of the child before a court should be conducted in an informal manner which should be in-camera to encourage maximum participation by the child and give due regard to the child's procedural rights.⁷² The trial should be held as expeditiously as possible in accordance with CCPC.⁷³ The child is also provided with the opportunity to be heard in any judicial and administrative proceeding either directly or through a representative or an appropriate body in accordance with the CCPC.⁷⁴

During the trial, a plea of guilty or *Nolo Contendere* can be made by the parents/members of the family/legal guardian/Jabmi – however, it must only be in the best interest of the child.⁷⁵ During the trial, the judge is required to assist the child in achieving these rights by providing information and aiding the child during the court processes.⁷⁶

Post-Trial Rights

In Bhutan, a CICL is treated in a manner that would divert the child from the conventional criminal justice system unless the nature of the offence and the child's criminal history indicates that a proceeding for the offence should be initiated.⁷⁷ In recent years, Bhutan has been focusing on defining a child-friendly justice approach in its legal

66 Ibid, ss. 75–76.

67 Ibid, s. 73.

68 UNCRC (n 1), art. 37 (a).

69 Prison Act (n 42), s. 4.

70 CCPA (n 5), s. 156.

71 CCPC (n 48), s.4.

72 CCPA (n 5), ss. 138 & 143.

73 Ibid, s. 146.

74 Ibid, s. 8.

75 CCPC (n 48), s. 1954.

76 Kinzang Chedup, *Analysis of the Administration of Child Justice in Bhutan*, Master Thesis, Universitat Wien, 2017, p. 66.

77 CCPA (n 5), s. 10.

framework to provide special treatment and protection to juvenile delinquency. CCPA provides that every child alleged of having committed any penal offence is presumed innocent until proven guilty according to the law, which is also a fundamental right recognized by the Constitution of Bhutan.⁷⁸ The UNCRC also provides it as one of the guarantees for a child alleged as or accused of having infringed the penal law,⁷⁹ and to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians.⁸⁰

CCPA provides the institutionalization or detention of the child pending adjudication to be used only as a measure of last resort and for the shortest possible period of time.⁸¹ It also provides alternative sentencing for the CICL. If an offence does not threaten or cause harm or it is of a trivial nature, then the court may admonish or reprimand the child and dismiss a prosecution.⁸²

The reformatory approach can be seen when the court, in lieu of imprisonment, considers the availability of other appropriate facilities and correctional institutions.⁸³ According to the Prison Act, juveniles are sent to YDRC for reformatory programs after a court issues an order thereto irrespective of the duration of the sentence.⁸⁴ The center provides opportunities for rehabilitation and development of children to help in their reintegration into mainstream society as productive, contributing, and law-abiding citizens once they serve their sentence.⁸⁵ Juveniles continue their education in the local schools and also engage in vocational training as a part of the reformatory program upon admission to the YDRC.⁸⁶

As an alternative to imprisonment, there is also the possibility of community service if the offence committed by a child is a fourth-degree felony and below.⁸⁷ Additionally, the court can make an order to pay a fine in lieu of imprisonment if the offence is a felony of the fourth degree and below except if the child is a recidivist or a habitual offender.⁸⁸

78 CCPA (n 5), s. 136. Constitution of Bhutan (n 4), art. 7 s. 16.

79 UNCRC (n 1), art. 40 (b I).

80 Ibid. art 40 (b II).

81 CCPA (n 5), s. 101.

82 Ibid, s. 162.

83 CCPA (n 5).

84 Prison Act (n 42), s. 143.

85 Chedup (n 76), p. 25.

86 Prison Act (n 42), ss. 144 & 145.

87 CCPA (n 5), s. 171.

88 Ibid, s. 172.

CCPA also recognizes diversion, which is an alternative measure for dealing with a CICL other than a judicial proceeding⁸⁹ and also Family Group Conferencing.⁹⁰ Civil protection against legal consequences and social stigma such as expunging all data recorded and treating the reports as confidential is also ensured.⁹¹

CURRENT PRACTICE OF DIVERSION

The International Covenant on Civil and Political Right (ICCPR) states that children coming into conflict with the laws have to be directed towards rehabilitation and reintegration to build a better society.⁹² If the child is a first-time offender, the CCPA requires police to caution or make the child aware of the legal implications of the said offence.⁹³ However, if the child is not a first-time offender and if the offence committed by the child is a petty misdemeanor and below, the diversion is carried out by the police with the involvement of a probation officer.⁹⁴ If the offence committed is of misdemeanor and felony of the fourth degree, the case is forwarded to the Office of the Attorney General, where the diversion is carried out by the office.⁹⁵ Such diversion measures are guided by the Diversion Guidelines 2019. All diversion programs must be based on an assessment report of the probation officer irrespective of who initiates it.⁹⁶ The office has successfully implemented a diversion mechanism, in 14 cases in the year 2019.⁹⁷

Moreover, the entire diversion program is facilitated and assessed by the NCWC, which is the competent authority with regard to cases of the child coming into conflict with the law. Not every child is privileged to opt for diversion as there are set conditions to be eligible for diversion. Firstly, the offence committed by the child should not be of serious nature. Serious offences are not defined by or categorized in our laws per se.⁹⁸ However, offences of the first, second, and third degree are considered to be serious.⁹⁹ So, if a child has committed an offence of felony of the fourth degree and below, he or she is assessed to avail the diversion program. Secondly, the CICL or his or her legal guardian or parents must consent to the assigned diversion program.¹⁰⁰

89 Ibid, s. 186.

90 Ibid, s. 196.

91 Ibid, s. 236.

92 International Covenant on Civil and Political Rights, General Assembly, 1966 art. 14(4).

93 CCPA (n 5), s. 181.

94 CCPA (n 5), s. 183.

95 Office of Attorney General & United Nation General International Children Emergency's Fund, *Guideline for Prosecution; Child in Conflict with the Law* 2019, p 17.

96 Ibid.

97 Concept Paper, (n 28), p. 13.

98 Ibid.

99 Ibid.

100 Concept Paper, (n 28).

A child considered for a diversion is protected by the rights and principles provided by the CCPA. Right to presumption of innocence,¹⁰¹ right to remain silent,¹⁰² right to counsel,¹⁰³ right to the presence of a parent or guardian,¹⁰⁴ right to appeal,¹⁰⁵ and protection of child's privacy,¹⁰⁶ are some of the rights guaranteed by the CCPA in all the events of proceedings. These rights of the child are guaranteed even if he or she has to go through the conventional court system or otherwise.

POLICY OPTIONS

Need for Separate Child Courts

Children are considered as a section of the population who needs special care and assistance. Currently, Bhutan does not have separate juvenile courts and children-related issues are administered by the Family and Child Bench in the Dzongkhag court of Thimphu. In other Dzongkhags, children are tried by the same judge in the same conventional courts under the CCPC. While the justice system should protect the rights of the children guaranteed in the Constitution and other laws, there is a need for a robust child justice system, and one such method is through a separate child court throughout the 20 Dzongkhags. Therefore, a separate court would explicitly protect the rights of the children and ensure that their needs are efficiently addressed in a child-friendly manner in the administration of justice.

If Bhutan chooses not to have a specialized juvenile court in all 20 Dzongkhags, then a child court in each region should be established based on the frequency of child-related cases while a Family and Child Bench should be established in every Dzongkhag.

Transfer to Normal Prisons

Arbitrary arrest and deprivation of liberty are prohibited by the laws, and authorities ensure that it is enforced.¹⁰⁷ The police have an important responsibility to ensure that the child is directed away from the conventional criminal judicial proceedings and towards a more rehabilitative and restorative approach. However, juveniles, after they attend 18 years of age, are automatically transferred to normal prisons from YDRC

101 CCPA (n 5), s.136.

102 Ibid, s.109.

103 Ibid, ss. 178 & 179.

104 Ibid, s. 112 (g).

105 Ibid, s. 176.

106 Ibid, s. 21.

107 Bureau of Democracy, Human Rights and Labour, 'Country Reports on Human Rights Practices for 2016', US Department of States, 2016, USA, p.2

until they complete their terms.¹⁰⁸ This should also be addressed by the Government as children would be exposed to a completely new environment once they are sent to normal prisons where they are mixed with adult convicts. The Government should therefore ensure that children are kept in YDRCs rather than in adult prisons.

Separate Detention Centers

Separate detention centers for children are available in Thimphu and Phuentsholing but are absent in other Dzongkhags, which inevitably creates a disparity of treatment between children in these two Dzongkhags and others. For the moment, a cluster of detention centers for nearby Dzongkhags could be established whereby all the children in conflict with the law could be transferred to that detention center. Progressively Bhutan, with enough budgetary resources, can establish separate detention centers for the CICL in each Dzongkhags.

Criminal Responsibility

The minimum age of criminal responsibility sets the point at which a child can be held legally responsible. Under Article 40(3)(a) of the UNCRC, state parties are required to establish the minimum age of criminal responsibility.¹⁰⁹ Traditionally, the UN was hesitant to denote a specific age at which criminal responsibility should be set; however, in 2007, the UN Committee on the Rights of the Child (2007) stated that legislating criminal responsibility below 12 years old was not ‘internationally acceptable’. As a result, it encourages all States that have ratified the Convention to increase the age of criminal responsibility to 14 years old ‘as the absolute minimum age.’¹¹⁰

In providing guidance as to where the age should be set, the Beijing Rules (rule 4.1) provide that the emotional, mental, and intellectual maturity of the child should be taken into consideration.¹¹¹ Currently, Bhutan has abided by international practice and has set 12 as the age of criminal responsibility for children.

Bhutan, therefore, needs to take into consideration the General Comment on children’s rights in the child justice system, which encourages countries to raise the minimum age of criminal responsibility to at least 14 years¹¹² and also other countries that have set the age higher than the international standard.

108 Prison Act (n 42), s. 146.

109 UNCRC (n 1), art. 40 (3 a).

110 Chedup (n 76), p.25.

111 Ibid.

112 General comment No. 24 (2019) on children’s rights in the child justice system, 18 September 2019, CRC/C/GC/24.

Provide Legal Aid to CICL

Most of the CICL come from low economic backgrounds or broken families who need financial support to hire an attorney for their case. Article 9, Section 6 of the Constitution provides that the State shall endeavour to provide legal aid to secure justice which shall not be denied to any person by reason of economic or other disabilities.¹¹³ Moreover, according to CCPC, only an indigent accused can have legal aid for one's defence where the interest of justice so requires.¹¹⁴ However, for the purpose of the provision of legal aid, there are no definite agencies or procedures to administer this which has created gaps in the implementation of this provision.

Apparently, this has resulted in vulnerable groups, such as children, defending their own cases or by parents who have little or no knowledge of laws in the country. In this regard, it is recommended to provide CICL with free legal aid irrespective of their situations and economic conditions to ensure the fair administration of justice.

Monitoring System after Completion of Terms at YDRC

While YDRC is well-known for its facilities and services, the lack of reintegration procedures and follow-up raises the question of the effectiveness of the entire child reformative justice system in Bhutan. Some children who complete their term at the YDRC are neither monitored nor supported, leaving them without proper guidance falling into the same vicious cycle of coming into conflict with the law.

A tracer study which was conducted by YDRC in 2013 covering the period 2010 to 2012 found that of the total 51 YDRC graduates surveyed, 23 were employed, 13 were continuing education, and five were unemployed.¹¹⁵ Ten had been rearrested (14%), of which two minors have been sent back to YDRC for rehabilitation.¹¹⁶ The need for reintegration programs through support mechanisms to start a small business would be an encouragement to reintegrate them back into society. Furthermore, skills taught at the YDRC should match those required in the market. Save the Children, for example, is currently working with a group of youth who have had similar experiences to form a reintegration strategy.¹¹⁷

113 Constitution of Bhutan (n 41), art. 9 s. 6.

114 CCPC (n 48), s. 34.

115 Mediamax Consultancy, 'Tracer Study on Children in Conflict with the Law Released from YDRC in 2010, 2011 and 2012', *Bhutan Youth Development Fund, Save the Children, Royal Bhutan Police*, 2013, Bhutan, p. 15. (Hereinafter referred to as the "Tracer Study".)

116 Ibid.

117 'Study on Status of Vulnerable Children', *Renew, Save the Children*, 2015. Bhutan p. 27 available <https://renew.org.bt/wp-content/uploads/2021/05/Study-on-status-of-vulnerable-children-2015.pdf>

Strengthen and Improve Diversion for CICL

The relevant legislation, as mentioned in the above sections, elaborates on the requirement of children's cases to be diverted as long as certain criteria are met. Yet, currently, the number of cases diverted every year is minimal. This might be mainly due to a lack of financial and human resources and not due to the obliviousness of such requirements by the competent authority and relevant stakeholders.

Bhutan should look into the total number of cases every year and allocate enough resources to the competent authority and service providers for smooth functioning of diversion and make it available for everyone who fulfills the requirement.¹¹⁸ Although police have been implementing diversion, there is a lack of understanding about it amongst themselves as no formal training has been conducted for them in this area.¹¹⁹ There is the need to provide them with formal training on diversion as they are the first point of contact and can play a significant role in the child justice system.

POLICY RECOMMENDATIONS

Implementation

a. Establish mechanisms to provide legal aid and pro bono services to CICL

Although the Constitution provides for legal aid, as stated in the policy option, it has yet to be fully implemented. Furthermore, the CCPA provides for legal aid, stating that if a child or the child's parents or guardians are indigent, the state must provide legal aid.¹²⁰ There should be specialized structures and mechanisms offering free legal aid to CICL.

As per the Jabmi Act, one of the functions of Jabmi Tshogdey is to organize legal aid to an indigent person (pro bono) in the prescribed manner. However, the term "indigent person" is yet to be defined. It is recommended that the Jabmi Tshogdey should come up with a mechanism mandating every private law firm or practitioner to take up a few child-related cases on a pro bono basis. It is important that children have pro bono legal advice and support when they access the judicial system in the country.

118 Currently, Nazhoen Lamtoen, a registered CSO of the Country, is the only service provider for diversion programs in the country.

119 Concept Paper, (n 28), p. 19.

120 CCPA (n 5), s.180.

b. Strengthen and expand diversion

Bhutan should examine the total number of cases each year and allocate sufficient resources to the competent authority and service providers to ensure the smooth operation of the diversion and make it available to everyone who meets the requirements.

Simultaneously, diversion should be made available to all CICLs, regardless of location. There should be no disparity between different dzongkhags, and the government should provide sufficient funds to relevant stakeholders to allow diversion throughout the country.

c. Prioritize restorative justice for children

Bhutan should prioritize restorative justice for children to involve them in all matters that concern them as required by Section 20 of CCPA which requires all institutions or organizations to observe the principle of decriminalization, diversion and restorative justice.¹²¹ Restorative justice will not only allow children to take responsibility for their actions but also help them reintegrate back into society and be given a “second chance” to grow and develop.

d. Strengthen compliance and monitoring mechanisms

Bhutan still has to do more to put into practice the various International Conventions, especially in relation to the implementation and monitoring of children in conflict with the law. The Justice system and stakeholders should be empowered to go beyond the formal sector to identify and monitor children from being exploited and also ensure that prevailing practices are in line with the international conventions and best practices.

As stated by the Tracer Study, it is worrisome that around 14% of children were rearrested even after being released from YDRC.¹²² It noted that this could partly be a failure of the rehabilitation programmes, aftercare support mechanisms, primary care providers and lack of post-release support and monitoring mechanisms.

Either YDRC or relevant stakeholders like NCWC, RBP or CSO's – like Nazhoen Lamtoen – should come up with a mandatory system whereby anyone who is released from YDRC should be monitored and ensure that support mechanisms are available for the children to gradually reintegrate back into society.

121 CCPA (n 5), s. 20.

122 Tracer Study (n 115), p. 48.

National Capacity

a. Establishment of Non-governmental Organizations and Civil Society Organizations

Bhutan is seeing an increase of children in conflict with the law as a result of changing lifestyles and the impact of globalization, which has drawn the attention of many social workers and civil society organizations. As a result, it is critical that the Government recognize, support, and promote the formation of new NGOs and CSOs and work collaboratively with the existing NGOs and CSOs – especially those who are specialized in CICL in Bhutan. NGOs and CSOs can play a vital role to ensure the prevention and protection of children who are at risk.

Currently, the Government of Bhutan partners with these NGO/civil society organizations to complement activities for the benefit of the vulnerable groups of children in the country. The Government's efforts to improve access to quality and exclusive education where children from early childhood join Early Childhood Care and Development (ECCD) which are run by private individuals and NGOs¹²³ is a good step forward to introduce preventive measures at an early stage to avoid children coming in conflict with the law in Bhutan.

b. Capacity building

There is a serious lack of human resources in Bhutan in this specialized field of CICL, which is a challenge to the effective implementation of the relevant legislation with regard to the child justice system.¹²⁴ There are also concerns regarding building and sustaining the human and financial resources required to operationalize the Act's coverage of detention centres, care facilities and other services.

Requirements such as different categories of human resources and different types of shelters or alternative care homes laid down in the Act are only provided on paper for now,¹²⁵ and are yet to be realized in their full capacity.¹²⁶

At present, Dzongkhag legal officers provide services and advisory support to the NCWC and undertake case management and protection services on cases involving

123 Universal Periodic Review Report on the Situation of Human Rights in Bhutan, Third Cycle, 2019.

124 Phub Gyem, 'Human resource shortage, a challenge in implementing Child Care and Protection Act,' *BBS online*, 31 July 2019, <http://www.bbs.bt/news/?p=118564>.

125 CCPA (n 5), s. 33.

126 Currently there is only one shelter home in Bhutan based in Thimphu which was established in 2018. Pema Seldon, 'First ever shelter for disadvantaged children,' *The Bhutanese*, 12 August 2018, <https://thebhutanese.bt/first-ever-shelter-for-disadvantaged-children/>

children in the respective Dzongkhags.¹²⁷ They are also Gender and Child Focal Persons of the Dzongkhag since 2018.¹²⁸

However, there is a need for probation officers who are crucial for the assessment and diversion of the CICL.¹²⁹ Although three probation officers are currently recruited,¹³⁰ it is centralized in Thimphu Dzongkhag, and the Royal Civil Service Commission has made the post on a contractual basis,¹³¹ which has made it impossible to continue with the assigned tasks and effective implementation in child-related issues. It is recommended that such posts be made on a more permanent basis and be replicated in other parts of the country to improve access to justice for children – especially at the local and sub-national levels in the country.

Resources

a. Awareness of child justice system

Currently, there have been efforts dedicated to achieving human rights education and training through the incorporation of GNH (Gross National Happiness) values and principles in the school curriculum with topics on fundamental rights included in subjects such as civics, social studies and history.¹³² Life skills education programmes in schools have also helped deviate children from coming into conflict with the law.¹³³

However, the general awareness of justice for children and CICL is not widely known among the Bhutanese public. When it comes to the issue of children in conflict with the law, both the Government and the people of Bhutan need to be aware that it is complex and requires structural policies and reforms. It is therefore imperative that the Government ensures that the key stakeholders – such as law enforcement agencies, schools, parents, the community, and the media – should be aware of the existing child legislations and their role and responsibility in the child justice system. There is also the need for further capacity and technical expertise development of officials working in Government agencies, law enforcement agencies, CSOs and local governments. This can help them in the successful implementation and enforcement of legislation.

127 Universal Periodic Review Report on the Situation of Human Rights in Bhutan, Third Cycle, 2019.

128 Ibid.

129 Phub Gyem, 'Human Resource Shortage, a Challenge in Implementing Child Care and Protection Act,' *Bhutan Broadcasting Service*, 31 July 2109, <http://www.bbs.bt/news/?p=118564>

130 Yangyel Lhaden, 'NCWC shortchanged to look into women and child cases,' *Kuensel Online*, 30 March 2021, <https://kuenselonline.com/ncwc-shortchanged-to-look-into-women-and-child-cases/>.

131 Ibid.

132 Universal Periodic Review Report (n 123).

133 Ibid.

Apart from having legal instruments and a strong education strategy, it is recommended that the Government also place greater emphasis on child welfare and advocacy on CICL. Television, radio, posters, digital, and printed media should be used to disseminate information on the child justice system, restorative justice, and rehabilitation. Themes covering the rights of the child can be developed, and events should be organized throughout the country to highlight the issue.

b. Awareness of CCPA

There is a lack of awareness about the CCPA 2011, even amongst key stakeholders mentioned in the Act, such as schools, media, community, CSO, and parents/caregivers, as seen in the needs assessment survey on the child justice system conducted in 2013.¹³⁴ Some stakeholders mentioned that they do not have any idea about CCPA at all, while others do not know their responsibilities enshrined in the Act.¹³⁵ For instance, schools and media, whose responsibilities are mentioned in sections 26, 27, and 29, respectively of the CCPA 2011, are ignorant of the Act's provisions.

From the sample of school-going children (aged primarily between 12 and 18 years), 77.4% of respondents indicated they had not heard of the Child Care and Protection Act.¹³⁶ The same report also found that judges, registrars, bench clerks, police personnel, and law enforcement agencies are not really aware of child protection laws, issues, and policies.¹³⁷

It is recommended that the Government leverage partnerships with the media to strengthen advocacy and awareness among the public. Schools around the country should receive advocacy materials while relevant civil society organizations should collaborate with the Ministry of Education to establish child protection clubs/initiatives in schools.

At the community level, people living in that community should be made aware of the CCPA and what roles they can play in the community to help children residing there. Further, they can also play an active role in reporting cases of child abuse happening in their neighbourhood to the relevant Government agencies. This can be done by setting up a local system of “community monitoring” on cases of child abuse and child rehabilitation.

134 Bhutan National Legal Institute, Needs Assessment Survey on Child Justice System, ‘Child Justice System in Bhutan’, Thimphu, Bhutan National Legal Institute, 2013.

135 Ibid.

136 Renew, (n 117) p. 27.

137 Ibid.

Others

a. Increase the age of criminal responsibility

Bhutan has currently set 12 years as the age of criminal responsibility. However, the Global Study on Children Deprived of Liberty done by the United Nations General Assembly (UNGA) has recommended States to establish a minimum age of criminal responsibility, which shall not be below 14 years of age. It is therefore recommended that Bhutan should increase the age to 14 to comply with international best practices.

b. Create a mechanism/system to transfer CICL upon reaching the age of 18

The Global Study on Children Deprived of Liberty done by the UNGA has recommended States to not automatically transfer children deprived of liberty who reach 18 years of age to the adult criminal justice system. The Government of Bhutan should address this as well, because children will be exposed to a completely new environment if they are sent to regular prisons where they will be mixed with adult convicts. Bhutan could establish a transitory process in which CICL are not immediately transferred to normal prisons upon reaching the age of 18, but rather gradually prepare them to be transferred to normal prisons through a thorough assessment of their psychological behaviour.

c. Address challenges

The paper finds that there is a need to review the challenges in the system which have been discussed in the aforementioned sections, so that challenges and gaps in the implementation of legislation and procedures related to the administration of justice can be addressed. Through this, the Government of Bhutan in collaboration with civil society organizations and other development partners can achieve the needs of the changing society from the current CICL case management system and protect children from coming in contact or into conflict with the law in Bhutan.

CONCLUSION

Although there are many gaps and challenges in the child justice system in Bhutan, the rights and well-being of children have always been a national priority for the country – notwithstanding the financial and human resource challenges. It is evident that Bhutan has come a long way when it comes to child justice. However, as this paper has shown, there are still major policy gaps to be addressed and important changes required to further strengthen the child justice system in Bhutan. Child Justice is an ever-evolving subject that necessitates constant reformation and spontaneous efforts to better adapt to the changing times. Through strong Government leadership, inter-agency collabora-

tion between the judiciary, law enforcement agencies, NGOs and civil society and other stakeholders at the community level, Bhutan can achieve better protection of children and guarantee their rights as enshrined in the UN Convention on the Rights of the Child.

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INDIA

A qualitative study in the backdrop of the UN Global Study Recommendations¹

EXECUTIVE SUMMARY

Deprivation of liberty in the context of criminal justice is an experience that has a significant impact on children's emotional, physical, psychological, and social development, and severe, long-term adverse consequences.

Building on the United Nations Global Study on Children Deprived of Liberty ("Global Study"), which lays the scaffolding for understanding deprivation of liberty vis-à-vis children in an international context, this research focuses on children in conflict with law ("CICL") deprived of liberty in India in the administration of justice.

Multiple international instruments, including the United Nations Convention on the Rights of the Child ("UNCRC"), emphasise that countries should avoid detaining children. However, in India, despite the law providing for the principle of institutionalisation as last resort, a sizable number of children continue to be deprived of liberty in the administration of justice. As per the National Crime Records Bureau statistics, 35,214 CICL in India were apprehended in 2019 and 35,352 in 2020 (including those

1 Counsel to Secure Justice staff who worked on this project include Nimisha Srivastava, Executive Director (Concept and design, Project Oversight and Editing); Urvashi Tilak, Director, Restorative Justice (Concept and design, Project Management and Editing); Arti Mohan, Program Officer, Restorative Justice (Concept and design, Research and Writing); Kuhu, Program Assistant (Research Support); Shivrannana Rathore, Communications & Development Officer, (Graphics). CSJ also had support of Deeksha Viswanathan from National University of Juridical Sciences for research assistance. Organisations that offered support for the interviews: Association for Promoting Social Action; Enfold Proactive Health Trust; Kshamata; We are also grateful to one other organisation that desired to remain anonymous. Counsel to Secure Justice (CSJ) team members who conducted interviews: Arti Mohan; Kuhu; Nikita Kataria; Nimisha Srivastava; Shivangi Gonenka; Shivangini Singh; Urvashi Tilak. We thank each of the children who agreed to speak about their experiences. Their voices form the foundation of this study.

Counsel to Secure Justice is also thankful to the following people for lending their time and expertise to review the methodology and drafts of this report and suggest improvements. The Ethics and Methodology Review Committee that guided the research included Mohua Nigudkar, Assistant Professor, Tata Institute for Social Sciences; Shreya Rastogi, Founding Member, P39 A, National Law University Delhi; Swagata Raha, Head, Research, and Co-Head, Restorative Practices, Enfold Proactive Health Trust. In addition, CSJ is also thankful for the inputs of Bharti Ali, Co-Founder and Executive Director, HAQ: Centre for Child Rights; Mahesh Menon, Assistant Professor of Law, School of Law, Sai University; Kapil Aryal, Kathmandu School of Law University and Victor Karunan, former Deputy Representative and Senior Social Policy Specialist, UNICEF.

released on bail at the police station), while the exact number of children deprived of liberty is not known.

This study explores the existing research on CICL deprived of liberty as well as the voices of 12 CICL deprived of liberty in India. Based on their experiences, the study discusses conditions of deprivation of liberty for children in India and the psychological, social, and relational experiences. These children expressed concerns about the conditions of institutionalisation, lack of access to families and information, being subject to violence, and some spoke about their experience of discrimination.

Based on children's experiences of deprivation of liberty, Global Study Recommendations, and international legal instruments, including the UNCRC, this study proposes policy and practice recommendations to (a) best safeguard the rights of CICL who are at risk of being deprived of liberty and (b) reduce the reliance on institutionalisation for CICL.

INTRODUCTION

Background to the Study

In 2014, the United Nations General Assembly invited the Secretary-General to commission an in-depth global study on children deprived of liberty.²

The Global Study understands deprivation of liberty as a situation, “(irrespective of the terminology under domestic law) where a child is prevented by whatever means (physical force, physical barriers, threats, sanctions, restraints, medication, etc.) from leaving a particular facility, site or institution at will.”

The United Nations Global Study on Children Deprived of Liberty (“Global Study”), published after five years of work across 22 countries and

interviews with 274 children, comprehensively studied children deprived of liberty in six different contexts,³ including the administration of justice, that is, children in conflict with the law.⁴

2 *Rights of the Child*, 18 December 2014, UNGA A/Res/69/157, para 52(d).

3 The six different contexts are 1) Children deprived of liberty within the administration of justice; 2) Children deprived of liberty for migration-related reasons; 3) Children living in places of detention with their parents; 4) Children deprived of liberty in institutions; 5) Children deprived of liberty in the context of armed conflict; and 6) Children deprived of liberty on national security grounds.

4 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty’, *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, pp. 80, 84, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

The Global Study found that deprivation of liberty has a substantial impact on children's physical and mental health.⁵ Although the United Nations Convention on the Rights of the Child ("UNCRC") prescribes that children can be deprived of liberty only as a last resort and for the shortest appropriate time,⁶ the Global Study found that the vast majority of children deprived of liberty across the world have been detained against these principles.⁷

The Global Study highlighted that placing children in institutions is difficult to reconcile with the guiding principles of the UNCRC and proposed recommendations for better conditions of deprivation of liberty as well as for reducing its usage.⁸

a. Need for this study

While the Global Study covered India as one of the 22 countries, there is a need for a nuanced follow-up study that offers a more detailed understanding of the Indian context as well as voices of children particular to India and India's juvenile justice system.

b. Aim of this study

- To discuss India's child-specific justice system with the background of international obligations;
- To document the experiences of children deprived of liberty in India in the administration of justice; and
- To propose policy and law recommendations for the Indian context, based on children's experiences and Global Study recommendations.

c. Scope of this study

This study focuses on children deprived of liberty in the context of the administration of justice, that is, children in conflict with the law who were deprived of liberty (for detailed definitions, please see section 1.2) across India. Apart from an intensive review of the literature and existing statistics on children in conflict with the law in India, researchers spoke with 12 persons who had been deprived of liberty as children (for

5 Ibid, pp. 21, 65.

6 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 37(b).

7 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 10, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

8 Ibid., p. 67.

demographic details of the sample see Annexure 2; for the research ethics followed see Annexure 3), some of whom were above 18 at the time of the interview.⁹

The names used in this study are pseudonyms. Children who were below the age of 18 at the time of the interview have been referred to as “Child [Pseudonym]” and those who were above 18 at the time of the interview have been referred to directly with the pseudonym.

India's Child-Specific Justice System – Existing Legislation and Its Provisions

Having acceded to the UNCRC,¹⁰ India has a child-specific justice system¹¹ for persons below the age of 18.¹² The Juvenile Justice (Care and Protection of Children) Act, 2015 (“JJ Act”) adopts a child rights-based approach and with focus on care and protection of children, and disposal of matters in the best interests of children and for their rehabilitation and social reintegration through the creation of a child-specific justice system.¹³ This system is composed of special courts for children called Juvenile Justice Boards (“JJBs”) (comprising a judge – Principal Magistrate – “JJB Magistrate” and two other professionals called Social Worker Members – “JJB Members”) and specially trained police officers, as well as designated child care institutions. Considered progressive legislation in specific ways, the JJ Act ensures that CICL (persons below 18 years at the time of the commission of an offence) are not subjected to the death penalty or life imprisonment, and provides child-friendly procedures and provisions.¹⁴ At the same time, deprivation of liberty in the pursuit of administration of justice is allowed when in the child's best interests and as a measure of last resort.¹⁵

9 Respondents below the age of 18 have been referred to as child [pseudonym], whereas adult respondents (previously CICL) have been referred to with only their pseudonyms.

10 The Government of India acceded on 11 December 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations.

11 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 40(3).

12 As per the 1986 Juvenile Justice Act, a juvenile was a boy below the age of 16 and a girl below the age of 18. The Juvenile Justice (Care and Protection of Children) Act, 2000, raised this to anyone who hadn't completed the age of 18 on the day of the offence.

