

BLIND ALLEY

Juvenile Justice in India



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JUVENILE JUSTICE IN INDIA

Paromita Shastri

Enakshi Ganguly Thukral

With inputs from

Bharti Ali

Vipin Bhatt

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208 Shahpur Jat

New Delhi 110049

India

Telephone: +91-11-26490136

Telefax: +91-11-26492551

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FOREWORD

HAQ's first report on the juvenile justice system in India is based primarily on its own journey over the last three and a half years and experiences in this field. It is also a personal journey that we as individuals have traversed in this period. Several co-travellers joined us and left, each one of them bringing in something new and significant. They include our team members, volunteers and interns. One of them was Ruzbeh N Bharucha, who went on to write 'my god is a JUVENILE DELINQUENT', based on what he saw and experienced as a volunteer with HAQ, working with the Juvenile Justice Board.

Our co-travellers have also been the children who allowed us into their lives, shared with us their pain and hope, so that we could help them in some way. Parts of our journey were shared by members of the Child Welfare Committees and Juvenile Justice Boards, and the Delhi High Court Committee on Juvenile Justice that was set up sometime after we started work. We were all walking new roads and experimenting.

This report is also in a way the culmination of a journey that began in 1993, long before we started HAQ, when we were visiting a children's home in Delhi following reports of the death of a child. In about a year, our permission to visit the home was cancelled and our journey aborted. But we needed to reconnect with the issue and take it forward, which we have done now after 16 years.

In 2005, we began with legal aid and support to the children and their families. This included finding them lawyers as well as preparing them for court. Our experience in the courts and using the laws helped us advocate for changes in laws and policies. As part of some of the committees set up by the government to draft laws, policies, rules, programmes and schemes, we too learnt a lot.

However, the challenge of delivery of justice lies in implementation. This is where this study belongs. It is the culmination of our action research work over the last four years, supported by CORDAID, The Netherlands.

Since 2005, many changes have taken place in the juvenile justice system in India, more so in Delhi, and many more are unfolding, thanks to the interest and intervention of new actors. Several of these changes happened even as this report was being written. Because we felt the need to include all the new things, the report almost acquired the permanent status of a 'work-in-progress', till we decided to say halt.

Much more is still left to be done. The fate of the children caught helplessly in the juvenile justice system first came to light in 1985 when a case was filed seeking justice for four boys of 8-14 years belonging to the Pahadiya tribe of the Santhal Parganas, Bihar, who had been under trial for 14 years in connection with a murder committed in 1972. Since then, stories have become common of children being incarcerated in adult jails and, if they are lucky, in remand homes and of the thousands of little victims of abuse and exploitation awaiting justice all over the country, going back and forth in court, unable to leave behind their past and get on with life. Even as we were finalising

this report, Hindustan Times Newspaper reported the case of twelve-year-old Shiv Prasad Yadav, who according to Uttar Pradesh Police is a criminal with a “history”! His story is recorded in chapter 7.

The first Indian law on juvenile justice was enacted in 1986, giving way to a new one in 2000, which was amended in 2006. In most countries of the world, juvenile justice law deals only with children who have come in conflict with law, while in India this law addresses both children who are in need of care and protection including victims of crimes and those who have already ‘broken’ the law in some way.

However, the thinking on and understanding of juvenile justice across the world is still at a nascent stage and evolving. With rapid changes in society, the nature of offences committed against and by children also adopts different dimensions, requiring changes in law as well as the understanding of how to deal with it. Caught between the old and the new, justice for children is both delayed and diminished. It is therefore not at all surprising that several concepts and procedures, though identified as important, need much more thinking and fleshing out. This report is yet one more step towards identifying them as challenges that need much greater debate and thinking.

Our trainings for police as well as the wider juvenile justice implementing system—members of the Child Welfare Committees and the Juvenile Justice Boards, Public Prosecutors and Probation Officers, NGOs, etc have been sources of learning for us. For this study, we have drawn into all these learnings. We have also drawn upon our own experience of engaging with the juvenile justice system in Delhi and elsewhere, our interactions with practitioners at all levels and children, and visits to other states as well as our ongoing work on child trafficking as part of the Campaign Against Child Trafficking. While the rest of the world would go sight-seeing, members of HAQ used their spare time to visit juvenile justice institutions!

Paromita Shastri, who was commissioned to write this project last year and has since joined the HAQ team, also interviewed the following persons for this study. We thank them for their time and intellectual inputs.

- Justice Madan B. Lokur, Judge and Chairperson, Juvenile Justice Committee, High Court of Delhi
- Ms. Dipa Dixit, Member, National Commission for Protection of Child Rights
- Mr. Sudhir Yadav, Joint Commissioner of Police, Special Police Unit for Women and Children, Delhi
- Ms. Suman Nalwa, ACP, Special Police Unit for Women and Children, Delhi
- Dr. Bharti Sharma, former Chairperson, Child Welfare Committee, Delhi
- Mr. Raaj Mangal Prasad, former Director, Pratidhi and Chairperson, Child Welfare Committee, Delhi
- Mr. Santosh Shinde, Member, Child Welfare Committee, Mumbai and Child Rights Activist
- Mr. Sanjay Joshi, Executive Director, Bal Sahyog
- Ms. Ratna Saxena, former Superintendent, Prayas Observation Home for Boys, Delhi
- Ms. D. Geetha, Advocate specialising in laws on children, Chennai

We hope that this report will be a significant contribution to the ongoing debate and discourse on juvenile justice in India.

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PROLOGUE

In late 1972, four boys of the Pahadiya tribe belonging to the Santhal Parganas, Bihar, were arrested in connection with a murder case. They were around 8–14 years of age and, according to the jail wardens, apparently innocent. Their ages were put down at 18–24 years during the registration of the case. The boys were committed to the session court in July 1974 and the trial was posted for 30 August 1977. But the case was never heard. Eight years later, luck smiled on the Pahadiya boys, Kadra, Chamra, Jame and Jome. On a visit to the jail in the course of her research, civil rights and legal activist Vasudha Dhagamwar chanced upon their case and wrote to the Supreme Court. The Supreme Court took up her letter as Public Interest Litigation. The case finally opened for hearing in January 1981. The boys were acquitted a month later, after their entire boyhood was lost in prison where they spent their days doing manual work for the staff. Annoyed with such callous neglect of the boys by the local police and magistrates, Dhagamwar decided to fight for compensation. In 1986, the Supreme Court awarded Rs 5000 as interim compensation to each of the boys. This was also the year when India's first Juvenile Justice Act was passed, which defined (section 2h) a juvenile as "a boy who has not attained the age of sixteen years or a girl who has not attained age of eighteen years." But the final orders for the four Pahadiya boys who were definitely juveniles as per the new law, had still not come till 2000, 14 years after.

On 15 November 1994, three members of a family in Vasant Vihar area of Dehradun were killed reportedly by their domestic servant, Om Prakash Lakra.¹ The boy went missing after the incident and was arrested years later from his home in West Bengal. The Sessions Judge at Dehradun convicted him and sentenced him to death, a sentence that was confirmed on 19 September 2001. This was a year after The Juvenile Justice (Care and Protection of Children) Act 2000 was passed, making all Indians of 0–18 years liable to be prosecuted under this Act if ever they came into conflict with the law of the land. In 2003, the Supreme Court too upheld the sentence, rejecting the contention that Lakra was less than 18 at the time of the offence.² It also chose to ignore that even though the accused gave his age as 20 years in his statement before the trial court under section 313 of the Criminal Procedure Code on 7 March 2001, no evidence corroborating it had been put before the court. The Supreme Court justified its decision by saying that since the High Court had noted the accused had a bank account opened in his name in 1994, he would have to be, or declared himself, a major. A review petition was also subsequently rejected. In 2005, a writ petition was filed in the Supreme Court to bring upon record a school certificate that gave the date of birth as 4 January 1980. Lakra was 14 years and 11 months old at the time of the incident, even less than what was allowed by the JJ Act 1986. It was then found that the certificate was already on record in the appeal before the Supreme Court but was somehow missed by the bench. Yet, the Supreme Court bench dismissed the writ petition on a technical ground—that it should have been a curative petition—and also after noting the issues related to age "so that they may receive due consideration when the curative petition is taken up for consideration."³ But this curative petition too was dismissed on 6 February 2006 and no reason was offered. Section 22 of the JJ Act 1986 says, "Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent juvenile shall be sentenced to death..." The Supreme Court itself had ruled in 1983 that the death penalty should be imposed only in "the rarest of rare cases".

¹ http://www.combatlaw.org/information.php?article_id=1122&issue_id=39

² [2003] 1 Supreme Court Cases 648]

³ [(2005) 3 Supreme Court Cases 16]

Did the Pahadiyas deserve to be in prison for so long, unattended and uncared-for? Does Lakra really deserve to hang, even assuming that he had indeed committed the murder as a domestic servant? When children violate the law of the land, do they deserve the same punishment as adult criminals? When poor, neglected and abused children come into conflict with society's rules, should they be treated as an unwanted burden, even criminals? Why don't children committing minor offences even get a hearing sometimes, even as adults go free for the same offence? Why do abused children, who have come before the state to seek justice, end up with more humiliation? Why is justice delayed to children, putting their entire lives on hold? Juvenile Justice is all these issues and much more. Juvenile justice is about the future of children.

At its very basic, Juvenile Justice is an alternative law-based system for children that takes into account their special mental and physical needs, takes them away from the formal justice system for adults and provides them protection and restoration, enabling their re-integration into society and making 'things right as much as possible'.⁴ Almost every country has a juvenile justice process, though the quality and maturity vary from country to country. Mostly it is far from the ideal laid down in international standards.⁵ India's first juvenile justice legislation came in 1986, and in the past 23 years, the law has not only matured but become increasingly rights-based too.

Yet, from 1972 to 1999 and now to 2009, little seems to have changed on the ground for many of India's children. Especially for children who are bereft of parental care and protection or are economically or socially marginalised. If the first Juvenile Justice Act was about treating children in conflict with law as criminals and penalising them, the amended laws of 2000 and 2006 too are being used against children who are more in need of care and protection than in conflict with law. So much so that today's children in need are in serious danger of ending up as future criminals unless there is a significant overhaul of the implementation of the juvenile justice system in India and a sea change in attitude of the entire society towards these children.

Juvenile justice is the legal system that is meant to protect all young people. Juvenile comes from the Latin word *juvenis* meaning young. But over the years, the word has come to be used together with and often even interchangeably with "delinquency" – which describes children or young persons who are in conflict with law -- thereby harking to an association with crime and violence. Therefore even though the word juvenile and child refer to persons in the same age group, they conjure different images. While the word child relates to the image of 'innocence', 'vulnerability' and the need for protection, the word juvenile, due to its association with 'court' and 'delinquency', replaces the image of innocence with that of a 'hardened criminal'. It is precisely why child rights groups in this country have been strongly arguing for the need to do away with the term juvenile and use the less judgmental one, child, instead.

However, international and national laws on children tend to approach this issue in a broader sense to include all children who may have committed statutory offences (actions considered offences by the law of the land) and therefore infringed the law, and also children who need to be cared for in special institutions. They may be street children, children rescued from trafficking, disabled children, victims of abduction or/and rape and then abandoned by the family, or those living in special family circumstances such as refugee camps.

'Juvenile (In)Justice' in Children in Globalising India, HAQ: Centre for Child Rights, 2003

A person's a person, no matter how small

Dr Seuss, American writer and cartoonist

4 Marie Wernham with Savina Geerinckx & Elanor Jackson: Police Training on Child Rights & Child Protection: Lessons Learned and Manual. Consortium of Street Children UK, 2005 A training manual for the police. Section 2

5 Ibid

A CRY FOR JUSTICE

1

Chenchu Hansda was 14 years old when he was convicted to 14 years' imprisonment in 1999, the year HAQ brought out its first status report on children. He had been arrested as part of a mob that went on rampage in Orissa, setting on fire a Christian missionary Graham Staines and his two sons. While the co-accused—all adults—managed to get released on bail, nothing moved for Chenchu. He said he was not part of the mob, but the courts found him guilty. In 2005, the Orissa High Court sentenced prime accused Dara Singh and another to life, acquitting the rest. All 11 of them but Chenchu. It took seven years for his case to travel from the Juvenile Court to the Additional District Judge's Court in Bhubaneswar for further appeal. It mattered little that both the courts were in the same building and that child rights activists and lawyers had been relentless in campaigning and demanding justice for the boy throughout this time. After a year in an adult jail, he was moved to an Observation Home on a petition filed by activists. As he turned 18, he was shifted back to the adult prison, where he remained till he was released at the age of 22 years. Condemned and convicted for getting embroiled in a riot, a politically motivated adult action, Chenchu is today an illiterate, unskilled and broken young man with a bleak future. Open Learning Systems (OLS), an Orissa-based NGO that has stood by Chenchu all these years, finds it difficult to find sponsors to help his cause, because a 'child in conflict with law' is still seen by the society at large as a criminal! Chances of a job are better outside the village where few would know him but he is reluctant to go, leaving behind his dependent, old parents. It is also not fair, argues Kasturi Mohapatra of OLS, that he be separated again from his family after such a long and agonising wait. But Chenchu has few options.

No one would know the turbulence in the life of Mamta, a girl of 7 years from Hyderabad, till her parents separated.⁶ Her mother discovered that the father had been sexually abusing his daughter and even continued to do so after separation, using his visiting rights as he took the children out. Mamta's brother was aware of this but was too small to understand the gravity of the situation. In 2006, through extensive counselling – certain exercises and games – and with the help of a crisis intervention centre, HAQ learnt from the girl the extent of her abuse. A report "arguing for the best interest of the child" was submitted to the court, which in 2007, helped decide the case in favour of the mother, awarding her the custody of the children, while the father was allowed to visit the children in a specified public place only for two hours a month. The father has challenged this order. HAQ continues to provide legal advice to the mother and is happy to see she has learnt to cope with legal matters.



⁶ Names of children in HAQ case studies used in this report have been changed to protect their identity. The cases of Chenchu, Lakra and Pahadiyas are however well known.

17-year-old Prawal, originally from Jalpaiguri, West Bengal, is staying in an Observation Home for Boys in Delhi, for over two years now. Caught for the murder of his employers in a fit of rage – he was a domestic worker with an aged couple – there could be more to his story than meets the eye. HAQ was called in by the Principal Magistrate of the JJB for counselling the boy who appeared unnaturally quiet, depressed and dejected before the Board. Prawal admits to the murder, though every available evidence points against this fact. His previous employers, a doctor family, as well as the OHB teachers and officials find him hardworking, skilled, honest and rarely angry or impulsive. According to his father, Prawal could never control his hunger for a long time and this is the only thing that troubled this otherwise sedate boy. During counselling too, the boy was found to be very polite, soft-spoken and an introvert. He insisted he had killed the couple because in the 7-10 days he worked with them, they never gave him much to eat, keeping him forever hungry and irritable. On the day of the murder, they had compounded this with constant nagging about work. While his case is still being heard, HAQ has recommended that he be shifted to or placed under the supervision of a psychiatric institute in the city, such as VIMHANS. The OHB welfare officer insists he is a very good boy and skilled tailor, earning up to Rs 2000 a month from his stitching at the home. Prawal himself wants to go back to Jalpaiguri once he is released after three years – that's the maximum sentence period under the law – and start a tailoring shop.

Saurabh Chaudhuri, a 13-year-old boy from Bihar, was working as domestic help in Paschim Vihar, Delhi. He was regularly beaten up by the family. One day in 2006, after a severe manhandling by Priya, the lady of the house, Saurabh managed to land up before the CWC and a complaint was registered with the police station by Childline. The CWC sought legal support from HAQ for Saurav. The case went on for almost three years, moving from judge to judge with constant pressure on their part to arrive at a compromise, as it would apparently have been difficult to prove guilt. It is only after both the boy as well as HAQ insisted on filing charges that the magistrate gave a new date of hearing. In the mean time, the main accused got married and moved to another city. The judge argued that it was "difficult" for her to come to the hearings as she was now married! HAQ managed to get the boy an increased amount of compensation but only after the case dragged on for about a year more.

Chenchu, Mamta, Prawal, Saurabh. Different lives, dissimilar backgrounds, yet a single unfortunate incident was enough to change each individual destiny in one stroke, bringing the children before the care and justice system of the state and into a lifetime of turmoil. These stories may seem far removed from the image of childhood in our minds, which is a time of innocence, discovery, learning and freedom from responsibility. But they prove that children are no less a product of the society, context and environment they grow up in and learn from than the adults who are supposed to nurture, guide and protect them.

Incredible as they sound, these stories are really a microcosm of the working of juvenile justice system in India. A fascinating portrayal of all that is wrong with the law, its implementation, the government's care system, and the attitude of police and judiciary towards children who unwittingly come before the State for care and justice.

The reality in India as well as much of the world is that millions of children⁷, including those who need more care and protection than the rest for physical and psychological reasons, are growing up without it. They are neglected, forced to work, abused, incarcerated, and denied justice as well as their basic right to dignified living. Being soft targets, children are extremely vulnerable to natural or manmade disasters, cruel twists of fate, criminal elements and the society's sins of omission and commission. In a poor and less developed country like India, where the media and civil society are less vigilant, children often fall out of the cracks of the very system that is designed to protect them and give them justice. India's children were declared a 'supreme national asset' in 1974,⁸ yet over 40 per cent of 440 million children are still estimated by the government to be in need of care and protection.⁹ Some 10 per cent of the children or 44 million

7 For Example: Save The Children's Contribution To End Violence Against Children In Institutional Settings: Sharing Good Practice And Key Recommendations; Human Rights Watch and American Civil Liberties Union, Custody and Control Conditions of Confinement in New York's Juvenile Prisons for Girls. September 2006; Human Rights Watch, Cruel Confinement: Abuses Against Detained Children in Northern Brazil April 2003

8 The National Policy for Children 1974

9 Study on Child Abuse: India 2007, Ministry of Women and Child Development, Government of India, 2007

are destitute, including 12.44 million orphans, many of them living in institutional care. The institutions for children in conflict with the law are home to about 40,000 children.¹⁰ In fact, if all child rights indicators were to become a critical measure of the Human Development Index, India would fare far worse than her current rank of 132 among 179 countries¹¹ because of its poor performance in child protection.¹²

This is exactly what **Blind Alley, HAQ's report on Juvenile Justice in India**, tries to focus on. That despite apparently the best of intentions, several welfare schemes, a liberal democratic government, and 24 years of working laws on justice for children, several thousands of India's children are routinely neglected by the government's care system and often ill-treated and tortured beyond imagination and comprehension. That justice is routinely delayed, even denied, to the children who approach the system seeking care and protection, or come into conflict with law due to economic or work pressure, or are often taken into and detained in custody needlessly by a callous administration, resulting in an ultimate denial of their right to life. That the task ahead of the administration is gigantic, yet there is little will to meet the challenge with empathy while upholding the constitutional rights of the children as free and thinking human beings.

Since 1999, HAQ: Centre for Child Rights has used its might and raised its voice to protect the rights of children and demand the recognition of their role in the society as well as share in the economy. Since 2003, HAQ has supported and represented neglected children in their fight for care and protection, and since 2005, in their fight for justice, providing legal and other aid to children coming in conflict with the law.

Thus, HAQ works with two categories of children who come under the purview of the Juvenile Justice system in India: Those who are in need of care and protection – mostly victims of abuse, violence, exploitation and neglect – and those coming in conflict with law. HAQ provides legal support to children in need of care, protection and justice, assists in tracing families and bringing services to children (such as counselling, sponsorship and rehabilitation support), advocates for change in law and programmes, and monitors implementation of juvenile justice by engaging with the system as well as through research and documentation. The children may be referred to HAQ by the Child Welfare Committee, police, schools, other NGOs, family, friends, a concerned citizen – practically anybody. HAQ helps them deal with their own demons as well as police, regular courts and the Juvenile Justice Board (JJB).

In this report, HAQ collates the stories of all these children to distil its experiences and problems faced so far, as well as the challenges that still lie ahead. The overarching aim of this report is to present an overview of the juvenile justice system in India as it exists today with all its inadequacies, to highlight and question the slow process of and resistance to change, raise vital questions on the glaring gaps and shortcomings in the system, and offer suggestions on how they could be filled and set right. It also demands precedence to true restoration over institutionalization at any cost and, in the interim, real development of children within the institutions.

None of this can happen without a radical change in the attitudes of lawmakers, judiciary, administrators, government and other sector players and respect for the rights of the child. HAQ demands that a genuine concern for the child's future and her rights be mainstreamed into the juvenile justice process at every step. We must hear the child, respect her rights and let her know we care, or else we shall have failed her.

**That Justice is a blind goddess/Is a thing to
which we black are wise/Her bandage hides two
festered sores/That once perhaps were eyes.**

Langston Hughes, American Poet

¹⁰ http://www.childlineindia.org.in/cr_CPI_parentalCare_2.htm

¹¹ http://hdrstats.undp.org/2008/countries/country_fact_sheets/cty_fs_IND.html

¹² Working Group on Development of Children for the Eleventh Five Year Plan (2007-2012) - A Report, Ministry of Women and Child Development, Government of India, Page 53

THE RIGHTS OF A CHILD

2

When a society or government deals with a child in need of care or protection (CNCP) or coming into conflict with law (CICL), it is not doing the child a favour. The child is a bona fide citizen with full human rights as much as an adult citizen. This is something all of us tend to forget, relegating any action concerning children to the ambit of charity and goodwill.

Children's rights to protection from violence, abuse and exploitation are clearly laid out in international law, the legal standards of regional bodies, and in the constitutional and legal framework of most countries in the world. It reflects a basic human consensus that a world fit for children is one in which all children are protected, at home or outside of it.

Children are people too

Rights vs welfare approach

The Convention on the Rights of the Child (henceforth, CRC), adopted by the United Nations General Assembly on 30 November 1989, is the most ratified human rights treaty in history.¹³ It defines children as those less than 18 years of age and is designed to look at children as complete human beings. The CRC is the most important legal instrument in relation to juvenile justice because it is legally binding on all members. The most specific articles in relation to juvenile justice are Articles 37 and 40, which when read with the General Comment No.10, Children's Rights in Juvenile Justice, lays down a comprehensive mechanism that States must comply with in their administration of Juvenile Justice. However, these must be seen in the context of the overall framework of the CRC and its main 'umbrella rights.' These include: Art. 6 - The right to life, survival and development;

A Paradigm Shift in Approach to the Child in Need

From	To
A Needs-based Approach	A Rights-based Approach
Welfare of Children	Development of Children
Institutional Care	Non-institutional, preferably Family-based, Care
Custodial care in Institutions	Quality Childcare and Full Skill-oriented Development
Segregation and Isolation from Society	Inclusion and Mainstreaming
Child as Beneficiary and Recipient of services	Child as Participant and Partner in Own Development and Future

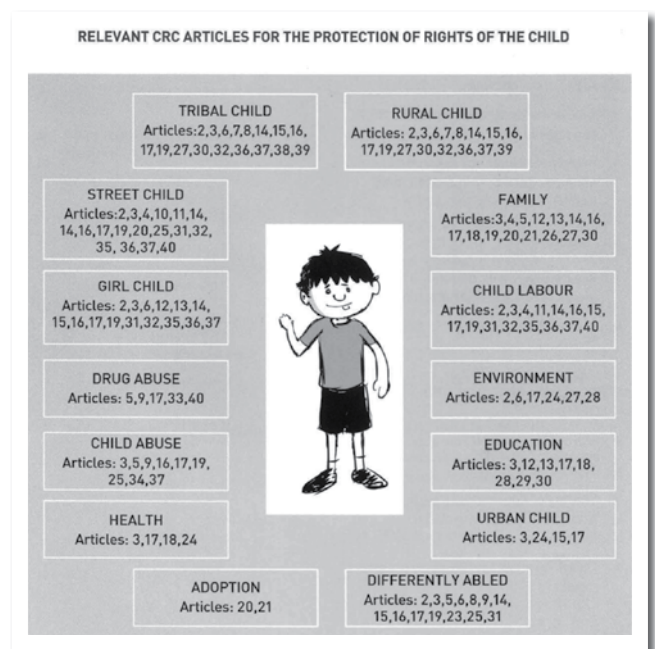


¹³ All countries except the United States of America and Somalia (not a democracy) have ratified it.

Art. 3.1- The best interests of the child as a primary consideration; Art. 2 - Non-discrimination on any grounds; Art. 12 - The right to 'participation'; and Art. 4 - Implementation, including of economic, social and cultural rights to the maximum extent of available resources.¹⁴ The provisions of the CRC and the guidelines laid down in General Comment 10 must be read together with all the international guidelines, some dating prior to the adoption of the CRC. They are:

- Guidelines for Action on Children in the Criminal Justice System, Economic and Social Council (UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted on 29 November 1985;
- UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), adopted on 14 December 1990;
- UN Rules for the Protection of Juveniles Deprived of their Liberty (The JDL Rules), adopted on 14 December 1990;
- UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), adopted on 14 December 1990;
- Guidelines for Action on Children in the Criminal Justice System, Economic and Social Council (ECOSOC) Resolution adopted on 21 July 1997;
- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC resolution adopted on 22 July 2005; and
- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC resolution adopted on 22 July 2005.

The CRC and other international standards on the administration of Juvenile Justice require nations to establish a child-centred, specialised justice system, whose overarching aim is children's social reintegration, and which should guarantee that their rights are respected. When discussing juveniles in conflict with law, international agreements emphasize the importance of preventing juveniles from coming into conflict with the law in the first place as well as an expectation of complete rehabilitation by the time they leave the juvenile justice system. Alternative measures such as 'Diversion' and 'Restorative Justice' form the bedrock of implementation of juvenile justice so that state parties act in the best interest of the child as well as in the long-term and short-term interest of society.



The Rights approach is an acceptance of the legal and moral obligations of the state and its institutions to fulfil its duties and responsibilities towards children in the "Best Interests of the Child". This must govern the approach to be followed in ALL ACTIONS CONCERNING CHILDREN.