13 Juvenile Justice (Care and Protection of Children) Act, 2015, India, preamble; ‘SOP for Rehabilitation of Children in Conflict with Law: Possibilities and Opportunities’, *Ministry of Women and Child Development*, 2017, pp. 3, 6, available at https://wcd.nic.in/sites/default/files/SOP%20ON%20REHABILITATION%20OF%20CHILDREN%20IN%20CONFLICT%20WITH%20THE%20LAW_0.pdf, accessed on 23 July 2021; Statement of Objects and Reasons of the JJ Act states, inter alia, “To make the juvenile justice system meant for a juvenile or the child more appreciative of the developmental needs in comparison to criminal justice system as applicable to adults.”

14 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 21; Swagata Raha, ‘Judicial Colloquium on Juvenile Justice’, *Centre for Child Rights, National Law University, Odisha*, 2018, pp. 8–10, available at <https://www.nluo.ac.in/wp-content/uploads/2019/11/Judicial-Colloquium-on-Juvenile-Justice-Report.pdf>, accessed on 23 July 2021.

15 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 12; Swagata Raha, ‘Judicial Colloquium on Juvenile Justice’, *Centre for Child Rights, National Law University, Odisha*, 2018, pp. 9–10, available at <https://www.nluo.ac.in/wp-content/uploads/2019/11/Judicial-Colloquium-on-Juvenile-Justice-Report.pdf>, accessed on 23 July 2021.

While India has a child-friendly justice system, certain provisions are at divergence from best-practice child rights standards, also advocated in the Global Study.¹⁶ First, the minimum age of criminal responsibility¹⁷ (“MACR”) in India is seven,¹⁸ lower than the average MACR (11-12) across the world¹⁹ as well as the standards stipulated by the UNCRC (14 years).²⁰ Second, after a re-enactment in 2016, CICL between the ages of 16 and 18 can also be tried as adults, in clear violation.²¹ Both these provisions deviate from international child rights standards, which require a higher MACR as well as for children to be processed solely through a child-specific justice system.²²

a. Deprivation of liberty under the Juvenile Justice Act

The JJ Act allows for deprivation of liberty in certain circumstances, and the aim of institutionalisation is care, treatment, education, training, all-round development, and

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- 16 Swagata Raha, ‘Treatment of Children as Adults under India’s Juvenile Justice (Care and Protection of Children) Act, 2015: A Retreat from International Human Rights Law’, *The International Journal of Children’s Rights* p. 757, volume 27:4, 2019, p. 775, available at <https://doi.org/10.1163/15718182-02704004>, accessed on 30 July 2021; ‘Concluding Observations of the Committee on the Rights of the Child, India’, Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.115, 2000, available at <http://hrlibrary.umn.edu/crc/india2000.html>, accessed on 4 August 2021.
 - 17 The minimum age below which the law determines that children do not have the capacity to infringe the criminal law.
 - 18 *Indian Penal Code*, 1860, India, s. 82; In India, the age of criminal responsibility is raised to 12 years if the child is found to have not attained the ability of understanding the nature and consequences of his act.
 - 19 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty’, *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 278, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021; ‘SOP for Rehabilitation of Children in Conflict with Law: Possibilities and Opportunities’, *Ministry of Women and Child Development*, 2017, p. 2, available at https://wcd.nic.in/sites/default/files/SOP%20ON%20REHABILITATION%20OF%20CHILDREN%20IN%20CONFLICT%20WITH%20THE%20LAW_0.pdf, accessed on 23 July 2021.
 - 20 *General Comment No. 24 on Children’s Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 22.
 - 21 In the past decade, following public outrage after two severe sexual assault cases, an amendment was passed allowing children between the ages of 16 and 18 years, who have allegedly committed “heinous crimes” to be tried and punished as adults based on a preliminary assessment by the JJB. The JJB can transfer the case to a Children’s Court as per Section 18(3) of the Act and this Children’s Court can try the child as an adult, or alternatively hold that the child ought not to be tried as an adult, in which case this court also has the power of the JJB; ‘Juvenile Justice: Advocating for Adolescent Concerns’, *Partners for Law in Development, India*, available at <https://pldindia.org/advocating-for-adolescent-concerns/juvenile-justice.php>, accessed on 26 July 2021; For a detailed discussion on transfer laws across the world see generally *Mumtaz Ahmed Nasir Khan v. The State of Maharashtra*, Bombay High Court, India, 2010, 3 SCR 353, p.16; Shruthi Ramakrishnan and Swagata Raha, ‘Children in Conflict with Law’, Enakshi Ganguly (ed). 2019. *India’s Children-Continue to Challenge Our Conscience*. HAQ: Centre for Child Rights. New Delhi. India.
 - 22 *General Comment No. 24 on Children’s Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, paras 5, 22; Swagata Raha, ‘Treatment of Children as Adults under India’s Juvenile Justice (Care and Protection of Children) Act, 2015: A Retreat from International Human Rights Law’, *The International Journal of Children’s Rights* p. 757, volume 27:4, 2019, p. 758, available at <https://doi.org/10.1163/15718182-02704004>, accessed on 30 July 2021; ‘Concluding Observations of the Committee on the Rights of the Child: India’, Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.115, 2000, available at <http://hrlibrary.umn.edu/crc/india2000.html>, accessed on 4 August 2021.

rehabilitation of children.²³ Three main institutions house CICL. First, during the pendency of the inquiry, the child can be sent to an Observation Home (“OH”).²⁴ Once the JJB finds the child to have been involved in the offence, they can be sent to a Special Home.²⁵ Finally, children between the ages of 16 and 18 who are accused or found guilty of a heinous offence (an offence for which the minimum punishment is seven years or more)²⁶ or children likely to pose a threat to themselves or others while their inquiry is pending are sent to a Place of Safety.²⁷ OHs, Special Homes, and Place of Safety (along with institutions for children in need of care and protection) fall under the category of Child Care Institutions (“CCIs”).²⁸ The JJ Act lists the principle of institutionalisation as a last resort in line with the Riyadh Guidelines and the Beijing Rules.²⁹ Even when deprived of liberty, children have a right to early release on bail (except under exceptional circumstances) and the right to be reunited with their families.³⁰

b. Specific contexts of deprivation of liberty in the administration of justice

Children are also deprived of liberty under national security laws and preventive detention procedures in different contexts, including Kashmir, certain areas of North Eastern India and other areas of civil unrest.³¹ Each of these situations is unique for which

23 Juvenile Justice (Care and Protection of Children) Act, 2015, India, preamble; Children Deprived of Liberty: What Does It Mean in the Indian Context, HAQ: Centre for Child Rights, 2017, pp. 11–18, <https://www.haqcrc.org/wp-content/uploads/2021/10/children-deprived-of-liberty-what-does-it-mean-in-indian-context.pdf>, accessed on 13 October 2021.

24 Juvenile Justice (Care and Protection of Children) Act, 2015, s. 2(40).

25 Juvenile Justice (Care and Protection of Children) Act, 2015, s. 2(56).

26 Juvenile Justice (Care and Protection of Children) Act, 2015, s. 2(33); *Shilpa Mittal vs State of Nct* Supreme Court, 2020, Criminal Appeal No. 34 of 2020.

27 Juvenile Justice (Care and Protection of Children) Act, 2015s. 2(46), s. 9(4) and s. 18(1)(g) proviso; Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 29(iii) – “(a) for children in the age group of 16 to 18 years alleged to have committed heinous offence pending inquiry, (b) for children in the age group of 16 to 18 years found to be involved in heinous offence upon completion of inquiry, (c) for persons above 18 years alleged to have committed offence when they were below the age of 18 years pending inquiry, (d) for persons above 18 years found to be involved in offence upon completion of inquiry, (e) for children as per the orders of the Board under clause, (g) of sub-section (1) of section 18 of the Act”; ‘Living Condition in Institutions for Children in Conflict with Law’, Ministry of Women and Child Development, 2017, pp. 10–194, available at https://wcd.nic.in/sites/default/files/Final%20Manual%2024%20April%202017_5.pdf, accessed on 23 July 2021.

28 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 2(21).

29 Swagata Raha, ‘Judicial Colloquium on Juvenile Justice’, Centre for Child Rights, National Law University, Odisha, 2018, p. 9, available at <https://www.nluo.ac.in/wp-content/uploads/2019/11/Judicial-Colloquium-on-Juvenile-Justice-Report.pdf>, accessed on 23 July 2021.

30 *Juvenile Justice Act, 2015 – A Handbook for Field Administrators*, National Gender Centre, Lal Bahadur Shastri National Academy of Administration, India, 2017, pp. 52–53.

31 Rawanda, Lubna, and Mohammad Idrees, ‘Issues and Problems Faced by Children in Conflict with Law during and after Their Detention’, *Sri Lanka Journal of Social Sciences* 44, no. 2, 2021; R. K. Narzary, ‘Impact of Conflict on Children in Assam and Manipur States in India’, *Assam: The Northeast Research and Social Work Networking*, 40, 2014. ‘Protection of Children’s Rights in Areas of Civil Unrest’, National Commission for Protection of Child Rights, 2010 available at http://edudel.nic.in/new_circulars/6954_6960_dt_08112010/enc_dt_08112010.pdf

significant data is not available. While one respondent in the study was from Kashmir and was held under preventive detention laws, the specific nuances of such contexts are beyond the scope of this study. Some children are also deprived of liberty in adult prisons as detailed later in the study.

CICL Deprived of Liberty in India

a. Statistics of CICL apprehended in India

Currently, there is no recent and cumulative data detailing the number of children deprived of liberty in India in the administration of justice. Offered below is data from various sources, including the National Crime Records Bureau, a 2018 Committee, the Ministry of Women and Child Development, and Prison Statistics India. However, apart from the 2018 Committee report, the data is either regarding the total CICL apprehended (out of whom not all will be deprived of liberty), or the total number of children in CCIs (including children in institutions for reasons other than administration of justice, such as children in need of care and protection). The exact number of CICL deprived of liberty cannot be ascertained with the different data points and demographics. Data on CICL in adult prisons is also provided; however, there is a massive mismatch between statistics recorded by the national Government and released publicly and those submitted by one state government to a High Court (discussed below).

CICL in OHs across India, 2018:

As per the 2018 *Committee 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 Report*, there were 7,422 CICL in OHs across India.³² However, this data has not been updated or followed up with a more recent study.

CICL apprehended:

As per the National Crime Records Bureau (“NCRB”) 38,685 CICL were apprehended in 2019 and 35,352 in 2020.³³ However, not all apprehended children are deprived of liberty, and specific statistics regarding children deprived of liberty were not available.

32 2018 Committee 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 Report.

33 ‘Crime in India’, *National Crime Records Bureau*, 2019, India, table 5A.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_2.pdf; ‘Crime in India’, *National Crime Records Bureau*, 2020, India, table 5A.4, available at <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>. As per the 2018 Committee for Analysing Data of Mapping and Review Exercise of Child Care Institutions under the Juvenile Justice (Care and Protection of Children) Act, 2015,

The majority of children in conflict with law apprehended under the substantive penal code (Indian Penal Code, 1860 (“IPC”)) as well as laws framed for specific subjects or geographical areas (Special Local Laws (“SLL”)) crimes were in the age group of 16 years to 18 years (75.2%) (29,084 out of 38,685) during 2019.

Year	Number of Children Apprehended	Boys	Girls	7–12 Years	12–16 Years	16–18 Years
2014 ³⁴	48,230	46,638	1,592	872	11,220	36,138
2015 ³⁵	41,385	40,468	917	602	11,052	29,731
2016 ³⁶	44,171	43,089	1,082	637	10,957	32,577
2017 ³⁷	40,420	40,155	265	514	10,712	29,194
2018 ³⁸	38,256	37,984	272	382	9,007	28,867
2019 ³⁹	38,685	38,405	280	467	9,134	29,084
2020 ⁴⁰	35,352	34,958	394	291	8,107	26,954

Table 1: Children apprehended in India since 2014

While there is no comprehensive data, it can be estimated that a large proportion of children in CCIs are CICL whose inquiry is not yet complete (i.e., they are detained pre-trial, even though pre-trial deprivation of liberty is considered a grave violation of the UNCRC).⁴¹ While some of these children are granted bail during the inquiry, they

and Other Homes Report, there were 7,422 children in conflict with law in Observation Homes. However, more children are deprived of liberty at police stations, other institutions and sent to adult prisons, contrary to law. The exact number of children deprived of liberty, hence, is likely higher.

34 ‘Crime in India’, *National Crime Records Bureau*, 2014, table 10.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2010.4_2014.pdf.

35 ‘Crime in India’, *National Crime Records Bureau*, 2015, table 10.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2010.4_2015.pdf.

36 ‘Crime in India’, *National Crime Records Bureau*, 2016, table 5A.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4.pdf.

37 ‘Crime in India’, *National Crime Records Bureau*, 2017, table 5A.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_1.pdf.

38 ‘Crime in India’, *National Crime Records Bureau*, 2018, table 5A.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_0.pdf.

39 ‘Crime in India’, *National Crime Records Bureau*, 2019, table 5A.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_2.pdf.

40 ‘Crime in India’, *National Crime Records Bureau*, 2020, India, table 5A.4, available at <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>.

41 *General Comment No. 24 on Children’s Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para. 97; estimation is based on data related to pendency retrieved from State Child Protection Society, Social Welfare Department, Government of Assam; State Data Management Centre, Women and Child Development Department, Government of Uttar Pradesh.

are still deprived of liberty for some time, often for extended periods, as highlighted by news reports.⁴²

All children (including but not limited to CICLs) in CCIs across India, 2022: As per more recent data (February 2022) released by the Ministry of Women and Child Development, there are 77,615 children in CCIs across India. However, this also includes children in CCIs in other contexts apart from the administration of justice, including protective shelters and specialised adoption agencies.⁴³

CICL in adult prisons: Apart from CICLs in CCI, some are also sent to adult prisons:

India: Of the available statistics from adult prisons, 99 children between the ages of 16 and 18 were deprived of liberty in adult prisons as of December 31, 2018; 218 as of December 31, 2019; and 6 as of December 31, 2020.⁴⁴

Delhi: At the same time, as per a Delhi High Court order dated January 22, 2022, more than 800 children were deprived of liberty in adult jails over five years in Delhi alone, throwing the statistics of 6 children deprived of liberty in 2020 (for the whole of India) into question.⁴⁵

Contrasting Indian statistics with South Asia: CICL deprived of liberty across South Asia, 2021: The number of CICL deprived of liberty could also be much lesser than the number of children apprehended since the total data for children deprived of liberty in the administration of justice across eight South Asian countries is estimated to be 44,900.⁴⁶

There is no recent and cumulative publicly available data specific to CICL deprived of liberty in India with these multiple data points.

42 For example, Sadaf Modak, 'Trials Stalled during Pandemic, No Bail: Children in Conflict with Law Remain Stuck in Observation Home for Years in Mumbai', *The Indian Express*, Mumbai, 13 June 2021, available at <https://indianexpress.com/article/cities/mumbai/mumbai-covid-children-in-conflict-with-law-observation-home-7357437/>, accessed on 14 September 2021.

43 'Status of Child Care Institutes', *Ministry of Women and Child Development*, Available at <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1794729>.

44 'Prison Statistics India', *National Crime Records Bureau*, 2018; 'Prison Statistics India', *National Crime Records Bureau*, 2019; and 'Prison Statistics India', *National Crime Records Bureau*, 2020.

45 *Court on Its Own Motion v. State*, Delhi High Court, 2022, Criminal Writ Petition No. 1 of 2020 and 1560 of 2017 and 2563 of 2021.

46 'Estimating the Number of Children Deprived of Liberty in the Administration of Justice', UNICEF, 2021, available at <https://data.unicef.org/resources/children-in-detention-report/>.



Figure 1: Multiple data points result in no comprehensive data on CICLs deprived of liberty. Sources in text.

b. Background of CICL in India

Socio-economic background:

As per government statistics on the economic background of families of CICL (most recent released statistics were for 2015), more than 40% of the children belong to families whose annual income was less than INR 25,000.⁴⁷ These figures are similar to figures from earlier years where most children coming in contact with the system were uneducated and belonged to families facing economic hardships.⁴⁸ However, this does not necessarily mean that children with more privileges do not commit offences. Instead, it can be inferred that there is also a higher chance of their cases not being brought into the juvenile justice system due to resources available to the privileged and existing bias

47 'Crime in India', *National Crime Records Bureau*, 2015, table 10.6, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2010.6_2015.pdf; This data was not included post 2015.

48 'Children in Conflict with Law in Crime in India', *HAQ: Centre for Child Rights*, 2017, p. 3, available at haqrc.org/wp-content/uploads/2019/01/cicl-in-ncrb-stats.pdf, accessed on 14 September 2021; 'Why Children Commit Offences: Study on Children in Conflict with Law in Delhi', *Delhi Commission for Protection of Child Rights*, 2015, pp. 9–57, available at <http://www.delhiplanning.nic.in/sites/default/files/Why-Children-Commite-Sucide-Booklet.pdf>, accessed on 26 July 2021.

in the system.⁴⁹ Similar to nationwide statistics, a 2015 study of 90 CICL across five CCIs revealed that all children belonged to the lower socio-economic strata.⁵⁰

Education:

Out of the CICL apprehended for crimes under the IPC and SLL in 2019, only 18% had studied beyond matriculation, and 36% of CICL had either no education or received only primary level education.⁵¹ Similarly, in 2020, only 17.1% had studied beyond matriculation and 32.5% had either received no education or only till the primary level.⁵²

Gender:

Across the world, more boys than girls come in contact with the legal system and are deprived of liberty. Particularly in the administration of justice (as well as in the contexts of armed conflicts and national security), 94 per cent of all detained children are boys.⁵³ Similarly, in 2019, only 0.72% of the children apprehended in India were girls and, in 2020, this figure was only 1.14%.⁵⁴

SITUATIONAL DESCRIPTION – CHILDREN’S EXPERIENCE OF DEPRIVATION OF LIBERTY

Conditions of Deprivation of Liberty

As per international law requirements, when States deprive children of liberty, they must ensure that children can avail of all human and children’s rights under the UNCRC, includ-

49 See, for instance, in relation to the adult criminal justice system, *Justice Frustrated: The Systemic Impact of Delays in Indian Courts*, 2020, edited by Shruti Vidyasagar, Shruthi Naik, Harish Narasappa, Bloomsbury; Vijay Raghavan and Roshni Nair, ‘Over-representation of Muslims: The Prisons of Maharashtra’, *Economic and Political Weekly*, 12–17, volume 48:11, 2013.

50 Archit Gupta et al., ‘Sociodemographic Characteristics and Aggression Quotient among Children in Conflict with Law in India: A Case-Control Study’, *The National Medical Journal of India*, p. 172, volume 28:4, 2015, pp. 172–175, available at <https://pubmed.ncbi.nlm.nih.gov/27132723/>, accessed on 26 July 2021.

51 ‘Crime in India’, *National Crime Records Bureau*, 2019, table 5A.6, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_2.pdf.

52 ‘Crime in India’, *National Crime Records Bureau*, 2020, India, table 5A.6, available at <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>.

53 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty’, *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2019, p. 225, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

54 ‘Crime in India’, *National Crime Records Bureau*, 2019, table 5A.4, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205A.4_2.pdf; ‘Crime in India’, *National Crime Records Bureau*, 2020 table 5A.4, available at <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>.

ing the right to protection from any form of violence, neglect, and exploitation.⁵⁵ However, in practice, deprivation of liberty often results in the deprivation of many liberties, including the right to dignity, participation, and protection from violence and neglect.⁵⁶

The children interviewed in the Global Study spoke about lack of access to health care, education, leisure, information, child-sensitive procedures, insufficient con-

'Deprivation of liberty does not mean deprivation of liberties.' – Manfred Nowak, 2019

tact with family and the outside world, the violation of privacy, and difficult detention conditions.⁵⁷ To understand the impact of deprivation of liberty on CICL

in India, we reviewed existing literature and interviewed 12 CICL. As a result, we saw the concerns highlighted in the Global Study being echoed in the Indian context, detailed further below.

PROFILE OF CHILDREN INTERVIEWED

We interviewed 12 respondents (out of which two interviews were partial) ranging in ages between 16 and 21 at the time of the interview. Of these children, 10 were boys and 2 were girls. All were below the age of 18 when deprived of liberty. One had no education, two had completed their education till Grade 12, two had studied till Grade 9 and Grade 11, and seven were currently pursuing their education. Ten were employed either before the incident or at the time of the interview. Most of the children had come in contact with the legal system for the offence of (murder or theft) and most had come in contact with the legal system for the first time. Eight children were out on bail and four children's cases were over. The children belonged to Delhi, Rajasthan, Maharashtra, Karnataka, West Bengal, and Jammu & Kashmir.

55 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 73, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

56 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

57 49 Manfred Nowak & Manu Krishan, 'The UN Global Study on Children Deprived of Liberty: The Role of Academia in Making the Invisible and Forgotten Visible', in Helmut Kury & Sławomir Redo, *Crime Prevention and Justice in 2030*, Springer Cham, Switzerland, volume 1, 2021, pp. 231–249.

Pseudonym	Age at Interview	Gender	Education	First Time Incident	Duration of Stay (in Days)	Duration in Police Custody (in Days)	State
Udit	19	Male	Yes	Yes	285	1	Delhi
Sunny	16	Male	Information not available	Yes	10	Information not available	Delhi
Bilal	17	Male	None	No	97	Information not available	Delhi
Navneet	Information not available	Male	Pursuing 10th	Yes	110	0	Rajasthan
Lalit	17	Male	Yes	Yes	450	3	Rajasthan
Sumit	Information not available	Male	Till 11th	Yes	180	1	Karnataka
Khushi	18	Female	Pursuing 12th	Yes	3	0	Maharashtra
Chetan	Information not available	Male	12th	Yes	1	0	Karnataka
Sourav	19	Male	Till 9th	No	790	6	West Bengal
Manasvi	21	Female	12th	Yes	365	Unknown	Maharashtra
Ali	17	Male	Information not available	Yes	45	3	West Bengal
Javed	17	Male	Pursuing 12th	Yes	15	17	Union Territory of Jammu & Kashmir

a. Infrastructure and management: Child friendly?

As per the JJ Rules, “the Child Care Institutions shall be child-friendly and in no way shall they look like a jail or lock-up.”⁵⁸ However, courts have observed how CCIs, particularly OHs, are similar to prisons in their infrastructure and management with jail-like infrastructure and uniformed police officers.⁵⁹ Courts have observed that some OHs do not have an open area for children or even potable water.⁶⁰ Some children we spoke with resonated with these concerns. Male Child Navneet spoke about meeting his family through grilled jail-like bars, remarkably similar to the infrastructure of an adult prison. Contrary to the requirement of OHs being child-friendly, Manasvi (female, 21), a child with a non-transmissible health condition, was asked to stay alone in a completely barren

58 Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 29(2).

59 See, for instance, *Sampurna Behrui v. Union of India*, Supreme Court of India, 2018, 4 SCC 433.

60 *Court on Its Own Motion v. State of Punjab*, Punjab and Haryana High Court, 2013, Civil Writ Petition No. 9968 of 2009 (O and M).

room without access to basic facilities, including water. Inadequate or inappropriate jail-like infrastructure makes the experience of deprivation of liberty harsh for children.

In line with child-friendly infrastructure, the JJ Act also encourages non-stigmatising language⁶¹ (for example, ‘inquiry’ instead of a ‘trial’, CCI/OH instead of ‘prison’, ‘special home’ instead of ‘remand home’). However, in practice, accusatory and adversarial language related to the legal system continues

“I was treated like a criminal.” Manasvi (female, 21)

to be used. For example, Male Child Navneet said that he had internalised the term ‘*bacchon ki jail*’, the Hindi equivalent for ‘children’s prison’ instead of the official language of ‘OH’. Similarly, instead of the prescribed terminology of ‘superintendent’, he also spoke about the ‘Jailer Sir’.

Based on existing studies, judgments, and our respondent interviews, OH infrastructure and management reflect adult prison systems in specific ways, adversely impacting children’s rights and well-being.

Health and Development

Institutionalisation for children has been found to have adverse impacts on physical health and development, mental health, and cognitive development.⁶² First, the Global Study stated that deprivation of liberty negatively impacts children’s health since it is a distressing, traumatic experience that may impact mental health. Second, detention conditions may be harmful to health, including exposure to unsanitary conditions, which increase the risk of infection, restrictions on movement, and inadequate diet, which may impact physical development.⁶³

Earlier studies showed that in India, CICL in CCIs are often deprived of basic amenities like adequate nutrition and sanitation,⁶⁴ contrary to the prescribed rules.⁶⁵ Lack of

61 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(viii).

62 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty’, *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, pp. 119–120, 153, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021; Rachel Horan, ‘Desistance Approaches in Working with Children Deprived of Their Liberty’, *Today’s Children, Tomorrow’s Parents: An Interdisciplinary Journal*, p. 74, volume 45–46, 2017, pp. 74–87, available at <https://bettercarenetwork.org/sites/default/files/Revista-nr-45-46.pdf#page=76>, accessed on 23 July 2021.

63 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty’, *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, pp. 119–120, 153, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

64 Bharti Ali & Praveena Nair S, ‘Twenty Years of CRC: A Balance Sheet, Volume I’, *HAQ: Centre for Child Rights*, 2011, India, p. 29, available at <https://haqcrc.org/wp-content/uploads/2016/07/twenty-years-of-crc-a-balance-sheet-volume-I.pdf>, accessed on 24 July 2021.

65 Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rules 29–31.

basic facilities such as electricity is common,⁶⁶ and courts have observed how many institutions have deplorable conditions, including blocked drainage and stagnant water.⁶⁷

“One time, I had 10 days old, smelling, bread for breakfast. Because I was so hungry, and there was nothing else to eat, I ate it.” Bilal (male, 17)

Among the respondents, while Udit (male, 19) and Child Lalit (male, 17) spoke positively about amenities, including clothing, food, bedding, toiletries, and access to heating/cooling facilities, some highlighted stark concerns. Sourav (male, 19) lamented the substandard quality of food, including the inadequate quantity, the lack of taste and nutrition. Khushi (female, 18) wasn't given basic dental hygiene amenities and said all the girls in the OH were given only one bar of soap for common use.⁶⁸ Child Bilal (male, 17) remembered how being given stale bread made many children sick. Bilal also spoke about no action being taken to address a mosquito outbreak, owing to which he and other children could not sleep at night.⁶⁹ Male Child Sunny (16) spoke about how many children in the institution were experiencing itching, probably attributable to bed bugs or other unsanitary conditions. Inadequacy of basic amenities poses a substantial risk to children's health.

Good quality health care is also, often, not consistent.⁷⁰ Udit (male, 19) and Child Lalit (male, 17) said that they had access to medicines when they were unwell, and a medical professional would be available for a stipulated time. Manasvi (female, 21), who had a pre-existing health condition, was also taken frequently for hospital visits. However, Sourav stated that the in-house doctor gave the same antipyretic irrespective of the ailment. Medical aid was also, often, inconsistent. For example, Child Bilal (male, 17) was once sick with severe abdominal cramps and sought help multiple times through the night but finally cried himself to sleep without any recourse.

Overall, deprivation of liberty, owing to the frequently problematic conditions of institutionalisation and the lack of consistent, good quality health care, is likely to impact children's health adversely.

66 Swagata Raha, 'Judicial Colloquium on Juvenile Justice', *Centre for Child Rights, National Law University, Odisha*, 2018, p. 9, available at <https://www.nluo.ac.in/wp-content/uploads/2019/11/Judicial-Colloquium-on-Juvenile-Justice-Report.pdf>, accessed on 23 July 2021.

67 *Court in Its Own Motion v. State of Punjab*, Punjab and Haryana High Court, 2009, Civil Writ Petition No. 9968 of 2009 (O and M).

68 Contrary to Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 30.

69 Contrary to Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 31(1)(v).

70 Contrary to Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 34.

a. Mental Health

As per a study that reviewed the literature on children in the juvenile justice system, 70% of children who come into the juvenile justice system have a diagnosable mental health problem⁷¹ and need mental health support. Sourav, Udit (male, 19), Manasvi (female, 21), Child Lalit (male, 17), Chetan (male, age unknown) and Child Bilal (male, 17) had access to counsellors, but,⁷² as was the case with male Child Navneet (male, age unknown), the counsellor mostly asked case-related questions, and at times, in the presence of the investigating officer.⁷³ Even when counselling is provided, it may not be by trained mental health professionals who are equipped to address mental health challenges.⁷⁴ While this can still have significant benefits,⁷⁵ it fails to provide the specialised mental health support required.⁷⁶ Sourav, a respondent who stayed for a longer duration, thought counselling benefitted him but said that it needed to be supplemented by basic needs being met, including adequate nutrition. Khushi (female, 18), Child Sunny (male, 16) and Child Javed (male, 17) did not have access to counsellors.

Not only is the mental health of children coming into the legal system already vulnerable, but deprivation of liberty also further aggravates it. Khushi (female, 18) shared that she started experiencing depression after coming in contact with the legal system, even though she was deprived of liberty for a relatively short period of 36 hours (she also had additional stressors at home, but the experience of the legal system took a toll on her). After being regularly beaten at the police station for 17 days, Child Javed (male, 17) started experiencing fear, insecurity, and long spells of crying and did not have a mental health professional to assist him. He continues to experience the impact of this even after being released.

71 Snehil Gupta & Rajesh Sagar, 'Juvenile Justice System, Juvenile Mental Health, and the Role of MHPs: Challenges and Opportunities', *Indian Journal of Psychological Medicine* p. 304, volume 42:3, 2020, p. 305, available at https://doi.org/10.4103/IJPSYM.IJPSYM_82_20, accessed on 30 July 2021.

72 Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 35 (prescribes steps to be taken for children's mental health).

73 A police officer who plays a crucial role in the investigation of the offence and plays a crucial role in the inquiry.

74 Aditi R., 'No Psychologists at Juvenile Homes for Nearly Two Years', *The Hindu*, Chennai, 23 October 2017, available at <https://www.thehindu.com/news/cities/chennai/no-psychologists-at-juvenile-homes-for-nearly-two-years/article19914595.ece>, accessed on 3 August 2021.

75 Pupul Dutta Prasad, 'Reimagining Counselling in the Juvenile Justice System', *Economic & Political Weekly* volume 55:9, 2020, available at <https://www.epw.in/node/156353/pdf>, accessed on 4 August 2021.

76 Snehil Gupta & Rajesh Sagar, 'Juvenile Justice System, Juvenile Mental Health, and the Role of MHPs: Challenges and Opportunities', *Indian Journal of Psychological Medicine* p. 304, volume 42:3, 2020, p. 305, available at https://doi.org/10.4103/IJPSYM.IJPSYM_82_20, accessed on 30 July 2021.

b. Solitary confinement

Solitary confinement is one factor that significantly deteriorates mental health.⁷⁷ Earlier studies show that solitary confinement continues to be used for children despite not being allowed as per law.⁷⁸ While nine respondent children said that solitary confinement was not used and children were only isolated to be quarantined, Manasvi (female, 21), at the age of 13, was made to stay in solitary confinement for a year because she had a physical (non-transmissible) health condition. She stayed in a closed room and was allowed to step out in the wee hours of the morning to take a shower and, occasionally, to perform chores. She had to call out to the staff to use the washroom and wait for hours for them to respond. Manasvi started experiencing suicidal thoughts and also acted on them. Child Ali (male, 17) was sent to adult prison and kept in solitary confinement for one and a half months. Sourav was kept in solitary confinement in the OH as punishment for a disciplinary violation. The staff stated that it was an order of the 'court' and other children were prohibited from talking to him.⁷⁹ From the children we spoke with, the experience of deprivation of liberty, particularly of solitary confinement, adversely impacted their mental health.