India had a National Policy for Children in 1974, much before it ratified the CRC in 1992.¹⁵ It introduced a National Charter for Children in 2003 and a National Plan of Action in 2005. It also ratified in 2005 the CRC's two optional protocols on the Use of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography in 2005. Other than these, India also signed the SAARC conventions on Combating Trafficking and

¹⁴ <http://www.juvenilejusticepanel.org/en/standardsoverview.html>

¹⁵ Ratified on 11 January 1993, Office of the UNHCR, Status of Ratifications of the Principal International Human Rights Treaties. <http://www.unhcr.ch/pdf/report.pdf>.

Commercial Sexual Exploitation of Women and Children as well as on Regional Arrangements for the Promotion of Child Welfare in 2002, and the SAARC Decade of the Rights of the Child 2001-10. Addressing denial or violation of children's rights is also part of the nine UN Millennium Development Goals that must be met by the world by 2015.

The current thinking of the government of India on children is reflected in the report of the Working Group on Development of Children for the Eleventh Plan (2007-12) of the Planning Commission. It says, "Child protection (which covers juvenile justice) is about protecting every right of every child. The failure to ensure children's right to protection adversely affects all other rights of the child and the development of the full potential of the child."¹⁶ Towards this end, The National Plan of Action for Children, 2005 recognises that UNCRC shall be the guiding instrument for implementing all rights for all children up to the age of 18 years.

The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes. The successful prevention of juvenile delinquency requires efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood.

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)

In the Beijing Rules, the aims of juvenile justice include the promotion of the youngster's welfare and the assurance that each response towards juvenile delinquents will always be in proportion to circumstances of the youngster as well as the crime. The Rules include specific measures that cover the different phases of juvenile justice. They emphasize that imprisonment should only be used as a last resort and for the shortest possible period of time.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)

The most important international instrument are the United Nations Standard Minimum Rules for Non-Custodial Measures, adopted by the General Assembly in its resolution 45/110 in December 1990 and also known as the Tokyo Rules. The Rules stipulate legal protections to ensure the impartial application of non-custodial measures within a transparent legal system, ensuring the protection of the offender's rights and the resort to a formal complaint system if ever they feel that their rights have been violated.

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

Juvenile Justice was earlier under the Ministry of Social Justice and Empowerment, while the other child-related schemes and programmes were the responsibility of the Department of Women and Child, under the Ministry of Human Resources Development. Juvenile Justice came under the Ministry of Women and Child Development (MWCD) once it was formed in February 2006 and placed in independent charge of Minister of State Renuka Chowdhury, who was replaced by Krishna Tirath in June 2009.

A fair system on the outside

Evolution of Juvenile Justice

The need for a separate legal system for children arose out of the realisation that the existing adult legal system was not equipped and sensitive to the special needs of children. The basis of a juvenile justice system is that children's liabilities are diminished and they be provided with protective and restorative measures, enabling their re-integration into society. The juvenile justice system is based on the philosophy of diversion, which means 'diverting' children in conflict with the law away from the formal criminal justice system, and in particular, away from formal court processes and detention. Through this process the diverted person comes to realise that there are other options in life apart

16 Working Group on Development of Children for the Eleventh Five Year Plan (2007-2012) - A Report, Ministry of Women and Child Development, Government of India, Op cit

from crime. Restorative justice is an important component of diversion. This approach focuses on 'restoring' damaged relationships (between victim, offender and community) to the way they were before a crime was committed – to 'make things right as much as possible'.¹⁷

Because the concept of Juvenile Justice is derived from the belief that both problems of delinquency as well as that of children and youth in abnormal circumstances cannot be resolved by the traditional processes of criminal law, the system is not designed to deal with young offenders alone. Its role is to provide specialised and preventive treatment services for children and young persons as a means of 'secondary prevention, rehabilitation and socialization'.¹⁸

Across the world, the term juvenile justice is interpreted and implemented in policy differently.¹⁹ An analysis of the models across the world of implementation of juvenile justice shows there are six major models – participatory, welfare, corporate, modified justice, justice, and crime control. Often, countries have a mixed system, as in India, where the system has evolved as a combination of welfare, modified justice, justice and crime control. As in the crime control and justice models, the law for child offenders focuses on criminal offence and police, lawyers and judges as the prime actors. For children who need care, the law is closer to the welfare and modified justice models, allowing for more informality in processes by doing away with judicial officers, involving experts and social workers and focusing on development, growth and integration.²⁰

In the general perspective, juvenile justice implies providing for welfare and well being of children who are in distress and difficult situations, and therefore needing special attention, while the formal justice mechanism deals with those who have committed an offence or are likely to do so. In the way it has been interpreted in India, the term refers to social as well as juridical justice.²¹

If the JJ system is meant to seek social as well as juridical justice, it must begin with evolving a jurisprudence that is child-centred and child - friendly, setting standards for justice, care and protection of children who come in contact with the legal system, establishing legislative and administrative mechanisms to ensure all of the above through prevention, protection, rescue, rehabilitation, recovery and social reintegration.

The law in India

Differential treatment for children can be traced as far back as the code of Hammurabi in 1790 BC, which laid down specific punishments for children who ran away from home.²² In India, the story of special legislations for children, which culminated in the present day JJ system, began in 1850 with the Apprentice Act, which required that children between the ages of 10-18 who have been convicted in courts be provided vocational training as part of their rehabilitation process. Ironically, as we shall see later, even in the course of the next 158 years, the state has fallen far short of providing this basic care.

The Apprentice Act gave way to the Reformatory Schools Act, 1897. The Indian Jail Committee (1919-20) brought to the fore the vital need for square trial and treatment of young offenders. Its recommendations prompted the enactment of the Children Act in Madras in 1920 and by the Bengal and Bombay Acts in 1922 and 1924 respectively. These three pioneer statutes were extensively amended between 1948 and 1959. In 1960, at the second United

17 Marie Wernham with Savina Geerinckx & Elanor Jackson: Police Training on Child Rights & Child Protection: Lessons Learned and Manual. Consortium of Street Children UK, 2005 A training manual for the police. Section 2

18 Juvenile Justice Before and After the Onset of Delinquency, working paper prepared by the Secretariat, Sixth UN Congress on Prevention of Crime and Treatment of Offenders, Caracas, Venezuela, P6 (25 August-5 September, 1980), cited in Ved Kumari: Juvenile Justice System in India- From Welfare to Rights, OUP, 2004 Pages 1-2

19 "It has been variously used to refer to the juvenile court, the institutional linchpin of the innovation, and to the stream of affiliated institutions that carry responsibilities for control and rehabilitation of the young, including the police, the juvenile court itself, the prosecuting and defending attorneys, juvenile detention centres, and juvenile correctional centres" in Ved Kumari Ibid Page.3

20 Ved Kumari Ibid

21 Ved Kumari Ibid

22 T H Khan: Juvenile Justice System in India: An Appraisal, Central India Law Quarterly, Vol 7, 1994

Nations Congress on the Prevention of Crime and Treatment of Offenders at London, the issue was discussed and some therapeutic recommendations were adopted. The resultant Central enactment was the Children Act, 1960.

The Children Act was replaced by the first Juvenile Justice Act, 1986, to bring the operations of the juvenile justice system in the country in conformity with the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). This law covered both delinquent juveniles and neglected juveniles. Juvenile was defined as a boy who had not attained the age of 16 years or a girl who had not attained the age of 18. Neglected juvenile included those found begging, the homeless and destitute, those whose parent or guardian was unfit or incapacitated, those living in brothels or with a prostitute or frequently going to such places, or those likely to be abused or exploited for immoral or illegal purposes or unconscionable gain. Delinquent juvenile was a juvenile who had committed an offence.

The law on juvenile justice provoked much concern in human rights circles. It was seen to be custodial in nature, mainly because both children in need of care as well as those who had committed an offence were initially, after apprehension or being picked up by the police, housed in the same observation home, from where they were then taken to different institutions. It also came under flak for the way juveniles were treated in detention centres designated as special homes and juvenile homes.

The combination of a growing focus on the issue of juvenile justice as well as the pressure faced by the government to submit a Country Report to the Committee on the Rights of the Child outlining concrete achievements, apparently inspired the Ministry for Social Justice and Empowerment to draft a new law, the final outcome of which was the Juvenile Justice (Care and Protection of Children) Act, 2000.²³ Introduced by the then Minister for State for Social Justice and Empowerment, Maneka Gandhi, the draft law was discussed only for a few hours in Parliament and not referred to a select committee. The 2000 Act made the age limit of 18 years uniform for both boys and girls in consonance with the CRC and sought to facilitate speedy disposal of disputes. It also made state intervention imperative in the case of a Child in Need of Care and Protection (CNCP)—under the 1986 Act, such a child was called a “neglected juvenile” - as well as the Child in Conflict with Law (CICL), earlier called the “juvenile delinquent”.

Even this Act was seen to be weak on care jurisdiction and inadequate in after care and follow-up of the children in difficult circumstances, and was amended in 2006 to become the Juvenile Justice (Care and Protection of Children) Amendment Act 2006, hereafter the JJA.²⁴

The current JJ framework

The preamble of the JJA says the Act provides for the “proper care, protection and treatment (of children) by catering to their development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation”.

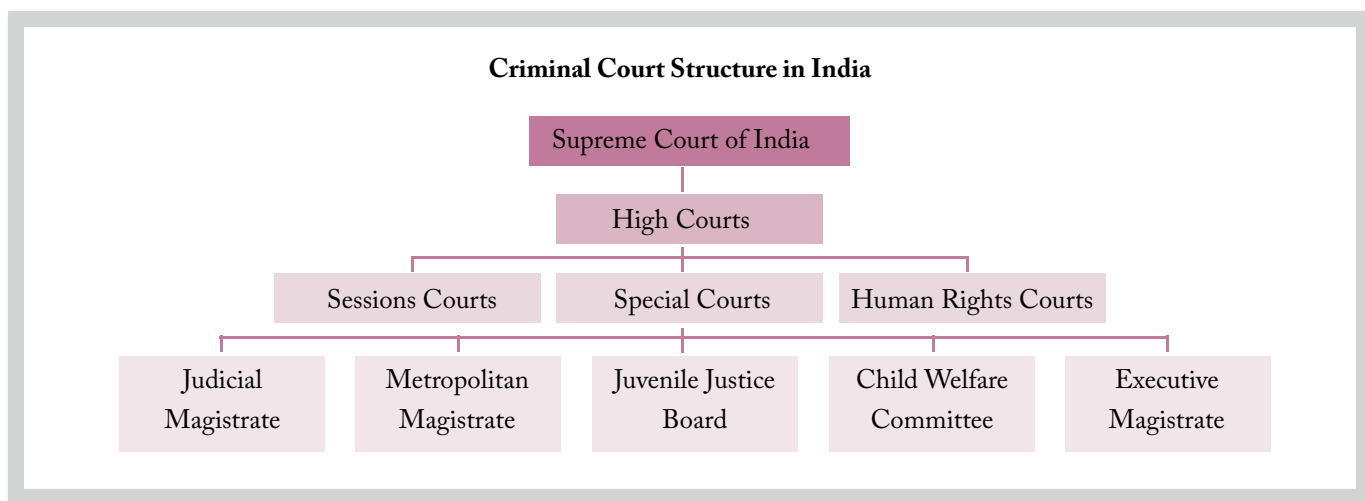
In its true spirit, the Act outlines the roles to be played by the government, represented by the judiciary, police, probation and social welfare services, local government bodies, including the panchayati raj institutions, as well as non-government organisations or NGOs and social workers. The 2006 amendments attempt to strengthen and widen the juvenile care and justice framework as well as establish the premise that the best of institutions cannot substitute for care in a family, with the ultimate aim of promoting a child-centric rehabilitation and family restoration-focused system.

The JJ Act envisages separate adjudicating machineries to deal with the two groups of children, distinct from those of the adults, namely the Child Welfare Committee (CWC) for the CNCP and the Juvenile Justice Board (JJB) for the CICL. Even though children in both categories come within the purview of this system, any person aggrieved by

23 Arvind Narrain: The Juvenile Justice (Care and Protection of Children) Act, 2000: A critique in Children in Globalising India: Challenging Our Conscience, HAQ: Centre for Child Rights, 2002

24 This Act has been discussed in detail in Children in Globalising India: Challenging Our Conscience, HAQ: Centre for Child Rights, 2002

an order made by a competent authority under the juvenile justice law is allowed to take his or her complaint to the Session or High Court. The JJB has the power only to make changes to its own order about the institution or person caring for the child (either on its own or on an application).



The JJ Act also envisages state protection and establishment of institutions for such children. For children in need of care and protection, there are Shelter Homes (short-term stay) and Children's Homes (long-term stay). For children in conflict with law, there are Observation Homes and Special Homes. The former are where the accused are housed till the enquiry is complete and an order is passed, while Special Homes (formerly, correctional homes) are where these children go after they have been sentenced and an order is passed for their rehabilitation. In most cases, a single institution serves as both these categories. Additionally, there are Aftercare homes /organizations to fulfil that special role of rehabilitating children leaving Special Homes or Children's Homes and integrating them with the larger society. However, there are very few aftercare homes in the country.

More sinned against than sinning

From juvenile to child

The JJ Act includes the following children as Children in need of care and protection (CNCP):

- Street children: By far the largest group needing care and protection.
- Children who are victims of crime and abuse: The biggest group denied care and protection.
- Homeless children (pavement dwellers, displaced/evicted, etc)
- Orphaned or abandoned children
- Children whose parents cannot or are unable to take care of them
- Children voluntarily separated from parents
- Migrant and refugee children
- Trafficked children
- Children in bondage
- Children as sex workers and children of sex workers/sexual minorities
- Children of prisoners
- Children affected by conflict and natural disasters
- Children affected by HIV/AIDS and terminal diseases

- The girl child
- Children with disabilities and other special needs
- Children belonging to ethnic and religious minorities, other minority communities and those belonging to scheduled castes and tribes, and
- Children in institutional care.

Children in conflict with law, on the other hand, are simply children who have done something that has violated the law of the land. Juvenile legislation encompasses all the categories of children mentioned above, including child labour for which there is an additional law, complicating matters immensely, as we shall see in subsequent chapters.

Yet the boundaries can blur and often do. Across the world, most of the children in conflict with the law are essentially children who were denied their rights and access to education, health, shelter, care and protection for some reason.

Vital sections of The Juvenile Justice (Care and Protection of Children) Amendment Act 2006

2(a)(a) Inclusion of definition of Adoption: "Adoption" means the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship

2(d)(i) Child beggars to be included in the definition of children in need of care and protection

10(1) In no case a juvenile in conflict with law shall be placed in a police lockup or lodged in jail

14(2) Since the provision for enquiry to be completed within four months lacks proper implementation, as inquiries are pending before the Boards for a long period of time, it is proposed that the Chief Judicial Magistrate/Chief Metropolitan Magistrate shall review the pendency of cases of the Board every six months, and shall direct the Board to increase the frequency of its sittings or may cause constitution of additional Boards'

15(1) (g) The Juvenile Justice Board can make an order directing the juvenile to be sent to a special home for a maximum period of three years only

16(1) No Juvenile in conflict with law can be put under imprisonment for any term which may extend to imprisonment for life

21 Contravention of provisions dealing with prohibition of publication of name etc. of child/juveniles shall be punishable with fine extending to twenty five thousand rupees as against existing 1000 rupees

4 & 29 The State Governments to constitute Juvenile Justice Board and Child Welfare Committee for each district within one year of the Amendment Act coming in to force

33(3) The State Governments may review pending of cases before the Child Welfare Committee in order to ensure speedy completion of enquiry process

34(3) All State Government/voluntary organisations running institutions for a child/ juvenile shall be registered under this Act within a period of six months from the date of commencement of the Amendment Act, 2006

41(4) State Government shall recognize one or more of its institutions or voluntary organizations in each district as specialized adoption agencies for the placement of orphans, abandoned or surrendered children for adoption. Children's homes and the institutions run by the State Government or voluntary organizations for children who are orphans, abandoned or surrendered shall ensure that these children are declared free for adoption by the Child Welfare Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with guidelines.

62(A) Every State Government shall constitute a Child Protection Unit for the State and, such units for every district, consisting of such officers and other employees as may be appointed by that Government to take up matters relating to children /juveniles with a view to ensure the implementation of this Act.

Worldwide, poor and marginalised children form the major share of children held in police custody, detention institutions and prisons.²⁵ If the philosophy behind the juvenile justice system is to transfer the burden of motive to the environment in which the child grows in, and hence try to find the motive and intent within the family, guardians, society and so on, there is a thin line between the CNCP and the CICL.

Many of the CICL are children in such difficult circumstances that are sometimes indistinguishable from crime. For instance, children trafficked or in prostitution or begging. Of late, trafficking of young boys for prostitution is on the rise and tourism hotspots like Kerala and Goa are emerging as the new attraction for paedophiles. In the eye of the law, such children may be “committing a crime” but in reality, it is they who need care and protection the most. Recent changes in JJ law treat children in begging and prostitution as CNCP, but the corresponding change in attitude has yet to come about at all levels.

Thus, HAQ believes, and therefore argues, that since almost always CICL come out of the wider category of CNCP, the crying need for the system is to treat the former in the same way as the latter, with a light touch of the law and with the compassion and dignity that they probably never received before.

Also, over the years, the word juvenile has come to be associated with delinquency or offence or breaking of law. Despite law reforms and changes in attitude, it continues to evoke the image of an erratic criminal, not a disadvantaged child led astray. The JJ Act too continues to reflect the same confusion. It uses the word Juvenile to define children who are in conflict with law, but also uses juvenile and child interchangeably, as in sections 2 (1) and 5(2) for instance. **But semantics matter. It is precisely for this reason that HAQ as well as other child rights organizations have been arguing for the use of the word child instead of juvenile. Even the law, HAQ feels, can be renamed Justice for the Child Act.**

Children are not mini persons with mini rights, mini-feeling and mini human dignity. They are vulnerable human beings with full rights which require more, not less, protection:

Maud de Boer-Buquicchio, deputy secretary general of Council of Europe, 2005

²⁵ Nikhil Roy and Mary Wong: Juvenile Justice. Modern Concepts of Working with Children in Conflict with Law. Save the Children. 2004

UNLOVED: THE CHILD IN INDIA

3

Who is a Child ?

The Indian state defines a child variously. While the JJA (Section 2k) defines a child as any person up to the age of 18 years, and is in harmony with the UNCRC, other laws do not. As we saw earlier, the 1986 JJA defined a juvenile as a boy less than 16 years old or a girl less than 18 years old. This definition was altered by the 2000 Act, adopting the CRC's age limit.

While the ideal age to cast a vote or get a driving licence is 18 years, the right age for marriage has been kept at 21 for a boy and 18 for a girl. The age of consent for girls remains at 16 years (15 years or puberty in case she is married). The Child Labour (Prohibition and Regulation) Act, 1986 defines a child as a person below 14 years. Confusion over age has been the biggest deterrent against speedy justice for the child in need.

Increasing vulnerability

The state of our children

The vast majority of India's children at risk have to contend with the ever-revolving doors between the care and justice systems. The failure of the legal and administrative machinery to respond to their needs of care and protection often sends them back and forth between the two systems. As Arvind Narrain says, "the expansion of the category of children in need of care and protection has led to serious questions as the system still remains custodial in nature and what one in effect does is bring more children within a criminal justice framework."²⁶ Even children, who have committed no offence but are deprived of parental care and shelter, routinely end up in the formal justice system in India supposedly for their own good. And since often the care system resembles the prison system, children prefer to remain out of it, surviving anywhere, even on the streets, resulting in a vicious cycle of neglect and criminalization.



Even in the case of unaccompanied and refugee or shelter-less children – children who need the care of the state simply because they have no other option--international standards require that the child is treated in a manner consistent with the promotion of his or her sense of dignity and worth and that decisions are clearly taken in the

26 Arvind Narrain, The Juvenile Justice (Care and protection of children) Act, 2000: A critique in Children in Globalising India. Challenging Our Conscience. HAQ: Centre for Child Rights. 2002

best interests of the child, taking into account age and special needs, allowing the right to express own views, and without curtailing fundamental rights and freedoms.

A 2005 International Save the Children Alliance (ISCA) report for the UN says “violence in the family, including physical, sexual and psychological abuse as well as neglect, abandonment and discrimination, not only has a major impact on the child’s well-being and development, it fundamentally affects a child’s choices and may force her or him into coping strategies that often lead to further victimization or criminalization”.²⁷ Thus, often the primary factor that brings children into conflict with the law is the breakdown of their familial, protective and familiar environment, the same situation that makes them children in need of care and protection.

Interestingly, the ISCA report also says, “the reality is that a majority of children will break the law at least once before they become 18”. More pertinently, the nature of such offences is almost always trivial. Studies show 90 per cent of children who come into conflict with the law or come into contact with the justice system are one-off and first-time offenders and three-fourths of them will usually have committed petty crimes like stealing of goods, offences that ironically don’t make an adult a criminal, but can help put a child behind bars. In many countries certain acts are considered as offences when committed by children but are considered to be no offence when committed by adults.²⁸ Also, very few of these children go on to become career criminals, if ever, and don’t pose a threat to the community. This brings into question the very need to keep them in detention, especially for years together as it happens in India. According to Dr Hira Singh, former director, National Institute of Social Defence, Ministry of Welfare, government of India, “it is generally seen that even when the child has been recognized as an offender, he or she is more of a victim of certain situational compulsions rather than a perpetrator of crime”.²⁹

Notwithstanding this, more than one million children, most of them boys, are in detention worldwide, says Save the Children. More than 90 per cent of them are in remand, awaiting trial. Many of them are simply trying to survive and thus in need of protection but are unfortunately criminalized as they enter the formal justice system because of the absence of a child-centred justice system in many nations.³⁰

A similar situation exists for girls even though few of them commit any crime. Girls from poor families, unable to survive on the street as in India, are often trafficked into child labour or prostitution. Almost always, children in actual or potential conflict with law emerge out of the children deprived of the basic needs for survival and in urgent need of protection, and more so from underprivileged families and communities, including discriminated minorities such as the tribal. Often, as experience in India or even the US shows, prejudice related to social or economic status may not only bring a child into conflict with law even when no crime has been committed but also influence and decide the future course of justice delivery.

Statistics on children who are in conflict with law or have fallen into delinquency reveal they often come from a particular background, or rather are found in a particular background, including growing up in violence and exclusion. Over 72 per cent of the children apprehended for being in conflict with law, says the National Crime Records Bureau (NCRB), come from households with an annual income of less than Rs 25000. The next biggest group, 27.3 per cent, belong to the families with an annual income of Rs 50,000–Rs 2 lakh. The share of such children from the upper middle-income group of Rs 2-3 lakh is only 0.16 per cent, while the remaining 0.19 per cent came from those earning more than Rs 3 lakh.³¹ Either the children of the rich do not commit crimes as frequently as the poor, or they manage not to get apprehended and charged.

27 The Right Not to Lose Hope: Children in Conflict with the law, A contribution to the UN Study on Violence Against Children, Save the Children UK, 2005

28 The UNICEF Innocenti Digest.

29 Hira Singh: Current Issues in Juvenile Justice Administration, Unpublished text

30 The Right Not to Lose Hope, op cit

31 Crime in India 2006, National Crime Records Bureau, Ministry of Home Affairs, Government of India

Lives on the margin

Many forms of child abuse

The Government of India recognises that some children are living in especially different circumstances and includes orphans, street children, beggar children, migrant children, children affected by human made and natural disasters, drug addicts, children of nomads, refugee children, slum and migrant children, children of commercial sex workers, children of prisoners, children affected/ by in armed conflict, displaced children, evicted children, young children in charge of siblings, children born as eunuchs or brought up by eunuchs and other children who need care and protection in this category.³² These are children who are victims of abuse and exploitation, or victims of their social, political and even geographical circumstances. Many of them are included in the JJA as CNCP.

Violence against children is particularly rampant in India. Every year around 26 million children are born in this country³³, which is also home to the world's largest number of children out of school – 19 per cent of all children. Most of them end up as child labour. The 2001 census³⁴ put the number of child labour in the country at 12.66 million, while unofficial estimates range from 14 million to 50 million. The same census also found 4 lakh children under the age of four in some form of work. As a recent (May 2008) High Court judgement in UP said, “We felt that if it was ensured that every child was present in school as mandated by the said Constitutional provision and the decisions of the Apex Court as well as this Court, when any child was found out of school during school hours it could be presumed that such a child had run away because he had been abused at home or he/she was a trafficked child or a child engaged in unacceptable or illegal child labour.”³⁵

Of the lucky 81 per cent who are enrolled in a school, close to 53 per cent drop out before completing middle school or the eighth standard and 70 per cent do not complete full schooling or the secondary level. Of the dropouts, 66 per cent are girls. Some 46 per cent of the children come from scheduled castes, 38 per cent from scheduled tribes and almost all affected by HIV/AIDS or infectious diseases are still out of school. Most of these children end up in difficult circumstances, that is, in need of care and protection.

There are 420 million children in India, or over two fifths of the population, but they do not vote and apparently do not constitute a politically powerful lobby. In the last four years, on an average, only 2.7 per cent of the questions asked in Parliament by members related to children. Ironically, even as 60 per cent of these questions were on education,

Myths We Need to Break

- Child abuse is a western concept.
- All empowered adults protect their children.
- Educated and upper-class people never abuse children.
- Those who abuse children are mentally ill and need to be treated more than punished.
- Child abuse happens in slums/poverty-stricken areas/some regions/some communities/dysfunctional families/big households.
- Home is the safest heaven and the family is ALWAYS the best place for the child.
- Spare the ROD and SPOIL the child.
- Boys are not sexually abused and there is no need to worry about or protect a male child.
- Girls ask for it by behaviour or improper dressing.