"I didn't see the outside for a year. I didn't even know whether it was night or day." Manasvi on her experience of solitary confinement

Education/Recreation and Leisure

Deprivation of liberty impacts children's access to education. Male Child Navneet said that because of being in the OH, he could not go to mainstream school and might have to repeat a school year because of missed attendance.⁸⁰ Even within the OHs, male Child Sunny (16) and Manasvi (female, 21) said they did not have access to education.

"The thing I felt worst about was that they wasted a whole year of mine. They didn't let me give my exams. Wasting a year is not a small thing, isn't it? In a year a child can do so much." - Manasvi

77 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, pp. 527–528, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021; Unni Krishnan, J.P. And Ors. vs State of Andhra Pradesh And Ors, Supreme Court of India, 1993, AIR 2178; Keramet Reiter et al., 'Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018', *American Journal of Public Health* p. 56, volume 110, 2020, p. 560, available at <https://doi.org/10.2105/AJPH.2019.305375>, accessed on 4 August 2021.

78 Bharti Ali & Praveena Nair S, 'Twenty Years of CRC: A Balance Sheet, Volume I', *HAQ: Centre for Child Rights*, 2011, India, available at <https://haqcrc.org/wp-content/uploads/2016/07/twenty-years-of-crc-a-balance-sheet-volume-I.pdf>, accessed on 24 July 2021.

79 Terminology such as 'court', not in consonance with the JJ Act, 2015, continues to be used by people working in the juvenile justice system.

80 Due to the pandemic, schools were closed and all children were promoted and this situation did not arise.

Manasvi (female, 21), who stayed for a year in solitary confinement, sought to continue secondary level education but was repeatedly refused. Finally, she had to settle for listening through the door to pre-primary education given to other children. Manasvi (female, 21) spoke about the need for uninterrupted education while staying in the OH. At the minimum, she said that they ought to be able to appear for exams.

From the interviews, we observed some efforts at improving education and vocational training within CCIs. For instance, Child Lalit (male, 17) spoke about educational opportunities within the OH and had received a certificate when he completed a course. Navneet also had access to courses related to electrical and computer work. At the same time, a lack of information about the duration children are required to stay in the OH was seen by Sourav as a hindrance to education/skill development as they aren't sure whether to enrol for courses.

While Child Sunny (male, 16), Child Lalit (male, 17), Child Navneet (male, age unknown), Khushi (female, 18) and Udit (male, 19) spoke about being given time to play games and sports and Child Javed (male, 17) spoke about having access to a library, this was not the case for all children. Child Bilal (male, 17) had access to a music class but said the most challenging part of staying in the OH was being perpetually locked up and not being allowed to play, contrary to their right to play.⁸¹

When asked what recreation he had access to, Ali, yet another child who spent time in solitary confinement, said all he did was sit and cry. Even when there were activities, Sourav said these were “half-hearted initiatives” related to primary education and did not equip them for the future. Sourav spoke about a need for being taught life skills and other skills that would help them earn.

Children's Right to Participation: Right to Be Heard and Legal Aid

Children have a right to participate in matters affecting them, which entails being heard and given adequate information.⁸² An important manifestation of the principle of participation for CICL under the JJ Act is the right to be heard at all stages of the inquiry⁸³ and be provided adequate information about their cases.

81 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 31.

82 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 12; Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, pp. 207-208, 511, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021

83 *Juvenile Justice (Care and Protection of Children) Act*, 2015, India, s. 8(3)(c); *Juvenile Justice (Care and Protection of Children) Model Rules*, 2016, rules 8(3)(iii) and 8(3)(vii); *Juvenile Justice Act, 2015- A Handbook for Field Administrators*, National Gender Centre, Lal Bahadur Shastri National Academy of Administration, India, 2017, pp. 22-23.

a. Right to be informed

As per the JJ Rules, the Child Welfare Officer⁸⁴ is required to familiarise every new child with the OH and its functioning, including the code of conduct and the children's rights.⁸⁵ However, apart from Child Javed (male, 17), all other children interviewed said that the staff had not given them any information about the OH, and other children told them about the institution. Instead of the OH staff providing the orientation, Child Lalit (male, 17) shared that older children are asked to explain the code of conduct within the institution, and often, they employ violence while doing this. No child was told about their rights at any stage. Child Ali (male, 17) was not even aware of the reason the police apprehended him.

b. Legal aid and access to justice

Every child deprived of liberty should have prompt access to legal assistance,⁸⁶ including the right to challenge the deprivation of liberty itself.⁸⁷ Male Child Navneet and Udit (male, 19) said they (and, according to them, their parents) were not informed about the possibility of having legal aid or given any information about the case. Sourav (male, 19) was told about legal aid by others in the adult jail. The children did not have information about their cases (the stage of inquiry, the sections applicable, when they could be released etc.). Only Sourav (male, 19) shared that the JJB Magistrate appointed a legal aid lawyer for him. Male Child Sunny (16) saw a notice board that mentioned a free legal aid lawyer. As a result, he could contact a lawyer. Child Sunny and Child Lalit (male, 17) said their lawyers never met them even once. The lawyers of the respondent children did not discuss the cases with them, and only Manasvi's (female, 21) legal aid lawyer explained the case to her. As was evident from most children, JJBs did not ask children if they were comfortable with their legal aid lawyers.

A child's parents did not give him any information about the case: "You are a child; you shouldn't know about these things." The child said, "But, I think I should have been told too, after all it's my case even though I'm a child I should have the right to know what's going on." Sourav (male, 19)

84 "Child Welfare Officer" means an officer attached to a Children's Home for carrying out the directions given by the Committee or, as the case may be, the Board with such responsibility as may be prescribed; Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 2(17).

85 Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 69(G).

86 This is a role of the JJB as per Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 8(3)(c); This is also a role of the police as per Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rules 8(3)(iii) and 8(3)(vii).

87 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 37(d).

Sourav (male, 19) suggested that children in OHs should be offered education about the law and their constitutional and other rights.

c. Right to be heard

In line with best practices, social workers/psychologists with experience of working with children (JJB Members) and the judges (JJB Magistrates) jointly engage in the decision-making process.⁸⁸ They must interact with the children to ensure they are heard.⁸⁹ In Manasvi's (female, 21) case, the Magistrate helped explain the following steps to her in detail. However, male Child Sunny (16) and male Child Navneet said the Members did not interact with them and did not enquire about their well-being or legal needs. Male Child Sunny (16), Child Lalit (male, 17), Manasvi (female, 21) and Child Javed (male, 17) said they did not get any opportunity to speak up in the JJB and were not heard. Lalit also added that the 'court' environment was intimidating, and even when children have been subjected to violence, it is hard to speak up.

The right to complain is an essential aspect of being heard.⁹⁰ However, within the OH, children said that there was no complaint mechanism, or if there was one, they would often be punished for using it, effectively curtailing their right to be heard. In some cases, Sourav (male, 19) said complaining within the OH would also impact their case adversely. At the same time, there were instances when complaints remedied the situation. For instance, Sourav recalled that when children engaged in vandalism in the OH in protest of the bad quality of food, a senior government official took action and terminated the cook's employment. However, apart from such determined collective demonstrations, children's right to be heard appeared hard to realise within OHs.

Contact with Family and Isolation

Deprivation of liberty results in isolating children from their families and their communities. Contact with the families helps ensure transparency of institutions, ensures children's well-being, and helps support children with reintegration since

88 Section 4 of the JJ Act provides for the appointment of the Members and Section 8 provides responsibilities; The Global Study discusses the Austrian example, having a similar concept, as a best practice model.

89 *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (The Havana Rules)*, 14 December 1990, UNGA 45/113, rules 76-77; Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 39(5) (which prescribes a complaint mechanism which is required to be opened in the presence of children's committees).

90 Ton Liefwaard, 'Deprivation of Liberty of Children', in Ursula Kilkelly & Ton Liefwaard (eds), *International Human Rights of Children*, Springer, Singapore, 2018, pp. 321-357; Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 74.

they will be returning to their families.⁹¹ The UNCRC mandates that children deprived of liberty have a right to maintain contact with their families through correspondence and visits, which can only be denied if it is in the child's best interests.⁹² However, the Global Study showed that many children worldwide spoke about inadequate access to their families.⁹³

Sourav (male, 19) had a relatively positive experience in the OH and was allowed to meet his family for almost an hour without

"I had to cry in front of them to let me talk to my parents." Bilal (male, 17)

the presence of guards. Another respondent, Udit (male, 19), from a comparatively privileged background, spoke about how he could meet his family for a maximum of 15 minutes after negotiating with the institution's staff.

However, Chetan (male, age unknown), Child Lalit (male, 17), Child Navneet (male, age unknown) and Khushi (female, 18) shared more arduous experiences, resonating with the findings of the Global Study. Male Child Javed (17) and male Child Navneet spoke about how the most challenging aspect of being in the institution was limited access to their families. From a marginalised background, male Child Bilal (17) had come into the OH multiple times for different incidents and was only allowed to meet his family once a month after he cried and pleaded with the staff. Particularly during the pandemic, visits were limited, and children met their families with a considerable distance between them, having to yell to be heard. Even pre-pandemic, male Child Navneet (age unknown) said that when they would speak to the families, all children would be sitting in the same hall, and they had no privacy for the conversations. Despite the staff wanting to help, they often lack available resources. From the respondents, we learnt that not only were meetings inconsistent and short, but male Child Javed and male Child Navneet shared they also did not get privacy while talking to their families, effectively hindering their right to meaningful contact with their families. Due to a curfew and the communication blockade in one state, telephonic communication with the family was not possible for one child for a significant time. The family had to go to great lengths to arrange a vehicle to travel during the curfew to visit the child.

91 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 37(c); Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(v).

92 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 598, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

93 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 19.

Safety and Protection from Violence

Children have a right to protection against violence and ill-treatment, including when deprived of liberty.⁹⁴ However, the Global Study found that children regularly experience violence when deprived of liberty.⁹⁵

A criterion that justifies children being sent to a CCI is when their safety is at risk.⁹⁶ For example, from the respondents, Child Lalit (male, 17), who was being threatened by a rival gang, perceived he was safer in the OH. Many such reasons justify a child's stay in the CCI. However, based on previous research and our respondents' sharing, the stories of violence experienced in CCIs exceed those of safety, similar to the Global Study's findings.

a. Violence by police

Studies across India have documented widespread incidents of torture, violence, forced confessions, physical and sexual abuse experienced by CICL at the hands of the police.⁹⁷

*"Police should not use violence against children."
Child Lalit, (Male, 17)*

Earlier studies showed that children are subjected to severe violence to force them to confess to unrelated crimes.⁹⁸

*"They said, 'Till you confess we will keep beating you' and they [the police] beat us. Hence, you confess."
Child Bilal (male, 17)*

On similar lines, the police subjected Child Lalit (male, 17) and Child Ali (male, 17) to severe physical violence and tortured them into confessing. Child Lalit spoke about

confessing under duress after three days of violence and verbal degradation by intoxicated police officers. Police officers threatened to douse him with petrol and kill him if he

94 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 96, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

95 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 12(1) (moral, physical or psychological danger).

96 'Why Children Commit Offences: Study on Children in Conflict with Law in Delhi' *Delhi Commission for Protection of Child Rights*, 2015, pp. 9-57, available at <http://www.delhiplanning.nic.in/sites/default/files/Why-Children-Commite-Sucide-Booklet.pdf>, accessed on 26 July 2021. Bincy Wilson & Shraddha Chaudhary, 'Access to Legal Aid among Children in Conflict with Law in Karnataka', *The Centre for Child and the Law-National Law School of India University*, 2018, available at <https://ccl.nls.ac.in/wp-content/uploads/2017/01/Access-to-legal-aid-among-cicl-in-karnataka-1.pdf>, accessed on 23 July 2021.

97 Ibid.

98 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 10(1); Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rules 8(3)(i), 9(6) & 69 d(1).

didn't confess. Even though children cannot be kept in the police lock-up,⁹⁹ Child Lalit and Child Ali were kept there for days and subjected to violence until they confessed. Police officers told Ali they would release him if he confessed, but he was sent to an adult prison after he confessed. Child Javed (male, 17) was kept in the police station for 17 days and subjected to physical and psychological torture. While at the police station, Javed was not allowed to use the washroom. Manasvi (female, 21, when 13 and suffering from an illness, was hit by police staff (male and female). Her family, already angry at her because of the incident, didn't intervene. Male Child Bilal (17), who had been brought into the OH multiple times for different cases, had a similar experience. After being subjected to severe violence and verbal degradation, he was forced to confess to more incidents than he was involved in. Even though violence by police and staff of CCIs is a punishable offence,¹⁰⁰ based on previous studies discussed earlier and the respondents' inputs, it becomes evident that it remains unchecked in many instances.

"In the beginning we were treated as animals. Any staff in the mood to beat would come to us and start beating. We suffered a lot of torture, physical as well as psychological. The time spent at the local police station was nightmarish. I still get horrified when I recall what I have gone through. I think the system should place certain checks so that no children should go through what we have gone through." Child Javed (male, 17)

"Nobody takes the police's bad behaviour towards a minor seriously or treats it as a crime, especially when a child has been accused of a crime. The police had gone to the extent to tell me that they would shoot and kill me." Child Lalit (male, 17)

"I pray to god that nobody goes through what I have been through." Child Lalit (male, 17) recalling his experience with the police

Conflict situations further increase vulnerability to police violence, with an enhanced fear of being framed for false cases, particularly during curfew.¹⁰¹ For example, from our respondents, Child Javed (male, 17), when apprehended, had the police, military, and paramilitary come to his house. They beat him and his mother up and then dragged him to a police van. Such violence and treatment are directly in dissonance with child rights and the rights of any person (child/adult) being apprehended.

99 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 75.

100 Rawanda, Lubna, and Mohammad Idrees, 'Issues and Problems Faced by Children in Conflict with Law during and after Their Detention', *Sri Lanka Journal of Social Sciences* 44, no. 2, 2021.

101 In 2019, the Indian Government scrapped Article 35A and Article 370 of the Indian Constitution which provided special status to the then state of Jammu and Kashmir. Citing fears of protests, the government blocked mobile phone and internet communication, and also detained more than 4,000 people (as per official numbers) including politicians.

*"Just being a Kashmiri, makes us so vulnerable."
Child Javed (male, 17)*

"If the key actors in juvenile justice, such as police officers... do not fully respect and protect [children's human rights and freedoms], how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?" UN Committee on the Rights of the Child (CRC Committee) (2007b) General Comment No. 10 Children's Rights in Juvenile Justice. CRC/C/GC/10

Another prong of safety for children entails not being made to stay with adults during deprivation of liberty, particularly adult prisoners.¹⁰² Contrary to the provisions of the JJ Act strictly stating that children should not be sent to adult prisons, they are often sent to adult prisons and made to stay with adult prisoners in the same barracks.¹⁰³ In a landmark judgment, the Supreme Court stated that anomalies con-

tinue despite clear directions for an age memo to be signed by both police and jail authorities.¹⁰⁴ Sourav (male, 19) spoke about his experience of being sent to an adult jail for two months at the age of 15 after being beaten up by the police and told to state he was 19 on video. Child Ali (male, 17) was taken to an adult prison, and after his hands were tied, he was beaten by the staff and told that if he told anyone his actual age, they would "break his limbs". Staying with adult prisoners can significantly compromise children's physical and psychological safety.¹⁰⁵

b. Violence in the CCI

Violence is also widespread in CCIs, including corporal punishment by the staff and bullying and violence from other children,¹⁰⁶ despite being criminalised by the law.¹⁰⁷

102 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 37(c).

103 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 10(1); Karan Tripathi, 'Over 123 Juveniles in Tihar: Why Children End Up in "Adult Jails"', *The Quint*, New Delhi, 15 March 2021; Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 8(3)(m) (The JJb is also required to conduct regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the Observation Home); 'SOP for Rehabilitation of Children in Conflict with Law: Possibilities and Opportunities', *Ministry of Women and Child Development*, 2017, p. 5, available at https://wcd.nic.in/sites/default/files/SOP%20ON%20REHABILITATION%20OF%20CHILDREN%20IN%20CONFLICT%20WITH%20THE%20LAW_0.pdf, accessed on 23 July 2021.

104 *Court on Its Own Motion v. Department of Women and Child Development*, Delhi High Court, 2013, (3)RCR (Criminal) 382.

105 *General Comment No. 24 on Children's Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 104.

106 Bharti Ali & Praveena Nair S, 'Twenty Years of CRC: A Balance Sheet, Volume I', *HAQ: Centre for Child Rights*, 2011, India, pp. 31–32, available at <https://haqcr.org/wp-content/uploads/2016/07/twenty-years-of-crc-a-balance-sheet-volume-I.pdf>, accessed on 24 July 2021.

107 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 82.

Studies show that CCIs use denial of food and isolation to discipline the children.¹⁰⁸ Similarly, a respondent child Bilal (male, 17), spoke about children being denied food as a punishment and locked up in solitary confinement if they violated any code of conduct.

Child Lalit (male, 17) and Manasvi (female, 21) spoke about staff using violence as a disciplinary measure. Manasvi, at the age of 13, just brought into the OH and grieving her recently deceased mother, was beaten up for crying. She was also subjected to violence for refusing to eat food. Male Child Bilal (17) shared that when a fight would break out among the children in his OH, CCI staff would beat up all the boys, irrespective of who was involved in the scuffle. Child Lalit (male, 17) also shared that stress positions were often used as corporal punishment. Rampant violence in CCIs is evidenced from literature and the children's responses. However, there is no data on the deaths of children while in custody in India.¹⁰⁹ Therefore, it is unknown if there have been such deaths owing to violence and, if so, to what extent.

According to the Global Study, the risk of violence in detention is higher for girl children. It includes sexual violence such as being strip-searched and subjected to invasive body searches.¹¹⁰ As per mandated procedure, searches should be done in a way that is "gentle, decent, and does not violate their dignity."¹¹¹ Nevertheless, a girl child said that being asked to undress on her first day was significantly distressing, especially since she considered it a violation of her religious beliefs.¹¹² Strip-searches for children should be avoided as part of the reception process, especially when alternatives such as scanning wands can be equally effective.¹¹³

108 Bharti Ali & Praveena Nair S, 'Twenty Years of CRC: A Balance Sheet, Volume I', *HAQ: Centre for Child Rights*, 2011, India, available at <https://haqcrc.org/wp-content/uploads/2016/07/twenty-years-of-crc-a-balance-sheet-volume-I.pdf>, accessed on 24 July 2021.

109 Bharti Ali & Praveena Nair S, 'Twenty Years of CRC: A Balance Sheet, Volume I', *HAQ: Centre for Child Rights*, 2011, India, available at <https://haqcrc.org/wp-content/uploads/2016/07/twenty-years-of-crc-a-balance-sheet-volume-I.pdf>, accessed on 24 July 2021.

110 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 273, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

111 'Living Condition in Institutions for Children in Conflict with Law', *Ministry of Women and Child Development*, 2017, pp. 10–194, available at https://wcd.nic.in/sites/default/files/Final%20Manual%2024%20April%202017_5.pdf, accessed on 23 July 2021.

112 See also, Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(x) re. the Principle of Equality and Non-Discrimination read with Article 18 of the International Covenant on Civil and Political Rights (ICCPR), emphasizing the right to practice religion publicly.

113 'Explainer: Routine Strip Searching of Kids in Prisons', *Human Rights Law Centre*, 2020, Australia, available at <https://www.hrlc.org.au/factsheets/2020/12/22/explainer-routine-strip-searching-of-kids-in-prisons>, accessed on 4 August 2021; for alternatives, see, Elise Archer et al., 'Memorandum of Advice: Searches of Children and Young People in Custody in Custodial Facilities in Tasmania', *Commissioner for Children and Young People in Tasmania*, Tasmania, 7 May 2019, p. 27, available at <https://www.childcomm.tas.gov.au/wp-content/uploads/2019-05-06-FINAL-Advice-to-Ministers-Searches-of-children-and-young-people-in>

Violations of children's right to safety, protection from violence, and dignity, apart from being grave human rights violations in themselves, influence children's thinking and hamper their reintegration towards being law-abiding, rights-respecting citizens.¹¹⁴

Discrimination and Stigma

Children in CCIs have the right to humane treatment, including not being discriminated against and being spoken to in a way that is not shaming or stigmatising.¹¹⁵

a. Stigmatisation based on the incident

Children shared instances of being shamed and stigmatised because of their legal cases. Manasvi (female, 21) recalled that while she was in the OH, the staff would repeatedly question her, asking her why she killed her mother. Khushi (female, 18) spoke about being uncomfortable after the staff told all the children about her case, and the girls started asking her why she had kidnapped a child. Male Child Bilal (17) was repeatedly referred to by the legal section he had been charged with (Section 307 of the IPC) by the staff. As a result, everyone in the OH knew about his case.

b. Health difficulties

Manasvi (female, 21) was stigmatised because of her illness. She was isolated by the staff even though her illness was non-transmissible, and younger children were threatened and told that they would be placed with her if they did not study. The staff also forbade other children from speaking to her.

"I would question why things were happening with me only and why I was treated differently from the other girls." – Manasvi on being treated differently because of her illness.

c. Religion

While deprived of liberty, children's religious rights ought to be guaranteed.¹¹⁶ However, Manasvi (female, 21) wasn't allowed to keep a picture of a deity and practice her religion. Children from religious minorities may experience another layer of deprivation of liberties, including not being allowed to practise their religion and being forced to practise the majority religion. For example, a Muslim respondent Khushi (female, 18), was not allowed to wear religious headgear. The headgear was confiscated. She shared

custody-in-custodial-facilities.pdf, accessed on 6 August 2021.

114 Ton Liefwaard, 'Deprivation of Liberty of Children', in Ursula Kilkelly & Ton Liefwaard (eds), *International Human Rights of Children*, Springer, Singapore, 2018, pp. 321–357.

115 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(x), s. 3(viii).

116 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 14.

that her headgear not being returned to her even when she was released was the most challenging part of her experience of deprivation of liberty. She also said that there was no arrangement for her to offer prayers, while male Child Navneet and Sourav (male, 19), respondent (Hindu) children, said they had a temple and prayers throughout the day. Sourav also said children were made to say prayers of the dominant religion before meals and not allowed to eat unless they did, irrespective of their religious leaning or lack thereof.

Implementation of Deprivation as a Last Resort

From the children's responses, we saw that deprivation of liberty does indeed result in deprivation of multiple liberties, including their right to adequate nutrition and sanitation, participation, being heard, safety, and protection from violence. As there is indeed a “manifest tension” between the rights of children and deprivation of their liberty,¹¹⁷ the question then explored is whether the deprivation of liberty is, in accordance with international and national legal requirements, used as a last resort for the shortest duration of time.

There is a “manifest tension” between the rights of children and deprivation of their liberty.

As discussed in the first section, children can only be deprived of liberty and removed from their family environment when there is a best-interest determination. However, even in such a case, the deprivation of liberty is required to be for the shortest possible duration.¹¹⁸ The JJ Act resonates with the same principle.¹¹⁹ Recently, the Delhi High Court, noting that more than a thousand cases of petty offences in Delhi had been pending for over a year, ordered the termination of proceedings in petty offences against CICL pending for more than six months.¹²⁰

Bail can be denied when children are at risk, for example, of violence from another gang or when they do not have supportive family members with whom they can stay.¹²¹

117 Ton Liefwaard, ‘Deprivation of Liberty of Children’, in Ursula Kilkelly & Ton Liefwaard (eds), *International Human Rights of Children*, Springer, Singapore, 2018, pp. 321–357.

118 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty – Note by the Secretary General’, *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2019, pp. 67, 69–72, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

119 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(xii).

120 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s.2 (45): Petty offences are offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years. Nupur Thapliyal, ‘Juvenile Justice Act: Delhi High Court Terminates All Petty Offences Cases Against Children Where Inquiry Is Pending for Over 1 Year’, *Live Law*, 2021, available at <https://www.livelaw.in/news-updates/delhi-high-court-terminates-long-pending-petty-offences-against-children-jj-act-182864>, accessed on 13 October, 2021.

121 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s.12.

While children can be deprived of liberty in such circumstances, often, in reality, this is not the case. Children are sent to institutions even when it is not necessarily in their best interests and for periods longer than the “shortest period of time” as was evident when the Bombay High Court ordered for the release of a child who had been in a CCI for 54 months, contrary to his best interests.¹²² While it is not possible from our respondents’ interviews to state whether the deprivation of liberty was indeed in accordance with these standards, there is anecdotal information to infer that the standards weren’t always met. From our respondents, children were deprived of liberty for an average of 196 days (including two months spent by one child in an adult jail). For children like Navneet (male), who were released as soon as their family got money for the lawyer and bail, the lack of resources kept them deprived of liberty. While a monetary sum is not necessary for the child to be released, male Child Navneet spoke matter-of-factly about how money is a prerequisite. The lack of finances can be a strong barrier to the principle of institutionalisation as a last resort. Similarly, lack of good quality, free legal aid also impedes the release of some children.

During the pandemic, the UN Committee on the Rights of the Child further urged all states “to release children in all forms of detention, whenever possible,”¹²³ and the Indian Supreme Court and the National Commission for Protection of Child Rights (“NCPCR”) passed similar orders.¹²⁴ However, while some children were released, many children continued to be deprived of liberty during the pandemic, often pre-trial.¹²⁵ Due to the pandemic, children were not produced before the JJBs for up to a year (even though online hearings were being conducted) and as per news reports, in many cases, children were deprived of liberty for long periods, without their inquiry even commencing.¹²⁶

122 Tried as an adult, kept in OH, Sadaf Modak, ‘Bombay HC Grants Bail to Youth Who Served 54 Months at Juvenile Home’, *The Indian Express*, Mumbai, 13 September 2020, available at <https://indianexpress.com/article/cities/mumbai/one-of-the-longest-serving-inmates-youth-gets-bail-after-serving-54-months-at-juvenile-home-6593821/>, accessed on 14 September 2021.

123 Statement, UN Committee on the Rights of the Child, 8 April 2020, para 8.

124 ‘Send Children in Conflict with Law Back to Their Homes: NCPCR’, *Outlook: The News Scroll*, New Delhi, 30 March 2020, available at <https://www.outlookindia.com/newscroll/send-children-in-conflict-with-law-back-to-their-homes-ncpcr/1785487>, accessed on 14 September 2021; Sanjeev Verma, ‘Punjab Starts Releasing Children in Conflict with Law for 21 Days’, *Times of India*, Chandigarh, 30 March 2020, available at <https://timesofindia.indiatimes.com/city/chandigarh/punjab-starts-releasing-children-in-conflict-with-law-for-21-days/articleshow/74880294.cms>, accessed on 14 September 2021; *In Re: Contagion of COVID 19 Virus in Children Protection Homes*, Supreme Court of India, 2020, 15 SCC 280.

125 Aditi Mallick, ‘40 Undertrial Juveniles Released’, *Times of India*, Hyderabad, 27 March 2020, available at <https://timesofindia.indiatimes.com/city/hyderabad/40-undertrial-juveniles-released/articleshow/74836691.cms>, accessed on 14 September 2021.

126 Sadaf Modak, ‘Trials Stalled during Pandemic, No Bail: Children in Conflict with Law Remain Stuck in Observation Home for Years in Mumbai’, *The Indian Express*, Mumbai, 13 June 2021, available at <https://indianexpress.com/article/cities/mumbai/mumbai-covid-children-in-conflict-with-law-observation-home-7357437/>, accessed on 14 September 2021.

DEPRIVATION OF LIBERTY VIS-À-VIS CHILDREN'S NEEDS FOR REFORM AND SOCIAL REINTEGRATION

The previous section highlighted the experience of deprivation of liberty and discussed how it is often used at divergence from children's rights stemming from national and international requirements. This section explores whether the deprivation of liberty addresses the pathways that brought children into the system and its impact on children's rehabilitation and social reintegration.

Pathways that Result in Children Coming into the System

Earlier research highlighted certain factors that predispose children towards coming in contact with the legal system.¹²⁷ This includes familial neglect/lack of familial supervision, dropping out of school, peer pressure, and community factors, including witnessing violence in the community or having access to substances that can be misused.¹²⁸ Another study of 90 CICL across five CCIs in 2015 showed that many CICL were from broken homes, had addictions, suffered physical and sexual harm, and had family members in prisons.¹²⁹

From our interviews, we saw some common pathways: peer pressure, substance misuse, violence in the family, and financial difficulties. From the respondents, peer pressure was a common factor that resulted in children coming in contact with the legal system. Male Child Sunny (aged 16) spoke about how he would not have gotten into

Children who reach the "adjudication process are children who are 'made voiceless' due to their multiple deprivations, including inadequate housing, parenting, care and protection, education, employment and caste discrimination." Parackal, S., & Panicker, R. (2019), p.234

"At home there was no money to eat or go anywhere, even during Eid we fasted but didn't have money for food to break the fast with. Seeing all this used to disturb me. I wanted to fix it." Khushi (female, 18)

"They should explain to me what I did wrong and give me a chance to make things right, to improve, and to make something of myself. But they only shouted at me constantly, exactly what the situation at home was like." Khushi (female, 18)

127 'Why Children Commit Offences: Study on Children in Conflict with Law in Delhi', *Delhi Commission for Protection of Child Rights*, 2015, pp. 9–57, available at <http://www.delhiplanning.nic.in/sites/default/files/Why-Children-Commite-Sucide-Booklet.pdf>, accessed on 26 July 2021; Saju Parackal & Rita Panicker, *Children and Crime in India*, Palgrave Macmillan, India, 2019.

128 Ibid.

129 Archit Gupta et al., 'Sociodemographic Characteristics and Aggression Quotient among Children in Conflict with Law in India: A Case-Control Study', *The National Medical Journal of India* p. 172, volume 28:4, 2015, pp. 172–175, available at <https://pubmed.ncbi.nlm.nih.gov/27132723/>, accessed on 26 July 2021.

trouble if not for involvement with peers who had access to drugs. Similarly, Child Bilal (male, 17) and Sourav (male, 19) attributed their wrongful behaviour to the influence of friends and the use of alcohol or drugs. Easy access to addictive substances in their community was common for many children, and consuming substances got them frequently involved in fights. Khushi (female, 18) spoke about violence at home and familial financial difficulties and how they “didn’t even have food to eat”, which resulted in her mother being suicidal. Her family wanted her to drop out of school and had planned her marriage. To mobilise money for her school fees and afford food for her family, Khushi tried to get money illegally. Khushi said, “Keeping [children] caged and just giving them basic amenities is not an improvement” and not what creates space for reform. She spoke about the need for someone to have listened to her and explained why her actions were wrong.

From these interactions, it can be inferred that irrespective of the factors that bring children into the system, deprivation of liberty did not address, even in part, the underlying core factors that caused children to be involved in an incident, as most children will go back into the same communities where they witness violence and have easy access to substances that can be misused.

Reform and Rehabilitation

Children continue to face multiple challenges on the path to reintegration and receive inadequate support. While staying in OHs has some potential benefits, Manasvi (female, 21)

“When a child is sent there [OH] for any crime that he has committed, he will get a lesson not to commit any crime again. He will value everything. When he sees half cooked chapati he will remember home-made food. He will miss his parents. He will reminisce that if his parents were there then they would have taken him out on festivals and occasions.” Lalit (male, 17) on how OHs help children reform

“The experience did not help me in any way, it only impacted me adversely.”. Child Javed (male, 17)

“A child can stay in an OH for 6 months and still not improve, you can just go about eating, drinking and sleeping for that time” “Sudhar grah ka matlab hai sudharo”. Khushi (female, 18) on the need for CCIs to actively support children in reform

said that OHs are helpful and teach them to develop a routine and even change behaviours; a counternarrative highlighted increased challenges post-release. Child Javed, (male, 17) talking about his experience of deprivation of liberty said, “The experience did not help me in any way; it only impacted me adversely.”

Contrary to skills needed for rehabilitation and social reintegration (both aims of the law), some children leave equipped with an enhanced skill set required for engaging in harmful behaviour, with Sourav (male, 19) stating that he learned new ways to be violent while in the adult prison.

One male child, Navneet, got monetary assistance on being released from the institution for his education. However, when asked about the support they received for rehabilitation, one child said he was simply let off with an admonishment and told never to come back into the system. On the other hand, children like Manasvi (female, 21), who had support from NGOs, said they got active, tangible support in reintegrating through learning life skills.

Apart from lack of support at the release stage, children also face increased challenges post-release. One challenge is police targeting children who have been deprived of liberty once. For example, male Child Bilal (17), who had previously been apprehended multiple times, was repeatedly threatened by the police even after being released: they threatened to apprehend him for unrelated wrongs and send him to an adult prison, as a result of which he had to relocate. Children also continue to face stigma on release. Khushi (female, 18) experienced depression for a year after the incident and attributes it to the ostracism, shaming from relatives and neighbours, and the strong sense of guilt she was experiencing. While dealing with these challenges, children often have no tangible support, including the support required to deal with the toll on their mental health.

The children said that there need to be alternatives to the deprivation of liberty. Child Lalit believed that children should not be kept for longer than six months in any CCI. Male Child Bilal (17) suggested that children should be allowed to stay with their families. Sourav (male, 19) suggested that in less serious offences, children need to be engaged in discussion about what they did wrong and then let go.

POLICY RECOMMENDATIONS

Through this study, even though the sample size is small (12), the children's voices help draw attention to the fact that deprivation of liberty does obstruct children's rights in many ways, often causing them harm. While there is a global focus on reducing the deprivation of liberty, it is also vital to ensure that existing institutions are made better¹³⁰ and comply with legal requirements, and sound alternatives for rehabilitation and reintegration of children are implemented. Pivoting on the recommendations made by the Global Study, drawing from the voices of children in this study as well as the literature reviewed, the following policy options are proposed.

130 Claire Lightowler, Bruce Adamson & Maria Galli, 'Not Cut Out for Prison: Depriving Children of Their Childhood', *Scottish Journal of Residential Child Care* p. 108, volume 20:1, 2021, pp. 108–121; Stuart A. Kinner et al., 'The Health of Children Deprived of Liberty: A Neglected Human Rights Issue', *Lancet Child & Adolescent Health*, p. 6, volume 4:1, 2021, pp. 6–7, available at [https://doi.org/10.1016/s2352-4642\(19\)30386-4](https://doi.org/10.1016/s2352-4642(19)30386-4), accessed on 23 July 2021.

Need for Publicly Available Statistics

There is a need for publicly available data on children deprived of liberty, the duration of such deprivation, and the type of offences in which they are involved (and not just data on apprehension). UNICEF, in its recent study, also flagged this concern.¹³¹ While some data exists, it is not publicly available. Such data is the first step to ensure that the depth of the problem is comprehended. Certain aspects of data, including statistics on deprivation of liberty, must be made available to the public at different levels. Higher authorities must review the nature of bail orders and the reasons for denying bail.¹³² Similarly, instances of deaths of children while deprived of liberty must also be made public.

Reducing the Deprivation of Liberty of Children

Pre-trial detention is in violation of the UNCRC¹³³ and should only be used in cases where it meets the best-interests standard and only after alternatives have been carefully considered.¹³⁴ In practice, even children accused of petty offences are deprived of liberty, contrary to the provisions of the law.¹³⁵

a. Minimising the duration of deprivation of liberty

Deprivation of liberty must only be resorted to when no other option seems viable and not as a matter of routine. It also should necessarily be in the child's best interests.

When used, there need to be strict outer time limits: at the stages of *police custody* (in a child-friendly space) (never longer than 24 hours), *pre-trial* (inquiry) institutionalisation (under no circumstances should it be longer than 30 days until formal charges are laid and needs to be only for the minimum time necessary) and *institutionalisation pending inquiry* (with a maximum of six months between the initial date of institutionalisation and the final decision on the charges). In addition, to check the time spent in police custody, the JJBs must have a mandatory duty to ask children how long they were kept in the police station or lock-up.

131 'Estimating the Number of Children Deprived of Liberty in the Administration of Justice', UNICEF, 2021, available at <https://data.unicef.org/resources/children-in-detention-report/>.

132 For instance, during the pandemic, see *In Re: Contagion of COVID 19 Virus in Children Protection Homes*, Supreme Court of India, 2020, 15 SCC 280.

133 *Convention on the Rights of the Child*, 2 September 1990, 1577 UNTS 3, New York City, 20 November 1989, art. 37(b); Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(xii), s. 3(xiii).

134 *General Comment No. 24 on Children's Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 86.

135 Nupur Thapliyal, 'Juvenile Justice Act: Delhi High Court Terminates All Petty Offences Cases against Children Where Inquiry Is Pending for Over 1 Year', *Live Law*, 2021, available at <https://www.livelaw.in/news-updates/delhi-high-court-terminates-long-pending-petty-offences-against-children-jj-act-182864>, accessed on 13 October, 2021.

Ensuring adequate, timely, accessible, and good quality legal aid (from the moment the child is apprehended) can be instrumental in reducing deprivation of liberty at the stage of police custody, as well as at the stage of institutionalisation. Legal aid should not only be provided at the JJBs but also in the OHs, and all stakeholders, including the CCIs and JJBs, must have a mandatory duty of ensuring children have access to legal aid.

b. Alternatives to institutionalisation

To avoid detaining children, international instruments, including the recent General Comment No. 24 (2019) to the UNCRC, emphasise that countries should explore alternatives such as diversion and restorative justice. Diversion ought to be offered at most stages of the criminal justice proceedings, especially for (but not limited to) petty offences. This would equip police officers, prosecutors, judges, and CCI staff to initiate processes such as restorative justice (conducted by trained facilitators) that involve the families and transfer children to their families.¹³⁶

As institutionalisation is only intended for the child's safety, children and their families should get relocation support (tangible and otherwise) instead of being institutionalised when appropriate.

c. Reducing the number of children deprived of liberty

While this report does not include voices of children accused of status offences,¹³⁷ it is plausible that a significant number of children are detained owing to status offences¹³⁸

136 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty – Note by the Secretary General', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2019, pp. 180, 312, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021; Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 3(v) (provides that the primary responsibility of care, nurture and protection of the child lies with the biological family or adoptive or foster parents. All decisions made for the child should involve the family of origin unless it is not in the best interest of the child to do so).

137 A status offense is a noncriminal act that is considered a law violation only because of a youth's status as a minor such as underage drinking, sexual activity etc.; Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty – Note by the Secretary General', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2019, p. 336, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

138 'Recommendations of the Regional Conference on Juvenile Justice, POCSO and Restorative Justice', *National Human Rights Commission*, 2018, India, available at https://nhrc.nic.in/sites/default/files/minutes_recommendation_JJ_POCSO_03082018.pdf, accessed on 14 September, 2021; Harish S. Tatiya et al., 'Consensual Sexual Intercourse among children Vs Current Legal Provisions under POCSO: A Scientific Review with Prospective Quantitative Analytical Study', *Medico Legal Update* p. 60, volume 20:3, 2020, pp. 60-65, available at [www.medicolegalupdate.org/scripts/MLU_July_2020_New_18.8.20_Final%20\(1\).pdf](http://www.medicolegalupdate.org/scripts/MLU_July_2020_New_18.8.20_Final%20(1).pdf), accessed on 14 September 2021; (Research in five states by the Centre for the Child and the Law (CCL) at the National Law School of India University, Bangalore, revealed that more than 20% of the judgments under the POCSO Act involved romantic relationships between the victims and the offenders).

and suffer the adverse impact of deprivation of liberty evident from the voices of children in this study. In consonance with the Global Study Recommendations, CRC Committee Recommendations, and to decrease the adverse impact of the justice system on younger children, it is recommended (1) to reduce status offences by lowering the age of consent for consensual sexual offences in line with recent judicial discussions as well as (2) reconsider other status offences.¹³⁹

To decrease the number of children subjected to deprivation of liberty and its adverse impacts, it is imperative to raise the MACR (see discussion in first section). In line with CRC Committee recommendations, it is also imperative to ensure that persons under 18 years are not tried as adults.¹⁴⁰ The existing transfer system must be reconsidered, as the trial and punishment of CICL as adults violate UNCRC provisions and the principles of best interest and reintegration objective of the JJ Act.¹⁴¹

In line with Global Study Recommendations, as well as principles of institutionalisation as of last resort and social reintegration in the JJ Act, early release and post-release programmes, including mentoring programmes, restorative reintegration processes, community service work, and group/family conferencing, must be allowed. Life skills and employment programmes must also be offered to children post-release.

d. Prevention

As recommended by the Global Study, research has shown that intensive family- and community-based programmes help address pathways and prevent children from coming into the justice system,¹⁴² particularly programmes that identify communities at risk

139 Many judgments have highlighted the concern with consensual sexual offences being criminalized. For instance, *Sabari @ Sabarinathan @ Sabarivasan v. The Director General of Police and ors*, Madras High Court, 2019, Cr. Appeal 490/ 2018; *Arhant J. Sunatkari v. The State of Maharashtra*, Bombay High Court, India, 2020, Cr. Appeal 332 / 2020; *General Comment No. 24 on Children's Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 18. *Atul Mishra v. State of Uttar Pradesh and ors*. 2022 LiveLaw (AB) 51.

140 'Concluding Observations of the Committee on the Rights of the Child: India', Committee on the Rights of the Child, U.N. Doc. CRC/C/15/Add.115, 2000, p. [*], available at <http://hrlibrary.umn.edu/crc/india2000.html>, accessed on 4 August 2021; *General Comment No. 24 on Children's Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 30.

141 Swagata Raha, 'Treatment of Children as Adults under India's Juvenile Justice (Care and Protection of Children) Act, 2015: A Retreat from International Human Rights Law', *The International Journal of Children's Rights* p. 757, volume 27:4, 2019, p. 775, available at <https://doi.org/10.1163/15718182-02704004>, accessed on 30 July 2021; Shruthi Ramakrishn and Swagata Raha, 'Children in Conflict with Law', Enakshi Ganguly (ed). 2019. *India's Children Continue to Challenge Our Conscience*. HAQ: Centre for Child Rights. New Delhi. India

142 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty – Note by the Secretary General', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2019, p. 520, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

(violence/substance abuse) and develop a targeted intervention. Creating/enhancing focus on such programmes is crucial in preventing children from entering the system. Better conceptualisation of the village- and block-level child protection committees (envisaged under the Integrated Child Protection Scheme (ICPS)) is needed, imbibing decentralised and customised mechanisms, prioritising civil society and community ownership, rather than a one-size-fits-all approach. In addition, smooth linkages with other functionaries would be an effective step towards ensuring support for children who may otherwise be at risk.¹⁴³

Minimising the Harm Caused by Deprivation of Liberty

Reducing the usage of deprivation of liberty requires sustained political will and multi-layered responses at the level of the legislature, police, judiciary, as well as other child protection stakeholders.¹⁴⁴ However, deprivation of liberty will remain a (/n unfortunate) reality for many children, and efforts to reduce it must necessarily be paralleled by efforts to minimise the harm caused by institutionalisation.

Based on the children's experiences discussed in the first section, it is crucial to ensure stronger implementation of existing provisions of the child-specific justice system, including ensuring that children at all stages of the juvenile justice process are not denied any rights and have access to all basic amenities, protection from violence, protection from discrimination and stigma and access to education, adequate information, access to their families, access to quality legal aid, adequate healthcare, access to mental healthcare, protection of religious rights, and access to effective procedural safeguards and complaints mechanisms.¹⁴⁵ Implementation of all child rights at all stages of the juvenile justice process following the JJ Act and Rules must be ensured.¹⁴⁶ Compliance must be checked against already existent child

143 Revised Integrated Child Protection Scheme (ICPS), Ministry of Women and Child Development, Available at <https://cdnbbsr.s3waas.gov.in/s34c144c47ecba6f8318128703ca9e2601/uploads/2020/10/2020102336.pdf>. The scheme was 'revised' in 2014; there is no recent scheme document available, detailing the structures envisaged under it, at the current scheme website linked from the website of the Ministry of Women and Child Development, at <http://wcd-icps.nic.in/public/about.aspx>.

144 Stuart A. Kinner et al., 'The Health of Children Deprived of Liberty: A Neglected Human Rights Issue', *Lancet Child & Adolescent Health* p. 6, volume 4:1, 2021, pp. 6–7, available at [https://doi.org/10.1016/s2352-4642\(19\)30386-4](https://doi.org/10.1016/s2352-4642(19)30386-4), accessed on 23 July 2021.

145 Manfred Nowak, 'The United Nations Global Study on Children Deprived of Liberty – Note by the Secretary General', *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2019, p. 339, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021.

146 Juvenile Justice (Care and Protection of Children) Act, 2015, India, s. 7(1); Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rules 6(5) & 8(3)(v).

rights monitoring toolkits for OHs, while also ensuring these toolkits are continuously evolved and consistently implemented¹⁴⁷

No child should be deprived of education and life skill training. Even if a child is in a CCI for a few days, they must be helped to realise this right. CCIs must have education/life skills modules for different periods of stay ready and start using these the day the child comes into the system.

It must be ensured that children can meet their parents regularly and for a significant amount of time in a space that is conducive for the meetings. JJBs and CCIs must record data on the frequency and duration of meetings.

Strip searches should be avoided and alternatives such as wand scanning should be used to maintain the dignity of the child.

While children in CCIs already face severe rights violations, the situation of those in adult prisons is worse. Strict compliance with the law in ensuring children are not sent to adult prisons is crucial, including resorting to age determination not as a routine matter but only after assessing the physical appearance and when such assessment throws doubt regarding the young person's age.¹⁴⁸

a. Police-related recommendations

At the time of apprehension and while in police custody, torture and extra-judicial confessions continue to be prevalent, along with the absence of effective legal aid. In line with CRC Committee recommendations, every child must have access to legal assistance during the stage of police custody and should be supported by a parent, legal guardian or other appropriate adults during questioning¹⁴⁹ and not be asked to sign any statement.¹⁵⁰ Legal aid must be ensured from the time of apprehension.

147 For instance, the one prepared by the *Centre for Child and the Law: National Law School of India University*, 'Toolkit to Monitor the Rights of Children Alleged to Be in Conflict with Law in Observation Homes', 2018, pp. 41, 59, 61, available at <https://ccl.nls.ac.in/wp-content/uploads/2017/01/Toolkit-to-monitor-the-rights-of-children-alleged-to-be-in-conflict-with-law-in-OH-1.pdf>, accessed on September 14, 2021.

148 *Sheela Barse & Ors. v. Union of India & Ors.*, Supreme Court of India, 1986, 3 SCC 632; Karan Tripathi, 'The Quint Impact: DCPCR Pulls Up Tihar on Juveniles in Adult Jails', *The Quint*, New Delhi, 25 March 2021, available at <https://www.thequint.com/news/law/dcpcr-pulls-up-tihar-on-juveniles-in-adult-jails-quint-impact#read-more>, accessed on 14 September 2021. Section 94, JJ Act, 2015; *Ram Vijay Singh v. State of Uttar Pradesh*, Supreme Court of India, 2021 Criminal Appeal 175 of 2021.

149 *General Comment No. 24 on Children's Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 60; Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 8(3)(v).

150 Juvenile Justice (Care and Protection of Children) Model Rules, 2016, rule 8(3)(vi).

Further, only specifically trained police (as discussed in the first section) should apprehend and interview children.¹⁵¹ In the long term, a specific cadre of the police that exclusively works with children would be helpful.¹⁵²

Police Complaints Authorities, as directed by the Supreme Court, need to be created/operationalised/enhanced by state governments to ensure a complaint mechanism for police violence inflicted on children.¹⁵³

Increased training must be provided for police and other staff working with children to ensure that they are trained in the legal provisions of the JJ Act and child rights provisions and tools. Along with training, all staff must be compensated adequately and in a timely manner.

b. Increase budgetary allocation

The existing JJ Fund (under the JJ Act) has been called “a bit of an embarrassment” by the Supreme Court and requires financial resources to be made effective.¹⁵⁴

State-wise funds released under the Child Protection Services Scheme for CCIs (inter alia) have decreased to almost one-third between 2018–19 and 2021–22.¹⁵⁵ Contrary to the recent budget cuts to the ICPS in the Union Budget of 2021–22, as well as merging it under Mission Vatsalya in 2022–23, and resulting in a further reduction of the amount allocated, increased funding is crucial for ensuring the proper functioning of CCIs, including OHs.¹⁵⁶

c. Conclusions

This study, based on the model of the Global Study, interwove literature and voices of children deprived of liberty to showcase the reality of such deprivation for children

151 Also see, Guidelines for Establishment of Child Friendly Police Stations issued by the NCPCR, <https://www.childlineindia.org/uploads/files/knowledge-center/Guidelines-for-Establishment-of-Child-Friendly-Police-Stations.pdf>.

152 See for initial steps in this direction, Juvenile Justice (Care and Protection of Children) Rules, Gujarat, 2019, Rule 95.

153 As of date while not all states have PCAs, those which do have also been criticized as PCA findings are not bindings on state governments; *Prakash Singh & Ors v. Union of India*, Supreme Court of India, 2006, 8 SCC 1; Staff Reporter, ‘Karnataka State Police Complaints Authority Lacks Bite’, *The Hindu*, Bengaluru, 9 February 2019, available at <https://www.thehindu.com/news/national/karnataka/karnataka-state-police-complaints-authority-lacks-bite/article26226301.ece>, accessed on 14 September 2021.

154 *Sampurna Behrui v. Union Of India*, Supreme Court of India, 2018, 4 SCC 433.

155 ‘Status of Child Care Institutes’, *Ministry of Women and Child Development*, Available at <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1794729>.

156 ‘Budget for Children 2021-22: Cast in Shadows’, *HAQ: Centre for Child Rights*, 2021, pp. 11–12, available at <https://www.haqcrc.org/wp-content/uploads/2021/02/budget-for-children-2021-22.pdf>, accessed on 14 September 2021. ‘Pushed and Juggled Beyond the Margins’, *HAQ: Centre for Child Rights*, 2022.

in India. It aimed to understand each of the 12 children's experience of deprivation of liberty and the research design allowed for an in-depth understanding of their lived reality. While not all children across the country may have the exact same experiences, the voices of these 12 children, triangulated by the literature reviewed, highlight the need for acknowledging the concerns regarding the use and conditions of deprivation of liberty in India. The JJ Act commits the Indian State to ensure that "all needs of children are met and that their basic human rights are fully protected"¹⁵⁷ in accordance with the Constitution of India and international obligations. It is incumbent upon the State and the child protection system to listen to the voices of these children and realise the policy reform measures suggested to truly implement the aims of domestic law and international instruments.

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Counsel to Secure Justice ('CSJ') is an Indian non-profit that works on access to justice for children and enhancement of child protection systems, integrating a restorative approach. CSJ's work spans legal and psychosocial support to child sexual abuse survivors, mental health, restorative and access to justice support for children in conflict with law, and capacity building of institutional and grassroots child protection stakeholders. During the pandemic, CSJ also supported children and women in violent, abusive, and other difficult situations, through direct interventions like helplines as well as training of child protection agencies. The research was conducted and drafted by Nimisha Srivastava, Urvashi Tilak, and Arti Mohan.

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157 Juvenile Justice (Care and Protection of Children) Act, 2015, India, Preamble.

MALDIVES

EXECUTIVE SUMMARY

This report is commissioned by the Kathmandu School of Law Research Project, Analysis of the Deprivation of the Liberty of Children in the Administration of Justice in South Asia. It examines the practices in deprivation of the liberty of the children in Maldives. The research was carried out as a desk review of the relevant laws and policies in regard to children in conflict with the law and other pertinent legislations relating to juvenile justice and protection of the rights of the children who are institutionalized by the state. The mode of data collection was confined to the analysis of these legal documents. A few unpublished reports on the current challenges in the implementation of juvenile justice were also analyzed in addition to reports by other relevant organizations. Hence, the study involved a comparison of the previous practices in the administration of justice and the newly enacted legal frameworks.

The Juvenile Justice Act (18/2019) and the Child Rights Protection Act (19/2019) are two pertinent legislations that lay down elaborate procedures and safeguards for the deprivation of liberty of children. These legislations show a strong commitment to the international legal framework and provide for the use of detention only as a measure of last resort in addition to other safeguards. An institutional setup at various levels is further incorporated by the JJ Act and CRP Act. All these provisions safeguard the rights of the children in conflict with the law and children placed in state-run institutions. This study highlights the numerous challenges that may be encountered in the implementation of the JJ Act and CRP Act and also provides a set of recommendations to overcome them.

JUVENILE JUSTICE SYSTEM IN MALDIVES AT A GLANCE

Causes and Patterns of Children in Conflict with Law

This section will explore the historical development of Juvenile Justice in Maldives prior to the new legal framework (including the *JJ Act*). The country witnessed a surge in the number of young people involved in many crimes including serious crimes like

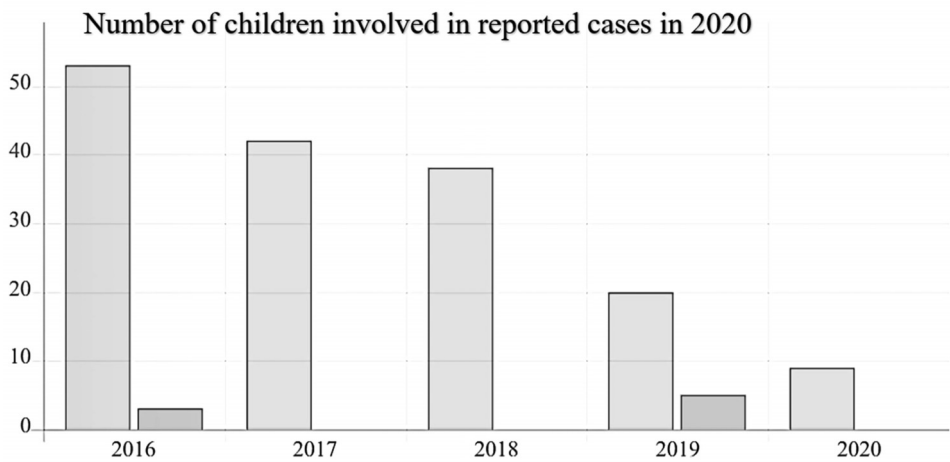


Table 1.1. Source: Maldives Juvenile Court (2022).

murder, gang violence and drug trafficking.¹ The cause of the children in conflict with the law (CCL) is attributed to the peculiar geographical and socio-economic conditions of the country.² The majority of the people are forced to migrate to the congested capital city of Male, where people are unable to find economic stability and are forced to stay away from their families. Hence the social fabric represents broken families and more often children being brought up by single parents, step-parents, or grandparents, which is accompanied by feelings of actual or perceived neglect, lack of adequate housing and high cost of living in Male.³ These factors have contributed to deviant behavior among children.⁴ Children who come from such backgrounds often face emotional, sexual and other forms of abuse including neglect, and thus find themselves easy prey for recruitment by gangs and circumstantial pressures to commit crimes.⁴ Most of the studies concur in their findings with these causes of children coming into conflict with the law in Maldives.⁵

A large population of the children who commit offences (as well as those who are at risk of it) are generally male; there are, less (yet still very significant) number of females

1 Zaeema Rasheed Aboobakuru, 'A Maldivian Perspective on Juvenile Justice', *United Nations Asia and Far East Institute* 2016, p. 201, available at https://www.unafei.or.jp/publications/pdf/RS_No102/No102_16_IP_Maldives.pdf, accessed on 20 July 2021.

2 Ibid.

3 Ibid.

4 Afra Usman Adam, 'Court Procedures in the Administration of Juvenile Justice—A Desk Review', *Department of Judicial Administration*, 2021, p.10.

5 Ibid.

as well as indicated in Tables 1.1 and 1.2.⁶ Table 1.3 shows that the general ages of children involved in committing a crime are between 16 and 18, though 2018 showed the highest number of 15-year-old juvenile offenders. Most of those who dropped out of school, dropped out between grades 8 to 10, during compulsory secondary education. The ranges in which juvenile offenders come from conventional and divorced families are quite similar and the differences tend to not be very significant. The media reports of the *DJJ* show that in 2018 and 2020 the statistics showed that the highest number of CCL was from conventional families. While in 2019 and 2021, the highest numbers were from divorced families. The main offences committed are largely related to drugs and gang violence (it is described as “fistfights” (*jehun/maaraamaaree*) in the reports. In some cases, it involves violence where sharp weapons are also used. In terms of the regions, the larger number of arrests and reported cases are from the atolls. There is a significant difference between the number of cases reported in Male’ and the number of cases reported in other regions (atolls), the latter being higher.

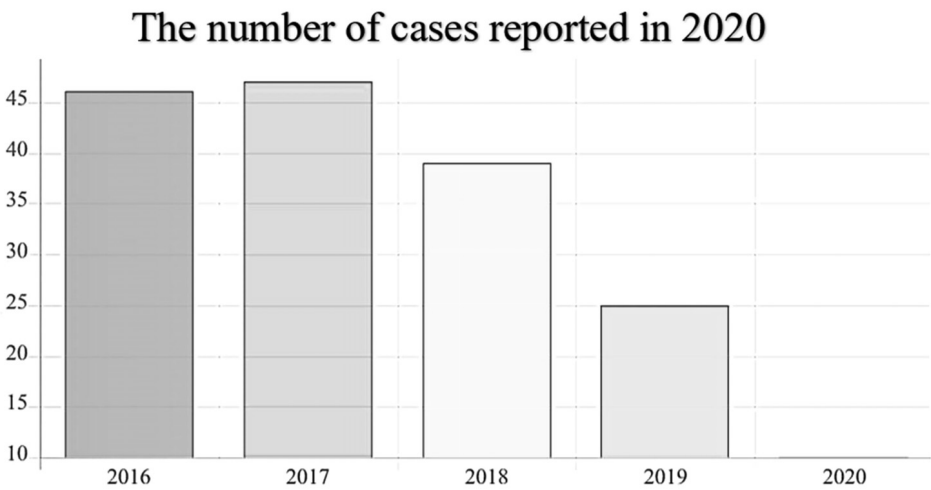


Table 1.2. Number of cases reported in 2020. Each bar represents the number of cases that were reported to the Juvenile Court in that allocated year. In comparison to the previous years, the number of cases reported in 2020 is quite small. Hence, the bar for that year is not visible.

6 Media Reports of the Department of Juvenile Justice, 2018, 2019, 2020 and 2021, Available at <https://www.gov.mv/en/search?organisation=department-of-juvenile-justice>, accessed on 10 February 2022.

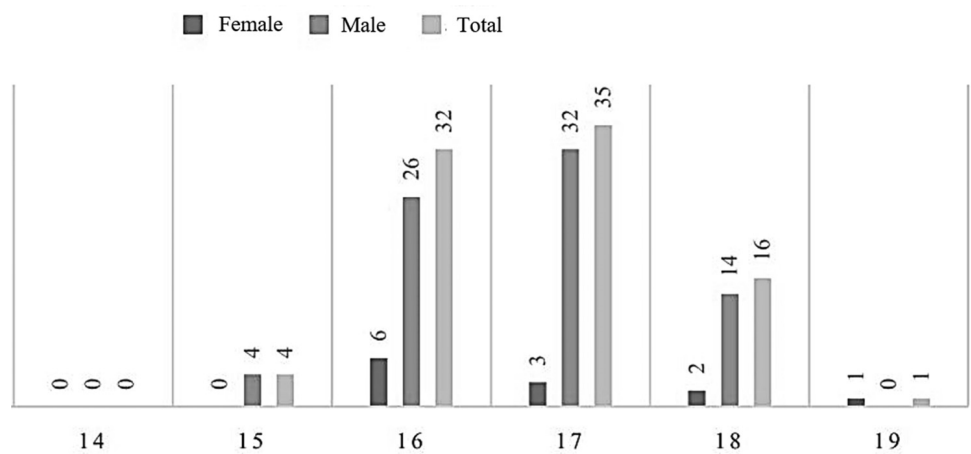


Table 1.3. Cases reported to the Department of Juvenile Justice from 1 January 2021 to 30 June 2021 (Agewise).

Source: Department of Juvenile Justice Media Report 2021.

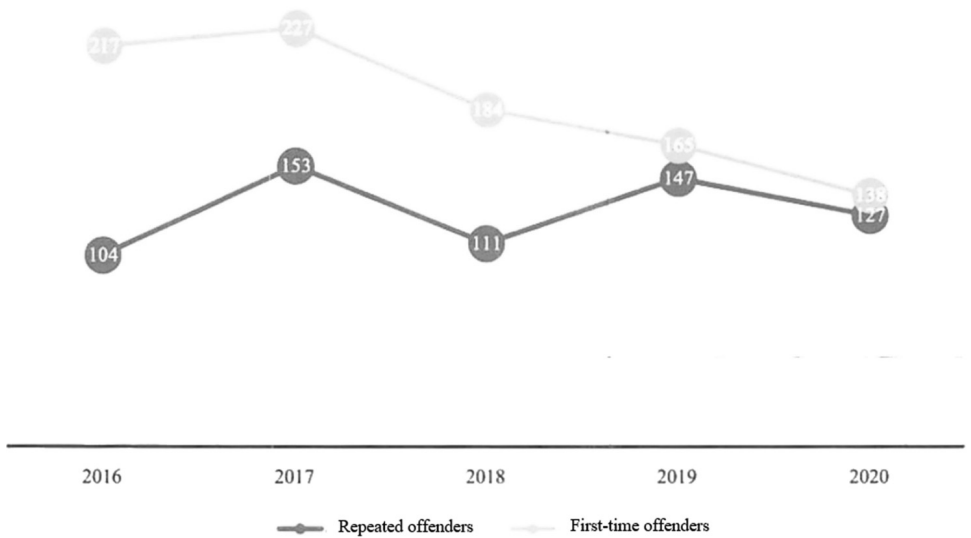


Table 1.4. Cases reported to the Department of Juvenile Justice from 2016 to 2020.

Source: Department of Juvenile Justice Media Report 2020.

The section below will provide an insight into the legislative and the institutional setup for the deprivation of the liberty of children in Maldives.

Legislative, Institutional and Adjudicatory Frameworks

a. Legislations

Until the recent past, a single comprehensive legislation for the deprivation of the liberty of the CCL was largely absent. However, a number of legislations provided ample scope for the deprivation of the liberty of CCL.

Regulation on Conducting Trials, Investigation and Fair Sentencing of Juvenile Offences has been widely used in all matters of CCL (2006)/XX/MJ. s2(a).

Prohibition of Gang Violence Act (18/2010) – It allows apprehending CCL who are found liable for gang-related activities.