32 Working Group on Development of Children for the Eleventh Five Year Plan, op cit

33 Mapping India's Children: UNICEF in Action, UNICEF, 2004

34 As has been listed in the National Plan of Action for Children, 2005

35 Criminal Miscellaneous Writ Petition No 15630 of 2006, Vishnu Dayal Sharma, petitioner vs State of UP and others, Judges Hon'ble Amar Saran and Shiv Shanker

Parliamentarians haven't yet managed to pass a law that makes education of children compulsory, free and equitable. Right now, a public debate is raging to ensure that the draft law, called The Right Of Children To Free And Compulsory Education Bill, 2008, genuinely provides equal, free and compulsory education to all children and does not encourage different systems of education for the rich and poor, public and private.³⁶ For good reason too. The International Labour Organisation (ILO) estimates that each extra year of education till age 14 results in 11 per cent extra annual earnings in the future.³⁷

Even more shocking is that such a dismal state of affairs has existed for a long time. In India, abuse of children and violence towards them is partly allowed or even encouraged by culture, beliefs, traditions, superstitions and claimed economic realities. Subtle forms of violence against children – manifested in child marriage, outdated practices including and similar to Devadasi' (dedication of girls to gods and goddesses) or genital mutilation in some communities such as the Bohri Muslims, superstitions such as sex with a young virgin for curing sexually transmitted diseases – are justified on grounds of culture, tradition and religion.

Psychological and physical violence towards children is routine, for instance, slapping, hitting, pulling by the hair and boxing the ears as punishment at home or in schools. In many poor families, the child is forced to work, hard and unrelentingly, from an early age to supplement the family kitty or simply in order to survive, even as his or her physical and emotional well being as well as schooling is blatantly neglected.

Sexual abuse cuts across class, religion, caste or ethnicity. Even in educated, high-income families, sexual abuse might be frequent. What has been a matter of deep concern when addressing laws dealing with child sexual abuse is that most forms of sexual abuse that do not amount to rape is dealt with lightly. The most horrific forms of sexual abuse that children are subjected to, such as penetration in other parts of the body or forcing the penis into a child's mouth, is covered under Section 354 of the IPC which is about "outrage of modesty". It is a bailable offence with a punishment of imprisonment that may extend to two years or with a fine or with both. Only rape and sodomy can lead to criminal conviction. The word rape does not include boys and sodomy is tagged under 'unnatural offences', while intercourse is often interpreted to mean sexual relationship with an adult.³⁸

"The petitioner through the present petition contends that the narrow understanding and application of rape under Section 375/376 IPC only to the cases of penile/vaginal penetration runs contrary to the existing contemporary understanding of rape as an intent to humiliate, violate and degrade a woman or child sexually and, therefore, adversely affects the sexual integrity and autonomy of women and children in violation of Article 21 of the Constitution".

Sakshi v. Union of India & Others, Writ Petition (Crl) No. 33 of 1997 with SLP (Crl.) Nos. 1672-1673 of 2000

The inadequacy of this law first came to light when in Delhi, even though a six -year old girl had been systematically abused through fingers in her vagina and anus, made to perform oral sex over a period of time as well as forced to witness sexual orgies by her father, the Delhi High Court held that no rape had taken place but that the accused was guilty of only molesting the child. Even the Supreme Court, while giving its final order, did not expand the definition of rape but only laid down guidelines for examination of child victim in court.³⁹

The Law Commission of India has recommended measures to redefine rape laws to prevent the sexual abuse of children and women, which is yet to be adopted.⁴⁰ Concerned with the lesser sentences given to culprits committing sexual assault

³⁶ The bill was passed by Parliament on 4 August, 2009

³⁷ IPEC: Investing in Every Child. An Economic Study of the Costs and Benefits of Eliminating Child Labour, ILO, Geneva, 2003

³⁸ Pinky Virani, Bitter Chocolate: Child Sexual Abuse in India, New Delhi: Penguin 2000, page 25-26

³⁹ "There is absolutely no doubt or confusion regarding the interpretation of provisions of Section 375 IPC and the law is very well settled. The inquiry before the Courts relate only to the factual aspect of the matter which depends upon the evidence available on the record and not on the legal aspect. Accepting the contention of the writ petitioner and giving a wider meaning to Section 375 IPC will lead to a serious confusion in the minds of prosecuting agency and the Courts which instead of achieving the object of expeditiously bringing a criminal to book may unnecessarily prolong the legal proceedings and would have an adverse impact on the society as a whole. We are, therefore, of the opinion that it will not be in the larger interest of the State or the people to alter the definition of "rape" as contained in Section 375 IPC by a process of judicial interpretation as is sought to be done by means of the present writ petition." *Sakshi v. Union of India & Ors. (Writ Petition (Crl.) No. 33 of 1997 with SLP (Crl.) Nos. 1672-1673 of 2000)*

⁴⁰ Law Commission Of India, 172nd Report On Review Of Rape Laws. March, 2000

of different forms due to absence of a stricter law, Delhi High Court has asked the Centre to consider the Law Commission report and include “digital rape” while widening the definition of rape. The court made the observation while dismissing an appeal filed by 54-year-old Tara Dutt, father of four daughters, who was convicted of committing digital rape on a five-year-old relative in 1996. Digital rape is inserting finger into the victim’s private part. On June 7, 1996 evening, Dutt had forced his fingers into the private parts of a five-year-old daughter of his relative, when her mother, a domestic help, was away for work. Initially, police booked Dutt on charge of rape (the maximum punishment would be life sentence) but later the trial court converted the offence into outrage of modesty and the sentence to the maximum punishment of two years’ jail term.⁴¹

“Unfortunately the criminal law of our country does not recognise this form (digital rape) of sexual assault as a heinous crime. As a result, the culprit gets convicted for use of criminal force to outrage the modesty of a woman,” Justice S Muralidhar observed.

“It is a matter of grave concern that nothing has been done till date...Absence of stringent law to deal with impunity,” the court said.

Press Trust Of India, “Widen definition of rape for stringent punishment: Delhi High Court”, New Delhi, 3 May 2009

Societal scorn is also eloquent in the rampant killing of girl children in their mothers’ womb, and by neglect as well as sexual abuse when they are out of it. For every 1000 boys of 0-6 years, there are only 927 females in India, even fewer in northern states. India has the world’s largest number of sexually abused children, with a child below 16 years raped every 155th minute, a child below 10 every 13th hour, and one in every 10 children sexually abused at any point in time.⁴² India also has the largest number of missing children. The National Human Rights Commission (NHRC) says that on an average, 44,000 children are reported missing every year. Of these, as many as 11,000 remain untraced. Delhi, for instance, had over 7,000 children missing in 2006, though police claimed they were able to track 75 per cent of these.⁴³

Child abuse takes various forms. It includes physical injury, negligent treatment or maltreatment, psychological and emotional harm, sexual abuse, trafficking, and economic exploitation (as in the case of ill-paid, often tortured, child labour)—in short, any action or attitude that causes or may cause harm to the child’s development, protection, survival and role in society. Most of these abuses go unreported, including crimes, especially when they happen to children from poor families or those belonging to socially marginalised communities. Even otherwise, cases of serious abuse, such as sexual abuse, may be often swept under the carpet within households, ostensibly to protect “family honour”, while lesser abuses may not be considered serious enough to report in a culture that tacitly allows violence towards children, particularly girls. Rape of girl children still goes unreported due to social stigma and fear of harassment, while kidnapping or trafficking cases can often get categorised under missing children, to take just two examples.

According to the latest edition of Crime in India, published every year by the National Crime Records Bureau (NCRB), Ministry of Home Affairs, the number of crimes committed against children went up by 7.6 per cent to 20,410 in 2007, from 18,967 in 2006, accounting for 1.8 per cent of all crimes reported. Delhi accounts for 9.9 per cent of the crimes against children, ranked fourth after Madhya Pradesh (21 per cent), Maharashtra (13.3 per cent) and Uttar Pradesh (11 per cent).⁴⁴ However, in terms of crime rate it is far ahead of all – 12.2 per cent. All these numbers obviously exclude the under-reporting.

There is no legal definition of child abuse or child sexual abuse in India. The rate of conviction is poor and cases go on forever, delaying and often denying justice. The conviction rate at the national level for crimes against children stood at only 36.6 per cent in 2007.⁴⁵ Thus, there is further victimization of the child through the legal procedure.

There is no legal definition of child abuse or child sexual abuse in India. The rate of conviction is poor and cases go on forever, delaying and often denying justice.

41 Press Trust Of India. “Widen definition of rape for stringent punishment: Delhi High Court” Delhi, May 03, 2009

42 Sub-group Report, Child Protection in the Eleventh Five Year Plan (2007-12), Ministry of Women & Child Development, Government of India, page 15

43 NHRC, ISS, UNIFEM, Trafficking in Women and Children in India, Orient Longman, 2005

44 Crime in India, 2007, National Crime Records Bureau, Ministry of Home Affairs, Government of India, <http://ncrb.nic.in/cii2007/home.htm>

45 Ibid

A study conducted by the Ministry of Women and Child Development (MWCD) in 2007 found two out of every three children to be physically abused, mainly by the parents. More than half were also victims of sexual abuse. While the states of Assam, Andhra Pradesh, Bihar and Delhi reported the most abuse, the children most likely to be maltreated in this manner were children on the streets, working children and, surprisingly enough, children in institutional care.⁴⁶

Add to this the children affected by violence. Some 19 out of the 28 states of India face internal armed conflicts, which are characterised by gross violations of international human rights and humanitarian laws, both by the security forces and the armed opposition groups.⁴⁷ Be it Naxalites, government security forces and Salwa Judum, all have recruited and used children in the on-going conflict in Chhattisgarh, one of the 12 states plagued by internal violence. While there are no clear estimates, the Naxalite militants (fighting against the state of India), the Salwa Judum (state-sponsored militia used in anti-insurgency operations) and the government security forces are all recruiting children (both boys and girls) to training camps where they are taught to use weapons and explosives.⁴⁸ Many children have dropped out of schools and become Special Police Officers, lured by the monthly salary of Rs 1500. Children are routinely getting killed because they are suspected Naxals or attacked by the Naxals as informers. Education is disrupted because either the Naxals have destroyed the schools or worried parents have pulled children out of schools in the wake of violence.⁴⁹ Many schools have been turned into camps for refugees. Now even the Orissa government is following suit. In November 2008, it announced a plan to recruit around 2,000 local tribals as special police officers to counter Naxalite insurgents.⁵⁰

Thus, children today are growing up in an environment of violence, both in the private space and public. They are even being trained and used to perpetuate violence. On a daily basis, they confront ethnic and communal violence, state-sponsored violence, sexual abuse and exploitation in all forms. The latest Crime in India says 5,045 cases of rape of children were reported in 2007, 6.9 per cent more than in 2006. Worse, reporting of kidnapping and abduction went up sharply by 25 per cent to 6,377 cases. In Delhi on the other hand, a 12.6 per cent decline is reported in child rape cases while there is a 4.2 per cent increase in child kidnapping between 2006 and 2007. Madhya Pradesh reported the highest figure of 21 per cent, or 4,290 cases, out of 20,410 total crimes committed against children in the country.

Rising offences, higher insecurity

Crimes against and by children

What is the state of the “crimes” committed by children in India? What about the crimes committed against children? A true answer to this question is difficult to obtain partly because of underreporting of both types of crimes. Further, any proper study of juvenile justice in India is hampered by a near-total absence of qualitative and quantitative data on both the categories of children addressed by the JJ Act. The only data available are from Crime in India, the annual publication of the National Crime Records Bureau (NCRB), especially the data on “juvenile delinquency”, which provide a glimpse of the vast number of children requiring care and justice services. The Ministry of Social Welfare and the Ministry of Women and Child Development provide some data through occasional studies.

According to the Ministry of Women and Child Development, 40 per cent of India’s children, or close to 170 million, are in need of care and protection.⁵¹ This staggering number not only shows up the Indian society and parents in poor light but also fixes the scanner on the abysmal failure of the civil administration and the formidable challenge before the juvenile justice machinery. Delhi has half a million such children, being the capital and therefore a major destination for children from all over the country in search of better opportunities.

46 Study on Child Abuse: India 2007, Ministry of Women and Child Development, Government of India

47 Asian Centre for Human Rights, No succour for the victims of the armed opposition groups in India, 10 May 2006

48 Human Rights Watch, Dangerous Duty – Children and the Chhattisgarh Conflict, July 2008

49 Human Rights Watch, Dangerous Duty – Children and the Chhattisgarh Conflict, July 2008. page.4-7

50 Letter from Human Rights Watch to the Orissa government <http://www.hrw.org/en/news/2009/01/27/india-don-t-recruit-children-special-police>

51 Study on Child Abuse: India 2007, Ministry of Women and Child Development, Government of India

What about the children in conflict with law? The latest issue of Prison Statistics, NCRB, puts the number of “prisoners” in Delhi in the age group of 16-18 years at 64 and those under trial at 567 at the end of 2006.⁵² The number would be far higher once we add the age group of 7 to 15 years’ children, who will not be in prisons but observation homes. Over the years, there has been a steady increase in the number of children in conflict with law, from 17,203 in 1994 to 34,527 in 2007. The most common offences alleged to have been committed by children have been found to be: death due to negligence, attempt to murder, robbery or aiding robbery, hurt, and auto theft.

Interestingly, the share of girl offenders has consistently gone down, from 29.1 per cent in 1999, the highest so far, to 5.4 per cent in 2007. Looking at the data trend, it is clear that the slump happened because of the sharp rise in the total number of crimes by boys, once the age group of 16-18 years was included under children in 2001. The number of total crimes by boys zoomed upwards by 126 per cent from 13,854 in 2000 to 31,295 in 2001, squeezing the share of crimes by girls. Even in terms of overall numbers, crime by girls has shown a secular and steady decline from 2003 onwards, stabilising at less than 2000 compared to around 4000-5500 before that. All the four categories of causing hurt, Prohibition Act, riots and cruelty by husband and relatives, under which girls are commonly apprehended, have seen a decline, and it has been especially sharp for Prohibition Act.

Incidence and Rate of Juvenile Delinquency under IPC (1994-2007)				
Year	Incidence of		Percentage of Juvenile Crimes to Total Crimes	Rate of Crime by Juveniles
	Juvenile Crimes	Total Cognizable Crimes		
1994	8,561	16,35,251	0.5	-
1995	9,766	16,95,696	0.6	-
1996	10,024	17,09,576	0.6	-
1997	7,909	17,19,820	0.5	0.8
1998	9,352	17,78,815	0.5	1.0
1999	8,888	17,64,629	0.5	0.9
2000	9,267	17,71,084	0.5	0.9
2001*	16,509	17,69,308	0.9	1.6
2002	18,560	17,80,330	1.0	1.8
2003	17,819	17,16,120	1.0	1.7
2004	19,229	18,32,015	1.0	1.8
2005	18,939	18,22,602	1.0	1.7
2006	21,088	18,78,293	1.1	1.9
2007	22,865	19,89,673	1.1	2.0

Source: Crime in India 2007, NCRB

*Boys in the age group of 16-18 years considered juveniles since 2001

Children Apprehended under IPC and SLL Crimes by Gender (1994-2007)				
Year	Boys	Girls	Total	Percentage of Girls
1994	13,852	3,351	17,203	19.5
1995	14,542	4,251	18,793	22.6
1996	14,068	5,030	19,098	26.3
1997	14,282	3,514	17,796	19.7
1998	13,974	4,969	18,923	26.2
1999	13,088	5,372	18,460	29.1
2000	13,854	4,128	17,982	23.0
2001	31,295	2,333	33,628	6.9
2002	33,551	2,228	35,779	6.2
2003	30,985	2,335	33,320	7.0
2004	28,878	2,065	30,943	6.7
2005	30,606	2,075	32,681	6.3
2006	30,375	1,770	32,145	5.5
2007	32,671	1,856	34,527	5.4

Source: Crime in India 2007, NCRB

Social background of children in conflict with law

- 71 per cent of these children belong to families with an annual income up to Rs.25000 (\$625) a year
- 64.4 per cent of the total juveniles 'arrested' during the year 2005 are illiterate and 38 per cent have primary level education
- Over 8 per cent are homeless
- 91.7 per cent of the juveniles apprehended are in the age group 16-18 years
- More boys than girls come in conflict with law. Only 6.3 per cent of the apprehended children are girls.

Source: Crime in India 2007, NCRB

State-wise Classification of Juveniles Apprehended* (Under IPC And SLL) by Attributes During 2007

States/UTs	Education					Family Background			
	Illiterate	Primary	Above Primary but Below Matric/H.Sec.	Matric/H.Sec. & Above	Total	Living with Parents	Living with Guardians	Homeless	Total
Andhra Pradesh	749	707	317	180	1953	1335	251	367	1953
Arunachal Pradesh	20	46	39	0	105	50	55	0	105
Assam	255	246	362	292	1155	514	371	270	1155
Bihar	491	349	592	37	1469	1106	297	66	1469
Chhattisgarh	346	842	553	286	2027	1527	350	150	2027
Goa	20	29	23	5	77	64	8	5	77
Gujarat	520	1348	726	284	2878	2357	260	261	2878
Haryana	214	515	945	166	1840	1690	104	46	1840
Himachal Pradesh	5	8	75	57	145	145	0	0	145
Jammu & Kashmir	3	2	3	7	15	15	0	0	15
Jharkhand	161	185	109	54	509	306	132	71	509
Karnataka	50	88	419	60	617	512	81	24	617
Kerala	14	159	318	184	675	611	44	20	675
Madhya Pradesh	1752	2618	2231	749	7350	5597	1364	389	7350
Maharashtra	1236	3063	2045	492	6836	5792	870	174	6836
Manipur	0	0	0	0	0	0	0	0	0
Meghalaya	55	40	6	5	106	70	35	1	106
Mizoram	0	32	59	0	91	91	0	0	91
Nagaland	0	0	0	0	0	0	0	0	0
Orissa	148	217	229	64	658	435	157	66	658
Punjab	44	41	29	15	129	129	0	0	129
Rajasthan	539	743	699	143	2124	1899	200	25	2124
Sikkim	38	48	8	0	94	94	0	0	94
Tamil Nadu	639	680	394	8	1721	1185	247	289	1721
Tripura	1	1	0	0	2	0	2	0	2
Uttar Pradesh	56	171	102	98	427	381	46	0	427
Uttarakhand	6	32	34	57	129	100	29	0	129
West Bengal	51	48	41	5	145	96	35	14	145
States	7413	12258	10358	3248	33277	26101	4938	2238	33277
Andaman & Nicobar Islands	0	40	32	3	75	69	6	0	75
Chandigarh	15	25	58	20	118	112	4	2	118
Dadra & N. Haveli	0	9	2	0	11	11	0	0	11
Daman & Diu	3	0	0	11	14	11	3	0	14
Delhi	490	270	170	40	970	711	145	114	970
Lakshadweep	0	0	0	0	0	0	0	0	0
Puducherry	5	57	0	0	62	59	3	0	62
UTs	513	401	262	74	1250	973	161	116	1250
India	7926	12659	10620	3322	34527	27074	5099	2354	34527

Source: Crime in India 2007, NCRB

*Note- The word arrested had been used by the National Crime Records Bureau in this table despite change in the law. Under the JJ Act, children are to be apprehended and not arrested. HAQ has changed it.

One reason could be that, to paraphrase a Delhi High Court judge, the JJ system has been designed keeping boys in mind. The terminology, the processes, the homes, the courts, it is almost as if girls do not exist. Although there is no clear evidence, it does seem that either girls have forsaken the path of crime or police have been booking fewer girls after the 2000 Act.

Of the many social and economic factors that push children towards crime, the most important are lack of education and poverty. In 2006, 64 per cent of the total children arrested were either illiterate or had studied only up to primary level. Also, 92 per cent of the children came from very poor families, earning about Rs 4000 or less a month. In fact, over 72 per cent came from the poorest families that earned less than Rs 2000 a month, that is, those living even below the official all-India average poverty line of Rs 2500 a month.

Homelessness is the third biggest factor. The biggest group of children needing care and protection are the street children, many of who are actually missing children. In Delhi, 1100 children between 8 and 12 years went missing in 2008, out of which 200 have still not been traced, and January 2009 again saw another 100 go missing, forcing police commissioner Y S Dadwal to hold a meeting with his senior colleagues. An estimated 30 million children, who have either run away from their families or got separated from them for various reasons, are living on the streets. Railway stations are the second most preferred home for these children, said a National Human Rights Commission study in 2004. Every year, more than a thousand children land up there. In 2007, 1141 missing children were found at the New Delhi Railway Station, said the Railway Police Force. Interestingly, in personal interviews, many of these children say that they prefer to remain in their “transitory” homes rather than living miserably in government-run children homes.

Under the JJ Act, children are to be apprehended and not arrested, yet the Crime in India statistics continue to use arrested. A word of caution about the data. For all we know, the NCRB statistics could be the tip, at best half, of the iceberg. The table next page gives an idea of the nature of the disposal of cases, which in turn is a reflection on the “attitude” of the juvenile justice system. It is clear that the number of convictions (the number of children sent to Special Homes, where they go if found guilty of the charge) is higher than the acquittals.

“While at the national level, reported cases of crimes by children in conflict with law have gone up between 2007 and 2006 by 4.7 per cent, in Delhi the number has reduced substantially by 21 per cent. The number of children in conflict with law apprehended by the police has also gone down in Delhi by 35.9 per cent, whereas at the all-India level this number has increased by 7.4 per cent.”

Status of Disposal of Cases of Children in Conflict With Law (1998-2006)

Year	Arrested and sent to Courts	Sent to home after advice or admonition	Released on probation & placed under care of		Sent to Special Homes	Dealt with Fine	Acquitted or disposed of otherwise	Pending disposal
			Parents/ Guardian	Fit Institution				
1998	18,964	2,620	3,889	829	1,751	908	2,107	6,860
1999	18,460	1,656	5,298	768	1,281	832	3,358	5,267
2000	17,982	2,619	3,091	2,012	1,864	609	1,132	6,656
2001	33,628	4,127	4,833	1,003	4,037	897	4,436	14,296
2002	35,779	3,236	11,338	1,240	3,381	908	1,693	13,983
2003	33,320	3,413	9,074	1,526	3,936	1,592	1,730	12,049
2004	30,943	3,848	5,662	1,138	4,942	1,256	1,957	12,140
2005	32,681	3,807	5,578	1,933	4,423	1,361	1,801	13,778
2006	32,145	4,036	5,723	1,482	4,510	1,023	1,579	13,792
2007	34,527	4,476	6,324	1,336	5,077	1,543	1,474	14,297

Source: Crime in India 1998-2006, NCRB

Cases pending disposal imply that the children are either kept in observation homes or may have been released on bail. HAQ's experience says police usually don't make an effort to verify the age of the child, instead sending him by default to adult prison and "under-trialhood". It is quite possible then that many of the apprehended may not be appearing on the NCRB's books, even in the age group of 16-18. But they will eventually surface in observation homes, so a combination of the number of children in observation homes and the numbers of children caught by police and released on bail, will better capture the total number of children coming into conflict with law. However, no public records are available on the number of children released on bail and there seems to be a great hesitation among the department officials in sharing such information with the public.⁵³

**Children need love,
especially when they do not deserve it.**

Harold S Hulbert, child psychiatrist

53 Sub Group Report on Child Protection for the Eleventh Five Year Plan (2007-2012), Ministry of Women and Child Development, Government of India

DO WE REALLY CARE?

4

It would be interesting to begin with an outsider's perception of the JJ system in India. Writing in the Harvard Human Rights Journal as late as in 2008, after 22 years of a functioning juvenile justice system, Erika Rickard feels: "Juvenile judicial proceedings differ notably from ordinary criminal proceedings. The room is typically occupied by the following: the three JJB members hearing the case; probation officers serving as courtroom clerks; a court reporter; a guard from the Observation Home (where children are provisionally incarcerated); a police officer or two; possibly the victim and his or her family; and the child, sometimes with his or her family. Some districts have shifted proceedings from courthouse to Observation Home; rather than make the proceedings more child-friendly, however, this simply removes trained courtroom staff from the proceedings and replaces them with (usually untrained) probation officers. These alternative proceedings do not significantly diminish the sense of formality and criminal suspicion. Regardless of the location of the proceedings, the overwhelming feeling imposed on the child is that of intimidation and fear."⁵⁴

Juvenile Justice at work

The same feeling is echoed by the National Commission for Protection of Child Rights (NCPCR) when it says, "criminalization and deinstitutionalization and ensuring the basic dignity of children remain unmet objectives", because of "incomplete, inconsistent and inadequate application and implementation of the juvenile justice system" as well as pervasive cultural and systemic roadblocks.⁵⁵ Rickard adds, "One of the more pernicious of the Government of India's flaws, lack of oversight, flourishes in the juvenile justice system. Physical abuse, corruption, and abuse of power dominate the system, from police to incarceration to legal proceedings."⁵⁶

As a result, in 2006, the Supreme Court issued notices to all High Courts asking them to appoint a Judge to monitor the functioning of the Juvenile Justice system in their states. The Delhi High Court ordered a three-member committee to be set up under Justice Madan B. Lokur to look into the working of the JJ system in detail. Since then, workers from both NGOs and government homes admit, there has been a notable



improvement in the affairs of these children. In Maharashtra too, the High Court exercises direct control over juvenile justice matters. Justice Ranganath Desai has been given the charge of reviewing the implementation of the JJ Act

⁵⁴ Erika Rickard, J.D. Candidate, Harvard Law School, 2009: Paying lip service to the silenced: Juvenile justice in India, Harvard Human Rights Journal, Vol. 21, Issue 1, 2008

⁵⁵ www.ncpcr.gov.in/report/Sub_Committee_report_on_review_of_Operations_of_Observations_and_Children_Homes.doc

⁵⁶ Erika Rickard, op cit

and submitting quarterly reports to the High Court. Justice Mohan S Gouda was appointed by the Karnataka High Court to oversee the functioning of the JJ Act and institutions and Justice V. Gopala Gowda, Executive Chairman, Karnataka Legal Services Authority (KLSA) was to assist him.

Officials working at government homes as well as NGOs, more so in Delhi, admit in personal interviews that the 2006 amendment and the central rules notified in October 2007 have made the juvenile process simpler and speedier. Their contention is partly true. But while the latest Act has smoothed quite a few wrinkles of the care and justice process for both categories of children, HAQ's experience shows that several problems still exist in interpretation and implementation of law and in the attitude of the police, judiciary and the care system where bureaucratic red tape prevails. The following chapters will review in detail the many obstacles—legal as well as non-legal—in the wide swathe of the implementing system.

One major reason for—as well as the result of—the tardy and ineffective implementation of the law is the unnecessary and often prolonged delay in settling the complaints, hanging like a Damocles' sword over the lives of the children. And of course, another reason is the perennial lack of funds as well as the will to commit them.

Too far from freedom

Overworked justice system

Even when the law seems adequate, the law enforcement machinery and the justice delivery mechanism are unable to keep pace with it. The CRC emphasizes the importance of conducting proceedings involving juveniles “without delay”.⁵⁷ So the JJ Act specifies that proceedings “shall be completed within a period of four months from the date of commencement,” but with exceptions if the “period is extended by the Board having regard to the circumstances of the case and in special cases after recording the reasons in writing for such extension”.⁵⁸ Thus cases languish in the system indefinitely, affecting both CNCP and CICL. Although it is not even possible to know how many cases are delayed beyond four months, the existence of any such case that does not have proper justification should violate the JJ Act.

Juveniles who are detained under arrest or awaiting trial (“untried”) are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.... Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention.

UN Rules for the Protection of Juveniles Deprived of their Liberty, GA res. 45/113, annex, 45 UN GAOR Supp (No 49A) at 205, UN Doc A/45/49 (1990).

How long do the apprehended children usually wait for justice? About a year on an average, if not more. Often, it is simply because the legal infrastructure is not enough to meet the needs of the number of children before it. In a speech on judicial reforms in February 2008, Chief Justice of India K G Balakrishnan pointed out that even with a network of about 14,000 functioning courts and a working strength of 12,500 judges handling 40 million cases, each judge in India was required to deal with a record number of 4,000 cases a year, clearly a Herculean feat.⁵⁹

In July 1987, the Law Commission recommended that India ought to have 107 judges per million of population by 2000, the ratio achieved by the USA in 1981.⁶⁰ These were endorsed by a Parliamentary Standing Committee in 2002. Yet, India still has only about 12 judges for every million people—even Britain has 51 per million—and the total case

⁵⁷ Convention on the Rights of the Child, supra note 2, article 40

⁵⁸ JJ Act, supra note 8, article 14.

⁵⁹ http://www.combatlaw.org/information.php?article_id=1139&issue_id=40

⁶⁰ <http://lawcommissionofindia.nic.in/101-169/Report120.pdf>

backlog is estimated at 29.2 million. In Delhi, the High Court had a backlog of 74,599 cases as of March 2008, which will take 466 years to clear, if the number of judges remain at the present 32, instead of the required 48, says the Chief Justice's Annual Report on the Delhi High Court.⁶¹

If this is the state of the principal justice system, it is not difficult to foresee that the juvenile justice system, being comparatively nascent, would be even less equipped to meet the needs of all children requiring care, protection and justice. According to Crime in India, 32,681 children were apprehended in 2005. Of which, 13,778 cases, or over 42 per cent, were still awaiting trial at the end of the year. The situation hardly improved two years later. In 2007, 14,297 cases, or 41.4 per cent of a total of 34,527 were "pending disposal".

Disposal by Courts of Persons Arrested for Committing Crimes Against Children (2007)							
Crime Head	Total No. Persons Under Arrest Including those from Previous year	No. of Persons whose		Percentage of Persons		Whose Trials Remained Pending	Persons Convicted to Trials Completed
		Cases Compounded or Withdrawn	Trial Completed	Trial Remained Pending at the end of the year	No. of Persons Convicted		
Infanticide	385	2	69	314	31	81.6	44.9
Murder	7846	7	1674	6165	719	78.6	43.0
Rape	18447	66	3562	14819	1210	80.3	34.0
Kidnapping & Abduction	17522	54	3043	14425	1019	82.3	33.5
Foeticide	206	1	26	179	4	86.9	15.4
Abetment of Suicide	161	1	40	120	9	74.5	22.5
Exposure and Abandonment	1067	3	94	970	12	90.9	12.8
Procuration Minor Girls	833	3	144	686	24	82.4	16.7
Buying of Girls for Prost.	154	0	23	131	0	85.1	0.0
Selling of Girls for Prost.	159	0	20	139	1	87.4	5.0
Child Marriage Restraint Act, 1978	2037	15	216	1806	70	88.7	32.4
Other Crime	24975	482	4588	19905	2030	79.7	44.2
Total	73792	634	13499	59659	5129	80.8	38.0

Crime Head-wise Percentage Disposal of Cases by Courts of Crimes Committed Against Children in India (2007)							
Percentage of Cases to Total Cases for Trial No. of Cases							
Crime Head	Cases Withdrawn by Govt.	Compounded or Withdrawn	In which Trials Completed			Pending Trial at End of Year	Conviction Rate
			Convicted	Acquitted or Discharged	Total		
Infanticide	0.0	0.4	9.5	9.5	18.9	80.7	50.0
Murder	0.0	0.2	8.3	9.6	17.9	81.9	46.2
Rape	0.0	0.2	6.3	12.0	18.3	81.5	34.3
Kidnapping & Abduction	0.0	0.3	5.1	10.1	15.2	84.5	33.7
Foeticide	0.0	1.9	2.8	13.1	15.9	82.2	17.6
Abetment of Suicide	0.0	2.5	5.0	21.7	26.7	70.8	18.8
Exposure and Abandonment	0.0	0.2	1.6	8.6	10.2	89.6	15.4
Procuration Minor Girls	0.0	1.1	3.1	16.3	19.4	79.5	15.9
Buying of Girls for Prost.	0.0	0.0	0.0	16.1	16.1	83.9	0.0
Selling of Girls for Prost.	0.0	0.0	2.2	12.7	14.9	85.1	15.0
Child Marriage Restraint Act, 1978	0.0	1.1	4.6	8.9	13.5	85.4	34.4
Other Crime	0.0	1.9	7.0	10.8	17.8	80.3	39.4
Total	0.0	0.9	6.3	10.9	17.2	82.0	36.6

Source: Crime in India 2007, NCRB

The latest figures are even more disturbing. Although NCRB statistics say 441 cases are pending, Delhi actually had about 4,000 juvenile cases pending at its two JJBs at end 2008.⁶² Haryana and Punjab have 6,326 cases, while in

61 <http://www.timesonline.co.uk/tol/news/world/asia/article5748288.ece>

62 Interview with Madan Lokur, Judge, Delhi High Court and Chair of the High Court Committee on Juvenile Justice

Mumbai, about 450 new cases of juvenile crime are recorded each year, and there is a backlog of about 900 pending trial since 2004. The lack of an adequate number of JJBs is the reason for the steep rise in the number of pending cases.

Has the situation improved? Not remarkably, going by the official figures. At Delhi's JJB no 1 at Kingsway Camp, the backlog of cases as of 31 July 2008 ran to as high as 2,100. At JJB no. 2 at Delhi Gate, there were 1,859 cases pending, some from as early as 1998. Although since the High Court committee started working, many more children are being released on bail, reducing pressure on the homes, the total backlog of the cases in Delhi has reduced only slightly, from 4,550 as of 1 January 2008 to 3,554 on 1 November 2008.

Way down on the priority list

Many laggards in states

NCRB statistics say only five states – Madhya Pradesh, Maharashtra, Chhattisgarh, Uttar Pradesh and Andhra Pradesh – account for the maximum number of crimes against children. Four of these states except UP, as well as Gujarat, Haryana and Tamil Nadu, on the other hand, account for the maximum number of crimes by children. Among the Union territories, Delhi is at the top of the heap in both these areas.⁶³

Yet, states remain laggards in reforming and updating their administration of juvenile justice, be it in setting up the desired number of institutions and courts or in speeding up delivery of justice. Many of them have not put in place a counterpart for the NCPCR. Despite the NCPCR Chairperson Shantha Sinha writing to all states in March 2008 to set up a commission, only five states have done so till now. The Delhi Commission for Protection of Child Rights started in 2008 with Amod Kanth, retired Director General of Police and founder of NGO, Prayas, as Chairperson. Goa and Sikkim too have set up three-member commissions, while the Maharashtra Commission, at the time of writing this report, was functioning with only a Member-Secretary and has yet to name members. Karnataka set up the Commission in July 2009.

Government funds reach only a few big states

The flagship centrally-sponsored scheme, A Programme for Juvenile Justice, run by the Ministry of Women and Child Development, had a revised budget allocation of Rs 23 crore in 2006-07, of which Rs 21.7 crore was utilised. The scheme reaches 39,962 children living in 711 homes in 25 states and Union territories. The cost is shared equally between the states and the Centre.

Being the only one of its kind, the scheme is popular. Utilisation of funds was 89.5 per cent in 2002-03, 102 per cent in 2003-04 and 94 per cent in 2006-07. Yet, the scheme served to promote huge disparity in use of central funds.

Only 70 per cent of the states have been able to make use of these funds. Arunachal Pradesh, Himachal Pradesh, J&K, Jharkhand and Manipur could not use the funds because of their inability to contribute a matching share of 50 per cent. Maharashtra alone received more than 35.5 per cent of the total funds released in 2002-03 and 45.31 per cent in 2003-04.

In 2006-07, 65 per cent of the budget was spent on only four states--Maharashtra, Uttar Pradesh, Andhra Pradesh and Madhya Pradesh. Maharashtra, a state with 35 districts, had 273 fully funded homes under the JJ scheme, while Uttar Pradesh with 60 districts had only 47 homes.

Source: NCPCR, http://www.ncpcr.gov.in/Reports/Sub_Committee_Report_on_Review_of_Operations_Of_Observation_and_Childrens_Homes.doc

While many states have set up the CWCs and the JJBs in accordance with the law, most of these function more in letter than spirit. In many states, there has been no qualitative improvement in the structure and functioning of the institutions, only the nomenclature has changed.

63 Crime in India 2007, National Crime Records Bureau, Ministry of Home Affairs, Government of India

State administrations are often found not cooperating with the judiciary and vice versa; they don't even contribute their share of the fund for setting up standards and institutions under the JJ Act or for implementing central government programmes such as the ICPS. Delhi, despite being the capital city with the largest number of street children and despite having the worst figures of crime against and by children, has not yet set up any cell to implement the recently approved ICPS.

Due to lack of data, it is impossible to give the full picture prevailing in all the states but below, we try to give as much detail as possible for some states where either HAQ teams have visited (specifically, during August to October 2007)

Progress of JJ Institutions in the Country											
State/Union territory	JJ rules notified on	Number of districts	Total Number of JJ Institutions		Total number of government-run homes					JJ fund (Rs lakh)	District/ State Advisory Boards/ committees, SJPU, adoption agencies
			JJB	CWC	Observation homes	Special homes	Shelter homes	Children homes	After care homes		
Andhra Pradesh	8.5.2003	23	17	17	10	2		5	1	Yes	SAB
Arunachal Pradesh		16									
Assam		27	27	27	4			3		No	
Bihar	2.9.2003	38									
Chhattisgarh	Notified	18	9	7	6				11		
Delhi	19.8.2002	10	2	4	3	1		9	2	Yes, Rs 10 lakh	SAB, SAB
Goa		2	9								
Gujarat	31.12.2003	26	26	26	16	13		33		Yes	SJPU (women cell), SAB, 20 adoption agencies
Haryana	10.10.2002	20	4	19	1	1	2	2	1	Yes	SAB, SJPU (women cell)
Himachal Pradesh	4.5.2002	12	2		1		4	1			
Jammu and Kashmir		14									
Jharkhand		24	21	11	7			3			SAB
Karnataka	26.9.1002	28	5	27	5	2		45		Yes	SJPUs in all districts, SAB
Kerala		14	14	10	13	2		8	3	Yes	
Madhya Pradesh	15.7.2003	50	48	48	18	3		3	2	Yes	40 DABs, 1 SAB, SJPU in all districts, 12 adoption agencies
Maharashtra	30.7.2002	35	30	37	14	3		32	4	Yes	SJPU in 27 districts, city advisory boards
Manipur	Notified	9	1	1	1	1		1			3 adoption centres (NGOs)
Meghalaya	8.12.2004	7	7	7	3	1	2	3	1		
Mizoram	1.8.2003	8	1	1	2	2					SAB
Nagaland		8									
Orissa	Notified	30	30	30	3	3		24		Yes	SJPU in 6 districts, rest under women cell
Punjab		20									
Rajasthan	23.7.02	32	32	16	2			5		yes	SJPU in all districts, SAB.
Sikkim	13.3.2003	4	1	1	1					Yes	SAC
Tamil Nadu	14.2.2002	31	8	18	6	2	2	38	3	Yes	SJPUs in all dist,
Tripura	23.2.2002	4	1	1	2						
Uttar Pradesh	31.3.2004	70	25	12	22	2		19	4		SAB
Uttarakhand		13									
West Bengal	2003	18	7	7	5			14	8	Yrs	

Compiled by HAQ from state government reports submitted to NCPDR, Ministry of WCD and own sources.

Note: 1. In many states, observation homes and special homes are the same.

2. Out of the six Union territories of Chandigarh, Dadra and Nagar Haveli, Puducherry, Andaman & Nicobar, Daman & Diu and Lakshadweep, the first three have one JJB and a government-run multipurpose home each. Information is not available on the rest.

and obtained a ground-level scenario or about which HAQ has managed to secure some information from local officials or through the NCPCR. According to NCPCR members, the southern states score well in implementing juvenile justice, while the northern states have a really poor record. In Bihar and UP, for instance, the JJBs sit for only two days a week.

In **Bihar**, a HAQ team found, dismal conditions prevailed in the government-run homes and the justice-dispensing system. In a Patna home, for instance, rooms were dirty and used as storerooms while children were found to be sleeping on the floor or under beds, where mice ran all over them. They had to cook their own food on a coal stove, and the food was not even enough. The kitchen walls had turned black due to the soot and smoke from coal. In a building meant for 60, 145 were staying. One big classroom took in all, while another room was used for candle-making and sewing.

HAQ also found that in Bihar, most of the children, some of them as young as six years, were being indiscriminately booked during Dussehra from railway stations. Police beat them badly and tortured them by covering their heads with cloth and then pouring oil over, practically suffocating them. To avoid torture, children signed blank papers. The children complained that the JJB was rejecting all bail applications from children involved in serious crimes. For petty offences, the children were being sent to the higher court for bail, yet Lok Adalats were being organized every month to dispose of petty offences. Since the JJB was also busy with the Patna commissioner cases, children were being sent to Nalanda JJB, 70 kms away. In Jharkhand, the JJBs have been set up in all 21 districts on paper, but in practice only seven are working as they are sitting in the premises of the seven functioning Observation Homes.

Even in **Assam**, the number of children arrested for vagrancy from railway platforms was very high. They were produced before the Railway Magistrate and then before the JJB, but most of these complaints “were dismissed due to non interest of prosecution in processing the case”. There was neither an order nor a system in maintaining files. Files were incomplete, missing vital documents, and many of the existing ones were duplicates. Most of these files didn’t have a report from the probationary officer attached. The children were addressed as “accused”, and the “arrest memo” said “accused was arrested and handcuffed with rope and key was given to police official”. All of them, irrespective of age, were handcuffed.

For the 23 districts in Assam, two JJBs and 23 CWCs had been notified in August 2007. The JJB in Guwahati is located in the District Court itself. One of the trial courts bears the board “Principal Magistrate, Juvenile Justice Board” and deals with cases from Bongaigaon, Golpara, Dhubri, Kokrajhar, Nalbari, Barpeta and Kamrup districts. But the social workers serving on the Board were not appointed till August 2007. A second JJB in Jorhat deals with the cases from all the other districts. The JJB sat in the trial court and tried to accommodate as many children as possible on one date. Cases were pending from as far back as 1990.

As in many states, the Children’s Home in Assam visited by HAQ also included the Observation Home, although more (10-12) rooms were used for the former. The children in conflict with law, of all ages and all kinds of crime, were dumped in a single, dirty room, locked from outside — almost 50 of them were present on the day of the visit by HAQ. A bigger room had been constructed and was ready but waiting for inauguration!

Almost all the children were suffering from skin ailments. The government doctor hardly ever came, the children said, and when he came, gave one tube of ointment to all. Bereft of care and legal counsels, the children were constantly running away from the home.

In the 35 districts of **Maharashtra**, there were 28 JJBs and 29 CWCs till August 2007. Mumbai is the only district with two JJBs—one for Mumbai Rural (established on 9 April 2007) and the other for Mumbai City. In all other districts except the last, separate First Class Judicial Magistrates had not been appointed for the JJBs. The role of a Principal Magistrate for the JJB had been given as an additional charge to the Chief Judicial/Metropolitan Magistrate

or any other First Class Judicial Magistrate of the district. There were also no social workers in the Mumbai City JJB at that time.⁶⁴

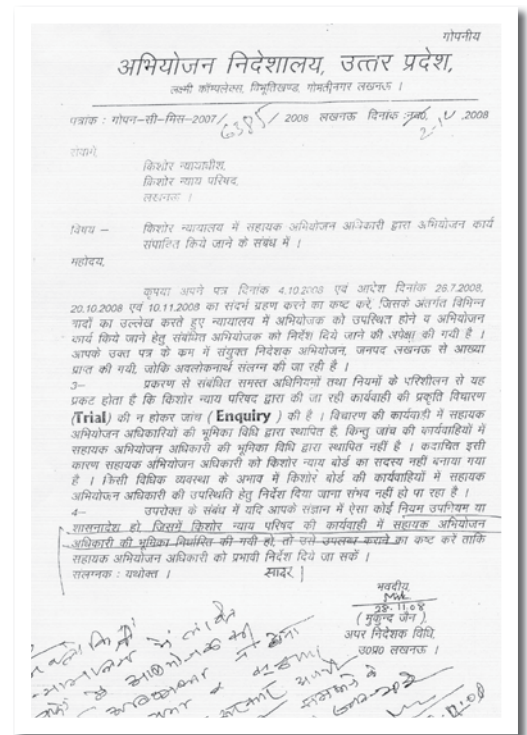
The CWCs had 1,334 sittings during April-August 2006, in which 7,058 cases were reported to have “been handled” and 3,606 remained pending; a total of 1800 cases of juveniles in conflict with law were brought before the JJBs in the same period. Between 2001 and 2005 there were altogether 17,052 cases of children in conflict with law; from 2,810 in 2001, the number went up steadily to 4,216 in 2005. Till August 2006, 16,695 cases had been pending, though the backlog was only 2,235 in the government’s record books. The state government said the rate of disposal was slow because the CJM of the districts were holding additional charge of juvenile justice matters. The Chief Justice of Maharashtra admitted that pendency of cases in the state as well as Pune was too high. In Pune, the NHRC had to issue a notice to the state government in June 2007 for the failure of the JJB there in settling nearly 3,000 cases, some pending for the past 16 years, and attempting to dispose of some 171 cases at a Lok Adalat in full public glare. One would expect the social worker members on the CWC or the JJB to have helped speed up the cases, but the social workers said they didn’t foresee much role for themselves, as they were not empowered to undertake judicial proceedings or pass orders, although their signature on the final order remains a requirement.

Cases were found to be pending in **Uttar Pradesh** too for 17 years where the sorry state of affairs is believed to have made it to a UNICEF documentary. Many of the respondents were now married and with children. Yet, instead of settling the 3,000 pending cases, the Lucknow JJB was busy getting a new court constructed with an elevated platform. The courts there were slapping a minimum bail on children of Rs 10,000, going up to Rs 50,000. Interestingly, the verification of surety is an important process in UP, once the amount goes up to Rs 10,000 and above. This verification of surety was further delaying the cases.

The JJB here is so bureaucratic that even after the presentation and verification of age certificate of the children from school it ordered bone verification tests. On the date of visit, 195 children were found cramped in a home that should ideally house only 50.

Of the 70 districts in UP, only 17 had JJBs as of September 2007 and 10 districts have CWCs. All of these are located inside the Observation Homes. Even as late as in May 2008, a directive by Justice Amar Saran and Justice Shiv Shanker of the Allahabad High Court, said “We are still not informed about the time frame by which the institutions and homes which are required to be set up in all the districts under the Juvenile Justice Act, such as juvenile justice boards, different classes of government children’s homes for children in conflict with the law, and in need of care and protection, child welfare committees etc. will actually be set up. We have also not been informed about the impediments in constituting these institutions and children’s homes. No information has been furnished when the Commission for Protection of Child Rights will be constituted in the state of UP.”⁶⁵

To begin with, the Prosecution Branch of the Government of UP had notified that no Assistant Public Prosecutor be provided to the JJBs as they were holding an Inquiry and not Trial. However 17 lawyers have been provided by the State Legal Services Authority in all the 17 JJBs.



In **Orissa**, although relevant JJ institutions have been working since 2003 and even the JJ fund has been set up, officials

64 Report by Bharti Ali of HAQ: Centre for Child Rights after her visits to Maharashtra and Karnataka as part of the NCPCR team.

65 Vishnu Dayal Sharma Vs State of UP and others, Criminal Misc. Writ Petition No. 15630 of 2006

complain of little knowledge of the JJ system among the people, lack of publicity and awareness effort. Nor was there awareness of the new ICPS. Funds flow from the central government was poor.⁶⁶

In **Madhya Pradesh**, one of the few states where juvenile justice is still under the Ministry of Social Justice, efforts are on to bring it under the Ministry of Women and Child Development. The separation keeps the government from taking a proactive interest in a more efficient administration of juvenile justice. “The WCD staff,” laments a senior official, “is totally unaware of juvenile justice issues and it will be necessary to train them all. Nor are there any civil society organisations in the state working for such children.”⁶⁷

The government has set up JJBs in 48 districts (except for the two new districts), though the benches are often common. But the magistrates sit for six hours, four days a week, which has helped cut down the number of inmates in observation homes. But the backlog of cases has not significantly reduced from the 1986 figure of 19,000 for the whole state. Nor is training of SJPU taking place.

Most of the social workers taken for the JJBs and CWCs have resigned due to poor emoluments and lack of official paraphernalia, such as a car with red lamp! In such a situation, the rehabilitation of children is suffering. In the case of girls, the most popular option is to get them married, sometimes even before they turn 18, owing to a literal implementation of the concept of restoration to family. The JJ fund of Rs 5 lakh a year is being used from the current fiscal year for rehabilitation.

But the general consensus is that, despite being the capital of the country, **Delhi** takes a lead in poorly administered government care for children. Though its justice delivery system has improved over the past couple of years, the government that provides the Welfare Officers and Probation Officers and is responsible for the infrastructural needs constantly remains at loggerheads with the JJ system. The number of Welfare and Probation officers is inadequate, and the infrastructure in the homes and institutions is poor. The staff of these institutions do not co-operate and in some instances even bypass the CWC through whom the CNCP are sent to children’s homes. Although Delhi has set up the JJ fund with Rs 5 lakh, it is still not clear what is to be done with it. Even the inspection committee it created did not work, resulting in a High Court committee to probe the status of administration of juvenile justice in the state.

Although the CWC sitting at the girls’ home has done exemplary work for the last six years, the current situation is a matter of concern. Several of the members of the CWC have completed their extended term in February 2009 but the selection committee for appointing new members has not yet been formed. As a result, a few members of the CWC, whose terms are not yet over, move from location to location dealing with the cases, slowing the rate of disposal.⁶⁸



The NCR region suffers the most probably because of jurisdictional issues. In a shameful instance of gross neglect by the MWCD, hordes of girls were rescued from a Ghaziabad ashram in October 2008 from the clutches of the ashram head, ironically known as Baba Balanath (child god), who had been sexually abusing the children openly and in full knowledge of the local authorities. The misdeed came to light through the sting operation of a national TV channel, which said it was forced to take the help of the National Commission for Women after repeated complaints to the MWCD failed to get any response even after the videotapes were shown.

66 Presentation by Sangramjit Nayak, Under Secretary, Department of Women & Child Development, Government of Orissa, at the NCPCR National Roundtable on JJ Act in February 2008.

67 Personal interviews with officials in the ministries of WCD and Social Justice and Empowerment in May, 2009

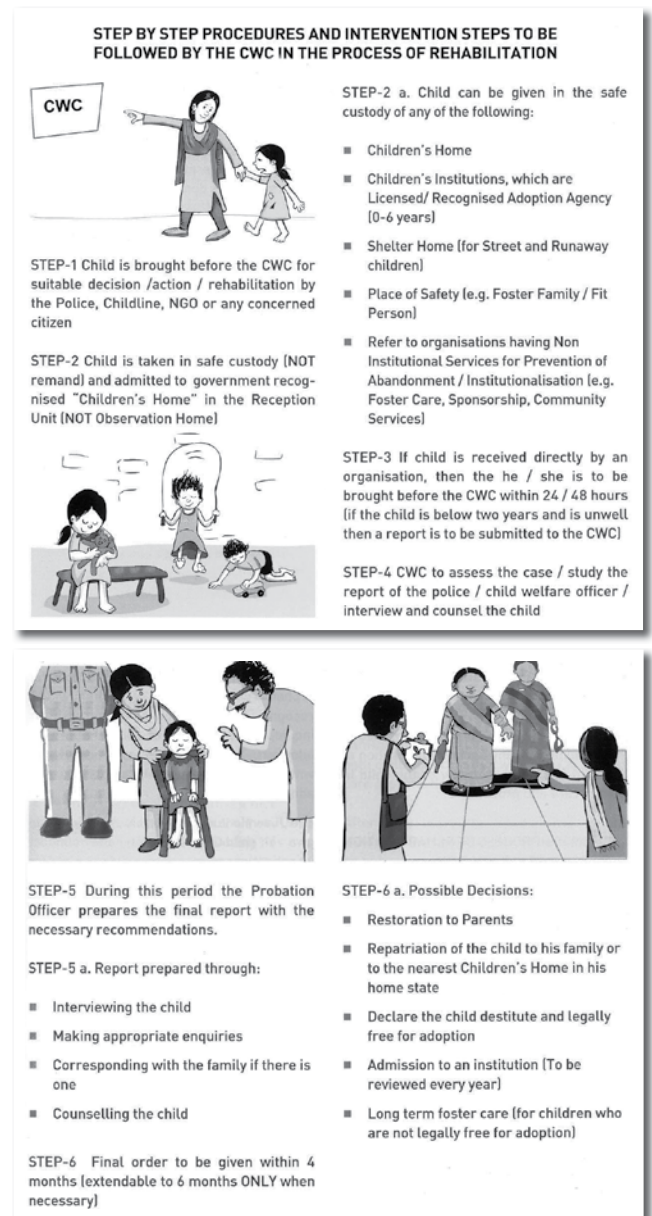
68 Vacancies in all the CWCs were filled in July 2009.