Drugs Act (17/2011) – Minors can be detained under this Act for their involvement in drug-related offenses. However, the Drugs Act also stipulates foregoing the detention in lieu of an agreement by the offender to undertake a successful rehabilitation program. This agreement can be suspended and the imprisonment sentence can be restored if the offender breaches the agreement.⁷

Maldives Penal Code (6/2014) – It provides a defense of immaturity for children under the age of 15 years, and an excuse for any criminal offense committed by the minor.⁸ However, this excludes the *Hadd* offenses,⁹ where such defense is not applicable.

Criminal Procedure Code (12/2016) – It lays down the procedure of arrest and detention of persons violating the law including minors.¹⁰

Institutional and Adjudicatory Mechanisms

The following institutional and adjudicatory frameworks were in practice to deprive the liberty of the CCL.

⁷ Drug Act 2011(17/2011), Also see supra n 1, 202.

⁸ Section 53, Maldives Penal Code.

⁹ Islamic criminal law classifies offenses as *Hadd* or *Ta'zir* depending on whether it is violation of the rights of God (Allah) or Individual. Depending on the nature of the violated rights, the concerned procedure will be followed. If the Rights of Allah are violated, the procedure for *Hudud* is followed. While there is some disagreement on the exact definition of *Hadd* offenses, most jurists define *Hadd* as penalties that are described in the Quran. See Imran Ahnsan Nyazee, *General Principles of Criminal Law* (Shariah Academy International Islamic University, Islamabad, 2007), pp 63–64.

¹⁰ Criminal Procedure Code (12/2016).

a. Juvenile Court

Given the urgent need to tackle the rapid number of cases of CCL a need for a specialized system for the adjudication of the crimes committed by minors was considered important. Maldives is a party to the UN *Convention on the Rights of the Child (CRC)*, 1989.¹¹ In order to give effect to the international obligation, the protection of the Child Rights Act 1991 (9/91) was adopted.¹² Under Section 9 of the said Act, Juvenile Court was established on 1 August 1997 which was named as the *Court of Children's Affairs* to try offenses committed by minors.¹³ This was in response to the increasing offenses by minors. With the enactment of the 15 November Judicature Act 2010, the court was renamed *The Juvenile Court*.¹⁴

The Juvenile Court was established with the purpose of providing equal justice and paving a way for the rehabilitation and reintegration of juvenile offenders in society.¹⁵ Further, the establishment of the Juvenile Court was considered to be a must for a speedy, efficacious and just trial of CCL.¹⁶ The Juvenile Court had jurisdiction over any offences committed by minors, orders pertaining to the investigation and detention of the minors or any other matter expressly stated by law to be dealt with by the Juvenile Court.¹⁷ In other words, the Juvenile Court had exclusive jurisdiction over children under the age of 18. The power of the Juvenile Court to have jurisdiction over these matters is derived from Schedule 4 of the Judicature Act, 2010.¹⁸ The *Maldives Penal Code* also provides for the exclusive jurisdiction of the Juvenile Court for crimes committed by children.¹⁹

b. Juvenile Justice Unit

A *Juvenile Justice Unit (JJU)* was established under the Ministry of Home Affairs and was responsible for making provisions for the rehabilitation and reintegration of CCL into society.²⁰ Officers from the department are usually assigned cases and have to be present at all the stages with the children.²¹

11 Maldives ratified the treaty on 11 February 1991, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=106&Lang=EN, Accessed on 10 August 2021.

12 Available at <https://juvenilecourt.gov.mv/upload/document/8.pdf>, accessed on 1 August 2021.

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Section 53, *Maldives Penal Code (6/2014)*: It provides for the exclusive jurisdiction of the Juvenile Court for crimes committed by children under the age of 18 years. Also see Supra n.1.

20 Supra (n 1) p. 206.

21 Ibid.

c. Procedure for Arrest and Detention

Article 27 of *CRC (1989)* obliges State Parties to consider detention of the child as a measure of last resort and for a minimum period. In case of a child committing an offence, the Maldives Police Service would conduct the questioning and inform the parents of the child within 4 hours of arrest.²² Police have to make a referral to the *JJU* whereby an official would be assigned, who would be present in addition to the parents at all times. The law also prescribes that the investigation be completed within a period of 15 days.²³ Under the previous practice, the police were required to produce the arrested children before a magistrate within 24 hours of arrest. The magistrate then decided on the issue of remand, bail or release. The new criminal procedure code (12/2016) provides for differences in arrest and detention procedures for minors. It lays down the procedure for informing the minor's parents about the reasons for arrest and questioning, to be done only by the police and in the presence of their parents/guardians.²⁴ A referral to the Prosecutor General's office is made by the police, and the prosecution has to charge the offenders within 30 days.

Until recently the country did not have a separate detention facility for minors. Nevertheless, the Maldives has maintained the policy of non-segregation of the adults from juvenile offenders. The juvenile offenders are detained in the same adult facility but in separate locations. In addition, care is taken to keep the male and female juvenile offenders segregated in different detention facilities.²⁵ However, as these are detention facilities for adult offenders as well an absolute lack of interaction cannot be entirely prevented as they continue to be in proximity. The lack of a separate detention facility for children posed a challenge in abiding by the principle of detention as a matter of last resort. In the absence of this being clearly stipulated in the law, this philosophy was already guiding the juvenile justice system in Maldives. Consequently, an arrest was made only as a measure of last resort and the number of children in custody is less. There are three children in detention in Asseyri prison out of which two are serving sentences and one is in a pre-trial detention. There are four children in detention in Maafushi Prison. In the 2021 report published by the Human Rights Commission, the children's detention center located within the K. Himmafushi Asseyri prison, which was assigned to detain children in a way that obstructs their freedom, was considered a violation of their rights of the children. A notice was sent to the Maldives Correctional

22 Ibid. n 1.

23 Supra (n 1) p. 206.

24 Criminal Procedure Code (12/2016); Other legislations include Domestic Violence Act (3/2012) and Special Provisions Act to Deal with Child Sex Abuse Offenders (12/2009).

25 *Report of the Technical Assistance Needs Assessment in the Area of Juvenile Justice*, Republic of Maldives, May to July 2020, p. 66.

Services on 14 October 2021 by the Commission requesting the detained children to be transferred to a safe and protected place.²⁶

Recently the first Juvenile Detention center has been established in the Asseyri Prison by the Maldives Correctional Services.²⁷ This detention center is in line with international guidelines. It consists of eight cells with a maximum of two children to be accommodated in each cell. This facility will have specially trained officers who have been provided with training on the minimum standards of the treatment of children in detention. Sixteen officers have been trained out of which seven will be actively on duty. This center intends to provide children in this facility age-appropriate educational services, psychological and Islamic counselling and a number of other life skills.²⁸ Nevertheless, a number of challenges in fully keeping up with the international commitments arise due to the lack of alternative measures to pre-trial detention.²⁹ A matter of equal concern has been the lack of effective rehabilitation programs. In collaboration with the UNICEF and JJU, the Maldives Technical Educational Vocational and Training Authority conducted vocational training for 43 detained CCL in 2017.³⁰ However, such a program is not sufficient by any means to prevent recidivism though they include training on life skills.

d. Alternative Detention Practices

The office of the Prosecutor General since 2018 has actively taken measures to prevent the arrest of the children alleged to be in conflict with the law. These measures are intended to provide an opportunity to rehabilitate the young offenders instead of prosecution.³¹ The prosecution takes all the efforts to minimize the trial and incarceration of the juveniles. In many cases involving minor offenses, the prosecution enters into a non-prosecution agreement as long as the offender does not violate the terms of that order or gets involved in a serious offence. Many times, in cases of involvement of children in minor offences, a child is let off with formal and informal warnings.³² Case conferences have been in place to determine if at all case proceedings should be commenced. These conferences involve multiple stakeholders like the juvenile justice

26 *Human Rights Report 2021*, Human Rights Commission of the Maldives, 2021, Male', p.17.

27 Aminath Yusreen Ahmed, Juvenile Detention Centre Inaugurated at Asseyri Prison, *The Prisons Story*, Maldives Correctional Service, 30 January 2022, available at [https://en.prisonstory.mv/3721#:~:text=Maldives%20Correctional%20Service%20\(MCS\)%20has,today%20at%20the%20Asseyri%20Prison](https://en.prisonstory.mv/3721#:~:text=Maldives%20Correctional%20Service%20(MCS)%20has,today%20at%20the%20Asseyri%20Prison), accessed on 5 March 2022.

28 Ibid.

29 *Report of the Technical Assistance Needs Assessment in the Area of Juvenile Justice*, Republic of Maldives, May to July 2020, p. 46.

30 *Unicef Annual Report 2017*, UNICEF Maldives, 2017, p. 3, available at <https://www.unicef.org/maldives/media/331/file/UNICEF%20Maldives%20Office%20Annual%20Report:%202017.pdf>, accessed on 10 August 2021.

31 Supra (n 24) p. 51.

32 Ibid.

officers, including the JJU and the family members. A policy of diversion is implicit at all levels of contact of the minor with the law.³³

e. Trial and Sentencing

The children are vested under the Constitution of the Maldives with a right to a speedy trial. The courts have self-initiated a speedy case management schedule whereby initial proceeding should be commenced within three working days of the receipt of the documents by the court. There is also a self-worked compliance to complete the said proceedings within six months which can be extended only by the permission of the chief judge of the Juvenile Court. The criminal procedure code further provides a number of provisions for a speedy trial.³⁴

The courts are mandated to conduct closed hearings.³⁵ The hearing is to be conducted in the presence of officers assigned from the JJU, the parent or the guardian, and other relevant agencies wherever applicable.³⁶

During the hearing, the court proceeds with the awareness of the rights of the child and due weightage is given to the right to be heard.³⁷ The court also encourages and ensures such rights are made available to the children and provides them with special assistance like an interpreter, if required.³⁸ At all stages, the JJU is required to make a social enquiry report.³⁹ This report is essential for conducting risk assessments to arrive at a decision of prosecution or non-prosecution.⁴⁰ The social enquiry reports and the case files along with risk assessments are sent to the prosecution for their consideration to arrive at a decision of prosecution or non-prosecution.⁴¹ There may be flaws and errors in data gathered by the police while investigation and which can affect the social inquiry report required for risk assessment.⁴² In terms of sentencing, CCL is provided two-thirds of the punishment than adults.

Some Reflections from the Past

From the above discussion, it follows that juvenile offenses are rampant in the Maldives. There have been efforts to establish a Juvenile Justice system which is fully compliant

33 Ibid.

34 Supra (n 1), p. 206.

35 Ibid., p. 207.

36 Ibid.

37 Supra (n 1), p. 207.

38 Ibid.

39 Ibid.

40 Ibid.

41 Supra (n 24), p. 57.

42 Ibid.

with the international norms and standards. Maldives has attempted its best to practice international norms and standards in terms of depriving children of their liberty. The country lacked a special comprehensive law on Juvenile Justice, but nevertheless practiced the principle of detention of last resort and actively practiced diversionary measures and consequently less children were placed in detention. However, these efforts were not sufficient to address all the issues of CCL. Thus, a need was felt to revamp the existing system.

One of the major setbacks faced by this system notwithstanding the progressive approach adopted is the lack of alternative sentencing as opposed to detention.⁴³ Another persisting challenge is the lack of separate detention facilities and the less successful rehabilitation program.⁴⁴ It is recommended to enact the Juvenile Justice Bill without any delay in order to establish an effective rehabilitation program and eliminate administrative detention of children.⁴⁵

Challenges in the Juvenile Justice Sector include a lack of training for Juvenile Justice professionals.⁴⁶ They lacked sensitivity and there was a shortage of the number of people working in the Juvenile Justice Sector.⁴⁷

Under the previous system, a social enquiry report along with a case file and a risk assessment was sent to the office of the Prosecutor General for appropriate diversionary measures.⁴⁸ The social enquiry report contained the child's (CCL) personal, social, psychological and crime-related information. The production of such a report is not required by law; nevertheless, this is practiced to arrive at a reasoned course of action to be adopted for CCL.⁴⁹ The Juvenile Court would request the production of such a report before sentencing.⁵⁰

While the social enquiry report is useful to identify appropriate measures to be taken in respect of a CCL, there are some flaws in the format of the report.⁵¹ Among such flaws is the lack of proper data to be included or the report being quite technical.⁵² These errors are primarily attributed to the lack of proper training among juvenile justice professionals regarding the use and the importance of the use of such

43 'HRCM Submission to the Universal Periodic Review of Maldives, May 2020 (36th Session), October 2019', *Human Rights Commission of the Maldives*, 2019, Maldives, p. 4.

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid.

48 Supra (n 24), p. 57.

49 Ibid.

50 Ibid.

51 Ibid.

52 Ibid.

information.⁵³ Furthermore, requesting the production of such reports is not uniformly practiced especially by the magistrate courts (in the Islands) thereby resulting in a lack of consistency in the sentencing of CCL.⁵⁴

TRANSFORMING THE JUVENILE JUSTICE SYSTEM: PRESENT CONTEXT

The year 2019 was significant for the strengthening of the child rights legal and normative framework in the country. Two remarkable legislations, *Child Rights Protection Act (19/2019) CRP Act*, and *Juvenile Justice Act (18/2019) JJ Act*, received Presidential assent. These legislations were much needed for upholding the constitutional and other special legal protection of the minors in addition to fulfilling the international obligations. The *JJ Act* legislation recognizes the need and importance of a separate juvenile justice system as fulfilling its constitutional mandate under Article 35(a) and the role of prevention of reoffending and rehabilitation of CCL. The *JJ Act* brought a number of legal and procedural changes in the administration of Juvenile Justice in the country. Following the enactment of the *JJ Act*, many previous legislations have been repealed⁵⁵ and the number of applicable laws is as follows.

- *Child Rights Protection Act (19/2019) Juvenile Justice Act (18/2019)*
- *Criminal Procedure Code (12/2016)*
- *Penal Code (6/2014) with exception of repealed Sections 44(a) and 44(e)(1)*
- *Drug Act (17/2011)*
- *Prohibition of Gang Violence Act (18/2010)*⁴⁶, with exception of repealed section 19(b)
- *Domestic Violence Act (3/2012)*
- *Special Provisions Act to Deal with Child Sex Abuse Offenders (12/2009)*.⁵⁶

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Upon enactment of this Act, the following provisions of the stated Acts and Regulations will be deemed as repealed. Sections 8, 9, 12, 29 (Protection of the Rights of the Child, 9/91), Section 8, 19, 38 (Prevention of Acts Prejudicial to Common Social Norms 11/2010), Section 19 (Prohibition of Gang Violence Act, 18/2010) and Regulation “Juvenile Justice Regulation” that came into effect on 20 January 2019.

⁵⁶ Supra (n 24), p. 26.

Highlights of the JJ Act

a. Definition of the Child

A significant contribution of the above-mentioned twin legislations is the uniformity in the definition of a child. The *CRP Act* adopts the definition of the CRC thus defining a child as any person who is under the age of 18 years. Thus, the definition of the child is in conformity with the international obligations as opposed to the previous Act (*Child Rights Act, 9/91*) which defined a child as anyone below the age of 16.⁵⁷

b. Age of Criminal Responsibility

The *JJ Act* prescribes the age of criminal responsibility as 15 years.

c. Principles of Juvenile Justice

The Act lays emphasis on the following principles of Juvenile Justice: *principle of non-discrimination, prioritizing the best interest of the Child, choosing alternatives to prosecution, protecting the rights of the child, while arrest and detention are to be used as a measure of last resort.*

The Act provides for a number of provisions for the effective implementation of juvenile justice in the country. However, this study has focused on what appears to be the most significant feature of the *JJ Act*, which has the utmost bearing on the deprivation of the liberty of children.

d. Building Strong and Enduring Institutional Framework

The Act provides for establishing institutions for the administration of the JJ system in the country and aims at establishing *Juvenile Courts, Department of Juvenile Justice*, and *Establishing Juvenile Units* at all agencies including police and prosecution. Some of the significant contributions have been discussed in detail below.

Creation of twin institutions of juvenile court and department of juvenile justice:

The *JJ Act* lays emphasis on building robust institutions for governing CCL. Hence the Act envisaged the creation of Juvenile Court and the Department of Juvenile Justice and a number of departments within the already established institutions.

57 Law on the Protection of the Rights of the Children, 9/91 defined child under the age of 16 years, whereas there were variations in other legislations as well.

Juvenile Court:

The Act established a *Juvenile Court* to be based in the capital city of Male', with the direction that juvenile court divisions would be established in each Atoll.⁵⁸ However, the Amendment Act (33/2020),⁵⁹ provides that no division of Juvenile Court will be established in the Islands.⁶⁰ It provides that where the need arises, officers from the Juvenile Court in Male' will travel to the Islands and in other cases the trial will be conducted virtually.⁶¹ This will prove to be an obstacle for the overall administration of juvenile justice in the country. This is also a problem as the defense counsels are mostly based in Male'.

The Juvenile Court possesses exclusive jurisdiction for the crimes committed by children. One of the exceptions is in the case of drug-related offenses involving the child. Such cases will be dealt by the Drug Court.⁶² Further, the High Court and the Supreme Court are required to conduct specialized proceedings for juvenile offences guided by the principles of juvenile justice.⁶³

The *Department of Juvenile Justice (DJJ)* replaces the former *Juvenile Justice Unit (JJU)* under the ministry of home affairs.⁶⁴ All the resources (financial, human and technical) of the former *JJU* are automatically transferred to the *DJJ*.⁶⁵ The *DJJ* is mandated to perform a number of functions.

It is responsible for providing and organizing the necessary rehabilitation programs for the reintegration of the children in society and has to collaborate with necessary institutions to further this end. In addition, the *DJJ* has to ensure one person is assigned to each case and represents the child at all times to protect his or her best interests. The *DJJ* is expected to perform the following roles.

“Appear before the Court to protect the interests of children summoned to court during investigation stage and of children who are being criminally charged;

- Conduct awareness programs in the area of prevention of child involvement in crime;*
- Conduct diversion programs and community conferencing;*

58 Section 21 JJ Act (18/19).

59 Amendment to JJ Act (33/2020).

60 Ibid.

61 Ibid.

62 Section 21 (b) JJ Act (18/2019).

63 Section 21(f) JJ Act (18/2019).

64 Section 17(a) JJ Act (18/2019).

65 Section 17(b) JJ Act (18/2019).

- *Organize and conduct rehabilitative programs for children in conflict with the law, including for those who need to be removed from the community;*
- *Monitor the conditions of children deprived of liberty;*
- *Providing psycho-social and social support to the children;*
- *Train persons interacting with children within the justice system;*
- *Conduct studies to identify reasons for children committing offenses;*
- *Maintain statistics and a database on children in conflict with the law;*
- *Conduct awareness programs.*⁶⁶

The Act provides for establishing detention centers and long-term secure facilities for children who need to be isolated from society. They have to be established at institutions and Atolls.⁶⁷

Diversion System

The essence of the *JJ Act* lies in its clear and unambiguous emphasis on establishing a diversion system. To this end, the Act requires, firstly, a risk assessment to be conducted upon the first contact of the child with the enforcement agencies to gauge the risk of reoffending and to determine whether to proceed with the prosecution or opt for diversion measures.⁶⁸ Where the risk of recidivism is considered less, the child allegedly in conflict with the law can be released with a verbal warning, and with or without a formal caution.⁶⁹

Diversion had been previously practiced as well. Diversion is practiced with the objective of protecting the child from the negative impact of criminal prosecution and providing an opportunity for the reintegration of the child back into the society.⁷⁰ Consequently, the Act strongly emphasizes diversion at all levels of offending and at all stages of contact of the CCL with the relevant enforcement institutions and agencies.⁷¹

A number of diversion actions including written or verbal apology, supervision and monitoring orders, financial compensation for the damage and much more are listed in the *JJ Act*.⁷²

66 Section 18 JJ Act (18/2019).

67 Section 79 JJ Act (18/2019); also see Supra (n 22), p.73.

68 Section 31 JJ Act (18/19).

69 Section 33(a) JJ Act (18/19).

70 Section 34 JJ Act (18/19).

71 Section 35 JJ Act (18/19).

72 Section 36 JJ Act (18/19).

The Act calls for pre-trial diversion during investigation and prosecution. Police, a relevant institution, authorized to investigate criminal cases against the child, and the prosecutor general have been vested with the discretion to opt for a pre-trial diversion.⁷³

The *JJ Act* also sets out conditions to be satisfied to qualify for the diversion program including obtaining the consent of the child and the guardian for such a procedure. The diversion action is subject to termination in case of a breach in the terms of the diversion action.⁷⁴

Rights on Apprehension, Detention Search and Interrogation

The *JJ Act* provides for the rights of children relating to their detention or apprehension or search and interrogation.

a. Detention or Apprehension

Where a case is considered unsuitable for diversion and investigation is to be commenced, the police officers are required to conduct it in civies. The communication with the child shall be made at all times in a manner that is easily comprehensible to the child. The apprehension or detention of the child should be carried out only as a measure of last resort and for the shortest possible time. The cause and the place of detention have to be informed to the child and his parents or guardians. In no case can any kind of force be used against the child except unless it is required to prevent any kind of harm to the child himself/herself or to any other person. The use of any form of physical force including cuffs, knives or guns, or torture devices is strictly prohibited.⁷⁵ Any child to be apprehended or detained is vested by law to have a right to inform the parents and guardians of his/her arrest and has a right to be questioned only in their presence.⁷⁶ Where parents and guardians cannot be reached out to within 2 hours of arrest, the Department of Juvenile Justice has to be contacted and informed about the same and they have to assign an officer to meet the child. This procedure should be followed where the parent/guardian is unwilling to come or there is evidence that the parent/ guardian is also involved in the crime committed by the minor.⁷⁷

73 Section 37 JJ Act (18/19).

74 Section 41 JJ Act (18/19).

75 Section 48 JJ Act (18/19).

76 Section 49(a) JJ Act (18/19).

77 Section 49(b) JJ Act (18/19).

b. Interrogation and Search

The Act further provides for effective legal assistance to the child in conflict with the law from the time of apprehension or arrest. In the event that the child cannot afford legal assistance, he/she has to be provided with such legal representation.⁷⁸

The child should not be detained in custody for questioning in case of alleged involvement in an offence of a serious nature except where there is an apprehension of the child absconding or tampering of evidence. Where it is necessary to make a search of the body (sexual organs), it should be carried out pursuant to a court order and conducted by a qualified medical professional and in the presence of the child's parents or guardians.⁷⁹ The search has to be conducted in a manner whereby the child's dignity is not compromised.

Such procedures ensure that the CCL is not subjected to any physical or mental harassment which may prove detrimental to the overall well-being of the child.

c. Pre-trial Detention

The *JJ Act* clearly provides that the detention of the children should be carried out only as a measure of last resort. The pre-trial detention must only be made pursuant to court orders and only if compelling reasons are present.⁸⁰ The judge should consider pre-trial detention only where the child has allegedly committed a serious offence or in the light of the report of the *DJJ*.⁸¹ Factors like apprehension that the child may conceal evidence or abscond, or harm, absent himself/herself for trial, danger to the public or child, or risk of the child committing an offence⁸² are to be given due weightage while determining if a pre-trial detention is necessary.⁸³

The Act makes it mandatory to order pre-trial detention only where alternative measures are not available. Such detention should also be for the shortest time. It is mandatory for the courts to inquire from the Maldives Police Service if the conditions of detention are still operative. This review is to be done by the judge every 15 days even where no application to review is made.⁸⁴ The judge has the discretion to order conditional release of the CCL.⁸⁵

78 Article 50 *JJ Act* (18/19).

79 Section 56(a) *JJ Act* (18/19).

80 Section 59(a) *JJ Act* (18/19).

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

84 Section 59(e) *JJ Act* (18/19).

85 Section 60 *JJ Act* (18/19).

d. Trained Professionals

The Act includes a number of provisions for trained professionals at all institutions and departments where a contact will be made between the child in conflict with the law and justice professionals. Section 51(f) provides that the child should be questioned only by specially trained officers.⁸⁶

A special unit with probation officers and correctional officers dealing with children is to be established within Maldives Correctional Services as per Section 25 of the *JJ Act*. It is commendable that in 2019, 17 cases were granted probation by the Juvenile Court.⁸⁷ The lack of adequate persons trained in social and psychological support which are in particular required for the successful rehabilitation and reintegration of CCL would prove to be insalubrious for the effective implementation of the Act.⁸⁸ As mentioned above, a basic training in the international minimum standards has been provided to a few selected prison officers. However, the numbers and the training provided are by no means enough to meet the requirements stipulated in the Act.

Rehabilitation Programs

Much before the enactment of the *JJ ACT*, some rehabilitation programs had been conducted and some are still ongoing. They were mostly aimed at providing education and life skills. These initiatives have not been sufficient to address the issue of recidivism in CCL. Nevertheless, an effective rehabilitation program with clearly specified pre- and post-release strategy is the need of the hour. In this context the *JJ Act* lists a number of rehabilitative programs to be undertaken, including “*counselling programs, family conferences, community conferences, case conferences, educational programs, vocational and life skill programs, community service programs, intensive programs for specific outcomes, and other general and specialized rehabilitation programs specialized inconsideration of the condition of the Children and their families*”⁸⁹

IMPLEMENTATION OF THE JJ ACT (18/2019) AND (CRP ACT 9/19): KEY ISSUES AND CHALLENGES

The preceding sections have provided an overview of the past and the present aspects of Juvenile Justice in the country. The *JJ Act* appears to be in compliance with major international legal standards but nevertheless due to some operative challenges effective

⁸⁶ Section 51(f) *JJ Act* (18/19).

⁸⁷ *Supra* (n 22), p.60.

⁸⁸ *Ibid.* p.72.

⁸⁹ Section 75(b) *JJ Act* (18/2019).

compliance with the international standards may be thwarted. This section will discuss some of the challenges that need to be overcome to improve the situation of CCL.

Jurisdictional Issues: Discord with the Drug's Act

Compared to its previous position, the *Juvenile Court* now enjoys exclusive jurisdiction over crimes committed by children. The only exception is the involvement of the child in drug-related issues over which the *Drug Court* gets primacy. It has often been questioned whether the drug court is equipped to deal with all aspects of CCL. It has also been highlighted that many cases of drug offenses involve children who have been victims of different kinds of abuse. The additional attention that such children may require seems to be beyond the competence of the Drug Court. The Court is vested with powers of rehabilitation and reintegration of offenders including educational and vocational measures; however, they are based on the *National Drug Agency (NDA)*. On the other hand, the *DJJ* has access to the social enquiry reports of the child and can coordinate with the NDA and make the child undergo a successful treatment program (court process) if the reports reveal the issue of substance abuse. In other words, duplication of jurisdiction will result in unnecessary use of already scarce resources.

International law lays emphasis on a specialized Juvenile Justice System which is reflected in the General Comment no. 24 CRC. Hence the jurisdiction of the Drug Courts appears to be in potential conflict with the rules of international law.

Recommendations

Thus, it is recommended that the Juvenile Court should be granted exclusive jurisdiction over all matters of offending children, including substance abuse or other drug-related issues. Nevertheless, a liaison with the Drug Court can be maintained and should be well coordinated.

Creation of specialized units is suggested within the existing institutions or at least appointing specialized judges to deal with all offenses regardless of their seriousness and gravity.

a. Interpretative Issues

The law does not clearly address the issue of the protection of children who are at risk of offences and juvenile offenders.

b. Training of the Professionals

The *JJ Act* foresees a robust and integrative rehabilitation mechanism for CCL. This involves diverse professionals dealing with the children at various stages. The Act

lays emphasis on the relevant training of these professionals and their sensitization to the needs of CCL. This includes imparting training in interviewing techniques and child-friendly approaches at all levels—police, prosecution and courts. International law also provides that the professionals should be capable of working in an interdisciplinary team and should have the capacity to understand the social, emotional, psychological and developmental needs of children, especially, vulnerable children. The lack of adequately trained and sensitized professionals required for the effective implementation of the rights of the CCL, in particular, has been highlighted in many studies.

Thus, it is recommended that Juvenile Justice and other child rights personnel should undergo extensive training on all the aspects of children's needs. There should be a monitoring mechanism to provide incentives for following training and any breach of the accepted behavior by the officials should be dealt with strictly.

c. Establishment of All the Required Institutions and Programs

The *JJ Act* aims to establish a rigorous and strong institutional and rehabilitative mechanism for minimizing the recidivism of CCL. Consequently, a number of institutions are to be created for the full realization of the objectives of this law and international law. It is, however, feared that the envisaged institutions, which remain pivotal to the Juvenile Justice system in the country, may not be established soon due to a number of existing challenges like scarce financial and human resources. The Maldives Penal Code also envisaged the creation of institutions for alternative sentencing; the said institutional setup is yet to be established.⁹⁰ However, recently, a Juvenile Detention Centre has been established in Asseyri Prison. Nevertheless, it is recommended that the institutional mechanism should be put in place without any further delays.

Situational Analysis of Children in State-Run Shelters

The children's shelters are placed under the management of the Ministry of Gender and Family.⁹¹ These shelters provide a safe and secure environment for children who have been victims of neglect and abuse. Until recently, there were two shelters, viz., Kudakdingey Hiyaa in Villingili and Amman Hiya. Later another facility for children in *Fiyavathi* was established in *Hulhumale*.⁹² Children were sent to these centers on the

90 Batool Zahoor Qazi, "Implementation of the Maldives Penal Code 2014: Lessons from Maldives," *15th ASLI Conference*, 10 and 11 May 2018, Seoul National University, South Korea, p.10.

91 Ministry of Gender Family and Social Services, Male', Maldives, available at http://gender.gov.mv/en/?page_id=2799, accessed on 7 February, 2022.

92 Ibid.

basis of their age. This has sometimes led to the segregation of the children from the same family which adds to their emotional trauma and other issues they face.

Under the *Child Rights Protection Act (CRP19/19)* abandoned and neglected children, children facing mental and physical abuse, children addicted to drugs or facing exploitation or children exposed to any threatening environment are deemed to be in need of care and protection.⁹³ In cases where a child is considered to be in need of care and protection, the Act mandates that the child be removed from the environment and brought under state care or someone be appointed to take care of him or her.⁹⁴ The *CRP Act 19/19*, places the primary duty on the guardians of children to ensure their safety and protection.⁹⁵ Where the child does not receive the requisite protection the state has a duty to intervene and provide the necessary protection to the child.⁹⁶

In accordance with the mandate of the *CRP Act 19/19* the following centers based on the community shelter model have been established. *B.Amaan Veshi (B. Eydhafushi)* was the first to be established and 17 children have been moved there from State-run shelters in *Villimale* and *Hulhumale*.⁹⁷ In addition to *Eydhafushi* such community-centric shelters have been established in other areas in the country—*SH. Amaan Veshi (Sh. Funadhoo)* *GN. Amaan Veshi (Fuvahmulah)* *HA. Amaan Veshi (Ha. Dhidhoo)*.

As of now the total number of children under state care is 210 (114 male and 96 Female).⁹⁸

The Human Rights Commission of Maldives (*HRCM*) in its December 2020 report, highlighted the concern that there persisted a number of allegations of the abuse of children in state care including torture and neglect.⁹⁹ In 2016 a local NGO had reported that the children in the state-run shelters tend to stay there for longer than needed.¹⁰⁰ According to the NGO the shelters are understaffed, and highlighted the lack of basic facilities and education.¹⁰¹ In *Kudakudhingey Hiya (villingilli)* 22 complaints of children being mistreated were submitted to the *HRCM* in 2019.¹⁰² However, no action

93 Section 69(a) *CRP Act (19/2019)*.

94 Section 88(a) *CRP Act (19/2019)*.

95 Section 10(b) *CRP Act (19/2019)*.

96 Section 10(c) *CRP Act (19/2019)*.

97 17 Children in State Care moved to “Amaan Veshi” in B. Eydhafushi, “Corporate Maldives”, available at <https://corporatemaldives.com/17-children-in-state-care-moved-to-amaan-veshi-in-b-eydhafushi/>, accessed on 6 February 2022.