But the most shameful lack of service in Delhi is its failure, despite being the capital state of the country and having surplus resources, to provide free legal counselling to the children. The CWCs and police have been freely taking help of the NGOs, unless thwarted. In October, for instance, a police constable called up the HAQ office for advice, failing to get a recently orphaned child into a home after running around for a whole day. The superintendents of the two homes he tried were absent, none else would take the responsibility of admitting the child, nor was he allowed by law to keep the child at the station.

Nearly 80 per cent of the homes in Delhi are run practically as animal shelters, even as the government is sitting on the foster care scheme drafted with much care. There is no child protection unit, nor any advisory board or monitoring committee as mandated by the JJ Act. Since 2002, the state government has also not done any social audit for any of its homes. Nor is it encouraging sponsorship or adoption, which would have reduced overcrowding at homes. There is also no attempt to provide medical and specialized services such as counselling to the disabled, mentally disturbed and addicted children at the homes, rather there is an attitude of shutting out the problem that all home officials acknowledge candidly. The Delhi government has also not completed registration of NGOs working with children. Not every care home is registered and/or licensed.

In the south, the better performing states are Kerala and Tamil Nadu. **Kerala** was one of the forerunners, framing the JJ rules in 2003, after setting up a programme development and monitoring cell in 1998 as well as the JJ fund. The state has also been dealing with children in conflict with law under the Probation of Offenders Act 1958, which has provision for admonition, release on probation and community treatment. Yet, 24 per cent of the prison population consisted of young offenders less than 21 years. According to K Rajan, Superintendent, Children's home at Kozhikode, such incarceration neither helps the offender, leaving him with a stigma for life, nor benefits the state in any way. The state, he says, has to spend about Rs 700 per day to keep each person in prison, whereas with probation and community counselling, such cost can be reduced to Rs 70. He also concedes that better training and a higher number of probation officers are urgently needed because a similar programme conducted earlier on the JJ Act and rules was very successful and resulted in closure of many pending cases against children.⁶⁹

In the 29 districts in **Karnataka**⁷⁰, there were 8 JJBs and 28 CWCs till August 2007, and 14 more JJBs had been approved and sanctioned. Out of 140 members appointed to the 28 CWCs in this State, 47 are women. As far as



Child Protection and Juvenile Justice System for Children in Need of Care and Protection, by Dr Nilima Mehta, Childline India Foundation, April 2008

⁶⁹ Presentation made by K. Rajan, Superintendent, Children's home, Kozhikode and Member, State Juvenile Justice Advisory Board, at the NCPCR National Roundtable on JJ Act in February 2008.

⁷⁰ Report by Bharti Ali of HAQ: Centre for Child Rights after her visits to Maharashtra and Karnataka as part of the NCPCR team and the report available on www.ncPCR.gov.in/report/Karnataka_Report.pdf

the 8 JJBs are concerned, of the 16 social worker members, 10 are women. While the CWCs operate from the children's homes, the sittings of the JJBs are held within the court premises, except in Bangalore.

Karnataka is both a sending and a receiving state for CNCP. It has received many children from other states who may have come there in search of employment or are runaway children or trafficked. Without information on the number of children restored to their families, it is difficult to come to any conclusion on the status of children in need of care and protection in Karnataka. To add to this, data provided by the Police Department reveals that 19,106 children were reported missing from the State in the last five years (2002-2007), of which 51.5 per cent were girls and 48.5 per cent were boys. In Bangalore, the capital city, there were two CWCs sitting twice a week, but only one JJB, which sat for only two hours, 3 pm to 5 pm, one afternoon a week.

The Principal Magistrate is the Chief Metropolitan Magistrate. The two social worker members are associated with two NGOs, Echo and Alternate Law Forum respectively. There was a special order requiring the JJB to sit for two days in a week, but due to lack of staff and infrastructural facilities, they were unable to follow the order.

There is one Observation Home for Boys in the six-district Bangalore city but none at all for girls. Since there were very few girls in conflict with law, they were sent to the adult women's reception centre. While the CWCs operated from the children's homes, the JJBs sat within the High Court, except in Bangalore. According to the Principal Magistrate of the JJB in Bangalore, there were 7,000 vacancies in the police department and the officers were not trained on how to deal with children.

About 1,500 cases are reported to be pending before the JJB. Some are pending from 2000 and 2002. The Principal Magistrate said there was no time period stipulated in the JJ Act within which the Social Investigation Report (SIR) should be filed by the Probation Officers and hence matters got delayed. It is well within the powers of the Principal Magistrate to specify the date for submission of the SIR while writing an order for SIR.

While the Board has often held discussion with the Directorate of Prosecution to provide prosecution services, it has been refused on the grounds that prosecution is required only in the case of trials and since the JJ Act talks about holding an 'inquiry' and not a 'trial', no prosecution services were required.

Disposal is directly related to the inquiry, where the Probation Officers have a critical role to play since their reports about the child's social background and circumstances are considered by the CWCs and JJBs for arriving at a decision. In a written response to questions asked by NCPCR, the State Department puts the number of Probation Officers (POs) assisting the CWCs and JJBs in inquiry and social investigation report throughout the state at 27. The response also points out that these POs work out of the children's homes. In that case how they handle matters connected to the JJB/observation homes is a matter of concern.

Ever since the law brought within its purview children aged 16-18 years with the JJ Act, the need for personnel has increased manifold. Allegations that the State Department has no money to pay salaries and hence it does not appoint necessary and trained staff were however, refuted by it. The Director, Karnataka DWCD reported that they have recently looked into the issue of appointments and dealt with it through general transfers.

However, there is a SJPU in every district, established with the support of three NGOs, Echo, Bosco and APSA, also members of the CWC or the JJB. Echo has trained 50 children traffic controllers and tied up with the traffic police for placement.

SC Sets Right Dichotomy On Juvenile Status

The Supreme Court said all accused between the age group of 16-18 years convicted or still facing trial as criminals across the country, would now be treated as juveniles

New Delhi: The 1986 Juvenile Justice Act allowed the courts to adopt a soft approach towards a young man if he committed a crime before he attained 16 years of age. In 2000, a new law was enacted extending the same relief to accused if they were below 18 years of age.

In this 14-year interval, thousands of youth between the age group of 16-18 faced trial like normal criminals. Many are still under trial. In contrast, those below 18 years of age were treated as juveniles under the 2000 Act, which came into effect from April 1, 2001.

The Supreme Court set right this major dichotomy between the Acts of 1986 and that of 2000, and said all accused between the age group of 16-18 years, convicted or still facing trial as criminals across the country under the old law, would now be treated as juveniles under the new law.

A Bench comprising Justices Altamas Kabir and Cyriac Joseph said the intent of the Juvenile Justice Acts were “to give children, who have for some reason or the other gone astray, to realise their mistakes, rehabilitate themselves and rebuild their lives and become useful citizens of society, instead of degenerating into hardened criminals”.

For this reason, it said two separate definitions of “juvenile”, one terming them as below 16 years and the other less than 18 years of age, operating simultaneously was unacceptable.

“The law as now crystallised places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence, even prior to April 1, 2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the commencement of the Act and were undergoing sentence upon being convicted,” said Justice Kabir, writing the judgment for the Bench.

Allowing a plea of one Hari Ram, who was facing trial as a normal criminal being disqualified to be treated as a juvenile under the 1986 law for he was 17 years of age at the time of commission of the crime, the Bench said implementation of the Juvenile Justice Act “requires a complete change in the mindset of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Act”.

The Times of India, 7 May 2009

Perhaps some of the worst conditions prevail in the north-eastern region of the country, bypassed by central economic development policies and making it ripe for local unemployed youth to fall victim to pressure from armed insurgent groups. In the current socio-economic situation in **Manipur** for instance, “the worst affected groups are children and women,” says K. Pradip Kumar, member-secretary of the Child Welfare Committee, Imphal East District, and assistant co-coordinator of NGO Coalition for Children's Right to Protection (CCRP).⁷¹ Though key statutory bodies like CWCs and JJBs were constituted in all nine districts in 2007, various vital provisions of the JJ Act are yet to be fulfilled, making the administration of juvenile justice difficult and incomplete. For instance, the state had a Principal Magistrate for its only JJB during 2003-06 but since then, there has been no separate Metropolitan Magistrates or a first class Judicial Magistrate serving as principal magistrate, JJB. Nor have Special Juvenile Police Units, the special juvenile fund and child protection units been set up.

A recent Supreme Court judgement, extending the provisions of the JJ Act to all persons awaiting trial or convicted of any offence committed at less than 18 years of age, will now raise the backlog before the courts in all states.⁷²

Too little, too late

Budgeting for justice

Lack of resources is also a huge roadblock in enforcing the mandate of the law. The allocated budget for all interventions that are required for children in need of care and protection as well as those in conflict with law in 2008-09 was

⁷¹ <http://www.kanglaonline.com:80/index.php?template=kshow&ckid=1335>

⁷² Hari Ram Vs State of Rajasthan and another, Criminal Appeal Number 907 of 2009

Rs 262.7 crore. Yet, the specific programme for Juvenile Justice, called Prevention and Control of Juvenile Social Maladjustment, received less than Rs 22 crore, not even 10 per cent of the total! HAQ has calculated that just one day's expenditure on all the CWC and JJB members, were they to be in place in full strength, would amount to Rs 2,13,800 for a single day (based on the norm of Rs 500 per member per sitting, with a minimum number of three sittings a week)! Add to this other administration costs, as well as the salaries of all the principal magistrates, and it is no wonder that posts remain unfilled at so many levels.

A lot of hope is riding on the new Integrated Child Protection Scheme (ICPS), designed by the Ministry of Women and Child Development to be a solution to the many implementation concerns, through an entirely new bureaucratic structure-- State and District Child Protection Units (CPUs)--and increased expenditures for child protection. The CPUs are intended to be both supervisory bodies as well as the chief funding resource for all Observation/Special Homes, JJBs and Special Juvenile Police Units. Although some allocations were made in the past two fiscal years (2007-09), little money was spent as the scheme was waiting for approval from the full Planning Commission, which came only in February 2009. The scheme will hopefully get a realistic budget allocation after a new government takes over at the Centre and passes a full budget. The allocation of Rs 60 crore (including Rs 6 crore for the north-east) in the Interim Budget for 2009-10 would have to be substantially hiked for the scheme to make any impact at all.⁷³

Budget for Implementation of Juvenile Justice (in Rs Crore)									
Programmes And Schemes	2004-05 (BE)	2004-05 (RE)	2005-06 (BE)	2005-06 (RE)	2006-07 (BE)	2006-07 (RE)	2007-08 (BE)	2007-08 (RE)	2008-09 (BE)
Other Schemes for Child Protection*	23.60	17.50	30.55	16.10	19.00	17.50	30.30	24.90	30.80
Prevention & Control of Juvenile Social Maladjustment	18.90	18.90	0.01	20.43	23.00	21.85	18.90	21.78	18.00
Swadhar	2.70	3.69	5.50	5.50	7.00	7.00	13.50	13.50	18.00
Short Stay Home	15.00	14.40	15.00	15.00	15.90	15.72	15.90	15.90	15.90
Integrated Child Protection Scheme (ICPS)	New Scheme						85.50	38.50	180.00
Total	60.20	54.49	51.06	57.03	64.90	62.07	164.1	114.58	262.70

Source: HAQ; Centre for Child Rights

There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.

Kofi Annan, former UN Secretary General.

⁷³ The 2009-10 Budget has allocated Rs 60 crore for this scheme, which is not enough at all.

BLINDFOLDING JUSTICE

5

HAQ's years of work in the field of juvenile justice have thrown up several questions. For instance, where does the problem really lie in delivery of juvenile justice? What makes the police and the judiciary insensitive? Why do children in need of care and protection continue to languish in homes and institutions—untrained, unskilled and unprepared for life? Why do children in conflict with law continue to be treated as criminals even when the principles of juvenile justice do not attribute “culpability” to all who are below 18 years of age? Why is it more difficult for children to get released on bail than adults charged with a crime? Is institutionalisation really necessary for all them? What about alternative correctional measures for such children? While adoption has come to be a viable and acceptable measure for rehabilitation and reintegration for CNCP, what about foster care, sponsorship and other such alternative care models for all children? Does the present JJ system address the present and future of CICL and how? What is being done for their reintegration into the mainstream society? Is “diversion” possible using the existing CrPC? How to determine “best interest”? Is it the “best interest” of a child as he or she sees it, or is it as seen subjectively by different groups of adults? There are no easy answers to these questions. Below is a summary of the broad groups of problems, which we examine in detail in the following chapters.



What is Diversion?

What does diversion mean? Does it require a child to plead guilty? Is it all right to do so? Will it not lead to even innocent children being forced to admit guilt to avoid incarceration? In the Indian society, will that not lead to stigmatisation? There is a distinct lack of clarity with regard to the concept of diversion in India.

Internationally, diversion refers to moving the child out of the judicial process into alternative treatment. Admission of guilt is a pre-requisite to most diversion options. This can begin at the stage of apprehension by the police.⁷⁴ There is a lot of overlap between alternatives to detention and diversion: pre-trial diversion measures such as mediation, family group conferencing, NGO referrals, community service etc. automatically provide alternatives to detention. However, in some cases it may not be possible to divert a child from the formal system prior to the trial stage, e.g.

⁷⁴ Marie Wernham with Savina Geerinckx & Elanor Jackson: Police Training on Child Rights & Child Protection: Lessons Learned and Manual. Consortium of Street Children UK, 2005 page 78

in cases of serious crimes where release into the community would not be appropriate, or where the child has not admitted guilt.⁷⁵ In Maharashtra, particularly Mumbai, this procedure is being followed. There is concern voiced over the fact that a child must plead guilty to be “diverted” from the judicial process under the JJ system.

Speaking to some judges and lawyers, it would appear that diversion is interpreted to mean “diverting the child into an alternative legal system through the setting up of the mechanisms under the JJA”, in which it can be established, through a process of fair trial, if the child has committed the offence as charged.

“Diversion is the process of trying the child wherein he/she is diverted from the regular criminal court. It occurs only on account of the age of the alleged offender being less than 18 and has nothing to do with the admission of guilt. There is no dilution of the standard of proof before the JJB in proving the guilt of the child in conflict with the law. The JJB is still part of the criminal justice system. We have different fora to try those cases and different forms of punishment.”

In the words of a Judge of the Delhi High Court

- The UN Committee on the Rights of the Child in its General Comment No. 10 (2007) states clearly that juvenile justice should promote the use of alternative measures such as diversion and restorative justice, which the State parties must ensure to respond to children in conflict with the law, in an effective manner serving not only the best interests of these children but also the short- and long-term interest of the society at large.
- The Beijing Rules too advocate diversion mechanisms. It clearly says these would help in dealing with the negative effects of subsequent proceedings in juvenile justice administration (for example, the stigma of conviction and

Towards Diversion and Restorative Justice – the India Model

India diverts juveniles at an earlier stage than many other systems.

The very fact that cases of children in conflict with law are not meant to go through the regular court system, but have to be dealt with by a Board comprising a Judicial Magistrate and two Social Workers is the first step towards diversion.

India does not allow plea bargaining for juveniles, and this is the right balance because it reduces the risk of children being under pressure to accept responsibility when they have not committed an offence.

There is greater emphasis in the law on use of appropriate terminology in matters involving juveniles so that children who come in conflict with law do not get treated as criminals. Children cannot be arrested, they can only be apprehended. There can be no trial against a juvenile. If at all, it has to be an inquiry, which should not last more than six months at the latest. These are some examples of India’s way forward on diversion and restorative justice.

Stress on measures like leaving the child on advice or admonition, directing him/her to perform community service, putting him/her through counseling, releasing him/her under probation are important diversionary provisions in Section 15 of the JJ Act.

Similarly, no joint proceedings of a juvenile and adult, destruction of records, removal of disqualification of a juvenile from employment on the basis of any previous record of conviction, provisions for maintaining confidentiality and privacy of the juvenile are yet some more measures built into the main law itself.

The Central Model Rules of Juvenile Justice, 2007 take a leap in clearly stating that where a juvenile is allegedly involved in the commission of petty and non-serious offences with punishment of less than seven years, there shall be no FIR registered against the juvenile.

The maximum period for which a child can be detained in an institution on disposal of a case is three years, even though the offence may otherwise warrant a higher punishment. To this extent there is a move away from retributive justice. Institutionalisation has to be the measure of last resort.

The principle of positive measures guides rehabilitation and restoration of a child in conflict with law back into society.

75 Ibid

sentence). They go so far as to say that in many cases, non-intervention would be the best response (11). Diversion could involve removal of the child from the formal criminal justice into some other stream such as redirection to community support services. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner (11).

- The Riyadh Guidelines call for enforcement and other relevant personnel, of both sexes, to be trained to respond to the special needs of young persons and should be familiar with and use referral possibilities for the diversion of young persons from the justice system (58).

Why is a 'restorative justice' approach to juvenile justice more effective than 'retributive justice'?

Criminal justice systems in many countries are 'retributive', i.e. they are concerned with 'retribution' and punishing the offender, concentrating more on the crime itself than on the people involved. However, this is often not in the best interests of the victim, the offender, or society in general.

A much better system is that of 'restorative justice': 'restoring' damaged relationships (between victim, offender and community) to the way they were before a crime was committed – to 'make things right as much as possible.' It promotes solutions to repair damage, reconcile parties involved, restore community harmony and reassure those involved.

Restorative justice is especially important in relation to young offenders as it can stop the process of a young offender turning into an adult offender.

In practice, restorative justice involves:

- Prevention of children coming into conflict with the law;
- Diversion of offenders away from the formal criminal justice system: e.g. victim-offender mediation, family group conferencing, referral to an NGO or other community or social programme, including substance abuse programmes, family reunification, community service, police warnings, behaviour contracts, conditional or unconditional release;
- Alternatives to detention: e.g. care, guidance and supervision orders; probation; community service orders; financial penalties, compensations and restitution; intermediate treatment and other treatment orders; orders to participate in group counselling and other similar activities; orders concerning foster care, living communities or other educational settings;
- Detention only as a last resort, for the shortest time possible;
- Access to legal assistance
- No capital or corporal punishment
- Public awareness
- Rehabilitation

Source: www.juvenilejusticepanel.org

Legal inadequacies

The JJA (Amendment 2006) and the model rules adopted in 2008 have tried to address several of the concerns and challenges that the earlier laws had thrown up. But several more remain unaddressed. Indeed, every day throws up a new challenge or issue. For example, neither the law nor the rules are clear on whether an Observation Home can admit a child without an order from the JJB. What does a policeperson do with a child who has been apprehended at night? Do all institutions for children in need of care and protection have to be "lock and key" homes? Reading the model rules would give the impression that they do, yet they are also meant to provide long-term care for children. What kind of an upbringing would that be? Says Justice Madan Lokur, chairperson of the High Court Committee, "a large number of changes need to be made in the Act and they cannot be made overnight. There are

In whose best interests?

How to determine the best interest of a child has always been a matter of controversy. The content of the best interest principle—Article 3 of the UN CRC—will either depend on the belief systems of the society, as represented in the administrators, or on what the child perceives to be in his or her best interest. And these two contexts can clash. No child, for instance, would consider in his or her best interest to be institutionalised, yet all over the world, it is done supposedly for the child's own good.

The amended rules of the JJ Act 2000 say, “The principle of best interest of the juvenile or juvenile in conflict with law or child shall mean for instance that the traditional objectives of criminal justice, retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice.”

“The principle seeks to ensure physical, emotional, intellectual, social and moral development of a juvenile in conflict with law or child so as to ensure the safety, well-being and permanence for each child and thus enable each child to survive and reach his or her full potential.” (Chapter II, 3 IV b and c)

John Eekelaar* says best interest can be interpreted through the lens of participation. Since best interest is determined by the child using the principle of dynamic self-determination, Article 3 should be read with Article 12 or Right to Participation of the CRC, which says the child has the right to “express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”. This is one of the central provisions in the CRC, a new vision of children's rights. It means that right from the point of arrest, to adjudication before the CWC or JJB, assessment by the authority, placement and to everyday living within the institutions, the child's opinion should be heard and taken into consideration as per his or her age and maturity. To give force to these two articles, at every stage in the interface between the child and the juvenile justice system, space should have been created for expression of the child's opinion, which is absent in the Indian law.

Also, in actual practice, interpretations of the best interests of a child can run contrary to what the child may want. This happens partly because even 17 years after India's signing the CRC, there is not much awareness of this concept all over the implementing system. It also happens because sometimes, adults' perception of best interests can be very different from the child's. The best example of this is the working child who in India might prefer to work to earn money to lead a better life and not agree to what the adults instead want for him, to go back to school.

We asked several people in the JJ system what in their opinion were “the best interests of the child”? The diversity of their replies is an indicator of the confusion that still prevails, perhaps rightly, over the issue.

Madan B. Lokur, Judge, Delhi High Court

“A decision taken in the best interest of a child should maximise the welfare of the child, keeping in mind the larger context of the welfare of the human society in which he or she is growing up. It is important to strike a balance between the two.”

Bharti Sharma, Chairperson of the CWC at the Nirmal Chhaya Girls' home during 2003-09

“It is a decision or behaviour or an act that does not impinge upon any of the rights of a child. Further, if it positively impacts a child's development such as physical, emotional, mental, social, spiritual as well as overall personality, it is said to have taken care of the best interest of the child.”

Dipa Dixit, Member, NCPCR, Delhi

“Defining best interests of a child is possible only when you look at every child that comes before you as your own. What would you have done in a similar circumstance if you had your own child in front of you?”

Santosh Shinde, CWC Member for Mumbai Urban and Convenor of NGO Bal Prafulta

“To define and understand “best interests” in the best way, we have to make the entire juvenile justice environment child-friendly.”

Raaj Mangal Prasad, Chairman, CWC, Kasturba Niketan Children's Home, Delhi

“The concept of best interest is well defined in our juvenile justice law. However, the decision has to take into account not only what is ideal but also what is feasible in the given circumstances, especially in the Indian conditions which are quite restrictive.”

* John Eekelaar: The importance of thinking that children have rights, International Journal of Law, Family and Life, Vol 6 No 1, 1992, <http://lawfam.oxfordjournals.org/cgi/content/abstract/6/1/221>

also several administrative issues, including lack of clear rules or guidelines, which hobble the JJ system. In fact, even after the framing of the Model Rules under the JJ Act, several anomalies remain."⁷⁶

Too few and ineffective

JJBs, CWCs & other infrastructure

The National Human Rights Commission (NHRC), which had been monitoring the status of the implementation of the JJA, said at a conference on juvenile justice in February 2007, "There is an urgent need to ensure that appropriate bodies are constituted in every district of every state and Union territory to expeditiously take up cases relating to juveniles and children in need of care and protection."⁷⁷ NHRC felt that a majority of the states had neither constituted or reconstituted the required number of institutions or boards under JJA nor framed the rules. The number of homes/institutions catering to the needs of juveniles, their capacity and the financial allocations were not in tune with the requirement. The amount spent on vocational training, health and recreation was negligible and there was a need to converge all the resources for this purpose. The Commission decided to direct all the state governments and Union territories to frame the required rules under JJA within three months and ask them to constitute Child Protection Units in every district to take up such issues.

The competent authority to deal with the child in conflict with law (CICL) is the Juvenile Justice Board (JJB), which consists of a magistrate and two social workers, one of who must be a woman. All of them are meant to have special knowledge of child psychology and child welfare. According to Dr Ved Kumari, this provision, if implemented in letter and spirit, has the potential to convert the legal and technical nature of the legal proceedings into care and welfare proceedings, even though the presence of the magistrate is essential for final disposition of the case, which must be decided by majority.⁷⁸

"In many other states the number of JJBs is inadequate to deal with the number of juveniles who are brought before law for justice. Even in those States/UT's where JJBs have been established, the infrastructure is inadequate making it difficult for them to effectively discharge their duties. In some states/UTs, the number of JJBs is inadequate in terms of overall coverage of the total number of juveniles in conflict with law, which puts a lot of burden on the existing JJBs."

Draft ICPS scheme

For the children who need care and protection, the JJ Act allows the formation of Child Welfare Committee (CWC), which consists of a chairperson and four other members, at least one of whom is a woman and another an expert on matters concerning children. The CWC is expected to function as a bench of magistrates with powers similar to those conferred by the CrPC on a metropolitan or judicial magistrate.

The JJ Act mandates a JJB, a CWC and at least an observation home and special home each in every district of the country. Section 4 of the 2006 amendment Act says all these must come up within one year from the notification of this Act, or by end of 2007. But even now, the total number of JJBs is far less than the 611 required. An exact estimate is difficult to obtain; the Ministry's website has a list for 2005, before the JJA was amended.

In the draft Integrated Child Protection Scheme (ICPS), which was to be implemented in the Eleventh Five Year Plan period of 2007-12 to oversee the development of a national coordinated JJ structure, the MWCD itself admitted that many states and Union territories in the country have not established any JJB.⁷⁹

⁷⁶ Interview with Paromita Shastri, Research Director, HAQ: Centre for Child Rights during the course of the research for this report

⁷⁷ <http://nhrc.nic.in/dispatch.asp?fno=1411>

⁷⁸ Ved Kumari, *Juvenile Justice System in India- From Welfare to Rights*, OUP, 2004. Page 145

⁷⁹ Draft ICPS as on 17/08/2006. <http://wcd.nic.in/childprot/drafticps.pdf>

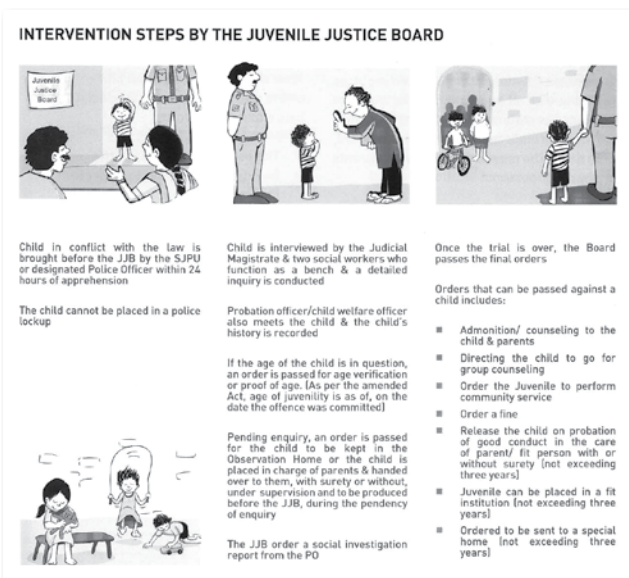
The ten-district Delhi, for instance, had been making do with only one board till January 2008, when a second was added. A third is likely to come up in 2009. Delhi has 5 lakh children in need of care and protection; in 2006, 3,452 such children were produced before the CWC. But it has only 11 children's shelter homes, three observation homes and three homes for mentally challenged children that are run by the government, far fewer than ideal. According to Amod Kanth, chairman of the Delhi Commission of Protection of Child Rights (DCPCR), all homes, including those run by NGOs, accommodate less than 10 per cent of the total number of children living in extremely difficult circumstances.⁸⁰

The situation could be worse in many areas of the country. The city of Mumbai, despite its significant slum population and reasonably high crime rate, has two JJBs for its two districts, Mumbai urban and Mumbai rural, which is shockingly inadequate. Bangalore has six districts but only one JJB and one observation home for boys. In the entire state of Karnataka, there is no observation home for girls. According to an Assessment Study of Juvenile Institutions carried out by the MWCD during 2006-07, there are 195 Observation Homes, 58 Special Homes and 26 Aftercare Homes in the country.⁸¹ That report is yet to be made public.

Out of 28 states and 7 Union territories (including the National Capital Territory of Delhi) in India, all states have constituted more than half of the required CWC and JJB per district and a few have them in all districts, though only recently. Punjab had its first JJB only on 15 September 2006. However, many of them are not independent and are sitting in existing courts with the magistrates holding additional charge of JJB. Only 20 states have constituted the three types of homes prescribed by the Act. Most of the states have not framed their own rules after the 2006 amendment, including Delhi. Many states have yet to set up the JJ fund under the Act or have set up the fund and not begun utilising it. Delhi set up a Rs 20-lakh fund in 2008 but hasn't spent anything out of it.

While the extension of the age limit has brought in more children who would qualify for care and protection under the JJ system, the expansion of the infrastructure and delivery system throughout the country still hasn't matched up and falls far short of the minimum requirements under the law and model rules. According to the annual report of the Ministry of Welfare for 1996-97, there were only 271 JJBs and 189 Juvenile Courts all over the country. That apart, said the report, there were only 280 observation homes, 36 special homes and 46 after-care homes in 1996. So this was the situation even ten years after the first law was passed.

Have things changed for the better in the next ten? Not really. In 2005, the government ran an evaluation study of nine states implementing the centrally sponsored scheme, A Programme for Juvenile Justice, which went into a wide



Child Protection and Juvenile Justice System for Children in Need of Care and Protection, by Dr Nilima Mehta, Childline India Foundation

80 Amod Kanth, Children in the Centre of Convergence in Delhi, DCPCR, unpublished paper, 2008

81 Draft proposal on Study on Children in Juvenile Justice System in India By Pravesh Kumar and Srinivas Varadan, Unpublished.

variety of indicators ranging from the rights of children, gender and disability to funding, staffing, reasons for institutionalisation, functioning of the institutions and so on.⁸² Among other irregularities, the study found that half of the 151 institutions covered were located in residential areas, violating norms. A single building often served as all types of homes for children. In two out of every three homes, there were no care plans for children nor enough wardens or other staff. Records were not being maintained, sufficient food was not being given, homes were poorly maintained, and educational and recreational facilities were poor. Nobody had ambulances and only less than half had a sick room or medical facilities.

The other shocking discovery by the ministry assessment is that there are 305 children of 0-6 years of age in Observation Homes and around 45 of them in Special Homes.⁸³ This defies understanding because, according to section 82 of the Indian Penal Code (IPC), no action is an offence if committed by a child less than seven years of age and nothing is an offence which is committed by a child above seven years of age but less than 12 years if he or she does not have sufficient maturity to understand or judge the nature and consequences of own conduct (Section 83). Despite the IPC provisions and the JJA, HAQ has found cases where small children were being apprehended or kept in homes in Delhi. Over the last two-three years, those below seven years are no longer incarcerated.

One of the reasons for the infrastructure not being ready in the states is the continued failure of the system to acknowledge child offenders as human beings with rights, which in turn results in the continued failure to acknowledge that there is a huge shortage of facilities for them. To take a simple example, the waiting rooms for children whose cases will come up for hearing at Delhi's two JJBs are dirty and have few facilities to ease the trauma of often up to 10 hours of wait. In a hall meant for 20-30 children at Kingsway Camp, Delhi's oldest board, about 50-60 children are crammed in. On hot summer days, waiting to be heard without any food or water, twice a month, could be punishment enough for these hapless children in conflict with law. The new JJB at Delhi Gate does not have a waiting "cage" and the children are made to wait in a police bus, arguably better though not the most comfortable in Delhi's dire heat or cold.

Human Resources: Infrastructure issues include staff strength, which usually implies the bare minimum or less at all JJ institutions. Yet, sensitive handling of children and effective service delivery require trained and experienced personnel at all levels of the JJ system and constant upgrade of their skills. Says Sanjay Joshi, superintendent of a home run by the NGO Bal Sahyog in Delhi: "Bureaucrats are devoid of a meaningful understanding of all that a child in need of care and protection wants. There are not enough linkages to enable an integrated JJ system and too many bottlenecks in the way of establishing those linkages."

The CWC at the Avantika home for the mentally retarded in Delhi, for instance, as well as the CWC at Alipur home for boys worked till recently with only two members, and not four. A child in distress has no one to turn to right now. There is no system to provide him or her with support services such as free legal aid, trauma counselling, etc, as HAQ learns from counselling the children who either come independently or through the CWC.

There are very few welfare officers attached to the CWCs. Homes are run by skeleton staff, often the superintendent alone. Delhi, for instance, has no welfare officer attached with the CWC. Instead of 16 welfare officers sanctioned, homes are making do with only 6, while 44 caretakers are doing the job of 72.

When it comes to JJBs, they are meant to have **Probation Officers** attached to them to facilitate its work (Section 2(s) of JJA). They are required to talk to children and record his or her point of view to share with the board, conduct home visits to check out the condition there, and prepare Social Investigation Reports (SIRs). However, the Act as amended in 2006 does not provide for a separate cadre of Probation Officers concentrating exclusively on matters relating to the release of CICL on probation, their supervision and rehabilitation.

82 CRY for Ministry of Social Justice and Empowerment, Government of India, Unfinished Journey, Programme for Juvenile Justice, 2005. The states are: Bihar, Delhi, Karnataka, Maharashtra, Manipur, Orissa, Tamil Nadu, Uttar Pradesh and West Bengal.

83 Ibid

Right now, the work of probation for purposes of the JJA is assigned to different departments in different states. In some states, probation service is placed under the Social Welfare Department, while in others it functions under the Panchayat Department or the Home Department. The task of the probation officers does not receive the necessary importance and as a result the cadre remains a mere formality. Not surprisingly, they are not adequately trained. They are recruited young, between 20 and 26 years, with little effort made to assess their interest in social service, which is the basis of probation services, and are given to handle the huge number of cases.⁸⁴ The probation programme that is already lagging behind, has received a setback due to paucity of personnel and funds.⁸⁵

The problem begins with the very process of recruitment of probation officers. Although there is a special law for the appointment and duties of Probation Officers attached to courts known as the Probation of Offenders Act, 1958, all the Probation Officers in Delhi are appointed by the Department of Social Welfare and are part of the regular pool of social workers or appointed by NGO Prayas (which runs the Delhi Gate OHB) which has been assigned this job. Since they can be called back to the department any time, they are not trained in providing any specialised probation services. Again, because they are not strictly part of the judicial service and staff of the Department of Social Welfare, the JJB finds it hard to exercise supervisory authority over them.

At the time of writing this report, in Delhi, there were only 10 such Probation Officers handling more than 4,700 cases. The Probation Officers are expected to cover cases across the city, but are expected to travel by public transport, which makes them reluctant workers. Not surprisingly, the SIRs are delayed or cursorily done, even faked. The after-probation services too are not very effective because even when a sentence of probation has been passed and the offender is placed under supervision it is nothing more than a regular visit to the officer, if that at all.⁸⁶

Attitude towards children: A trafficked and sexually abused girl appears before a Sessions Judge more than a year after the case was filed. The honourable judge takes one look at the girl and says, “But she doesn’t look abused !” A seven year-old girl, so badly raped that she is required to be hospitalised for 20 days, had to appear before the Magistrate seven times for recording her statement (under sec 164), only to be sent away every time. Despite having been physically abused, a domestic child worker is urged to compromise with the employer. A child complaining that her parents was forcing her to marry was “restored” to the same parents by the CWC, because the letter of the law says family is the best place for children and “there is nothing wrong with girls being married off”. All these are examples of the general attitude of the arbiters of juvenile justice.

The attitude towards child offenders is even worse. Suraj was apprehended from Nizamuddin, Delhi, on the charge of murder on 25 June 1999 and spent six and a half years waiting for justice. It took almost two years to verify his age (on 20 November 2001) and frame charges against him. More important for the rights of Suraj is the fact that for almost six years, he stayed in Tihar jail, a prison for adults, and was sent back there by the court. In the process of challenging the order, HAQ discovered that 12 children were staying in the “place of safety inside Tihar”, two of whom had been convicted. Bail, which is a right of every child, was regularly denied to children, leading to overcrowding in the Observation Homes. Pran from Bawana, Delhi, was apprehended in a murder case on 10 August 2001 and remained in judicial custody till 2006, when his case came to HAQ. His co-accused had been granted bail, but not he. When HAQ filed a bail plea on his behalf, it was again rejected, for no reason. In some other instances, such as in the case of Devinder of Jahangirpuri, HAQ had to move the session court to bail him out, after the JJB declined its plea in 2006. The boy had already been in judicial custody for 36 months. Denial of bail in this case happened both due to the attitude of the judiciary as well as due to a lack of understanding of the philosophy of juvenile justice.

There is little stress on “listening” to children or deciding on the basis of the principle of best interest of the child. As a result, instances of victims of trafficking for sexual exploitation being handed over by the courts to pimps posing as their family members are not unknown.

84 D. Trayosha, Probation: A Study In The Indian Context, Legal Service India. http://www.legalserviceindia.com/articles/pro_bat.htm (accessed on 26 Feb.2009)

85 Sunil. K Bhattacharyya, Social Defence: An Indian Perspective, Daya Books, New Delhi, 2003

86 D. Trayosha, Probation: A Study In The Indian Context, Legal Service India. http://www.legalserviceindia.com/articles/pro_bat.htm (accessed on 26 Feb.2009), op cit

Although Probation Officers are vital to the child-friendliness of the JJ system, their attitude to the children in conflict with law is not very empathetic and objective. Many of them sit on the chair while speaking to the child but make the child sit on the floor, which is a clear reflection of their officiousness.

Sometimes, the lack of adequate resources also contribute to the lack of interest in the staff. For example, unavailability of transport facilities directly impact the amount of time the Probation Officers spend on a case, resulting in the tardy nature of the SIRs or inadequate follow-up. In the words of one officer: “I come to the JJB, finish whatever tasks I am assigned, then travel for hours to reach the child and speak to him or her. I get back home late and exhausted, so I am back at the JJB the next day and realise the case is listed right in the morning, I have hardly any time to write my SIR properly. And it is not the best and most comprehensive report that I present.”

Lack of training also results in the kind of words used in the SIRs which are too general, judgemental and subjective. For instance, phrases such as “family relations are cordial”, “parents say child is obedient” and so on hardly add any value to the SIR and fail to throw any special light on the case.

Stress on Institutionalisation: As we saw above, Suraj was in custodial institutions for six and a half years. In the course of its interaction with the boys and girls, HAQ has found several children who have been in custody for over three years. Indeed, it would not be amiss to say that there is a general tendency in the JJ system to institutionalise children, whether CNCP or CICL. In the case of Reena for instance, a minor girl who was charged with kidnapping of another minor girl in 2006, police made her stay in the Children’s home at Nirmal Chhaya for nearly three months on the pretext of not being able to find her parents. Reena kept pleading with them to take her to Aligarh, where her home was. Police took her back only when the JJB ordered them to do so.

Lack of correctional services, counselling, health care, education and vocational training plagues institutions. Children also languish at homes for lack of police escort to send them home to other states. The JJ Act provides for sponsorship, foster care, group care, adoption and after-care services, but barring adoption, the other services have not been developed at all. Even adoption of such children is rare.

The nature of the institutions for CNCP as laid down in the law, despite being referred to as Children’s Home, are more custodial than an actual home. The fear and pressure of children running away from these homes and its consequences for the managers determines the nature of the confinement.

Lack of knowledge of law and precedents: Even two years after the 2006 amendment to the JJ Act, HAQ finds several instances of ignorance of the law and rules. This cuts across all levels of administrators and all arms of the JJ system. Such instances range from the Police Officer writing “JUNYLE JUSTICE” on the whiteboard during a HAQ training session to, as in the Suraj case, a magistrate ordering a child to be kept in a place of safety inside the Tihar jail.

It is indeed surprising that magistrates and sessions judges are not immune to the general ignorance. Some of them are not familiar with provisions relating to treatment of child victims or the JJA. Often they have to be provided with copies of the relevant judgements. As late as in August 2008, in reply to an RTI plea filed by Delhi-based NGO Pratidhi, a senior official in the Delhi WCD replied that the CWC had “no role in the process of placing children in after care homes”, displaying shocking ignorance of the law.

The cases of two boys, both convicted and living in a special home and charged with sexual abuse of another inmate, handled by HAQ in 2005 is a good example of the ad hoc application of law. While one boy was released on bail, the other’s plea was denied. It is mandatory to first release the child on bail in four months, instead of extending judicial remand, but rarely is the law implemented without a nudge. Most of the cases that have come before HAQ concern children who have spent more than three years in the observation home, waiting for their inquiry to be completed. Some of these cases go as far back as 2001 and 2002. All HAQ had to do was to cite the law and get the children

released unconditionally. Yet, roadblocks were aplenty. For instance, in the case of Sairam of Krishna Nagar, Delhi, who had been in judicial custody since March 2001, his statement was recorded in October, 2005 and the case put up for the final argument in end November 2005. After that, the case was adjourned an unbelievable 16 times! The boy was finally released only in 2007!

Apathy of the police: This is clear from the way police deal with children in need of care and protection. It can be seen in their refusal to register complaints, shoddy follow-up and investigation, collection of evidence or follow-up in court, all of which leads to lack of conviction and derailment of justice. The fact that young boys are picked up and held in police lock-ups, girls are treated badly in police stations, or subjected to harassment and even abuse, too reflect police apathy. “Madam, I have been working for 12 years but I got this job on compassionate grounds. I am not like those educated police, so you know, what to do?” says a police officer in charge of a case involving a mentally retarded child, where the evidence was very weak and investigation poor.

Each child has a story to tell. Once on the police records, the children become vulnerable to being constantly picked up as a “habitual”. Bikram is now almost 18 years. He has been in and out of the Observation Home several times. As the Principal Magistrate herself says, he is picked up by the police irrespective of whether he has committed an offence. Once he was even sent to Tihar Jail where he was abused by the other inmates. Tihar Jail is also the best place for training a young child into a “professional”. All his experiences have completely hardened him to the extent that he has become almost self-destructive. Clearly, neither the principle of diversion nor restorative justice has been used for Bikram.

This is of course not limited to Delhi. In Karnataka, the police often tortures children in conflict with law. They tend to arrest children again and again. Even where children have not done anything but are associated with some criminals or were part of the group indulging in a criminal activity, they are caught by the police and brought into the JJ system. The police also tend to play around with the age of the child.

Police asked to Destroy Juvenile Records after ‘Reasonable Time’

The Juvenile Justice Board has asked the Delhi Police to fall in line with relevant rules and destroy all files pertaining to juveniles after a reasonable time. This move is aimed at helping delinquent juveniles get rid of the stigma of being on the wrong side of law.

Deciding on a case on the issue of non-removal of a delinquent’s records even after the passage of considerable time, the Juvenile Justice Board also asked the police not to disclose to anyone any adverse information relating to a person tried for an offence as a juvenile.

The board’s direction came in response to a plea by a father who complained that even though ample time had passed, officers at the Narela and Rohini police stations had refused to remove various records pertaining to his son’s alleged involvement in a crime.

Allowing his plea, the board cited provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and said a juvenile shall not suffer from any form of prejudice or disqualification on account of a conviction vis-a-vis their future prospects.

The direction assumes significance, for the Act maintains that such juveniles must not be discriminated against at any stage of their lives because of their involvement in any act of delinquency.

Express News Service, New Delhi, Mar 17, 2009

Sometimes, police do not take complaints by children seriously and do not note them down. This neglect can have far-reaching consequences. On 12 December 2005, two boys, Junaid and Zakir from Meerut, had been caught and drugged by two people and locked up in a room that had visible signs of torture and abuse, even things like a cut human arm and syringes on the floor. Somehow they were able to escape the next day and went to the police who refused to register a complaint. They managed to reach a help booth in Seemapuri, set up on the occasion of Global

Day Against Child Trafficking being held by the Aanchal Charitable Trust. Since police refused to lodge a complaint, HAQ restored them to their parents. Later when the Nithari incident broke, 2006, HAQ was uncomfortably reminded of this case. It's difficult not to think that perhaps, acknowledging and working on the complaint of these two boys would have led police to a Nithari-like case.⁸⁷

Biases and prejudices: Working with the JJ system, one encounters several biases and prejudices. The community, police as well as judiciary are more empathetic if the victim of sexual abuse or rape is a small child, and not so much if adolescents, especially girls, who are believed to have been consenting or asking for it, are involved. The other prejudice is that child abuse happens only among the poor and in the slums and Mamta's case (mentioned in the first chapter) proves that wrong. Yet another bias exists against children in conflict with law coming from poor families — they are not only believed to be in the wrong always but are also picked up on the slightest excuse.

HAQ works with all age groups, but working with the 16-18 year group in conflict with law, particularly boys, remains the biggest challenge, partly owing to moral hazard issues (whom to support, as both are HAQ's constituencies) and partly owing to police bias against this age group. Many of these boys, booked for committing more serious crimes such as rape or murder, often seem to have planned the act or at least are aware of the crime and its consequences. While there is enough potential for reform of their psyche and future lives through proper counselling and intervention, it does not lessen the seriousness of the crime and its impact on younger children who too are in the care of HAQ and need proper healing and support services. For institutions like HAQ, which believes in justice for all, such special cases are a dilemma.

This dilemma is heightened by the police's tendency to lump the 16-18 year group with adult criminals. Despite the law making it amply clear that all children under the age of 18 come under the purview of the JJ rules, police routinely apprehend older boys and detain them in "lock-up", without going in first for age verification which is their responsibility. It is the biggest reason for detention of children for long periods and in turn, for cases piling up at courts. The situation is further complicated by the absence of ready availability of school certificates among many of the apprehended children, who mostly come from poor and underprivileged families and may not be attending school or have dropped out because of economic reasons. This issue is discussed in greater detail in the seventh chapter.

HAQ has spent many hours, needlessly, trying to get such boys declared as CICL and taken before the JJB for bail and ultimate release, a process that can be entirely avoided if the police are a bit more respectful of the rights of these boys even if they are, according to them, "criminals". In the case of Dinesh from Narela, Delhi, for instance, a boy apprehended in February 2006 in a case of rape, police produced him before the session court even after he produced a birth certificate. To top it all, the session court kept him in judicial custody and then sent him to a prison for adults.

Childhood is the most interminably governed sector of personal existence... the focus of innumerable projects that purports to safeguard it from physical, sexual and moral damage, to ensure its normal development.

A James, C Jenks and A Prout in Theorising Childhood

⁸⁷ In December 2006, a businessman and his servant in Noida, UP were arrested after skeletal and decomposed remains of several missing children were found around their house. At least 31 children were estimated to have been killed.

WHO SPEAKS FOR ME?

6

“The state”, writes Mahrukh Adenwala, “through legislation, is required to intervene to safeguard the child’s rights, especially in situations of absence of family support or when the family itself is the abuser. Removal of the child from the abusive situation, and its rehabilitation is the prime objective of JJA. The modes of rehabilitation envisaged under JJA differ depending on the circumstances of each individual case: institutionalisation in cases where parents are the exploiters, sponsorship in cases where parents due to economic constraints force children into exploitative vocations, adoption in cases where infants are abandoned.”⁸⁸

Fighting for Dignity

Children in Need of Care and Protection

The CWC has “the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and human rights.” As mentioned earlier, it consists of one chairperson and four members of whom at least one must be a woman and another, an expert on matters concerning children. Any CWC member must have five years’ experience in his or her respective field plus one of the following qualities: Special knowledge of social work, child psychology education, sociology or home science, or a teacher, a doctor, a professional worker of repute engaged in child welfare or a senior retired public servant involved in work concerning child welfare. Most members belong to the last category, probably because they are easily available, keen on a post-retirement income and familiar with the ways of the bureaucracy.

The CWC functions as a Bench of Magistrates and has the powers conferred by the Criminal Procedure Code of 1973 (CrPC). A child rescued from hazardous occupation, brothel, abusive family or any other such exploitative situation must be produced before the CWC who will conduct an inquiry to ensure his or her optimum rehabilitation with minimal damage. The CWC is not empowered to conduct judicial proceedings though.



88 Mahrukh Adenwala, The Juvenile Justice (Care And Protection Of Children) Act 2000, unpublished paper

While any person or organization, such as police or NGOs, can produce a child in need of care and protection before the CWC, the law (Section 32 of the JJ Act) also allows the child to produce himself or herself before the Committee if he or she feels so. This is in recognition of the child as a human being capable of expressing her/his views and taking decisions for herself/himself and is also in line with the principle of best interest of the child.

Unlike in the case of the JJB, which has one first-class magistrate and two social workers, the government follows a different policy in making up the five-member CWC to so that action is taken to the extent possible in the best interest of the child who is already vulnerable and marginalised. HAQ's experience shows that when the selection of members is done impartially, the voices of the children are really heard and children receive the sensitive and supportive environment she or he deserves. For example, in a number of cases of CNCP dealt with by HAQ, the CWC was quite proactive and cooperative. In fact, many a times, the CWC itself has sought legal advice and involvement from HAQ.

Problems arise when CWC members are appointed on the basis of their comfort level with the authorities. Usually these are persons who have earlier served the government and are therefore acquainted intimately with how the government prefers to work. There are several members across the country who are not present everyday, rarely take an interest in hearing out the children, and sometimes are more interested in following the "correct procedure" than take decisions based on the best interest of children because they are keen "to do the right thing" by the government and not necessarily by the children. In Delhi, for instance, many CWC members until recently, were persons retired from the state Social Welfare Department that itself has failed so far to realise the need for de-institutionalisation or find alternative ways of rehabilitating the children and restoring their dignity to them.

Sometimes, such members even clash with the chairperson who may come from a different background and have little patience with bureaucracy. Jointly, they can even obstruct the chair from innovatively dealing with the child. In fact, at Nirmal Chhaya, the previous CWC chairperson's enthusiasm in her work earned her a note from the local government department admonishing her for unnecessarily "staying late in office"! Needless to say, such members sometimes bring to their positions a feeling that the poor and marginalised children produced before them are 'bad' children who are worthy of only pity. Children rescued from brothels, street children, trafficked children and child beggars very often become victims of such bias and decisions taken "in their best interest" are clouded by personal opinions.

The CWC members are also found to be persons who have sometimes little or no experience of dealing with children and learn to function 'on the job'. In January 2008, Bal Adhikar Abhiyan, a network of NGOs in Delhi, complained to the High Court committee, that the CWC members at Lajpat Nagar, Mayur Vihar and Kingsway Camp, most of them retired government servants, were not attending work regularly and were instead busy with running their own NGOs! It also complained the members didn't know the basic principle of juvenile justice, let alone the rules.

Bharti Sharma, chairperson of the CWC at Nirmal Chhaya during 2003-09, says, "The effectiveness of what we do-- or what the JJB does – depends upon how we interpret the law and the rules to serve the best interest of the child. But members who have served the government are loath to take even calculated risks. They are too cautious and think only in terms of protection of their job or own backs." The lack of proper training and monitoring, compounded by the insensitivity of competent authorities, leaves little space for children's views to be expressed or heard.

The very process of the appointment of the CWC raises questions about the members' understanding and commitment to their role and functioning. On receiving a complaint of a domestic child worker, a CWC in Delhi was approached by an NGO for a written order for the police to rescue the child but the chairperson refused saying that this did not fall within his scope. In another case, a minor girl from Rajasthan who resisted going back to her family because she would have been married off was sent back home on the pretext that family is the best place for a child! A whole new dimension of the principle of "best interests of the child"!

While these are instances of the CWC not performing their role, there are also examples of members stretching the understanding of their role. Although members of the CWC together are equivalent in power to a bench of magistrates,

they are not magistrates. Yet in some states they insist on behaving like magistrates, like travelling in cars with beacons or trying cases of abuse and exploitation, as in child labour, and pass orders for compensation, whereas the law empowers them only to take cognizance of these cases and initiate a legal process.

The children in need of care and protection are also often children who are victims of abuse and exploitation by adults. While the CWC may be required to take care of them, their case for justice is fought in the regular district courts, the same ones where the adult offender is tried. Understandably, the attitude of the courts towards the child victims seeking justice is not much different from that towards adults. For instance, in one case of trafficking and sexual abuse involving a little girl, the judge looked at the girl and commented, “But she does not look abused!” ignoring that the first appearance of the child had taken place one year after the incident. While both the police as well as the judiciary are relatively more sympathetic to children below ten years of age, they tend to be far more moralistic and judgemental with older children.