98 Ministry of Gender Family and Social Services, Male, Maldives, available at http://gender.gov.mv/en/?page_id=2799, accessed on 7 February, 2022.

99 *Supra* (n 43), p. 23>

100 *Ibid.*

101 *Ibid.*

102 *Ibid.*

was taken as the incident had happened more than a year earlier.¹⁰³ In a recent incident children in *Fiyavathi* state-run shelter attracted a crowd by acting unruly and setting a fire inside the premises demanding a change in the rules.¹⁰⁴ While the children were safe the authorities are investigating the matter. Such incidents are an indication that the authorities need to ensure that the mandates of the *CRP (19/19)* are fully complied with. They could also be an indication of the changes that the authorities may have to face while fulfilling the mandates of the said Act.

The Act provides for the establishment of an independent Children's Ombudsman to monitor the enforcement of the matters under the Act.¹⁰⁵ The *CRP Act (19/19)*, also enjoins a specific obligation on the state to formulate policies to deter children from committing a crime. The *DJJ* is expected to identify and work with children at risk of committing crimes.¹⁰⁶ This is a new mandate for the *DJJ*, which requires additional support in terms of resources and adequate guidelines as also effective coordination within the respective departments.¹⁰⁷

Despite the enactment of the Act some concerns have been highlighted in the Human Rights Report which state that during the visits to the institutions where children were accommodated, the National Preventative Mechanism (NPM) noticed the following.

The programs aimed at providing children under the care of the state with classes and skills in order to assist them with integrating into society were not held regularly. Care plans were not arranged for the children residing in these institutions. In regard to their social, physical, mental and cognitive development, arrangements for recreation and sports had not been organized as well.¹⁰⁸

The staff employed at these institutions were not adequately trained to work in this environment and the institutions themselves were not sufficiently staffed compared to the number of children residing there.¹⁰⁹

The absence of specialized staff such as case workers, health officers, nurses, councilors and teachers was also noted by the NPM.¹¹⁰

103 Ibid.

104 Areeba, 'Crisis at Children's Shelter "Fiyavathi", as children stand out against authorities,' *The Times of Addu*, Maldives, 18 September 2021, available at timesofaddu.com/2021/09/18/crisis-at-childrens-shelter-fiyavathi-as-children-standoff-against-authorities/, accessed on 4 March, 2022. >

105 Section 113 *CRP Act (19/19)*.

106 Section 18(h) *JJ Act (18/19)*.

107 Ibid.

108 Ibid.

109 Ibid.

110 Ibid.

It was also observed from the institutions that catered to host children and were visited by the NPM, that there was an absence of a stable disaster management system including the lack of a proper fire safety protocol, immediate emergency response and measures to minimize property damage. In addition, there were no fire extinguishers within the facilities.¹¹¹

POLICY RECOMMENDATIONS

The study proposes the following recommendations:

1. The Juvenile Court should be granted exclusive jurisdiction over all matters of offending children, including substance abuse or other drug-related issues.
2. Alternatively, specialized units should be created within the existing institutions or at least specialized judges appointed to deal with all offenses regardless of the seriousness and gravity of the offense.
3. Effective coordination of the Juvenile Court with all the relevant institutions.
4. Establishing the envisaged institutions and programs under the *Juvenile Justice Act (18/19)* and the *Child Rights Protection Act (19/19)*.
5. Juvenile Justice professionals should be provided extensive training on all aspects of the needs of CCL, including collecting and maintaining of proper records. In addition, all the professionals and staff dealing with children institutionalized by the state must be trained.
6. There must be a robust mechanism to investigate the abuse of children and provide a monitoring mechanism to certify the child rights and services available at the state-run shelters.
7. The safety and security needs of the children should be given the utmost attention and mechanisms adopted to ensure that children are protected from every kind of harm.
8. Institutions which are entrusted with new mandates under the new legal framework are grappling with challenges to align their activities to fulfill the mandates. This is by no means an easy task and it requires technical expertise and support from external agencies to enable these institutions to effectively fulfill their respective mandates.

111 Ibid.

9. Lastly, the detention facilities must facilitate access of the NGOs or other agencies working on various causes to the children in detention.

CONCLUSION

This research has provided an insight into the past and the current practices of the deprivation of the liberty of CCL and the children in care and custody of the state in Maldives. Maldives has also grappled with the issue of an increase in the number of children committing serious crimes. The country has taken measures in the past to deal with the problem in the best possible manner while attempting to adhere to international norms and standards. This was not an easy task considering the numerous challenges that have been highlighted in the study. Maldives has been desirous of reforming the existing practices of deprivation of the liberty of children to align it according to the best international practices as envisaged in the *Convention of the Rights of the Child*. In this regard, the *Juvenile Justice Act (18/19)* was enacted. The Act seeks to significantly improve the Juvenile Justice administration in the country by seeking to give primacy to diversion, rehabilitation and reintegration of CCL. The *JJ Act* provides for establishing a number of institutions to fully align with the international best practices in relation to deprivation of the liberty of children. In addition, the *JJ Act* requires all juvenile justice professionals to undergo extensive training on various issues in relation to CCL. On the other hand, the *Child Rights Protection Act (CRP 19/19)* has also played an essential role in improving the legal protection afforded to children in general. *CRP Act 19/19* mandates the concerned authorities to take measures to protect the rights of the children in state-run shelters to ensure that the obligations under *CRC* are fully met.

However, some challenges in the nature of interagency jurisdiction, lack of fully trained professionals and the non-existence of the envisaged institutions need to be urgently addressed.

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She has a keen interest in the criminal justice system of Maldives and has researched extensively on the implementation of the Maldivian Penal Code Act, 9/2014, the rights of the victims in the criminal justice system of Maldives and domestic violence and juvenile justice and use of digital evidence in Maldives. Her published work includes *Capital Punishment in Maldives*, *Evaluation of the Sexual Harassment Law in India* and *Right to Education in India from a child rights perspective*. Her ongoing research includes the exploration of the law and technology interface in criminal justice and legal education. In addition, she has presented her research at various international conferences in Asia and USA. She is also a member of the national research team on youth and crime in the Maldives.

NEPAL

EXECUTIVE SUMMARY

Children in conflict with the law need stronger protection and better care around the world. The Convention on the Rights of the Child (CRC) exists to ensure that children in conflict with the law are provided the highest form of care in the administration of justice. A desk research method was used to generate this policy paper. The findings suggest that despite international and national laws, norms and standards, children in conflict with the law still face numerous difficulties during the administration of justice. The Constitution of Nepal 2015; the Act Related to Children, 2018; and Prison Act, 2019, deal with children in conflict with the law in Nepal. Significant progress has been seen in Nepal in the administration of justice to children. The State has adopted a child-friendly system through concepts such as child correction homes, observation rooms, juvenile court, and diversion for appropriate treatment to correct the behavior of children who have been punished by law but have not been prosecuted as adults due to their young age, and physical and mental immaturity. The Supreme Court of Nepal also directed the 77 district courts of the country to release the children being held in pre-trial detention for minor offenses in the care of their guardians. There were 81 children found to be dependent on their parents in 32 district prisons. In 2019–20 institutions like PA Nepal, Early Child Development Center, Victims Service Association and Prisoner Assistance Mission have protected and rehabilitated children dependent on their parents or guardians in prison. The armed conflict in Nepal (1996–2006) deprived children of liberty in many ways and hampered their education, and physical and mental health. Former child soldiers in Nepal display greater severity of mental health problems compared with children never conscripted by armed groups. This paper recommends the implementation of the existing policies for protecting the children from being deprived of liberty during the administration of justice.

INTRODUCTION

As a victim, witness, or perpetrator, children may come in contact with the court system. However, the legal system is frequently designed to deal with adults, leaving little room for children to engage with it. A child, especially as a victim, requires additional precautions in order to comprehend the procedures, and if they are an alleged or convicted offender, then the balance between punishment and rehabilitation must favor rehabilitation. The focus in South Asia is on punishment, with governments in the region allowing physical and corporal punishment, as well as long-term incarceration,

with few alternatives to confinement. Rule 11 B of the Havana Rules defines Deprivation of Liberty as “*any form of detention or imprisonment or the placement of a person in a public or a private custodial setting from which the person is not permitted to leave at will, or by order of any judicial, administrative or other public authority.*”

A comprehensive set of international human rights standards demonstrates the international community’s strong legal and political commitment to prevent the impairment of children’s liberty in the administration of justice. That legal framework has already aided in the creation of specialized juvenile justice systems, the adoption of non-custodial remedies, and a reduction in the number of children detained. Despite the lack of data relevant to South Asia, UNICEF estimates that over 1 million children globally are detained by law enforcement agents. Given the difficulties in gathering data on the many ignored and unreported children in care, this figure is likely to be significantly underestimated. Therefore this policy paper attempts to present a situational analysis of children deprived of liberty in the administration of justice in Nepal. It used the desk research method for collecting secondary information. The information was analyzed using predetermined themes—Deprivation of Liberty in the administration of justice, Deprivation of Liberty of children living in prison with the primary caregiver, and Deprivation of Liberty of children affected by armed conflict. Ten international reports, four academic research papers, and four Nepalese research reports were reviewed while writing the paper. It examines the current status of children deprived of liberty, the relevant policies, and their implementation status.

This policy paper suggests that children who are in dispute with the law require more protection and care all over the world. The purpose of the CRC is to ensure that children who are in dispute with the law receive the best possible treatment in the administration of justice. Despite international and national laws, norms, and standards, children in confrontation with law encounter various challenges during the administration of justice, according to the findings. The Nepalese Constitution of 2015, as well as the Children’s Act of 2018 and the Prison Act of 2019, deal with children who are in dispute with the law.

In the case of Nepal, significant progress has been made in the administration of justice for children. Due to their young age, and physical and mental immaturity, the State has adopted a child-friendly system that includes concepts such as child correction homes, observation rooms, juvenile court, and diversion for appropriate treatment to correct the behavior of children who have been punished by law but have not been prosecuted as adults. The Supreme Court of Nepal recently ordered that minors placed in pre-trial detention for minor offenses be released into the custody of their guardians. In 32 district prisons, 81 children were discovered to be reliant on their parents or guardians. Children who are dependent on their parents or guardians in prison

have been protected and rehabilitated by organizations such as PA Nepal, Early Child Development Center, Victims Service Association, and Prisoner Assistance Mission. In many ways, the armed conflict in Nepal robbed children of their freedom and impacted their schooling, and physical and emotional health. The former child soldiers of Nepal have more severe mental health issues than youngsters who were never enlisted by armed groups.

ADMINISTRATION OF JUSTICE

Around the world, children in conflict with the law need stronger protection and better care. While these are children who have been accused of some wrongdoing defined as a crime by the law of the land, they are children nonetheless, which means their physical, mental, and social development can be seriously impaired if they are subjected to the same or similar treatment as adults in conflict with the law. Recognizing this, there are several international human rights laws, specifically CRC,¹ which exist to ensure that children in conflict with the law are provided the highest form of care in the administration of justice. Article 37 of CRC elucidates the prohibition on State Parties from subjecting child detainees to torture, cruel, inhuman or degrading treatment or punishment, including life imprisonment or capital punishment. The said article ensures the right to a fair trial and humanity, respect, and dignity which is age-appropriate for any child in conflict with the law. Similarly, taking a step further, Article 40 recognizes child-specific needs such as the presence of a legal guardian in case proceedings and advocates for the child's reintegration and assumption of a constructive role in society. Further, it also mandates that States establish a minimum age below which children shall be presumed not capable of infringing the penal code.

Despite international and national laws, norms, and standards, children in conflict with law still face numerous difficulties during the administration of justice, mainly owing to their social and economic status. States are yet to formulate a holistic and multi-sectoral prevention and protection mechanism because of which children around the globe are detained in contravention of the child rights convention.

Globally, UNICEF reports that there are around 261,200 children in detention. UNICEF data of 2021 shows that South Asia has a relatively low ratio of children in detention, that is, 12 children in detention for every 100,000 population. Currently, South Asia hosts around 44,900 child detainees.²

1 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>, accessed 11 February 2022.

2 'Estimating the Number of Children Deprived of Liberty in the Administration of Justice (UNICEF DATA, 2022)', <https://data.unicef.org/resources/children-in-detention-report/>, accessed 8 February 2022.

LEGAL FRAMEWORK IN NEPAL

Outlining the Nepali legal provisions of children in detention, Section 13 of the Muluki Criminal Code, 2074,³ and Section 36 of the Children’s Act, 2075,⁴ provide that any act by a child below 10 years will not be considered an offense, thereby fulfilling the State obligation laid out in Article 40 of CRC, the minimum age for ability to infringe penal code. This minimum age is in line with the average minimum age for criminal responsibility, that is, 11–12 years,⁵ while it is below the standards established by the UNCRC, that is, 14 years.⁶ Likewise, Section 36 of Children’s Act of Nepal has categorized the punishment of a child depending on their age.

Below 10	No act shall constitute crime
10 to 14 years	In case of an offense punishable by fine, the child shall be released after counseling In case of an offense punishable by imprisonment, up to 6 months imprisonment or sent to a child reform home for up to 1 year
14 to 16 years	Half of the punishment imposable on an adult
16 to 18 years	Two-thirds of the punishment imposable on an adult

Source: Section 36, Act Related to Children, 2075 Nepal

Further, the Act stipulates that such punishment of imprisonment can only be applicable to a child below 16 years in case of heinous, grave, or repeated offenses. In other cases, the juvenile court, considering the age, sex, and maturity of the child, can waive the punishment and take more appropriate measures like individual, group or family psycho-social counselling service, orientation through institutions, community service, and

3 Muluki Criminal Code, 2074, <http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf>.

4 Act Relating to Children, 2075, <https://www.lawcommission.gov.np/en/wp-content/uploads/2019/07/The-Act-Relating-to-Children-2075-2018.pdf>

5 Manfred Nowak, “The United Nations Global Study on Children Deprived of Liberty,” *United Nations Task Force on the Global Study on Children Deprived of Liberty*, 2020, p. 278, available at <https://www.ohchr.org/EN/HRBodies/CRC/StudyChildrenDeprivedLiberty/Pages/Index.aspx>, accessed on 23 July 2021; “SOP for Rehabilitation of Children in Conflict with Law: Possibilities and Opportunities,” *Ministry of Women and Child Development*, 2017, p. 2, available at https://wcd.nic.in/sites/default/files/SOP%20ON%20REHABILITATION%20OF%20CHILDREN%20IN%20CONFLICT%20WITH%20THE%20LAW_0.pdf, accessed on 23 July 2021.

6 *General Comment No. 24 on Children’s Rights in the Child Justice System*, Committee on the Rights of the Child, 2019, CRC/C/GC/24, para 22.

so on. These provisions have also been incorporated in Sections 16 and 24 of the Criminal Offences (Sentencing and Execution) Act, 2074.⁷

Nepali laws have mandated that juvenile justice be child friendly and lenient. Not merely in regard to imprisonment, but the Act Related to Children, in Chapter-4, also specifies the procedure by which children in conflict with the law should be dealt with in all phases of a trial. From the point of taking the child in custody, the investigating authorities must not use force; must consult their family members, guardians or relatives; must take the opinion of the child in consideration; and, as far as possible, must arrange for child psychologists. There must be a separate observation chamber in every District Police Office where a child will be taken under control. Taking any bail or guarantee from a child in conflict with the law is prohibited. The child should not be subjected to handcuffs, fetters, solitary confinement or confinement with adult prisoners. In addition, the juvenile court can also send orders for diversion if it seems in the best interest of the child. The law also provides for the establishment of a juvenile bench in each District.

The Context of Nepal

In Nepal, there are eight Child Correction Homes operating across the country. In 2019, there were a total of 1,053 children living in correction homes, of whom 352 have been sent home due to COVID-19.⁸ Besides them, 286 children are being protected by various organizations.⁹ The National Child Rights Council report on the State of the Child in 2020, shows that Sanathimi, Bhaktapur, has the highest number of children (166 including 27 girls) in their juvenile correction center, Morang 155, Kaski 75, Makawanpur 35, Parsa 45, Rupandehi 75, Banke 106, and Doti 46. Thus 701 children are currently in a correction facility despite COVID-19.

The Central Child Justice Committee has reported that a total of 1,362 defendants (1,309 boys and 53 girls) were involved in 36 different types of delinquencies in 56 district courts in 2019–20.¹⁰ The report on the State of the Child in 2020 shows that out of the total 1,022 cases, 416 cases have been completed while the remaining 606 cases are still pending in court.¹¹ Regarding the offences, 288 children were accused of rape. There are 179 delinquents in connection with drugs, marijuana, nitro-vet, codeine, and brufen. Similarly, there were 75 cases with 129 defendants for cases of abusive behavior

7 Criminal Offences (Sentencing and Execution) Act, 2074, <http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Sentencing-and-Execution-Act-1.pdf>.

8 State of Children in Nepal, 2020, National Child Rights Council, Ministry of Women, Children and Senior Citizens, Government of Nepal, 2020.

9 Ibid.

10 Ibid.

11 Ibid.

in public, crime against morality, and harassment. Similarly, cases of child marriage, polygamy, robbery and theft were also seen to be high. There were also cases of money laundering, human trafficking, arms smuggling and organized crimes which reflect the use of children by criminal gangs.

Challenges of Implementation

In implementing the legal provisions on juvenile justice outlined in Act related to Children, 2018 and Criminal Offences (Sentencing and Execution) Act, 2074 (elaborated above) and establishing the Juvenile Justice Committee, pursuant to the Child Justice Procedural Rules 2019,¹² a Central Child Justice Committee was established at the federal level under the chairmanship of a Supreme Court Judge and a District Child Justice Committee was constituted under the Chairpersonship of a District Judge. In keeping with the principle of reformative juvenile justice, the State has adopted a child-friendly system through concepts such as child correction homes, observation rooms, juvenile court, and diversion for appropriate treatment to correct the behavior of children who have been punished by law but have not been prosecuted as adults due to their young age and physical and mental immaturity.

The Child Helpline Number (1098) has also been helpful in rescuing children in detention. A total of 25 boys and 11 girls imprisoned or detained with parents or delinquents were rescued through the helpline number.¹³

In regard to our local level government, 7 in Province 1, 3 in Province 2, 13 in Bagmati, 5 in Gandaki, 6 in Lumbini, 7 in Karnali, and 1 in Sudurpaschim have been declared child friendly.¹⁴

Further, in light of COVID-19, as a public health response and protection of children, on 20 March 2020, the Office of Attorney General issued an order for the release of child suspects and halted further arrests.¹⁵ At the same time, the Supreme Court of Nepal also directed the 77 district courts to release the children being held in pre-trial detention for minor offenses in the care of their guardians.¹⁶ As of 22 June 2020 UNICEF reported that almost 330 children, including 7 girls, were released from eight

12 UNICEF, *Access to Justice for Children in the Era of COVID-19: Notes from the Field*, December 2020, p. 42, <https://www.unicef.org/media/92251/file/Access-to-Justice-COVID-19-Field-Notes-2021.pdf>.

13 State of Children in Nepal, 2020, National Child Rights Council, Ministry of Women, Children and Senior Citizens, Government of Nepal, 2020

14 Ibid.

15 Ibid.

16 Ibid.

correction homes into the care of their parents or guardians, considering the threat of COVID-19.¹⁷

Children Living in Prison with Primary Caregivers

Young children who are dependent on their parents are also exposed to detention in cases where their parents or guardians are convicted and there is no alternative caregiver available. While all children are rights holders, being placed in a situation such as this makes it challenging to implement the best interests of the child. This is a particularly complicated scenario as it leaves us with either depriving the child of liberty by letting them accompany their parents to prison or subjecting the child to separation and anxiety following the incarceration of the parent. The Prison Fellowship International Asian Commission has drafted a background paper exploring the issues affecting children of incarcerated parents. It lists issues such as deprivation of basic necessities and opportunities; the danger of secondary victimization and depersonalization; deterioration in overall performance, behavior and situation of a child; and antisocial behavior among others.¹⁸ The Committee on the Rights of Child held a day of General Discussion on children of incarcerated parents in 2011 which, in light of all the dangers faced by children, recommended that State parties should issue non-custodial sentencing instead of custodial sentencing whenever possible to parents of young children. The Committee emphasized alternatives to detention for parents with full consideration of the likely impacts of different sentences on the best interests of the affected children.¹⁹ This recommendation was reiterated by the Global Study on Children Deprived of Their Liberty.

The Legal Context

Section 48 of the Act Related to Children, 2018, recognizes children staying in prison being dependent on their parents to be in need of special protection. Section 8 of the Prison Act, 2019,²⁰ specifies that in case a detained or imprisoned woman gives birth to a child in prison or has a minor child under 2 years, she can keep the child with her despite there being an alternative guardian outside prison. However, after the age of 2, the child can only be maintained inside the prison in case there is no one to take care of it outside. In such cases, the law provides that all care, education, maintenance,

17 UNICEF, *Access to Justice for Children in the Era of COVID-19: Notes from the Field*, December 2020, p. 42. <https://www.unicef.org/media/92251/file/Access-to-Justice-COVID-19-Field-Notes-2021.pdf>.

18 <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/Submissions/ChildrenofIncarceratedParentsPFI.pdf>.

19 <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>.

20 Prison Act, 2019, <https://policehumanrightsresources.org/content/uploads/2016/07/Prisons-Act-Nepal-1963.pdf?x96812>.

and subsistence of such a child will be carried out at the expense of the Government of Nepal until the prisoner or detainee is imprisoned. However, the implementation is weak. As mentioned above, despite the laws, one has to understand that children with incarcerated parents are at a huge risk and disadvantage. Coupled with insufficient resources and implementing bodies, most children in prison with caregivers are subject to neglect and abuse.

In regard to children living with their parents in jails, in the fiscal year 2019–20, 81 children were found to be dependent on their parents in 32 district prisons.²¹ Other than this, there are institutions like PA Nepal,²² Early Child Development Center Victims Service Association and Prisoner Assistance Mission which have protected and rehabilitated children dependent on their parents or guardians in prison. A total of 286 children (149 boys and 137 girls) were in the protection of such institutions in 2019–20. The number was 299 and 236 in 2017–18 and 2018–19 respectively.²³

Since the 1990s, the Nepalese jail population has steadily increased, and overcrowding and prisoner neglect continue to be a problem in the country. According to the report of the Department of Prison Management, 2020, there are 24,512 prisoners including 91 dependents in Nepal's jails.²⁴ This is more than double the official capacity. It was especially hazardous in the context of a pandemic like COVID-19.

Women account for about 7,000 of the detainees and prisoners, and most serve as primary caregivers for their children. After the age of 2, the Nepalese government is legally responsible for the welfare of the dependent children of inmates. When there are no other relatives to care for the child, they will be placed in prison with one of their parents, where they are subjected to abuse and neglect by the prison officials. In other cases, such children become homeless.²⁵ About 81 children are locked up with their mothers in prisons across the country.²⁶ As discussed earlier, the government is mandated to pay for the education and maintenance of the children of inmates. However, due to lack of government funds, this has not been aptly implemented.

In some places, local companies have started collecting funds for the education of children living in prison with their caregivers. For instance, in the Khotang District

21 Ibid.

22 <https://panepal.org/prison-program/>.

23 State of Children in Nepal, 2020, National Child Rights Council, Ministry of Women, Children and Senior Citizens, Government of Nepal, 2020.

24 <https://www.nepalitimes.com/here-now/nepals-prisons-need-to-be-depopulated/>.

25 Andrea Sarcos, "Building a Safe, Supportive Environment for Nepalese Prisoners and Their Children, 2021," <https://www.photographerswithoutborders.org/online-magazine/building-a-safe-supportive-environment-for-nepalese-prisoners-and-their-children>.

26 State of Children in Nepal, 2020, National Child Rights Council, Ministry of Women, Children and Senior Citizens, Government of Nepal, 2020.

Prison, three local companies established a fund worth Rs. 100,000 for the education of children. Further, the chief of the prison Chitrakar Acharya also stated that assistant teachers for the children in prison were arranged from within the prisoners.²⁷

Furthermore, NGOs like PA Nepal have programs such as (a) Nutritional and Personal Hygiene Support for pregnant mothers with juvenile children which provides nutritional and hygiene support programs in the Central Jail, Pokhara Women Jail, Palpa Jail, and Dhulikhel Jail among others; (b) Day Care and Children Support Program in Prison which advocates for child-friendly separate cells in every prison with minors where PA provides basic supplies as well as psychosocial counseling and enabling environment and external daycare for children. This program provides outdoor exposure, nutritious midday meals and education for children in prisons; (c) Day Care School; (d) Mental Health Program; and (e) Women's Program. NGOs have thus played a crucial role in mitigating the risks faced by children living with their caregivers in prisons.

CHILDREN AFFECTED BY ARMED CONFLICT

Armed conflict and deprivation of liberty are inextricably interwoven, as seen by the Geneva Conventions' numerous rules governing various forms of incarceration. The Geneva Convention and customary laws applicable to armed conflict afford special protection to children and prohibit their use as soldiers.²⁸ In the case of Lubanga, using child soldiers was deemed a violation of international humanitarian law.²⁹ Further, according to Article 39 of CRC States should not allow children under 15 to be directly involved in any hostilities or conflict. Similarly, Nepal is also party to the Optional Protocol of CRC, 1989, which specifically concerns itself with the involvement of children in armed conflict and stipulates that States may not recruit anyone under the age of 18 in the army or an armed group.

The Legal Context

Further, Article 39(6) of the Constitution of Nepal, 2072, prohibits the use of any child in the army, police, or armed groups. It also prohibits the use of children in a manner detrimental to their physical, mental, and sexual health for any cultural practice. Sub

27 "Education for Children Residing with Parents Inside Prison, 2018," <https://myrepublica.nagariknetwork.com/news/education-for-children-residing-with-parents-inside-prison/>

28 CIHL Rule 135, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule135.

29 "Congo Warlord Thomas Lubanga Convicted of Using Child Soldiers," <https://www.theguardian.com/world/2012/mar/14/congo-thomas-lubanga-child-soldiers#:~:text=Congo%20warlord%20Thomas%20Lubanga%20convicted%20of%20using%20child%20soldiers,-This%20article%20is&text=The%20international%20criminal%20court%20has,and%20turning%20them%20into%20killers.>

Article 9 also ensures special protection and facilities for children who are affected, displaced or vulnerable by conflict. Similarly, Article 42(5) also ensures that the families of martyrs in an armed conflict or a revolution shall have the right to get a prioritized opportunity, with justice and due respect, in education, health, employment, housing and social security. In addition, Section 7 of the Act Relating to Children, 2075, protects children from being deployed in the army, police, armed groups or from being used for armed conflict or political purposes. The Concluding Observations of the CRC Committee on the report of the Government of Nepal submitted in 2021 stated that Nepal has adopted the legal and programmatic measures provided in CRC and its Optional Protocol respectively.

Nepal faced a decade long (1996–2006) armed conflict which concluded with the signing of the Comprehensive Peace Accord (CPA) in 2006.³⁰ The CPA had provisions that prohibited any parties from using or enlisting children in military forces and also agreed on releasing anyone below the age of 18 immediately, which was later to be monitored by United Nations Mission in Nepal (UNMIN). However, there were some notable delays by the Maoists' in releasing the existing child soldiers. In 2010, the UN identified almost 3,000 Maoists fighting forces to be minors.³¹

Further, children of various ages have been affected by the impact of the armed conflict on their families. It has, however, had an especially negative impact on children, disrupting their education and obstructing their access to healthcare. As elder members of the family have fled from their native villages to avoid recruitment by the Communist Party of Nepal–Maoist or persecution by the government forces, some children have been taken from school to help at home. Children whose families have been displaced by the conflict should anticipate their schooling to be interrupted or even terminated, their access to healthcare to be hampered, and their living and environmental conditions to deteriorate and become less stable. Some children were also forced into the workforce.³² In Nepal, former child soldiers display greater severity of mental health problems compared with children never conscripted by armed groups.³³

In addressing the needs of children who were affected by armed conflict during this time, CCWB, with financial support from the EU, conducted a Project for Reintegration

30 Comprehensive Peace Accord, 22 November 2006. https://peacemaker.un.org/sites/peacemaker.un.org/files/NP_061122_Comprehensive%20Peace%20Agreement%20between%20the%20Government%20and%20the%20CPN%20%28Maoist%29.pdf

31 "Child Soldiers Global Report 2008 – Nepal", 20 May 2008, available at <http://www.refworld.org/docid/486cb11ec.html>.

32 UNICEF, "Situation of Women and Children in Nepal 2006."

33 B. A. Kohrt, M. J. Jordans, W. A. Tol, R. A. Speckman, S. M. Maharjan, C. M. Worthman, & I. H. Komproe, (2008). "Comparison of Mental Health between Former Child Soldiers and Children Never Conscripted by Armed Groups in Nepal." *Jama*, 300(6), 691–702.

and Rehabilitation of Children affected by armed conflict from 2015 to 2017. This project identified 18,665 children affected by conflict, and 10,499 children and their families were directly supported.³⁴

The Government of Nepal has been providing education support for children affected by conflict. Over 1,391 children are also supported in education via the Martyr's Academy in Sunsari (316), Dolakha (231), Kaski (172), Dang (408), and Doti (264) in 2018–2019. Additional support for Classes 11 and 12 is provided in the Martyrs' Academy in Sunsari, Kaski, and Dang. However, it was reported that these academies have remained closed due to the pandemic since April 2019 and no further data is available in this case.³⁵

Further, government projects have been conducted for the rehabilitation and reintegration of children affected by armed conflict (CAAC).³⁶ From 2015 to 2017, the Ministry of Women, Children and Social Welfare, under the direction of the Central Child Welfare Board, completed the mapping of CAAC-related service providers and also delivered direct educational support, health and nutrition support, and psychosocial counselling to 8,320, 114, and 829 CAAC respectively.³⁷ Further, legal support³⁸ and alternative care of around 118 children were also arranged under the project.³⁹

POLICY RECOMMENDATIONS

- The Federal Government should make every effort to limit the number of children kept in detention centers and prevent deprivation of liberty before it happens, including addressing the core problems and pathways that lead to deprivation of liberty in a systemic and holistic manner.
- The Government of Nepal as well as NGOs should devote adequate resources to minimize inequities and help families in fostering the physical, mental, spiritual, moral, and social development of their children, especially children with disabilities, in order to address the core causes of deprivation of children's liberty.

34 State of Children in Nepal, 2020, National Child Rights Council, Ministry of Women, Children and Senior Citizens, Government of Nepal, 2020, p. 35.

35 Ibid.

36 Government of Nepal Ministry of Women, Children and Social Welfare. (2017). *Project for the Rehabilitation and Reintegration of Children Affected by Armed Conflict*. Kathmandu. Retrieved from <https://ncrc.gov.np/uploads/topics/16441229737098.pdf>.