This attitude is reflected elsewhere too. The Delhi Police set up Crisis Intervention Centres (CIC) in all districts of Delhi in 2000 in collaboration with Delhi Commission for Women (DCW) and local NGOs. The main objective of setting up these CICs was to extend rehabilitation services to the victims of sexual abuse and handle the investigation of cases more professionally and sensitively. The following data that has emerged through Right to Information applications filed by a Delhi based NGO, Pratidhi, reflects how this very important support system has been functioning.⁸⁹

Cases Handled by the Crisis Intervention Centre in Delhi						
S.No.	District	No. of Cases registered	No. of cases referred to CIC (NGO) Name of CIC	No. of cases intervened by CIC's	Assistance Provided	Follow ups
1	Outer	Yr. 2007-120Yr. 2008-11 Till 29-02-08	57 (Name of CIC not available)	51	Counselling Available	Records not
2	North West	Yr. 2007-51Yr. 2008-14	2912 NGO-Sampoorna	2912	Counselling, legal and medical	One time and in some case records are not available
3	Crime and Railways	Yr. 2007-04Yr. 2008-Nil	03 NGO- Swanchetan & Smt. Naz Baby	03	Counselling	One time
4	Central	Yr. 2007-23Yr. 2008-04	2303 NGO - Swanchetan & HRLN	2303	Counselling Counselling	Yes Yes
5	New Delhi	Yr. 2007-02Yr. 2008-02	0202 NGO- Manviya Suraksha	0202	Conversed with the victim (Counselling)	Records of no. of follow ups is not maintained.
6	South West	Yr. 2007-51Yr. 2008-27	5127 NGO- Swanchetan Centre for social Research (CSR)	5127	Counselling, Economic, Medical & Legal	Nil
7	East	Yr. 2007-73Yr. 2008-25	4923 NGO Pratidhi	4923	Educational economic. Medical, legal & emotional (counselling)	Yes Regular follow ups were made and records maintained with NGO
8	West		Didn't get the information	Didn't get the information	Didn't get the information	Didn't get the information
9	Northeast		No Response received	No Response received	No Response recieved	No Response received
10	North	Yr. 2007-34Yr. 2008-27	3427 NGO Pratidhi & Nari Raksha Samiti	3427	Information not provided	Information not provided
11	South	Yr. 2007-34Yr. 2008-27	6706 NGO Prayatn Prayas Swanchetan Prerna, Nirman	6706	Medical, counselling, legal	N/A

Source: Pratidhi Newsletter Issue: XII July 08-September 08

89 Pratidhi Newsletter Issue: XII July 08-September 08

Their attitude to child labour is almost dismissive unless there has been severe and visible violence. The unfortunate truth here is the upper income class' acceptance of the fact that children of the poor must work and this is no big deal. HAQ's experience with a long drawn-out battle in court to get compensation for a child who broke the thigh bone of his leg, while climbing on to a stool on top of a chair at 11 pm for household cleaning, only reinforces this observation. The judge was far more sympathetic to the lady employer than the child and kept observing how difficult it was for her to travel to court since she had since got married and moved to another city. He also argued for a more "reasonable" compensation which was finally, after three years of back-and forth, settled at only Rs 10,000.

Little protection, even less care

State of the homes for children

Doubts over the safety of children at government-run homes have been raised since the time the homes have been in existence. More worrying is that the situation has changed little over the years. Reports of violence against children and their escapades as well as poor facilities and corruption at these homes regularly make headlines across India. The state of homes in Delhi, the capital, is so bad that one is afraid to imagine the condition of the homes in the regions that are not under public or media glare.

As a result, lost or homeless children prefer a life on the streets with all its insecurities and dangers than in a government/ NGO - run home. An evaluation of the central scheme on juvenile justice in 159 institutions in nine states in 2004, conducted by CRY (Child Rights and You) and the ministry of social justice, tells us why. The evaluation found that only 10 per cent of the sample of about 1300 children had come to the institutions on their own. The study also revealed many other lacunas of a home: children had no say over the food; schooling facilities were negligible and

Corruption eats away children's entitlements

The mismanagement of funds at the institutional level has been particularly connected with the purchase of provisions and other materials for children. The lack of a proper monitoring and auditing system increases the risk of the funds allocated for child welfare being misused and misappropriated.

The stocks and stock register in the homes reflect poor accountability as they are rarely updated and have been an issue throughout the visit to the institutions. The quality of food materials, especially vegetables and fruits, were found by the visiting NCPCR sub-committee member to be extremely poor in many institutions especially in Bihar and UP especially. In contrast, the quality of food items in Maharashtra where the NGOs were part of the management and in Assam where children were part of the kitchen management was much better.

There is a lack of transparency and accountability within the system. The financial information is not accessible and open. This leads to certain malpractices that continue to go unchecked.

In Bihar for eg, the sub committee member observed during his visit, account books and the stock registers were beyond access due to the absence of the staff concerned and also because the books were not updated. There appeared to be mismanagement of the stocks as there was very minimal stock available in the kitchen which seemed barely sufficient for the number of children in care. A review of accounts submitted by a home in Bihar revealed that the bills for the purchase of coal and provisions over a month had serial numbers running in order. This indicates the possibility of the bill books being fraudulently printed and used for accounting purposes.

To prevent corruption in the homes, NGO Pratidhi in Delhi has used the Right to Information Act to gain access to financial information within institutions. They have unearthed gross misappropriation of funds meant for children in several instances. In Alipur Children's Home for Boys, for instance, they found that the annual budget for purchase of undergarments amounting to around Rs 20 lakh was misappropriated against a forged quotation from Kendriya Bhandar.

Source: NCPCR http://www.ncPCR.gov.in/Reports/Sub_Committee_Report_on_Review_of_Operations_Of_Observation_and_Childrens_Homes.doc

whenever they were going to school, they walked to it; punishments were frequent; girls were never supplied any personal hygiene products; children had to take care of their own belongings and wash their own clothes; and there were neither a care plan for children nor enough staff to look after them.⁹⁰

A later evaluation of homes by the MWCD has been done but that report is unavailable. To an RTI enquiry by Pratidhi, the ministry replied on 4 August 2008, that an evaluation of all homes, government-run or NGO-run, all over the country had been carried out in 2006-07 in association with UNICEF, state governments and the National Institute of Public Cooperation and Child Development (NIPCCD). “The Institute has been assigned the task of compilation of these reports. The work of compilation of reports is under processing and will take some time to complete,” it added.

Stories of abuse abound. In November 2007, police sent a 14-year-old boy, sexually abused for six months, to the Lajpat Nagar observation home, Kasturba Niketan, where he was so verbally abused that the police had to take him back. The home officials justified their rejection by saying nobody could abuse the boy sexually as he was too dirty. How would they know?

In 2006, at the Majnu ka Tila home, boys were locked, deprived of essentials, and abused and berated by home officials.⁹¹ This sad state of affairs was unearthed by a surprise visit by former Justice Santosh Sneh Mann, who was heading the Juvenile Welfare Board at the time.

A detailed inquiry conducted by a Delhi Commission of Protection of Child Rights (DCPCR) team, which was ordered by the High Court after two girls died in 2008 at the Nirmal Chaya complex adjacent to Tihar jail in Delhi, found gross neglect of the health of the children. There was only one nurse for 258 girls of 0-12 years of age, medicines had expired, no register of stock was maintained nor were there immunization records of small girls, toilets were blocked and spaces below the staircases were used for similar purposes. Ten little girls had died in 2007 due to stomach ailments, yet the average money spent on medicines per child came to Rs 8.⁹²



On 19 September 2008, the NCPCR inspected the children's home at Narela, Delhi, and found that the 110 children there were living without even basic amenities such as food, clothing and medical aid. “It is totally unacceptable that such institutions inflict violence on children, depriving them of basic human rights,” chair Shantha Sinha said.⁹³ This is despite the Delhi government claim of spending Rs 40 -50 crore on each home. What can children do but escape?

The biggest drawback of the homes is that in many states, the children's special homes and observation homes are on the same premises. In Delhi, the Special Home for boys is situated in Majnu Ka Tila and the OHB was transferred to the Delhi Gate home in 2008. But at Nirmal Chhaya, the observation home for girls, the special home for girls as well as the home for girl children in need of care and protection are all in the same complex. In an observation home,

90 CRY for Ministry of Social Justice and Empowerment, Government of India, Unfinished Journey, Programme for Juvenile Justice, 2005. The states are: Bihar, Delhi, Karnataka, Maharashtra, Manipur, Orissa, Tamil Nadu, Uttar Pradesh and West Bengal..

91 Juvenile Home: HC asks government to explain, The Hindustan Times, 26 February 2006

92 DCPCR report submitted to the High Court on 21 January 2009 on PIL 6988/2007, Harsh Virman & others vs Govt of NCT Delhi & others

93 Chetan Chauhan, Lost Innocence! Children Living Like 'Animals' in a Delhi boy's home, finds National Commission for Protection of Child Rights, Hindustan Times, October 23, 2008

again, children alleged to have committed serious crimes like murder are forced to sometimes coexist with children caught for petty offences, mainly because of long-drawn-out cases; there is no segregation on account of age or type of crime. HAQ has come across an over 20-year old “boy” living in one of the homes in Delhi.

Bullying, ragging and abuse are part of everyday living in these institutions. With the boys thrown together, these institutions also become “schools of crime”. Because of a general lack of activities – other than watching TV (mostly Bollywood films that often show violence) – like playing or hobbies at the homes, the children are prone to fighting. Unnecessary delay in hearing cases, few vocational skills to learn except tailoring and carpentry, little education beyond going to school, if at all, and a general bleak outlook make them depressed and violent.

Even substance abuse is common. A qualitative study in Delhi in September 2005 in an Observation Home housing boys of 7 -18 years found adolescents using a large number of drugs.⁹⁴ Association for Development (AFD) / Pratidhi’s survey, for instance, found 78 per cent children suffering from substance abuse in Delhi homes.⁹⁵ “It’s no use denying that drug addiction is a serious problem at all the homes, government or NGO-run,” says Sanjay Joshi of Bal Sahyog. Joshi runs a decent care home for 120 children in the heart of Delhi, along with a middle school and a skill-training centre offering courses accredited by the central government. He gets little funding from the state government for running the home where 90 children stay now. “Compared to a minimum cost of Rs 4000 per child per month,” he says, “the state government gives Rs 500 per child. Obviously, conditions are pathetic.” Spending levels however may not determine conditions. In 2004-05, AFD found that for eight homes, the Delhi government had spent between Rs 2,500 and Rs 3,600 per child; close to Rs 10,000 per child was spent at the sole girls’ home. But all of them were equally badly run.

At the government homes, the rooms are badly maintained, windows have broken panes, kitchens are dirty, bathrooms are leaking and a dark patch of concrete floor is the playground. Even the government doctor is not regular in his visits. Sometimes, the probation officer fills the Social Investigation Report by asking the child all the questions and not bothering to do proper research or home visit. In the girls’ home at Nirmal Chhaya in Delhi, for instance, there is one staff member to look after more than 250 children — the clerk’s post is lying vacant for three years now. There is only one teacher each for education, tailoring, and art and craft, and one irregular teacher for the useful beautician’s course. The CWC gets over 300 visits a month, and many of them end up staying. Homes for all categories of children covered by the JJ Act are overcrowded and understaffed, thereby further shrinking the already limited space for children and hurting their right to a life with dignity. The CWC or the government care homes shouldn’t ideally turn away anybody, so they pack them in. In nine out of 14 homes in Delhi, the number of children exceeds capacity. On one visit, 195 children were found staying in a home whose official capacity is 50.

In 2007, when HAQ began visiting the Sewa Kutir OHB at Kingsway Camp in Delhi, there were about 250 children there. Of them, about 50 were learning stitching and sewing, another 20 were making food, and some were enrolled in the non-formal classes for further study. The rest spent their time watching television. According to a report on the working of the JJ system in Delhi by AFD, “diversion of staff has adversely affected the functioning of homes, particularly rehabilitation of children, as staff such as like teachers, instructors meant to impart training are deputed to manage either stores in place of clerks or kept on night duties.”⁹⁶ Pratidhi has used the Right to Information Act persistently and creatively to ferret information that the Delhi social welfare department tries very hard to protect, on how badly the homes are run and how the children are routinely deprived of their entitlements.

The worst casualty of such mismanagement is education. There is practically no education for children in conflict with law. Even after the child offenders get bail, because of the ongoing cases, they find it very difficult to get re-admission in schools. There is little thought given to the disruption of education when the JJB gives out dates of hearing.

⁹⁴ Chetna Malhotra, Nandini Sharma, Ratna Saxena and G.K. Ingle: Drug Use Among Juveniles in Conflict with Law, Indian Journal of Pediatrics, Volume 74, April 2007

⁹⁵ Status of Juvenile Justice System in Delhi, by Association for Development (AFD), based on Project ‘Bharosa’ experience 2001-05

⁹⁶ Ibid

Children in Government-run Homes in Delhi as on 1 December 2005

	Name of Home	Sanctioned Strength	Present Strength
Homes for Children in Need of Care and Protection			
1.	Alipur Children's Home for Boys – I	300	228
2.	Alipur Children's Home for Boys – II	100	105
3.	Narela Aftercare Home for Boys	240	132
4.	Lajpat Nagar Children's Home for Boys – I	100	100
5.	Lajpat Nagar Children's Home for Boys – II	100	123
6.	Children's Home for Girls – I Nirmal Chhaya,	100	200*
7.	Aftercare Home for Girls – II Nirmal Chaya	100	95
8.	Kingsway Camp Children's Home for Boys	100	197
Homes for Children in Conflict with Law			
9.	Observation Home for Girls – Nirmal Chaya	100	02
10.	Observation Home for Boys – Kingsway Camp	100	55*
11.	Prayas Observation Home for Boys – Delhi Gate	100	50
12.	Special home for boys at Magazine Road		
Homes for Mentally Challenged Children			
13.	Vikasini Home	100	197
14.	Pragati Institute	100	162
15.	Sukhanchal School and Home	75	105

*Figures as of September 2008. Source: Response of the Department of Social Welfare, Delhi to a query from Mr. Ravi Prakash under the Right to Information Act on 27/09/05.

Mentally challenged children and those unwanted by the family are victims of worse neglect, unable to get bail and dependent on the magistrate for legal assistance, often spending their entire childhood and even youth in these homes. Children are allowed a visit from their parents only once a week, with restrictions. To meet children, when a case is being heard, the parents have to ask a lawyer to write an application. This will go to the bench and the meeting will probably be approved for only five minutes, during which parents will talk to the child from outside the cage-like waiting room. HAQ has a copy of a form (see below) that is to be filled in by parents wanting to meet their children in a Delhi home, which allows a five-minute meeting time, though there is no such stated rule.

Stories of children in institutions point to gross violations and deprivation of many basic rights: the right to liberty, right to protection and participation and other development rights such as right to education. About the Narela home in Delhi, several complaints had been made about the lack of basic amenities to the Delhi government to shift the children to another home till this one was made liveable before the decision was taken in late 2008 to shut it down for renovation, that too after the High Court Committee's recommendations. Such instances are common to all kinds of homes, irrespective of their management pattern or type of inmates. Denial of access to legal aid and freedom to meet parents and guardians are other legal and human rights violations. Some homes, as a rule, get mandatory HIV tests done on children before admitting them. In this backdrop, HAQ's experience in trying to provide healthcare to children at observation homes in Delhi (see box next page) is revealing of how even honest efforts get mired in red tape.

Staff strength in the 8 children's homes

Category of Staff	Total sanctioned staff	Actually working staff
Welfare officers	16	06
Care takers	72	44

Institutionalisation, or committing children to homes, is both de facto and de jure the last resort under JJA. The principle of last resort in the Model JJ Rules highlights the need for resorting to institutionalisation as a temporary measure after reasonable enquiry, till other alternatives are explored, and that too for the minimum possible duration. Section 39(1) of JJA provides that the prime objective of any institution established under JJA is protection and restoration to parents, or through adoption/ foster care. In practice, however, many innocent children end up spending much of their childhood in a condition that is akin to, or worse than, being in prison. That alone should shame lawmakers and implementing authorities into radically reviewing the condition of homes as well as the practice of banishing the children in them.

In July 2007, HAQ brought to the notice of the High Court Committee the deplorable health conditions at the Kingsway Camp OHB in Delhi, particularly of three boys suffering from tuberculosis and the need to restore them to their families. As a result of such efforts, JJB held a camp in 2008 that highlighted the need for regular health care services at the OHB. HAQ tried to network with Sir Ganga Ram Hospital for such a service. The JJB and the High Court Committee discussed the issue and asked the Delhi Directorate of Social Welfare, that has the administrative responsibility for ensuring implementation of the JJ law, to seek the hospital's intervention. Unfortunately, instead of doing that, the Directorate wrote a letter to the hospital saying they would be happy to receive the hospital's voluntary services. This upset the hospital authorities as they were awaiting an invitation first before they could commit to any voluntary service. On the other hand, the Directorate felt inviting the hospital would imply a tacit acknowledgement of its own inability to provide adequate health care in institutions and a need for outside intervention. The matter ended there and the High Court Committee started looking at other options.

Following intervention of the High Court Committee, the number of children at OHB at Kingsway Camp has come down to 55 children and the Delhi Gate OHB run by NGO Prayas has only 30-50 boys, with most of the accused now promptly released on bail. These homes have also begun a lot of activities and education for children, thanks mainly to the High Court committee's efforts.

Review of Operations Of Observation and Children's Homes NCPCR Sub Committee Report

The National Commission for Protection of Child Rights set up a set Sub-Committee to study the Review of Operations Of Observation and Children's Homes in the country.

The key issues on the operation of JJ Homes that are highlighted in the report are:

- Slow responding & unimaginative JJ functionaries and their inability to deal with the special needs of the vulnerable children
- The inheritance of unsuitable & inflexible routine within institutions with little or no importance given to personalising intervention at the child's level
- Poverty of families - a deterrent to partnership with institutional functionaries in meeting needs of children
- Lack of understanding of the need to work with families and classification of children by symptoms
- Neglect of recovery and rehabilitation programmes
- Lack of resources
- Failure to make child participation an approach
- Little support for social work and social welfare professionals eager to make changes
- Weak database
- Lack of networking to tap community support services & resources
- Inter-departmental approach of bringing together all agencies involved with the care of vulnerable children unheard of!
- Institutions working in isolation when there could be sharing of resources; professionals like counsellors, vocational training teachers; improving skills in childcare etc.

The NCPCR is trying to bring education into the homes through the Sarva Shiksha Abhiyan (Education For All scheme) and the states are interested because of the abundance of central interest and money in it. But this

will take time, says NCPCR, and how much time is anybody's guess. Opening up institutions to legal experts, counsellors, de-addiction services and mental health professionals, even through NGOs, would go a long way in ensuring transparency and better accountability at the homes.

In the final analysis, it is important to remember that bereft of attention and plagued by neglect, today's child in need of care and protection becomes tomorrow's child in conflict with law. That is what the homes and other such institutions must prevent and they can't do so unless their environment improves radically and immediately.

Requirements at a Glance				
Staffing	Institutional Care	Psycho Social Requirements	Finance	Explore
Appoint trained relevant staff	Safe drinking water	Professional counselling	Timely audits	Open shelters
Increase numbers	Nutrition	Mandatory education	Transparency	Group Foster Care
Outsource	Appropriate clothing	Relevant Vocational Training	Registration	Sponsorship
Training	Health care and medical facilities		De-addiction Centres	Support to families
Incentives	Provide Toiletries	Recreation Facilities		Local Community Involvement
Accountable	Hygiene and Sanitation			Corporate Sector
Listen to them				Media

Source: Review of Operations Of Observation and Children's Homes. Nina Nayak, Minna Kabir, Sonykutty George, Rashmi Chopra and Vandana Kandhari, NCPCR Sub Committee Report. November '07 to March '08

If we are to teach real peace in this world, and if we are to carry on a real war against war, we shall have to begin with the children.

Mahatma Gandhi

ARE YOU WITH US?

7

The relationship between police and children is a precarious one. When the police apprehend a child for allegedly committing an offence or for an offence committed against him/her, it is the first point of contact between the child and the juvenile justice system. Also, the JJ Act confers a major role for the police for both categories of children, especially in regard to children in need of care and protection giving them the power to hold an inquiry, a provision that has been criticised as “a deeper level of recriminalization rather than decriminalization” of the children.⁹⁷

Role of Police in Juvenile Justice

Section 63 of the Act also envisages the creation of a Special Juvenile Police Unit (SJPU) in every district and city to handle cases relating to children. Members of SJPU are required to be specially trained and instructed to deal with all kinds of children in trouble. Also, in every police station at least one officer is to be designated as the “Juvenile or Child Welfare Officer”. Only an officer interested in children and with knowledge of the appropriate law is to be selected for this post, and both such officer and SJPU should continue to receive training on child rights. Below are the provisions in greater detail:

- Police are empowered to produce children in need of care and protection before the CWC. They may in the course of their duties come across a child in need of care and protection, or some other person may bring such child to their notice.
- A parent/guardian of a child or any other person of the child's choice should be informed about the arrest as soon as possible. The Probation Officer should also be informed to enable him to obtain information about the family background.
- A child cannot be kept in the police lock-up. On arrest, a child in conflict with law should be kept at the Observation Home. A child in need of care and protection should be kept at the Children's Home.
- The child should be produced before the competent authority within 24 hours of police having got his or her custody.
- Police should file a report before the CWC detailing the manner in which they obtained custody of the child.
- The main object of JJA is the speedy disposal of cases. To ensure expeditious completion of inquiries pending



97 Arvind Narrain: Juvenile Justice, A critique, 2004, Op cit

before the competent authority, police should file their reports on time, promptly respond to the directions of the competent authority, and conduct a prompt and diligent investigation.

- Police should take help of professionals and voluntary organisations working on children's issues when appropriate. For example, the involvement of a child psychologist or counsellor is important while recording a child's statement as they are trained to make the child feel at ease, speak openly and freely.
- Children ordered to be repatriated, should be escorted home or to any other place mentioned in the order within seven days. Disruption of a child's life should be minimal. Rehabilitation of a child by restoration to his family or transfer to an institution should not be delayed due to want of escort. And most importantly,
- On rescue or apprehension, the police must ask the victim or accused their age. If below 18 years of age, the child should be produced before the CWC or JJB, respectively. Only the competent authority under JJA has the exclusive jurisdiction to deal with a person below 18 years. Police should also make the child aware of his rights, especially the right to a legal counsel.

The reality of course is vastly different. There is uniformity among police in this country, especially when dealing with children in conflict with law—they are uniformly violative and disrespectful. According to D Geetha, a practising lawyer in Chennai, there has been hardly any change in police attitude towards children in conflict with law, despite the amendments to the law. "Though the law is now rights oriented, the police are not," she says.

She is right. Police officers "arrest" these children and prepare "arrest" memos, sometimes even for crimes that have not been committed. Previous "arrest" records and the officer's familiarity with the children are used against them. Instances of physical violence at the police station, within lockup, are common. Even as the law has changed radically, police keep on using the adult criminal justice vocabulary such as "accused", "child criminals", "repeaters", and "history-sheeters". Instead of saying the child has been sent to the Observation Home, they say he or she has been sent to jail for children. Instead of saying Juvenile Justice Board, they continue to use 'Juvenile Court'. Even the Government of India's publication Crime in India, brought out by the National Crime's Records Bureau, continues to use arrest and court.

Even as juvenile justice systems all over the world are using innovative ideas and diversion methods, Indian police find it hard to change. They pull the children by the ears and handcuff⁹⁸, hair them with rope and chain and send them to jails, which they believe are the best correctional facilities: "*Do din hawalat me rahenga to akal thikane aa jayegi* (two days in the lockup will cool their brains off)," they say. Railway police too "arrest" the homeless children – even six-year olds – in the name of vagrancy, handcuff them and produce them in front of the Railway Magistrate who in turn sends them to the JJB. One of these "arrest memos" said these children selling water bottles "were arrested, handcuffed with rope and the key was given to the investigating officer". During festivals such as Dussehra or Eid, when these children look towards earning some easy money, such arrests reach a peak. Worse, police often register the case against the minor under Police Act or under chapter VIII of CrPC in the name of maintaining peace and order. Often, they are looking for an excuse to pick up minors so as to earn some money. On May 4, HAQ received a call from a policeperson wanting to know what he should do with a boy and girl, both minors, he had picked up from the park allegedly upon receiving an unnamed call on 100. It was clear from his queries that he didn't believe unchaperoned children had any right to sit in the park and talk and he was letting his personal beliefs interfere with his official duty!

In the case of children who are victims of sexual or other physical abuse, police often delay lodging an FIR. The complaint mechanism is unfriendly or even hostile to the child victim or family although, according to law, no police station can refuse to file an FIR on any ground, once a complaint has been made. Sometimes, children are kept overnight in the station, on the pretext of medical examination, when the law says the examination should be as soon as the complaint is made, through a woman officer and doctor especially. In fact, all such procedures should be carried

98 <http://www.hindu.com/thehindu/holnus/004200902071421.htm>

4-yr-old shot at police and lifted cars, claim UP cops

Anuraag Singh
anurag@hindustantimes.com

VARANASI: Twelve-year-old Shiv Prasad Yadav, according to Uttar Pradesh Police, is a criminal with a history.

In 2001, when he was just four and stayed with his mother in eastern Uttar Pradesh's Ambedkar Nagar district, 180 km east of Lucknow, the Jaunpur police booked him under the Gangster Act.

Yadav, now a Class VIII student of Eida Public School in Mak, Haridwar, has been

appearing before a gangster court in Varanasi twice a month for the last four years.

Dressed in his school uniform, the son of a daily wage labourer told Hindustan Times: "I have to miss school when I come to the Banaras kachhri (Varanasi courts) with my father."

According to his lawyer J.S. Upadhyaya, another man, arrested for firing on a police party, lifting trucks and jeeps and selling stolen vehicles told the police his name was Shiv Prasad Yadav and that he was



a resident of Kandawa Bazar village.

Instead of verifying the credentials of the man, the police produced him before the court

and sent him to jail. But he managed to get bail. On March 15, 2001, the cops slapped the Gangster Act against him, but he did not respond to repeated

I come to kachhri (court) twice a month with my father... I have to miss school.
SHIV PRAASAD YADAV

police summons.