37 Ibid., pp. 10–16.

38 Ibid., p. 17.

39 Ibid.

- The Federal Government should use Article 37(b) of the UN Convention on the Rights of the Child which states that deprivation of liberty be used only as a last resort in exceptional cases and that children's views be heard and taken into account in all decisions that may result in their detention.
- Children should not be held in police custody for more than 24 hours. Pre-trial imprisonment should be avoided as much as possible, and should not exceed 30 days until the child is formally charged or 6 months until a verdict is given. If incarceration is unavoidable, the Federal Government should make individualized assessments of the child's needs. Any choice concerning whether or not a child should follow a caregiver in prison or be separated from her or him should be based on the child's best interests. This includes children born before the criminal justice processes began, as well as children born to a mother who is currently incarcerated.
- The Federal Government should guarantee that children who have previously been connected with the armed forces or armed groups receive appropriate rehabilitation and reintegration assistance, as well as family reunification where possible and in the best interests of the children.

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PAKISTAN¹

EXECUTIVE SUMMARY

This chapter situates itself within the global conversation surrounding children in conflict with the law and examines one subset of this uniquely vulnerable population—namely, children deprived of liberty in Pakistan. It first provides a broad overview of the principles present in the international legal framework for the protection of children in conflict with the law. It then discusses Pakistan’s legislative framework for the same, and barriers in implementing key provisions for juvenile justice. In doing so, it reflects on lessons learnt from provincial attempts at implementation and ways forward.

INTRODUCTION

Approximately 1.5 million children globally are deprived of liberty each year on the basis of judicial or administrative decisions.² This is despite the fact that the UN Convention on the Rights of Child (UNCRC)—the most ratified of all international treaties—provides that the arrest, detention, or imprisonment of a child should only be used as a measure of last resort.³ International research on children in conflict with law demonstrates a tremendous gap between the ground realities of this population, and the laws that are meant to protect their rights.⁴ The case of Pakistan is no different. This paper provides a brief overview of the challenges Pakistani children in conflict with the law face, against the backdrop of the domestic legal regime that governs their movement through the criminal justice system. It also examines international legal principles and instruments with which Pakistan must comply and concludes with policy options and recommendations to facilitate the uphill task of better safeguarding the rights and future of this uniquely vulnerable population.

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- 1 The author thanks Shumaila Shahani and Shizza Malik at the Legal Aid Society, Karachi, for their superb research support.
 - 2 Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty,’ *United Nations General Assembly*, 2019, p. 659.
 - 3 *UN Convention on the Rights of the Child*, 2 September 1990, E/CN.4/RES/1990/74, Geneva, 16 January 1990.
 - 4 See e.g., Florence Martin and John Parry-Williams, ‘The Right Not to Lose Hope: Children in Conflict with the Law - A Policy Analysis and Examples of Good Practice,’ *Save the Children*, 2005, London.

SITUATIONAL ANALYSIS OF CHILDREN IN CONFLICT WITH LAW

Of Pakistan's total population of 212 million, nearly half—45 percent—are children under 18 years of age.⁵ Children experience protection issues in virtually all spheres of life: routine violence and neglect at the hands of caregivers; economic exploitation; physical, sexual, and emotional abuse; substance abuse, and abandonment to name a few. These issues reflect broader structural and institutional failures on a country-wide level, all of which are on particularly stark display when dealing with children in conflict with law.

Research in Pakistan on the root causes of child delinquency largely point to economic and social vulnerability, which foster conditions in which crime thrives.⁶ The few empirical studies conducted across the country with juvenile populations have come to similar conclusions: poverty and drug addiction are strongly correlated with child delinquency,⁷ as well as lack of education and unemployment.⁸ Children in Pakistan are largely arrested for crimes against property—such as the possession of unlicensed firearms, vehicle theft, robbery/dacoity—and drug possession.⁹ This is consistent with international literature on youth crime patterns that suggest children are more likely to be arrested for petty, non-serious offenses and crimes against property rather than for violent crimes against persons.

Separated from their homes and communities, child offenders are especially vulnerable; they are subjected to legal processes and a prison system run by actors who largely do not recognize their needs as different from adults. Upon arrest, children are often subjected to excessive use of force and harassment as a means of interrogation by the police.¹⁰ They are then exposed to a criminal justice system characterized by delay and dysfunction, and are often incarcerated pending the final outcome of their cases.

Boys below the age of eighteen are held in special prisons usually designated as Borstal Institutions, Youthful Offender Industrial Schools (YOIS), or Remand Homes. There are no functional facilities in which to detain girls below the age of eighteen;

5 'Pakistan Annual Report 2020,' *UNICEF*, 2020, Islamabad, p. 15.

6 Amber Ferdoos & Amama Ashiq, 'Impact of Urbanization on Juvenile Delinquency: A Study of Muzaffarabad Jail,' *International Journal of Criminology and Sociological Theory*, p.1, volume 8:1, 2015; Hafiz Hanzla Jalil and Muhammad Mazhar Iqbal, 'Urbanisation and Crime: A Case Study of Pakistan,' *The Pakistan Development Review*, p. 741, volume 49:4, 2010; Muhammad Shahid Hassan et. al., 'Poverty, Urbanization and Crime Are They Related in Pakistan?' *International Journal of Economics and Empirical Research*, p. 483, volume 4:9, 2016.

7 Khalid Mahmood & Muhammad Asghar Cheema, 'Empirical Analysis of Juvenile Crime in Punjab, Pakistan,' *Pakistan Journal of Life and Social Sciences*, p. 136, volume 2:2, 2004.

8 Jawziya F. Zaman, 'Children in Conflict with Law: A Socioeconomic Mapping of Detained Children in Karachi,' *Legal Aid Society*, 2019, Karachi; Hira Saleem & Menaal Munshey, 'Committee for the Welfare of Prisoners: Impact Assessment Report,' *Legal Aid Office*, 2016, Karachi.

9 Zaman, J. (n. 8); Mahmood K. & Cheema M.A., (n.7), pp. 136-138.

10 'State of Pakistan's Children,' *Society for the Protection of the Rights of Child*, 2017, p. 215.

they are kept in special prisons designated for adult women. Official figures from 2020 suggest that there are only nine female juvenile offenders detained in the country, all of whom are located in Khyber Pakhtunkhwa (“KP”).¹¹ There are currently only seven juvenile detention facilities in the country—two in Punjab¹² and five in Sindh.¹³ No such functional facilities exist in Balochistan and KP.

Recent official statistics for the total prison population of Pakistan are as follows:

Province	Total Occupancy	Under-Trial Prisoners (UTPs)	% UTPs	Juveniles in Prison	% of Juveniles
Punjab	45,324	25,054	55%	618	1.36%
KPK	9,900	7,067	71%	339	3.42%
Sindh	16,315	11,488	70%	153	0.94%
Balochistan	2,122	1,244	59%	46	2.17%

*Table constructed from statistics in Ministry of Human Rights’ Report on Prison Reforms, 2020*¹⁴

These figures are noteworthy for several reasons. First, they point to the fact that the majority of the prison population consists of pre-conviction detainees, which holds true for the juvenile population, as well. This is due in large part to postponement of trials, adjournments, the non-production of witnesses on the day of hearings, an understaffed judiciary, and the inconsistent use of bail and probation as a means of decongesting prisons and protecting children from the harsh environment of incarceration.¹⁵ As recently as August 2020 it was reported that 95% of the child population in custody was under trial, which indicates that judges are not granting children bail and probation as often as they should.¹⁶ The lack of competent pro bono legal representation to advocate for such measures is also a problem. While Sindh and Punjab have made significant progress in this regard through public–private partnerships that ensure regular lawyer visits to prisons and free legal representation,¹⁷ the need for free

11 ‘Prisons Reform in Pakistan,’ *Ministry of Human Rights Government of Pakistan*, 2020, p. 29.

12 Punjab Prisons Department Official Website, https://prisons.punjab.gov.pk/punjab_jails. Accessed April 3, 2022.

13 Sindh Prisons Department Official Website, https://sindh.gov.pk/dpt/sindh_prisons/index.htm. Accessed on Apr 3, 2022.

14 ‘Prisons Reform in Pakistan,’ *Ministry of Human Rights Government of Pakistan*, 2019, pp. 28–31.

15 Ibid.

16 ‘COVID-19 and Children Deprived of Liberty in Pakistan – Advocacy Brief 8,’ *UN Office on Drugs and Crime (UNODC) and UN International Children Emergency Fund (UNICEF)*, 2021.

17 In Sindh, the Legal Aid Office-Committee for the Welfare of Prisoners (LAO-CWP) was founded by Justice Nasir Aslam Zahid in 2004 as a public-private partnership that provides free legal advice and representation

legal aid continues to exceed its supply in all four provinces, and child offenders are therefore left navigating an opaque criminal justice system without requisite knowledge or information about their rights.

Second, while overcrowding is not a prominent issue in juvenile prisons as much as it is in adult male prisons, other common problems remain. Complaints noted are the serving of unbalanced food, insufficient water, and inadequate accommodation.¹⁸ Also frequent are complaints of poor access to healthcare, lack of hygiene, and safety concerns.¹⁹ Furthermore, the shift on paper from punishment to the importance of rehabilitation is not reflected in ground realities. While all four provinces report mandatory literacy classes for child offenders,²⁰ these are not always provided through the Education Department, but through civil society organizations and philanthropists. This is also the case for many recreational and vocational facilities, as well, which are largely provided through non-government organizations based on donor programs and budget cycles, all of which prevents the long-term sustainability of such measures.

Third, while the official percentage of incarcerated children appears negligible in comparison to the total prison population, it is important to note that an estimated 57.8% of children under the age of five in Pakistan are unregistered,²¹ and the lack of documentation means that children under eighteen years of age are often misclassified during the investigation stage of the criminal process and subsequently placed in adult prisons. This in turn obviates all legal protections in place for child offenders as their cases wind their way through the criminal justice system. In the case of Balochistan and KP, the absence of juvenile detention facilities altogether necessitates children being confined in close proximity to adults, which can expose them to violence and abuse.²²

Birth registration is vital to ensure that accused children are not treated as adults by the criminal justice system, and the failure to do so has had lethal consequences. The UN Committee on the Rights of the Child has criticized Pakistan for “*the execution of several individuals for offences committed while they were under the age of 18 years, or*

to prisoners across Sindh. In Punjab, AGHS Legal Aid Cell was co-founded by Asma Jahangir in 1980 to provide free legal representation for vulnerable populations, and it conducts prison visits throughout the province and provides free legal assistance and advice to vulnerable prisoners.

18 ‘Addressing Overcrowding in Prisons by Reducing Pre-Conviction Detention,’ *CODE PAKISTAN, National Counter Terrorism Authority (NACTA), International Committee of the Red Cross (ICRC)*, 2018.

19 Ibid.

20 Provincial Prison Data submitted to the Prime Minister’s Prison Aid Committee, 2019. Statistics on file with author.

21 ‘Pakistan Demographic and Health Survey 2017–18,’ *National Institute of Population Studies (NIPS)*, 2019, p. 27.

22 ‘The State of Pakistan’s Children: Juvenile Justice,’ *Society for the Protection of the Rights of Child*, 2018; ‘Baluchistan Prisons: An Exposé,’ *National Commission for Human Rights (NCHR)*, 2019.

where the age of the individual was contested ... despite numerous calls from the international community and the United Nations in this regard.²³

THE INTERNATIONAL LEGAL FRAMEWORK

In 1990, Pakistan ratified the UNUNCRC,²⁴ the foundational legal instrument on child rights, and the country is therefore bound by its provisions and four basic principles: non-discrimination; prioritizing the best interests of the child; the right to survival and development; and respect for the views of the child.²⁵ These principles also underpin three fundamental international documents that provide States with a clear picture of the principles to be built into an ideal child justice system: the UN Guidelines for the Prevention of Juvenile Delinquency (“the Riyadh Guidelines”),²⁶ the UN Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”),²⁷ and the UN Rules for the Protection of Juveniles Deprived of their Liberty (“the Havana Rules”).²⁸ These form a pertinent point of comparison with Pakistan’s domestic landscape, as they represent an ideal legal framework that takes into account the unique vulnerabilities of children in conflict with law.

The Riyadh Guidelines tackle juvenile delinquency at its source, and recommend comprehensive child-centric plans to prevent children from coming into conflict with law in the first place. These include the provision of resources, funds, and inter-departmental programs that target the social, economic, physical, and psychological well-being of families, communities, and children.

The Beijing Rules address procedural safeguards and due process rights that must be enforced throughout the pre-trial, trial, and post-trial process. Such safeguards include the right to counsel,²⁹ limited detention time pending trial,³⁰ and a prohibition on capital and corporal punishment.³¹ The Beijing Rules recommend diverting children away from the criminal justice system, formal hearings, and incarceration³²

23 Zainab Z. Malik, ‘Death Row’s Children: Pakistan’s Unlawful Executions of Juvenile Offenders,’ *Justice Project Pakistan (JPP)*, 2017.

24 *Convention on the Rights of the Child*, 2 September 1990, E/CN.4/RES/1990/74, Geneva, 16 January 1990.

25 *Ibid.*

26 *UN Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”)*, 14 December 1990, A/RES/45/11.

27 *UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, 29 November 1985, A/RES/40/33.

28 *UN Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”)*, 2 April 1991, 45/113.

29 *The Beijing Rules*, Rule 7.1.

30 *Ibid.*, Rules 11.1, 11.2.

31 *Ibid.*, Rules 17.2, 17.3.

32 *Ibid.*, Rule 11.2.

toward other non-custodial measures such as probation, community service, group counselling, and so on.³³

Despite the above provisions, should a child offender nonetheless be deprived of liberty at any stage of the criminal process, the Havana Rules provide guidance on minimum standards of protection to ensure that children benefit from “meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.”³⁴ Much of the Havana Rules deal with the management and physical environment of the facilities in which children are kept,³⁵ along with provisions for recreation, education, and vocational training³⁶ to ensure that children are able to transition smoothly back to life outside prison.

The international instruments discussed above view youth delinquency through three distinct themes: prevention; due process safeguards within the criminal justice system; and the urgent need for non-custodial measures to facilitate rehabilitation and reintegration. In addition to these, regional instruments to which Pakistan is also a party broadly reaffirm these themes, viz, the 2002 SAARC (South Asian Association for Regional Cooperation) Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, which requires that juvenile justice be administered “in a manner consistent with the promotion of the child’s sense of dignity and worth, and with the primary objective of promoting the child’s reintegration in the family and society.” The subsequent section discusses the domestic legal and normative framework in Pakistan along these main themes.

PAKISTAN’S LEGAL AND POLICY FRAMEWORK

The Constitution of Pakistan does not directly address children’s rights, but numerous Articles implicate child welfare in general and children in conflict with the law. The Constitution authorizes the State to make special provisions for the protection of children,³⁷ protect life, liberty and dignity of a person,³⁸ and also requires procedural safeguards to arrest and detention.³⁹ An analysis of systems of juvenile justice at a federal level is made difficult by the fact that in 2010, the 18th Amendment to the Constitution of Pakistan devolved power over a number of subjects to the provinces, including

33 Ibid, Rule 18.

34 *The Havana Rules*, Rule 12.

35 Ibid, Rules 4(A)-(D).

36 Ibid, Rules 4(E)-(F).

37 *Constitution of Pakistan*, 1973, Articles 25(3) and 35.

38 Ibid, art. 9 and 14.

39 Ibid, art. 10.

juvenile justice and child welfare.⁴⁰ The Federal Government is no longer responsible for legislation related to the rights of the child in the provinces and legislating and policy-making is now a provincial responsibility.

While all four provinces have legislation on child rights, each struggles with varying degrees to define the separate yet interconnected concepts of child rights in general and the rights of children offenders. This subsequently affects the provinces' ability to establish monitoring mechanisms with clearly defined roles and responsibilities.

For instance, Sindh's Child Protection Authority (SCPA) is a statutory body tasked to oversee and monitor the implementation of province-wide child protection measures, including the support and standard-setting for reformatory and rehabilitative institutions for children.⁴¹ However, there is disagreement on whether and the extent to which child offenders might come within its ambit, even though the definition of the "child in need of protection measures" includes children who abuse substances or have been victims of violence and abuse—both of which are often the case with child offenders. Similarly, the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 does not clearly define the concept of child protection; consequently, the Child Welfare Commission, Child Protection Units, and Child Protection Committees are simultaneously working on child protection and social welfare services, which creates jurisdictional overlap and confusion with other government departments.⁴² A detailed analysis of provincial arrangements for child welfare is beyond the scope of this brief but generally speaking, institutional structures in the area of prevention need to be strengthened and their scope of work clarified to reduce the number of children who end up entangled with the criminal justice system.

The Pakistan Penal Code, 1860 (PPC), the country's main code of laws concerning crimes, offences, and their punishments, exempts children under the age of ten from criminal culpability,⁴³ and provides for limited criminal culpability for children between ten to fourteen years of age, depending on their maturity and understanding of the consequences of their conduct.⁴⁴ In its 2016 Concluding Observations on Pakistan, the UNCRC Committee noted that Pakistan is not aligned with internationally acceptable standards for the minimum age of criminal culpability, and recommended immediate legislative action.⁴⁵

40 *The Constitution (Eighteenth Amendment) Act*, 2010, Pakistan.

41 *Sindh Child Protection Authority Act*, 2011, Pakistan.

42 Tahira Jabeen, 'Child Protection Legislation in Pakistan: Bringing International Child Rights Obligations and Local Values Together', *Pakistan Journal of Criminology*, p. 16, volume 8:3, 2016.

43 *Pakistan Penal Code Criminal Law (Second Amendment) Act*, 2016, s.82.

44 *Ibid*, s.83.

45 *UN Committee on the Rights of the Child*, Concluding Observations on the Fifth Periodic Report of Pakistan, 17 May -3 June 2016, CRC/C/PAK/CO/5.

Pakistan's most recent—and significant—legislative attempt to comply with international child rights standards came in 2018 when it passed the Juvenile Justice System Act (JJSA), which has far-reaching provisions that prioritize non-custodial measures, the well-being of children, and the need for rehabilitation over punitive measures. This federal law has been adopted by all the provinces, but none have yet passed their own Rules of Business, which are needed to operationalize the system envisioned by the Act.

The JJSA defines a child as anyone under the age of 18 in line with the UNCRC and requires police officers to obtain documentation that proves a child's age at time of arrest—barring which a medical examination must be conducted to ascertain the same.⁴⁶ The Act also requires separate custodial arrangements for children at time of arrest in “observation homes;”⁴⁷ grants them right to state-appointed counsel;⁴⁸ mandates the creation of exclusive juvenile courts to hear their cases;⁴⁹ and binds courts to decide cases within six months.⁵⁰ Compliance with these provisions is still lacking. Resource and infrastructural constraints have largely prevented the establishment of observation homes so children are still detained in police stations alongside adults and are often not informed by the police of their right to pro bono legal services. While juvenile courts have been established and are functional in nearly all jurisdictions, there is an absence of consolidated numbers to show that trials are, in fact, concluding within six months.

To keep children out of custody unless absolutely necessary, the JJSA also requires judges to release children on bail barring certain exceptions.⁵¹ Most notably, it creates the option of disposing of cases through community-based diversion, which it defines as “an alternative process of determining the responsibility and treatment of a juvenile on the basis of his social, cultural, economic, psychological, and educational background without resorting to formal judicial proceedings.”⁵² Decisions regarding diversion are to be made by Juvenile Justice Committees (JJC)s, and it can be recommended at any stage of the process—by the police during investigation, the prosecution during trial, and also by the court.⁵³

Twenty-six districts of Sindh, eight districts of KP and all districts of Punjab have JJC)s set up⁵⁴ whereas data for Balochistan is unavailable. Regardless of this, the concept

46 *Juvenile Justice System Act (“JJSA”), 2018, Pakistan, s.8.*

47 *Ibid.*, s.5.

48 *Ibid.*, s.3.

49 *Ibid.*, s.4.

50 *Ibid.*, s.4(9).

51 *Ibid.*, s.6.

52 *Ibid.*, ss.9(1), 2(b).

53 *Ibid.*, s.9.

54 Group Development Pakistan, *Khyber Pakhtunkhwa Infographic Report on Justice for/with Children, December 2017–March 2021* [Infographic], 2021; Asif Mahmood, ‘Notification on formation of juvenile justice committees issued,’ *The News International*, Lahore, June 19, 2021; *Imkaan Welfare Organization v. Province of Sindh and another*, Sindh High Court Order, Pakistan, 2020, C.P. No. D-5496 of 2020.

of diversion is still novel for many actors in the criminal justice system, including judges and prosecutors, as a result of which the option is rarely discussed or introduced in judicial hearings. A prominent civil society organization, Group Development Pakistan (GDP), which works on child protection and juvenile justice issues, reports that up until March 2021, seventy children have availed of diversion in KP.⁵⁵ In Sindh, the Legal Aid Society's (LAS) staff reports that as of January 2021, ten cases have been disposed of by at least one JJC in the city. Beyond this, however, there is a dearth of consolidated data to be relied upon. Practitioners agree that many JJCs across the country are non-functional, as there are no established accountability mechanisms to ensure that cases are being referred to the committees and that meetings are occurring regularly.

In addition, the JJSA recommends modes of diversion in lieu of detention such as community services, which require close coordination with provincial departments, commissions, and institutions dealing with social welfare and child welfare. Such coordination is virtually non-existent. There is also anecdotal evidence to suggest that diversion is not popular with private lawyers, as diverting potential clients away from the formal system has a direct bearing on legal fees. These structural hurdles make it difficult to operationalize a pathway towards diversion, and concerted effort is required from the criminal justice system in each province. Nonetheless, the legal provisions discussed above are significant and show an important conceptual shift from retributive justice towards an approach that centers the international legal regime's commitment to rehabilitate juveniles, reintegrate them into society, and to resort to incarceration as a last resort.

The shift on paper from retributive to rehabilitative justice must also be accompanied by a comprehensive reform agenda that takes into account the beliefs and attitudes of stakeholders in the criminal justice system who are tasked with upholding the fundamental principles of child justice. While formal research on this is scant, NGOs and Civil Society Organizations that conduct legal and other training in the justice sector report the existence of problematic views, in which police officers or prison constables appear simultaneously empathetic and punitive towards children in conflict with the law. There is a recognition that the class of children they deal with are socially and financially disadvantaged at every turn, but to prevent them from becoming career criminals, there is a staunch belief in the importance of punishment. The words for punishment ("*saza*") and rehabilitation ("*islah*") are often used interchangeably, with incarceration sometimes seen as a form of "*islah*." These conflation merit further research and investigation, and might point to the fact that since the concept of juvenile rehabilitation has only gained currency recently, actors in the justice sector are still

55 Group Development Pakistan, *National Infographic Report on Justice for/with Children, December 2017–March 2021* [Infographic], 2021_2. Group Development Pakistan, *Khyber Pakhtunkhwa Infographic Report on Justice for/with Children, December 2017 - March 2021* [Infographic], 2021.

developing a framework within which to conceptualize how rehabilitation might differ from punishment. The absence of working rehabilitative structures and programs as envisioned by the JJSA further obscures this distinction.

While it is beyond the scope of this brief to undertake a detailed discussion of societal norms and beliefs in Pakistan, it must be noted that these are also responsible for normalizing punitive responses towards children rather than restorative and rehabilitative ones. Corporal punishment is common in schools, and a recent study of children in conflict with law showed that a majority of incarcerated youth had experienced victimization and violence in the home at the hands of parents and older siblings.⁵⁶ Parents interviewed as part of the same study expressed a sense of frustration and helplessness at their children's descent into drug use, truancy from school, and keeping bad company.⁵⁷ In addition to material constraints such as poverty and unemployment, children who face violence are much more likely to come into conflict with the law and until the juvenile justice reform agenda does not include fostering attitudinal changes in civil society, families, and communities at large, children will continue to suffer.

POLICY RECOMMENDATIONS

There is a plethora of overlapping legislation, administrative bodies, and statutory commissions dedicated to broadly upholding child welfare and protection, which also includes children in conflict with the law. Greater provincial control over child rights' legislation allows each province to cater its own social and political context, but it also leads to disparities between provinces in the quality and type of child rights' legislation they offer. The Federal Government has designated certain bodies that can advocate and lobby the provincial governments to adopt uniform policies and can provide a system of checks and balances.

For instance, the National Judicial (Policy Making) Committee ("NJPMC"), formed by Ordinance in 2002 and headed by the Chief Justice of Pakistan, is tasked with improving the capacity and performance of the administration of justice, among other broad mandates pertaining to judicial policy and the court system. In 2019 the NJPMC, in close collaboration with civil society organization GDP, issued a decision that to implement the principle of child-friendly justice processes, juvenile and child courts were to be established in every district throughout the country and to date, thirteen pilot Child

⁵⁶ Jawziya F. Zaman, 'Children in Conflict with Law: A Socioeconomic Mapping of Detained Children in Karachi,' *Legal Aid Society*, 2019.

⁵⁷ *Ibid.*

Protection Courts have been established.⁵⁸ This is an important first step and the NJPMC must continue its work to ensure implementation of its decision in the coming years.

Another federal statutory body tasked specifically to advance the rights of children as envisioned by the UNCRC is the National Commission on the Rights of Child (NCRC), formed in 2020.⁵⁹ Its mandate includes undertaking nation-wise surveys and reviews of legislation and policy, recommending measures for effective implementation, and liaising with provincial commissions and organizations to ensure better operationalization of child rights across the country. The NCRC is currently lobbying the provincial governments to notify their Rules of Business to operationalize the JJSA, and this effort must be prioritized. At the time of writing, Punjab, KP, and the Islamabad Capital Territory (ICT) have made progress and drafted rules, but these remain to be vetted by the Law Department, and there are no formal notifications yet. In the absence of Rules, it is impossible to effectively implement significant provisions of the JJSA that will replace the detention of children with non-custodial solutions.

In its advisory role, it is recommended that the NCRC lobby the provincial governments on other necessary points of action. For instance, there is an urgent need for capacity building within the criminal justice sector. Police and Probation Departments, in particular, require sustained training and subsequent monitoring of their role in implementing the JJSA. The Act expands the roles and responsibilities of both; it empowers them to recommend diversion in specific cases, for instance, and requires them to work closely with one another to build a comprehensive profile of arrested children to assist judges with their decision-making. Most police and probation officers are unaware of such provisions and lack directions from senior leadership on how to implement such measures on the ground. There is little interdepartmental coordination between the Police and Probation Departments, and probation officers themselves have no guidance on how to gather information favorable towards constructing reports in children's cases. In addition, training is needed to sensitize these actors on the unique vulnerabilities of children in conflict with the law and to encourage attitudinal shifts about the importance of rehabilitation over punishment. It is therefore suggested that the NCRC consider formulating recommendations for the leadership of both departments in each province and advocate for the formulation of standard operating procedures and guidelines to be implemented across departments for coordinated action.

The role of the judiciary in ensuring that the rights of child offenders are safeguarded is also critical. As previously discussed, the NJPMC—comprised of the Chief

58 Group Development Pakistan. (2021). *National Infographic Report on Justice for/with Children, December 2017–March 2021* [Infographic]. Available at: <<https://gdpakistan.org/wp-content/uploads/2021/05/National.pdf>> accessed 10 July 2021.

59 *National Commission on the Rights of Child Act*, 2017, Pakistan, February 28, 2020, s.3.

Justice of Pakistan and the Chief Justices of the High Courts—has taken the lead in establishing child courts, and can play an important role in developing performance indicators for the judiciary which rely not only on disposal rates to document successes, but also take into account procedural fairness and equity, greater knowledge about international norms and standards, and an improved understanding of the importance of probation, diversion, and other means of rehabilitation when adjudicating cases of children in conflict with the law. Each province has a judicial academy responsible for in-service training and education of judges; implementing provisions of the JJSA must be a regular feature of all courses taught to incoming judges, along with refresher courses for existing judges.

It is not only members of the criminal justice system who require training on the JJSA, but child offenders, families, communities, and local authorities, too, are unaware of the legal protections offered by law and this is in large part due to the absence of functional lawyer referral systems and pro bono representation. Each province should form a Legal Aid Authority that can provide such services. Punjab, for instance, has recently enacted a law to create a Legal Aid Authority and Sindh established a formal legal aid program in 2004, the Committee for the Welfare of Prisoners (CWP), which is fully government-funded and has facilitated the judicial resolution of over 18,000 cases in the last 15 years of its operations.⁶⁰ This model is a useful starting point on best practices and sustainable legal aid structures for the other provinces.

As is the case with any area of legal reform, the need for reliable, centralized data cannot be overstated in order to ensure evidence-based decision making at the highest levels. The Law and Justice Commission of Pakistan (LJCP) could play an important role to fulfill this gap. It is responsible for bringing “reforms in the administration of justice,”⁶¹ and “preparing schemes for access to justice, legal aid, and protection of human rights.”⁶² It is the only federal authority that actively collects data from prisons across Pakistan, and should recommend to each province the allocation of resources towards collecting and centralizing data—broken down by geographical area, gender, and age—on how many children are arrested; category of suspected offence; incarceration times; bail, conviction, and acquittal rates; and length of sentences. As part of this data collection, it is critical to identify female child offenders and their unique plight—as there is no reliable official data or research in any province or the federal level on this. Identifying areas that require further operationalization is within the NCRC’s mandate as discussed above, and the combined resources of the LJCP and NCRC should make data collection a priority.

60 ‘First Report of the Prime Minister’s Prisoner’s Aid Committee,’ 2019, p. 48. Available on file with author.

61 *Law and Justice Commission of Pakistan Ordinance*, 1979, Pakistan, s.6(1)(vii).

62 *Ibid.*, s.6(2)(c).

It is also recommended that an extensive mapping be undertaken to identify and assess the capacity of existing provincial welfare and rehabilitative mechanisms for children in conflict with law. It is critical that the role of civil society organizations, families, communities, local authorities, and religious leaders be explored to determine concrete ways to enable multi-sectoral collaborations in the process of restorative justice for children. There are many successful instances of such collaborations that can be taken forward as best practices. GDP in Islamabad, for instance, works closely with media, communities and civil society organizations to improve the legal framework for child protection and contribute to its enforcement. It is also one of the few organizations to bring children's voices into the conversation to better understand their context-specific challenges and needs, and has recently launched a youth participatory web series in collaboration with the Federal Ministry of Law and Justice to raise awareness about child justice. An example in Sindh comes from the Legal Aid Society which has spearheaded programs in juvenile jails with partner organizations who work on educational reform to ensure that upon release, children would have the basic tools necessary to either return to or begin their education. A long-term challenge with many such programs, however, is ensuring sustainable intervention in light of donor funding cycles and shifting project priorities. Changing attitudes surrounding child delinquency and providing rehabilitation to children in conflict with the law are long-term efforts that are difficult to accommodate absent political will and state ownership over the process.

The current policy focus—both nationally and provincially—is heavily dependent on actors in the national/federal criminal justice system; there are no state resources allocated towards designing rehabilitative programs, which could include victim-offender mediation, treatment or skills-based learning programs, or community service. This would require government-led coordination between the public and private sectors to conceptualize, design, and implement pilot projects that not only divert children away from the criminal justice system but also provide them with the skills needed to reintegrate into society and mitigate some of the risk factors that cause children to come into conflict with the law in the first place.

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SRI LANKA

EXECUTIVE SUMMARY

The United Nations Convention on the Rights of the Child (UNCRC), together with its successive guidelines calls on State parties to take legislative and non-legislative measures to ensure the protection of children deprived of liberty. The present study explores this aspect of the international obligations of the Sri Lankan State and evaluates the existing legal framework to determine the status of the children deprived of liberty. The present study has found gaps in the areas of minimum age for criminal responsibility and the stance of defining childhood, arrest, pre-trial detention, period of detention, the standard of treatment and care of children deprived of liberty, reintegration of children deprived of liberty, which make the children vulnerable to the violation of rights and re-victimisation. To resolve these shortcomings, urgent policy options – including legislative reforms, resource mobilisations and implementation of community-based outreach programmes are recommended.

INTRODUCTION

Children deprived of liberty fall under the marginalised group of humans whose basic human rights are often forgotten/ignored or violated. The United Nations Global Study on children deprived of liberty claims that these children are subjected to human rights violations including sexual violations, torture, inhuman and degrading treatment etc.¹ The study further claims that the legal system makes the children face detention at a young age by holding them indiscriminately in detention for prolonged periods of time. In most cases, there is no distinction in prison conditions between children and adults in perversion of the very basic principle of ‘the best interest of the children’. The continuation of such deprivation of the rights of these children has posed challenges to the State parties in terms of fulfilling their obligations undertaken by their ratification of the UNCRC.

Sri Lanka, which ratified the UNCRC in 1990, has taken substantial measures in the right direction to uphold child rights within the juvenile justice system. However, it is observed that there are some shortcomings in the Sri Lankan juvenile justice system in using ‘the deprivation of liberty as the last resort’ and ensuring equal protection of law to the children who come into contact with the administration of justice system. Due to these shortcomings, children deprived of liberty face far-reaching consequences.

1 Available at <<https://omnibook.com/global-study-2019/liberty/page-001.html>> accessed 31 January 2022.

Though legislative interventions to address these shortcomings have been attempted, none of those attempts have yielded required outcomes. The plight of the children deprived of liberty, as shown by available statistics, shows no improvement.² In this backdrop, the present study focuses on the causes for the continuing vulnerability of children deprived of liberty in Sri Lanka, with particular reference to her juvenile justice system with the underlying motive of proposing policy reforms.

METHODOLOGY

The study has used the international standards set out in the UNCRC, UN Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), UN Guidelines on Juveniles Deprived of Liberty (Havana Rules), UN Guideline for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and other regional standards such as SAARC (South Asian Association for Regional Cooperation) Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (2002), South Asia Call for Action on Ending Violation against Children (Colombo Declaration, 2012) as the benchmarks to assess the domestic legal framework pertaining to children deprived of liberty. The study encompassed four objectives namely,

- (1) to find out shortcomings,
- (2) to ensure equal protection of law to the juvenile offenders,
- (3) to bridge the gap between local and international standards and
- (4) to identify the necessary policy reforms.

In order to achieve these objectives, the following research questions were explored throughout the study.

1. What are the circumstances under which the administration of justice system of Sri Lanka comes into contact/conflict with the rights of children?
2. To what extent the existing Sri Lankan legal and institutional framework on child offenders adheres to the international standards and best practices?

2 Human Rights Commission of Sri Lanka 'Prison Study by the Human Rights Commission of Sri Lanka' available at <<https://www.hrcsl.lk/wp-content/uploads/2020/01/Prison-Report-Final-2.pdf>>, accessed on 1 February 2022; Amnesty International 'Sri Lanka: Torture in Custody', available at <<https://www.amnesty.org/en/documents/asa37/010/1999/en/>> accessed on 1 February 2022; Centre for Policy Alternatives *The Need for Accountability in Sri Lanka's Criminal Justice System*, March 2019, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/CPA_Criminal-Justice.pdf> accessed 1 February 2022.

3. What are the legal and social safeguards available for children when they are brought into contact with the administration of justice system of the country?
4. What are the gaps and shortfalls existing in the Sri Lankan legal system, which negate the safeguards in violation of the basic human rights of juvenile offenders?
5. What are the policy recommendations and suggestions that could be made in order to improve the status of children deprived of liberty?

The research study combined qualitative methods to find answers by way of utilizing information derived from secondary sources. The materials available in the libraries and digital space were utilized to gather necessary information. The initial plan to interview the stakeholders of legal and institutional framework pertaining to children deprived of liberty was dropped out due to the COVID 19 circumstances and time constraints. This can be identified as the key limitation of the present study.

POLICY CONTEXT

The Sri Lankan legal framework pertaining to children deprived of liberty encompasses legislations, policies and procedures which are enshrined in the 1978 Constitution. Though the present Constitution is not a child-specific one, the provisions of fundamental rights are made applicable to children by way of judicial interpretation.³ Article 12 (1) ensures equal protection of the law to children and prohibits non-discrimination. By virtue of Article 12 (4), the State could enact special provisions for the advancement of children. Additionally, Article 27 (13) places an obligation on the State to promote the interest of children and youth with special care for the purpose to assure their full development. Taken together, it is evident that the Constitution has laid down the basic principles of equality and freedom for children while assuring that the State policies would pay attention to their well-being.

Soon after the ratification of UNCRC, Sri Lanka enacted the Children's Charter in 1991 to make the provisions of UNCRC applicable in domestic law.⁴ However, it is to be noted that the Children's Charter falls under the category of 'soft law' and thus,

3 See: *Hewa Maddumage Karunapala and others v. Jayantha Premakumara Siriwardena and others* SC/FR/97/2021 decided on 21 February 2021 available at < https://supremecourt.lk/images/documents/scfr_97_17.pdf?fbclid=IwAR28O0G308J8TOxiLJlOs7cIYj9yWgp_q3LRcUqQ1NDm5S4iOmqVQRWx-daY> accessed 22 February 2022; Jayampathy Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd Edition, A Stamford Lake Publication 2017) pg.91

4 See <http://www.childwomenmin.gov.lk/institutes/dep-probation-and-child-care-services/child-rights/crc>> accessed 13 January 2022.

cannot be enforced by the court of law. No attempts have been made by the successive Sri Lankan Governments to enact a corresponding legislation to upgrade the status of the provisions embodied in the Children's Charter, except an attempt evident in the International Covenant on Civil and Political Rights Act (ICCPR Act).⁵ In section 5(1) of the said Act, the best interests of the child have been given legal validity. If the ICCPR Act is considered in the same enthusiasm expressed in its preamble, it would be considered an inevitable provision in the child rights sphere of Sri Lanka. However, it is unfortunate to witness that the said provision of the ICCPR Act has not yet gained the judicial attractiveness and as a result, its' scope is still kept within narrow boundaries. In this backdrop, it is safe to arrive at the conclusion that the cardinal principles of UNCRC – namely, non-discrimination, the best interest of the child, right to life, survival and development and right to express views – have not yet been incorporated into the legal system in full force.

The national law relating to the children deprived of liberty is set out in three primary legislations namely:

- (1) Children and Young Persons Ordinance, No. 48 of 1939 (CYPO)⁶;
- (2) Probation of Offenders Act No. 10 of 1948 (POA)⁷ and
- (3) Youthful Offenders (Training School) Act, No 42 of 1944 (YOTSA)⁸.

The CYPO has established a child-sensitive justice system. The juvenile courts and supervision of juvenile offenders fall under the purview of this Act. The POA makes probation an alternative to detention and remand. It deals with the release of child offenders on probation and supervision of those offenders who are under probation. It also establishes a framework for probation service and its administration. The YOTSA lays down the platform to establish training schools for the detention, training and reformation of youth offenders.

Other legislative enactments such as Penal Code No. 2 of 1883⁹, Prevention of Terrorism Act No. 48 of 1979¹⁰, Vagrants Ordinance No. 4 of 1841¹¹, Brothels Ordinance

5 Available at <<https://citizenslanka.org/wp-content/uploads/2015/12/International-Covenant-on-Civil-Political-Rights-ICCPR-Act-No-56-of-2007E.pdf>> accessed 13 January 2022.

6 Available at <http://hrlibrary.umn.edu/research/srilanka/statutes/Children_and_Young_Persons_Ordinance.pdf> accessed 2 February 2022.

7 Available at <<https://www.srilankalaw.lk/Volume-VI/probation-of-offenders-ordinance.html>> accessed 2 February 2022.

8 Available at <<https://www.lawnet.gov.lk/youthful-offenders-training-schools-2/>> accessed 2 February 2022.

9 Available at <<https://www.lawnet.gov.lk/penal-code-consolidated-2/>> accessed 2 February 2022.

10 Available at <<https://www.lawnet.gov.lk/prevention-of-terrorism-3/>> accessed 2 February 2022.

11 Available at <http://hrlibrary.umn.edu/research/srilanka/statutes/Vagrants_Ordinance.pdf> accessed 2 February 2022.

No. 5 of 1889¹² also deal with child offenders. These legislations outline the circumstances that would make the children get exposed to the administration of justice.

In terms of the procedural law pertaining to child offenders, the CYPO remains the superior piece of legislation. When there are gaps in the CYPO, the Bail Act No.30 of 1997¹³ and the Code of Criminal Procedure No. 15 of 1979¹⁴ would come into force. In addition to the above enumerated substantive and procedural laws, the National Policy on Alternative Care of Children in Sri Lanka is being formulated to address certain grey areas of law relating to children deprived of liberty.

Taken together, it is evident that the Sri Lankan law pertaining to children deprived of liberty consists age old statutes which were drafted in the 19th century. Though legislative amendments were made from time to time to uplift the scope of these legislations, it is unfortunate to witness that the age-old practices have not been upgraded to face the challenges of the modern world. Existing research studies have identified weaknesses in the legal system relating to children deprived of liberty and called out for reforms.¹⁵ In response, a draft Child Protection and Justice Bill has been proposed in the year 2015 to replace the CYPO. Though the said draft bill embodies progressive attempt in reforming the juvenile justice system of the country and aligning it to the international standard and best practices of juvenile justice system, it also has neglected to consider the plight of children deprived of liberty in a commendable way. Thus, the status of the children deprived of liberty would remain with its drawbacks even if this bill is passed by the parliament in near future.

ANALYSIS OF FINDINGS/EVIDENCES

The findings of the present study are segmented under the subheadings of (a) *minimum age for criminal responsibility and the stance of defining childhood*, (b) *arrest*, (c) *pre-trial*

12 Available at <<https://www.lawnet.gov.lk/brothels-3/>> accessed 2 February 2022.

13 Available at <<https://www.lawnet.gov.lk/bail-3/>> accessed on 2 February 2022.

14 Available at <<https://www.lawnet.gov.lk/criminal-procedure-code/>> accessed on 2 February 2022.

15 UNICEF, *The Legal Framework for Child Protection in South Asia*, (2020), available at <<https://www.unicef.org/rosa/legal-framework-child-protection-south-asia>> accessed 27 July 2021; UNICEF, *Regional Parliamentary Guide N°1 2007 on Improving the Protection of Children in Conflict with the Law of South Asia* available at <<https://www.refworld.org/pdfid/51e7b5e24.pdf>> accessed 28 July 2021; Jeeva Nirella Rehabilitation and Re-integration of Juvenile Offenders in Sri Lanka (*US – China Law Review*, Vol. 8:499) pg. 499–509; UNICEF, *A Legal and Institutional Assessment of Sri Lanka's Justice System for Children* (2017), available at <<https://www.unicef.org/srilanka/media/376/file/A%20Legal%20And%20Institutional%20Assessment%20Of%20Sri%20Lanka%E2%80%99s%20Justice%20System%20For%20Children.pdf>> accessed on 1 August 2021; Jeeva Nirella, A Critical Analysis on the Application of the Legal Principle of Rule of Law in the Criminal Justice System of Sri Lanka (*Forensic Research & Criminology International Journal* Vol.4, Issue 3- 2017) – *China Law Review*, Vol. 8:499) pg. 499–509.

detention, (d) period of detention, (e) standard of treatment and care of children deprived of liberty detainees, (f) reintegration of children deprived of liberty.

Minimum Age for Criminal Responsibility and the Stance on Defining Childhood

Sri Lanka's minimum age for criminal responsibility is twelve years.^{16, 17} To hold the children between the ages of twelve and fourteen years liable for offences, the prosecution should establish that the child has a level of maturity to understand the nature and consequences of his or her conduct.¹⁸ The Code of Criminal Procedure (Amendment) Act No. 11 of 2018 guides regarding how the level of maturity of the child should be determined. For this purpose, a multidisciplinary panel consisting of the judicial medical officer of the district, a paediatric or adolescence psychiatrist and a psychologist would be appointed. The said team is mandated to examine the child with the consent of the parent/guardian/the court and submit a report to assist the magistrate to determine whether criminal responsibility can be imposed upon the child by considering the nature and consequences of the alleged offence.¹⁹ Further, the team would give its recommendations on the question whether the child is in need of any therapeutic intervention. In this context, it is clear that the children below the age of fourteen years is given some protection while the children between the ages of fourteen and eighteen are left out without any protection. Though the national framework embodies the 'doli incapax' or two age rules, the law still falls short to meet international standards.

The Sri Lankan legal system does not possess a uniform stance to define childhood based on age. While the Children's Charter considers humans below the age of eighteen as children,²⁰ various statutes take different approaches to defining childhood. The CYPO defines those below the age of fourteen as children²¹ and those between the age of fourteen and sixteen as young persons.²² Accordingly, the CYPO affords protection to humans below the age of sixteen. This leaves out the humans between the ages of sixteen and eighteen, who are still considered children according to the international norms, from the ambit of protection and care afforded under the CYPO. This shortfall has exposed the children to the justice system meant for adults while those below the

16 The Committee on the Rights of the Child has identified *fourteen years* as the minimum age for criminal responsibility in its General Comment No. 2 on children's rights in the child justice system 2019, paras 20–27; the minimum age for criminal responsibility in Sri Lanka prior to the year 2018 was eight years.

17 Section 75, Penal Code as amended in 2018.

18 Section 76, Penal Code as amended in 2018.

19 Section 122 A, Code of Criminal Procedure Act as amended by Act No. 11 of 2018.

20 Article 1, Children's Charter.

21 Section 88, CYPO.

22 Ibid.

age of sixteen are given a child-sensitive juvenile system. This amounts to a clear violation of the principle of non-discrimination guaranteed under the UNCRC.

The draft Child Protection and Justice Bill expands the juvenile justice system to all the children below the age of eighteen. In the meantime, the bill retains a provision to have a schedule of offences for which the children would face the ordinary justice system²³ and gives discretion to the magistrate to decide whether a child should be trialled at the ordinary courts in consideration of the seriousness of the offence.²⁴ However, guidelines regarding the discretion to be exercised is not specified therein.

Arrest

Though the Constitution guarantees the right to be informed of the reason for the arrest,²⁵ the CYPO and the draft Child Protection and Justice Bill remain silent in this regard. Thus, it is explicit that the children who are arrested in Sri Lanka do not possess the right to be informed about the charges against them in a language that they can understand.

There is no specific law in place that mandates how an arrest of a child should be executed. Due to this, the children are meant to face the law of arrest that is crafted for adults.²⁶ In the meantime, the law further fails to ensure that the children's parents or guardians are immediately notified about their arrest by the police officers. Though the CYPO merely requires the police officers to inform the parents or guardians for the purpose of making them to be present at the court proceedings,²⁷ the draft Child Protection and Justice Bill addresses this adequately.²⁸

The CYPO is silent on the children's right to challenge the legality of their detention and right to be produced before the magistrate within the prescribed time upon arrest. However, the general right to challenge the legality of the detention available to everyone in terms of the Code of Criminal Procedure Act²⁹ and the Police Act³⁰ is equivalently available for children as well. Further, both these acts specify that those who have been arrested should be produced before the magistrate within 24 hours. In the meantime, it is to be highlighted that the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 poses significant threats to children in exercising the

23 Section 5, draft Child Protection and Justice Bill.

24 Section 27 (2), *ibid.*

25 Article 13, Constitution of the Democratic Socialist Republic of Sri Lanka.

26 Chapter V, Code of Criminal Procedure Act No. 15 of 1979.

27 Section 16, Children and Young Persons Ordinance No. 48 of 1939.

28 Section 22, *ibid.*

29 Section 37, *ibid.*

30 Section 65, Police Ordinance No. 16 of 1865.

above-mentioned right if they are arrested under it. The Act allows the police officers to keep the suspects under their custody for seventy-two hours and empowers the minister to issue detention order for a maximum period of three months. None of these are subjected to judicial oversight.³¹

Pre-Trial Detention

The CYPO does not cascade the last resort principle which requires that the deprivation of liberty should be used only as a last resort and for the shortest possible period of time. It has given wide discretion to the magistrate and police officers to make a decision to deprive the liberty of the child.³² Further, the Bail Act incorporates the presumption in favour of release related to bailable offences and conditions to deny the bail has been set out in Section 14 of the Act. Thus, it becomes clear that CYPO's failure to place restrictions regarding the detention decision is to be made and thus, leaves room for child rights violations. The guideline 6.4.11 of the National Policy on Alternative Care of Children in Sri Lanka states that the last resort principle would be promoted via the Judicial Service Commission among the members of the legal profession. Though this guideline is in force since 2015, the latest data shows no considerable improvement in this regard. According to the recent publication³³ of the Department of Probation of Child Care Services, there were 2084 children who were admitted to the children's homes the count has gone up to 2256 in the year 2017.³⁴ The draft Child Protection and Justice Bill too has failed to incorporate the last resort principle. In this context, the need to address this gap via substantive law becomes necessary.

The CYPO possess limited alternatives to pre-trial detention. The release on own recognisance or a recognisance entered into by the parent or guardian,³⁵ and detention under the custody of a fit person³⁶ are the only alternatives available under the CYPO. However, Section 24(b) of the draft Child Protection and Justice Bill addresses this effectively and embodies provisions for a wide range of alternative options.

Though the CYPO gives discretion to the magistrate to vary or revoke the order of pre-trial detention of a child, neither is a regular review of the pre-trial detention order mandated nor is the maximum period of time of pre-trial detention specified. On the

31 Section 10, Prevention of Terrorism Act No 48 of 1979.

32 Section 15 (2), CYPO.

33 *Annual Statistical Report 2017*, Department of Probation and Child Care Services, Ministry of Child Affairs and Dry Zone Development, pg.6 available at <[http://www.probation.gov.lk/documents/downloads/Stat%20Report%202017-min%20\(3\)-compressed.pdf](http://www.probation.gov.lk/documents/downloads/Stat%20Report%202017-min%20(3)-compressed.pdf)> accessed 4 March 2022.

34 There are no statistics available to cover the period from 2018–2021.

35 Section 14 (1), CYPO.

36 Section 14 (2) and 15 CYPO.

other hand, the Bail Act specifies the maximum period for pre-trial detention.³⁷ Due to the gap in the CYPO, children may face a prolonged period of pre-trial detention and be forced into the circumstances which are detrimental to their emotional, psychological and cognitive development. The draft Child Protection and Justice Bill rectifies this situation by way of specifying the maximum period of pre-trial detention as four months subjected to a review every fourteen days.

Period of Detention

The CYPO and YOTSO have fixed a period of three years as the detention period for children deprived of liberty.³⁸ That period may be further extended for a period of six months at the discretion of the school manager.³⁹ It is to be highlighted that in any of those circumstances outlined above, the Act does not mandate to take into account the nature of the offence committed or the best interests of the child deprived of liberty. Though the Penal Code⁴⁰ and Code of Criminal Procedure Act,⁴¹ have prohibited capital and corporal punishment⁴² against children, those found guilty of offences punishable by capital punishment can be kept in detention indefinitely at the pleasure of the president.⁴³ Further, children who are found guilty of either culpable homicide, attempted murder, robbery and grievous hurt can be kept in detention for a specified period of time if there is no other option available.⁴⁴ The children deprived of liberty between the age of sixteen and eighteen would be subjected to the punishment and sentencing policy meant for adults. Guideline 6.4.4 of the National Policy on the Alternative Care of children in Sri Lanka calls out for the use of probation orders issued under the Probation of Offenders Ordinance to have community-based rehabilitation instead of detention in remand homes.

The draft Child Protection and Justice Bill takes a flexible approach in terms of the duration of detention and the detention at the pleasure of the President of Sri Lanka. However, the Bill does not embody provisions to encourage use of alternative options instead of detention.

37 Sections 16 and 17, Bail Act.

38 Section 42, Children and Young Persons Ordinance.

39 Section 44, *ibid*.

40 Section 53, Penal Code.

41 Section 281, Code of Criminal Procedure Act.

42 Section 3 of the Corporal Punishment (Repeal) Act.

43 Section 53 of the Penal Code and Section 24(1) of the Children and Young Persons Ordinance (CYPO).

44 Section 24 (2), Children and Young Persons Ordinance.

Standard of Treatment and Care of Children Deprived of Liberty

The Sri Lankan legal framework ensures that the children deprived of liberty below the age of sixteen are sent to the remand homes, approved schools certified schools or training schools. The CYPO and YOTSA have laid down the platform for this purpose. The Minister is empowered to issue regulations related to the management, administration and control of these institutions. According to the Ministry of Women and Child Affairs under which the said homes have been entrusted, these centres are serving the child offenders on different purposes.⁴⁵ However, there are no national-level guidelines and standards formulated so far on the standard of care and treatment for the children kept at these remand homes. This has paved way for adopting varying standards of care and treatment for these children and has subjected them to further victimisation due to the failure on the part of the State. Adopting varying standards can have serious threats to the children's well-being and development.

Those children deprived of liberty between the age of sixteen and eighteen have been placed in worser conditions compared to the above-mentioned category. It is unfortunate that the Prisons Ordinance has failed to incorporate any provision related to the care and protection of those who are kept in the prison. Further, the provisions relating to the use of weapons and force, the use of solitary confinement and the reduction of diet as forms of punishment are also subjecting the children to these inhumane conditions.

Sri Lankan law has not guaranteed the children their right to be separated from adults in all forms of detention. Though the CYPO requires the authorities to take necessary measures to prevent the children and young persons from adults while detained in police custody or taken for court proceedings, there is no provision in place that requires the children to be kept separately while there are in prison or in remand. The draft Child Protection and Justice Bill is too silent on this aspect.

On the other hand, the Prison's Ordinance ensures that the juvenile prisoners need to be separated from adults 'whenever it is possible'⁴⁶, though the term 'juvenile' is not defined. Such a provision will not yield effective remedies if it is not incorporated as mandatory.

Both the CYPO and YOTSA have failed to establish a complaint procedure in respect of children deprived of liberty. Due to this, the children are forced to suffer. Compared to this, the Prison Ordinance possesses a better mechanism where visits

45 Annual Statistical Report 2017–2020, published by the Ministry of Women and Child Affairs available at <[http://www.probation.gov.lk/documents/downloads/Stat%20Report%202017-min%20\(3\)-compressed.pdf](http://www.probation.gov.lk/documents/downloads/Stat%20Report%202017-min%20(3)-compressed.pdf)> accessed 22 February 2022.

46 Section 48(b), Prisons Ordinance.

of a member of the Local Visiting Committee is mandated to listen to the concerns of the prisoners.⁴⁷ Thus, the children deprived of liberty between the ages of sixteen and eighteen would get a chance to express their concerns about their detention conditions and experiences. Further, the Act requires every prison to maintain a complaint book to keep a record of what has been expressed to the member of the Local Visiting Committee and the corrective measures taken to resolve the issues.⁴⁸

By virtue of CYPO, the Minister is empowered to appoint visitors for remand homes and certified schools for independent inspection and monitoring of the affairs of the said homes.⁴⁹ According to the Prisons Ordinance, the Local Visiting Committee and the judges are empowered to visit the prisons for investigations and monitoring.⁵⁰ Additionally, members of parliament also possess the authority to engage in the same activity with regard to prisons.⁵¹ The Human Rights Commission also possess powers to monitor the welfare of the detainees and prisons and remand homes by way of having planned or sudden visits.⁵² According to the 2019 Annual Report of the Human Rights Commission,⁵³ the head office and the region's offices of the Commission had made eighty visits to the orphanages and rehabilitation centres for children. Compared to the head office visits, the visits of the regional centres are high. The report itself highlighted that the visits of the regional offices are essential to expand the scope of the Commission's activities. The report further claims that the objectives of these visits were to prevent torture and other types of custodial violations. The Commission had identified the ill-treatment and torture in custody and overcrowding and lack of amenities in cells as certain common issues faced by the detainees. Though the Commission claimed that the outcomes of the visits were to identify the rights violators and steps to take remedial actions and strengthen the coordination and corporation with other non-state actors, it is unfortunate to witness that the Commission also has failed to give particular attention to those children whose liberty is deprived.⁵⁴

Reintegration of Children Deprived of Liberty

The Sri Lankan law is silent in ensuring that the children released from detention are given support for their integration into the community. The National Policy on Alternative Care of Children has identified that reintegration has become particularly

47 Section 48 (2), *ibid.*

48 Section 38 (1) (a) (iii), *ibid.*

49 Section 48 (2) and 51(2) (b) of CYPO.

50 Sections 35 – 37 of the Prisons Ordinance.

51 Section 39, *ibid.*

52 Section 11, Human Rights Commission Act.

53 Human Rights Commission of Sri Lanka, Annual Report (2019), available at <<https://www.hrcsl.lk/wp-content/uploads/2020/01/Annual-Report-2019.pdf>> accessed on 25 July 2021.

54 *Ibid.*

challenging due to the lack of awareness about the available mechanisms among the children and weaker network coordination among those involved with the reintegration process.⁵⁵ Guideline 6.5 of the said Policy cascades the idea that best interest of the child principle would be the basis on which the reintegration would take place and lays down various mechanisms to be adopted for better reintegration management of the country. There is no doubt that the probation services could be used to achieve the goals of effective integration. Though, the probation service of Sri Lanka lack staff and other resources and individualised referral programmes for those who need reintegration,⁵⁶ the UNICEF, in one of its study has recognised that the Sri Lankan probation services show considerable improvement through partnership with non-governmental organisations and local communities.⁵⁷ Despite these positive signs, the lack of concentration from the legislative arm of the government of Sri Lanka in this regard still poses serious threats to the effective realisation of re-integration of children deprived of liberty into their respective families and societies

POLICY RECOMMENDATIONS

Expedite the Passing of Child Protection and Justice Bill

The existing research pertaining to the Sri Lankan children in conflict with the law⁵⁸ calls upon the Government of Sri Lanka to expedite the passing of Child Protection and Justice Bill. The said bill is to reform the juvenile justice system of the country by adhering to the relevant international standards and best practices. There is no doubt that this bill would provide a better national platform for child rights and help the State to meet its international obligations. However, the said bill would not alter the status of the children deprived of liberty since the available version of the bill as of today has failed to address the gaps in terms of arrest, pre-trial detention, period of detention, the standard of treatment and care of children deprived of liberty, right to be separated from adults in detention settings, complaint mechanisms, and reintegration. Against this backdrop, this study believes that if the Bill is passed as it is, yet again the

55 The National Policy on Alternative Care Children in Sri Lanka, 2015, pg.8 <available at <http://www.proba-tion.gov.lk/documents/downloads/Draft%20Alternative%20Care%20Policy.pdf>> accessed 27 July 2021.

56 Save the Children in Sri Lanka, 'Home Truths: Children's Rights in Institutional Care in Sri Lanka – Advocacy Document', pg. 27, available at < <https://resourcecentre.savethechildren.net/pdf/2965.pdf>> accessed 28 July 2021.

57 UNICEF, *Improving the Protection of Children in Conflict with the Law in South Asia – A Regional Parliamentary Guide on Juvenile Justice*, pg. 50, available at <<https://www.refworld.org/pdfid/51e7b5e24.pdf>> accessed 27 July 2021.

58 Guideline 6.4.1, The National Policy on Alternative Care Children in Sri Lanka, 2015, available at <<http://www.proba-tion.gov.lk/documents/downloads/Draft%20Alternative%20Care%20Policy.pdf>> accessed 27 July 2021.

legal system would face the criticism that the children deprived of liberty is left out or neglected. Thereafter, the legislature once again would be pushed to take initiatives to improve the status of children deprived of liberty which would double the cost in terms of time and other resources. Thus, the present study proposes that the passing of the Child Protection and Justice Bill should take place immediately after incorporating necessary amendments set out in the section below.

Incorporate Provisions Relating to Children Deprived of Liberty into the Child Protection and Justice Bill

The study proposes that the said bill should incorporate amendments in the following areas related to children deprived of liberty:

I. *Arrest of children*

The bill should make provisions relating to the child's right to be informed about the reason for the arrest in a child-sensitive manner. Further, the bill should incorporate a basic guideline regarding how the children should be arrested by way of specially prohibiting the use of force, handcuffs, and restraints.

II. *The last resort principle*

The bill should embody an express provision on ensuring that deprivation of liberty is used only as a last resort.

III. *Guidance on utilizing alternative options for detention*

The bill should at least specify the principles based on which the magistrate should exercise his discretion in making the detention decision. The said principles should give priority to the alternative care options embodied elsewhere within other statutes and keep the detention as the least one.

IV. *Guidelines on the treatment of children in detention*

The bill should possess a general guideline on the standards of care and treatment of children in detention. The said guideline should reflect the principles of the best interest of the child, non-discrimination, right to survival and development and right to participation. In addition to the general guideline, the bill should empower the relevant minister to formulate a detailed national-level guideline for the same purpose.

V. *Right to be separated from adults in all detention settings*

The bill should possess express provisions relating to this right. Having such a provision would prevent the children from being exposed to the conditions meant for adults.

The bill should also specify that when the children are kept in detention, they should be grouped after considering their age, sex and nature of offence. Girls and differently able children should be given special assistance and their personal needs should be taken into consideration when their place of detention is decided.

VI. *Complaint mechanism*

The bill should incorporate a provision to establish a child-sensitive complaint mechanism through which they may voice out their concerns relating to their detention conditions and treatment in the custodial settings.

VII. *Right to support the reintegration into the community*

Provisions relating to a plan related to reintegration of child offenders should be included in the Bill.

Amendment to the Penal Code to Raise the Minimum Age for Criminal Responsibility as Fourteen Years

Section 75 of the Penal Code should be amended to raise the minimum age as fourteen years and the protections afforded under Section 122A of the Code of Criminal Procedure Act should be metered to all children between the ages of fourteen and eighteen

Launch National Level Data Collection and Research Mechanisms

There has been no specific research by the state engine to identify the plight of the children deprived of liberty. This national-level shortfall keeps the gap open wide and affects the policy-level planning for improving the status of children deprived of liberty. Though there are few statistics and information reported in the publications by the Women and Child Affairs Ministry, Prison Department and Department of census and the Human Rights Commission, none of those reports has engaged in in-depth data collection related to these children. In a few instances, even the data collected by any means relating to these children is not available in the public domain. These drawbacks deprive the children of liberty, to remain neglected in the national strategic decision level settings and poses challenges in fulfilling the international state obligation related

to these children. In this context, the study proposes to devise a national-level data collection mechanism and research project to look into the issues faced by these children. For this purpose, information management systems and databases can be developed by way of collaborating with non-state actors.

Community-Based Outreach Programmes to Raise Awareness

Lack of awareness about the rights pertaining to the children deprived of liberty is another factor that makes the legal and institutional system reluctant to take appropriate remedial actions. In order to address this, national-level community outreach programmes for stakeholders should be launched to raise awareness relating to the rights of the children deprived of liberty. For this purpose, the relevant state and non-state actors can be mobilised and the resources can be obtained from the international and national-level funding agencies that work for the development of child rights.

CONCLUSION

The examination of the existing legal framework pertaining to children deprived of liberty has revealed that the Sri Lankan law is far behind compared to the international standards and regional practices. The plight of the children deprived of liberty in this existing context is unimaginable and the system itself hampers the well-being of those children due to its ineffectiveness. The State is the main guardian of these children and in the context of its obligations, the State is urged to take immediate steps to implement the policy options outlined in this study.

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