A few years later, a police team went to the village to nab the absconder, but could not get a whiff of him. Later, to the horror of Shiv Prasad's father Dushrath, his eight-year-old son received summons from the court instead.

For the first time, Yadav, along with his grandfather, appeared before the Gangster Court on March 28, 2005. Since then, it has become a monthly ritual. Besides, Yadav is being tried for four other cases, including one that pertains to firing on a police party.

When the court realised the truth, it directed the Jaunpur Police to submit a report about the accused's age, but no report has yet been submitted. "Even the court's directive to the investigating officer to appear before it has been ignored," said

Upadhyaya.

Additional District Judge G.K. Srivastava directed that all police proceedings, including arrest of a minor, be sent till the next hearing September 20 and summons to the Jaunpur police station to appear before the court all within the pending report about the accused and his age.

A tearful Dushrath Yadav, boy's father said, "I earn at Rs 100 a day working at a construction site. Appear before the court twice a month is a big strain on our finances."

out upon receiving the report of sexual abuse. It is not even necessary that the child go to the station, but in practice it seldom happens.

Naturally, children are the most scared of and angry with our law enforcers. They are upset for being charged with crimes they haven't committed and they are upset that police never lose an opportunity to apprehend them on the basis of their previous record even if they aren't guilty. The following story, one of the most complicated cases HAQ has ever handled and surely not unique in India, is a good example of such victimisation by police.

In September 2005, police in Delhi arrested Mahesh, a 16-year-old boy, in connection with snatching of mobile phone and purse along with adult accomplices. They registered his age as 19 years and produced him before a regular court, from where he was sent off to Tihar Jail. For a fortnight, his worried parents had no news of him, till the mother, a domestic worker, read about the incident in a local newspaper and approached the local police station of Lajpat Nagar where the officials denied any knowledge of him. Sure of his innocence, the mother, who worked in the house of a staff member of HAQ, approached her for help. By that time, three other boys, apprehended along with Mahesh, had got bail, yet police had not managed to inform Mahesh's family. At this time, two other cases were pending against this boy.

HAQ moved an application to transfer the case to the JJB and submitted the child's school admission certificate as proof of age. The case was duly transferred to the JJB. Mahesh too was shifted from Tihar Jail to an Observation Home that also served as a Special Home. Eventually, the JJB ordered Mahesh's release on bail but the actual release didn't happen. Despite a surety of Rs 500 furnished by the poor mother, the observation home refused to release him saying that another FIR (first information report of an alleged offence) was pending against him. This FIR was actually against another person of the same name, but police seemed keen to prove Mahesh was the "habitual offender". This second charge was dropped as a result of HAQ's persistent and strong legal representation. The JJB also dropped charges of stealing, and in March 2006, filed charges against him only under section 411 of the IPC for dishonestly receiving stolen property. HAQ then filed an application in the court of the Additional District and Sessions Judge for setting aside the JJB order. This was rejected by the JJB on the ground that trial was necessary to find out if the stolen property had been recovered from the child or not. Also, the JJB said, due to heavy backlog of cases, it was not possible to complete the trial in four months as per the law. This case is still pending.

Age Verification: Age verification and establishment of juvenility is fundamental to the implementation of the Act. The law clearly says when in doubt, the child must be presented before the JJB and the age verification can take its course. The maximum time given for age verification in the law is 30 days (Rule 12 Sub-rule 1). Mahesh had been apprehended before the Rules had been formulated and so did not have the benefit of them. Yet, to all appearances, he was someone below 18 years. But police apparently had no doubt whatsoever, so they kept him behind bars, then produced before the Metropolitan Magistrate and sent to Tihar!

The issue of claim of juvenility is also important. Till what stage in the course of the case can the issue of verification of age be raised and till what time can the age inquiry remain pending? This becomes particularly important in the light of section 7, which allows for establishment of juvenility even after the case is over. This is why JJB Magistrates refuse to easily dispose of cases where age verification is the issue—in this case, even after three years. She says she cannot close the case unless the age verification has been completed and juvenility clearly established. But how can such an enquiry take 8-9 years? How can juvenility be established after the case has been already decided?

Where should the child be kept? Under the JJA 1986, both the CICL and CNCP were housed in a common observation home initially, after being picked up by the police (most CNCP children were picked up by the police in those days), a provision that came under a lot of flak. The JJA 2000 separated the children at the very outset, to different destinations—the observation home and the children's home. While it is clear that CNCP children can be placed in any Children's Home or a Shelter Home without any written orders (Sub rule 5 of Rule 27 of the JJ Rules 2007), and be produced before the CWC the next day, the law is not so clear regarding CICL. Sec 12 (2) reads: "When such person having been arrested is not released on bail under sub-section (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board." Yet, no institution, whether government or NGO-run, is willing to house any apprehended child without written orders from the JJB. Where does that leave children apprehended in the night when the JJB has stopped functioning for the day? A police station, by default. Thus, although the law says the child cannot be locked up or lodged in a jail (Section 10 and Sub Rule 3 or Rule 11) and that once produced before the JJB and during pendency of the case, the child shall be in an Observation Home [section 12(2)], the confusion occurs because it does not specify where the child will be housed till he/ she can be produced before the JJB and the child suffers. HAQ gets the maximum number of queries from policepersons on what they should do with a child picked up on holidays or late at night!

Place of Safety: Section 2(q) of the JJA 2006, defines Place of Safety as "*any place or institution (not being a police station lock-up or jail), the person in charge of which is willing, temporarily to receive and take care of the juvenile and which, in the opinion of the competent authority, may be place of safety for the juvenile*". But it does not make it clear which children and in which circumstances a child could be sent to a Place of Safety. In the case of Amit Kumar for example, the 14-15 year-old child was in detention for the entire period of enquiry for his case that lasted five years, after which he was sent by the JJB to a Place of Safety. Ironically, that place was inside Central Jail No 5, Tihar, New Delhi, where the boy stayed for another 19 months, because he had crossed 18 years by that time.

These cases prove the police are mostly not interested in or particular about age verification, because of which many children are languishing in adult prisons such as the Tihar jail in Delhi, where they can be and are abused and mistreated. Also, they rarely inform the parents at the time of taking a child in custody, and parents are unable to arrange for a lawyer at the right time, fatally delaying the case. The law says that all possible attempts will be made by those seeking custody of the child to show that the child is above 18 years of age. To avoid this responsibility and further complications, police try to register the child as an adult.

In fact, HAQ's experience shows a remarkable lack of knowledge among the forces of the JJ law and rules as well as a lack of sensitivity towards children. Routinely, children are apprehended for trivial offences, remanded in adult prisons, and sent to session court. Worse, little effort is made to ascertain the actual age of the child. It is as if there is never any doubt among the officers about the child's culpability or his age. None of the medical examination methods, such as dental status, secondary sexual characteristics, and radiological examination/ bone ossification test are foolproof. For the last, the margin of error is two years, often enough to condemn the child as an adult. But this becomes unavoidable, and lengthens the inquiry if the birth certificate or school-leaving certificate is ignored. While the law talks of oral evidence, such practice is usually ignored in the case of poor or rural people, who rarely record the correct date and year of birth.

Police feel children who break the law can never change. They argue that they come from poor families, live amidst many hardships and violence, are uneducated, and thus prone to faltering in life and taking to crime. While they could be right in their basic premise (NCRB records for 2006 show that over 72 per cent of the children apprehended come from households earning less than Rs 25000 a year), HAQ's experience shows that the wheels of justice, and even the police machinery, grind excessively slow when it comes to the poor children needing care, protection or justice. The children from rich families almost always have a smooth sailing. They go to the regular courts, completely bypassing the JJ system, appoint expensive, efficient lawyers and get bail, leaving the board to deal with only the poor. Almost always, they avoid spending a night in the "lock-up".

Police argue that the latest JJ amendments and rules provide scope for more and more children to commit a crime and get away with it, as the law has now reduced the maximum sentence to three years and increased the age to 18 years. They also argue that children are 'used' by adult criminals to commit offences. On the surface, it does seem that juvenile crime has gone up after the inclusion of the 16-18-years age group. But what has actually happened is that the number of children booked for various crimes in the above 16 age group, earlier clubbed with adults, has now shifted to the below 18 age group, making it appear a new and alarming development.

While police are justified in worrying about the rising crime rate, in any age group, and being unable to bring it down, it does seem a bit far-fetched for them to assume that the children commit an offence—or are used by criminal elements to commit—in full knowledge that they can go scot-free thanks to the JJ Act! Increase in violence is a phenomenon that has affected society as a whole. Influence of consumerism, terrorism or crime shown in the media, violence or fights in the family or community leave a deep stamp on the unformed mind of children, especially marginalised ones. While uncared for and unprotected poor children are usually fodder for criminals, it is possible to argue that by their failure and negligence in catching criminals, police too are indirectly responsible for children drifting into crime.

The JJ system--especially the international standards--is still an alien concept for police, adapting to which will take time, keen interest and special skills. Strict policing or tackling law and order problem has been the focus of everything police have been taught or trained for, and the JJ approach is radically different from this. For instance, police have been trained in a certain manner for "questioning" while the JJ Act does not allow children to be questioned [Writ Petition (C) No. 8801/2008]. The spirit behind the insertion of this rule was to ensure that children are not victims of violence in lock-ups, not to forbid use of normal humane methods of getting critical information from them. So police complain they are unable to gather information from children involved in heinous crimes as part of gangs or in anti-state activities. The confusion of police is evident from their comments at HAQ's training sessions: "Madam, *aap to hamein social worker bana rahe ho* (Madam, you want us to become social workers)!"

Special police, special problems

A successful JJ system cannot work without a cadre of sensitised, informed and efficient police. The JJA calls for the setting up of Special Juvenile Police Units. One option—in fact, our preferred option—is the creation of a totally different and specialised cadre for children, so that new officers, sensitive and caring enough to deal with children in need, can come up within the system. Sadly, experience has shown that men and women join the police force to be part of policing. It is especially true of India, where it is viewed as a position of status and power, and of course in the present circumstance, as a source of money that is 'collected'. A separate cadre of police for children will be viewed as a soft and unattractive option. This will either be treated as a punishment posting, or a less-than-average force, defeating the very purpose of the JJA.

Ideally, then, since posting is not permanent, all police personnel should be trained in dealing with children and in the implementation of the JJA. That keeps not only the SJPU churning and dynamic but also helps keep staff open to mainstream policing.

Sometimes, even training cannot change all. Training the diehard could be a waste. In the frequent training sessions conducted by HAQ for police personnel, one officer made a regular appearance. We didn't know whether to be delighted by the officer's interest or dismayed by his low propensity to learn, when he himself admitted that he was merely using the sessions to escape emergency duty!

What then is the way out? A senior police officer has suggestions on how an SJPU can be set up and run.⁹⁹ An SJPU can consist of a Senior Child Welfare Officer (or Child Protection Officer) of the rank of Police Inspector and two paid social workers from a recognized and authorised NGO partner, who would report to both. The Superintendent of Police (SP) in district and the Deputy Commissioner of Police (DCP) in city shall head the SJPU and oversee its functioning. In every police station under the SJPU jurisdiction, a police officer with the right aptitude and appropriate training and orientation should be designated as 'Child Welfare Officer' and handle children in respect of the JJA. The NGO should be in charge of on-job sensitization and training of the SJPU staff and welfare officer, take part in district SJPU advisory committee, be a watchdog in joint review and monitoring of the SJPU functioning. The SJPU should also be assisted by the Department of WCD, which should take care of the salary etc of the social workers. These rules make it clear that the state government need to be proactive for an effective SJPU.

A well-run SJPU is welcome because it works as the first point for a child in need of care or justice and has the power to release a child without going through an FIR or filing of charges. If it is the child's first conflict with the law and the offence is of non-serious or very petty in nature (crimes where the maximum punishment is less than two years) parents or guardian can personally approach the SJPU to receive the child. They can also give a letter narrating the act of offence, with an assurance of taking good care of the child's need. At least one member of the JJB can accept the proposal and ratify a recommendation within 24 hours. It is only if parents or guardians have not come forward to receive the child, the standard procedure of sending him or her to CWC or observation home may be followed.

In Maharashtra, all 35 districts have SJPU. Says Santosh Shinde, CWC member for the district of Mumbai Urban, "We are now trying to appoint welfare officers in all the 87 police stations in Mumbai." That's not an easy job due to the general staff shortage. All of Maharashtra, for instance, has only 50,000 police officers, says Shinde, compared to a total population of 96 million.

In many states, however, all the SJPU and the Child Welfare Officers (CWO) do not exist. Even where these have been set up, there is lack of awareness within the department and proper training of the staff hasn't taken place. The police department actually finds it difficult to designate any one officer as the CWO as it needs the entire force for the diverse kind of work they have, from VIP movement to general law and order maintenance. The CWOs handle all kinds of cases and therefore find it difficult to run from one court to another and also be present in the JJB with the child. As a result, to expect them to be not in uniform when they bring a child to the JJB, a legal requirement under the Act, is simply out of the question. The law also provides for two social workers in the SJPU, all of who have yet to be appointed. The JJ Model Rules lay down their roles and responsibility but there is still a lot of ambiguity on who will appoint them and how, whom will they report to and how will they function.

The SJPU is but the first step in diversion from the JJ system. This is precisely the reason that clouds their role in the mind of the average policeperson. Police want to do "policing" and not what they say is a social worker's job. As one senior officer said, the SJPO cannot also be an Investigative Officer because the former is the "friend" of the child in conflict with law, and would therefore be biased in his/her investigation! This implies police don't feel SJPOs are expected to do "policing", and such work would obviously be uncomfortable to them.

The JJA requires the setting up of Special Juvenile Police Units (SJPU). The purpose of setting up Special Juvenile Police Units is to ensure that the children are dealt with in a child friendly manner with the help of designated Juvenile

⁹⁹ Presentation by Dr. D. V. Guruprasad, IPS, ADG of Police (R&T) and Nodal Officer, GSPP Project, Karnataka to the NCPCR National Roundtable on JJ Act in February 2008.

Police Officers. This is the first step in diversion in the JJ system. The police however are not very comfortable with this role. They do not see it as part of “policing” and feel that they are being turned into Social Workers. For instance, a senior police official says the SJPO cannot be an Investigation Officer simultaneously, as he or she is the “friend” of the child in conflict with law and would then be biased in his/her investigation! Clearly, developing a model for child-centred policing remains an uphill job.

Till such time as the SJPU or a specialised children’s cadre are in place, can police play a greater child-centric role in the JJ system? It can, as the Makkala Sahaya Vani, a child helpline set up in 1997 and housed in Bangalore Police Commissionerate, shows. Pratidhi in Delhi and Bal Prafulla in Mumbai are other examples of fruitful police-civil society collaboration. Police have also set up a website for missing children. Childline, which was launched in 1996 in Mumbai by the Ministry of Social Justice and Empowerment, is the country’s first toll-free tele-helpline, 1098, for children in distress. It is now a project supported by the MWCD, linking state governments, NGOs, bilateral / multilateral agencies and corporate sector. In the last 12 years, it has responded to over 13 million calls from children who live and work in Mumbai and has grown into a national child protection service that operates in 83 cities.

Always at the receiving end

How police defend themselves

HAQ’s interface with police personnel and the feedback received during training sessions reveal that there is a lack of knowledge among them about the JJ Act and its rules. Many of them also do not know the difference between the JJB and the CWC. That apart, police also feel that they are sometimes more sinned against than sinning. For instance, they ask, why should they alone be at the receiving end of public ire when NGOs are corrupt too and the government doesn’t function properly? Also, why is that only police has to face the human rights violation issues?

Other problems faced by police are:

- Lack of knowledge of correct procedures often forces them to follow the magistrate’s orders blindly. When they do know, they find it difficult to challenge what the magistrates say or do even if it is wrong, for instance, when they ask police to send the girl child to Nari Niketan or adult girls’ home. The senior magistrates, they say, often behave badly with them or put the entire blame on them.
- Senior and experienced police officers may be aware of the nitty-gritty of the JJ Act and rules but the juniors aren’t—at least that’s the most frequently asked question at the 35-40 trainings conducted by HAQ on average every year—so there is a need to share information among officials. How to deal with the Child in Conflict with Law and the Role of Police are our two most popular documents that police want to take back with them and circulate. They also want copies of important High Court judgements.
- Many junior policepersons do not know the differences between children’s homes and observation homes and are confused about which kind of child are to be sent to these homes or the CWC and the correct procedures of sending them. There is also scant awareness among them of the trafficking law. Often, upon receiving a child, they call up HAQ office to find out the correct procedure or seek advice or suggestions. While this is a welcome development, it happens only with those who are familiar with HAQ’s work and have come to depend on the staff. This also means policepersons who are confused and do not seek help from others may be sometimes unable to help the child in their custody.
- Even when they want to abide by the law, junior policepersons often have no option but to obey the order of their seniors or make do with the prohibiting circumstances. For instance, HAQ came across an incident

where the policeperson had tied a boy's hands by rope and brought him to the JJB. While this is against the law, it transpired that since a vehicle was not available at the station to take the apprehended child to the JJB, the police person had to bring him in a crowded public bus where the risk of the boy fleeing was great. As a result, he was forced to tie the almost-adult boy up so that his own job was not at risk. Then again, once the HAQ team was in the JJB conducting training when they suddenly noticed a boy being led handcuffed by the police. This boy, in his late teens, had been produced before the JJB and was now being taken back. The matter was brought to the notice of the Principal Magistrate who immediately had the handcuffs removed. But the policeman had a plausible explanation. The boy was to be taken between the Central Jail and the JJB by public transport, so what else could the poor fellow do to ensure that the boy did not run away and his job was not in jeopardy?

- The most important problem faced by police—rather, the point about which they face the maximum criticism—pertains to age verification of the apprehended. This is crucial, as this dictates whether the person apprehended would be tried under the JJ Act, which is less stringent than the other laws of the land. In many cases, police neglect has meant that the child is maltreated and sent to adult prison for no fault of his.

In their defence, officials offer two main arguments. First, that police are only human and make mistakes, especially since it is difficult to gauge the correct age of a child in the range of 16-18 years if there is no ready evidence. “Some amount of subjectivity is unavoidable,” says a senior police officer. “There are some who appear to be a child or juvenile. But there are also some who claim to be a child. If we have doubt, we always ask for a birth certificate.”

It is the second line of defence offered by the police that smacks of prejudice and highhandedness. They argue that if there is confusion about the age, there are various procedures to confirm it. “There is a medical board, there are the magistrates. It is not the end of the world anyway,” says the officer. What she forgets to mention is that by the time the correct age is established, the child will have spent a lot of time, needlessly, in the adult prison. Justice Lokur, for instance, cites the case of a 17-year-old uncovered in late 2008. The boy had been awaiting trial for five years in an adult prison. The judge felt he looked too young and asked to check his birth certificate; police apparently had no such doubt



while framing charges. And, of course, as we have said before, police never cease to remind one that raising the upper age limit for children to 18 years was a rank bad idea, something that should be corrected immediately to sort out this “age-related” confusion.

It is obvious why police is seeking the change. A lower age limit, by lowering the number of cases of children coming into conflict with law, will show up a less serious crime situation. It would also show police in a good light. The number of crime for the 16-18 years age group would simply get added on to the number of crimes for adults, and the latter being much higher would not be really affected. But if boys of 16-18 years are actually being used in crime and recruited by organized criminals or they are getting into conflict with law due to societal or economic reasons, such a step would simply mask the reality.

Criminal Neglect

Justice delayed is justice denied

The celebrated case of Pratap Naik, a 14-year-old Dalit boy from an Orissa village held in connection with murder over a land dispute in February 1989 and given life sentence, is the most glaring example of how an innocent child can lose more half his life embroiled in judicial processes and carelessness of the system. In 1991, after two years of incarceration, Naik was granted bail but since his parents couldn't afford the bond money of Rs 5000, he remained in prison. Then in 1994, he was acquitted but due to a mistake by a court employee, the release order was never received. He remained in prison till 2003 when he finally walked free after having spent 16 years in prison, without any apology from the government or compensation. Thanks to the persistence of a civil rights activist who took up his case, Pratap received Rs 8 lakh from the Supreme Court (the Orissa High Court had dismissed the plea) on 20 August 2007. He was then 32 years old.



Delays, refusals, postponements, adjournments are part and parcel of the Indian legal system, but one would think matters would be speeded up for children, especially since the JJ Act categorically says that trials must be completed in four months. Apparently not. According to a first-of-its-kind analysis of the nature of pending cases at different layers of the lower judiciary, done recently at the behest of the Supreme Court, 43,863 cases of juvenile crime are pending in courts of first class judicial magistrates/metropolitan magistrates.¹⁰⁰ Clearly, neither the child nor his/her legal representatives are being heard out in court.

"In the instant case, Pratap suffered erosion of his right in view of the callous attitude of the employees of the State. Pratap lost prime period of his life behind bars, though he was acquitted in the appeal by this court. He was born in 1975 and he was released by the judgement of this court on 31.10.1994. Therefore, at the time when Pratap was released he was 19 years old, but thereafter he was behind bars for more than eight years even though he was a free man....It cannot be said that since Pratap is poor his compensation should also be poorly assessed. Nobody can say if he would have been allowed to become free in the prime age of his life, he could have established himself as an important member of the community. But, that was not possible in view of the callous attitude of the state. So for eight years of illegal detention, the State must pay Rs 8 lakh to Pratap Naik...."

Prabir Kumar Das vs. State of Orissa and others. WP(C) No 11703 of 2005, 2007(III) OLR-435

In Delhi, the backlog of cases doesn't seem to be getting over very soon apparently because of the JJ Act. While a general court can be set up in any locality, the 2007 JJ Rules (9) mandates that the JJB must be situated in or next to the observation home. But the two observations homes for boys in Delhi already have JJBs attached to them and there is no space for a second one at either. The third observation home, which is for girls, can have a JJB attached to it but it would serve very little purpose. For one, there are few girls in conflict with law at the observation home. For another, the boys' home is located so far away that transporting them to the new JJB would be a problem. The decision to have a third JJB is caught in this muddle. Also, with the decline in pending cases, to less than 2,000 as on 1st Oct. 2009, there is a rethinking on whether to have a third JJB at all.

The cause lists (list of cases) before the JJBs in Delhi, for instance, sometimes run up to 70-80 cases a day. Out of the normal 6-7 hour day, the second half is taken up by preliminaries, such as verification of documents, and bail matters. This means the child barely gets 3-5 minutes with the magistrate!

Disposal of Juveniles Apprehended under Indian Penal Code and Special and Local Law in India (1988 to 2007)

Year	Arrested & Sent to Courts	Sent to Home after Advice or Admonition	Released on Probation & Placed under Care of		Sent to Special Homes	Dealt with Fine	Acquitted or Otherwise Disposed of	Pending Disposal
			Parents/ Guardians	Fit Instt.				
1988	38168	7380	920	4009	2229	4841	3849	89281
1989	36392	3253	9402	1809	1082	3772	3458	13616
1990	30816	3893	5662	1136	1338	4351	3331	11105
1991	29591	1797	6449	1286	1352	2450	2584	13673
1992	21358	1933	4091	1005	1161	2324	2018	8826
1993	20067	4731	1832	1003	1173	1425	2079	7824
1994	17203	3930	2693	703	947	1209	1122	6599
1995	18793	4880	2406	927	1144	743	1766	6927
1996	19098	4481	2283	795	1623	880	1517	7519
1997	17796	2475	3033	689	1122	1254	2212	7011
1998	18923	2597	3837	830	1767	909	2117	6866
1999	18460	1656	5298	768	1281	832	3358	5267
2000	17982	2619	3091	2012	1864	609	1132	6655
2001@	33628	4127	4833	1003	4037	897	4435	14296
2002	35779	3236	11338	1240	3381	908	1693	13983
2003	33320	3413	9074	1526	3936	1592	1730	12049
2004	30943	3848	5662	1138	4942	1256	1957	12140
2005	32681	3807	5578	1933	4423	1361	1801	13778
2006	32145	4036	5723	1482	4510	1023	1579	13792
2007	34527	4476	6324	1336	5077	1543	1474	14297

@ Boys in the age group 16-18 years have been considered as Juveniles.

Source: Crime in India, NCRB

HAQ's experience with dealing with CICL shows that they are very angry at the long delays and adjournments. While many of them are forced to stay in institutions homes for years, others find themselves having to keep coming back for hearings, sometimes even after they have become adults. In some instances, children plead guilty just to get out of the grip of the courts if they know that doing so would enable their cases to be closed and they would be released. Prolonged trials can frighten children and their families away from pursuing a legal solution, and some of them give up midway. Unable to bear the costs of travelling, poor parents often stop coming to court and/or visiting their child, leaving the child languishing in institutions.

A major reason for the delay in settling cases is the lack of lawyers to represent the children. It's a vicious cycle. Children from poor families are unable to afford the bail fees, let alone those of a good advocate. Some of them manage to appoint and pay them initially but are later forced to drop them after a year or so. Needless to say even if there are lawyers, they are at most times not those who treat the children with empathy.

Raman Lal's case points out how lawyers can sometimes unnecessarily complicate or even jeopardise the case. Raman was booked, along with two of his friends, Raj and Navin, in 2007. Raman's friend, Raj had made plans to secretly marry and elope with his girlfriend and all of them met at Raj's office to help Raj. Before they could carry out the plan however, the girl's parents got them arrested on the charge of kidnapping and rape on 20 September 2007. While the two boys got released on bail, innocent Raman could not get bail because of lack of clear proof of age. The boy was born at home and a certificate from the special education centre run by Delhi Public School, where the boy had studied, also seemed doctored. His mother had appointed three lawyers, including one from the Delhi Legal Aid Services Authority, spending a considerable amount of money. Yet, none of them were able to either prove the boy's innocence or argue strongly for a medical proof of age, forcing the child to continue in custody. On the contrary, the school charged that the age certificate has been tampered with, possibly by one of the lawyers or the kid's family. So Raman was placed in an observation home till the issue was resolved.

Nor are children getting legal aid. Neither the judiciary nor the Ministry of Women and Child Development is interested in following up on the issue of providing legal aid to the poor children. Even lawyers from NGOs such as HAQ have faced various hurdles when they tried to assist children. They are also not allowed to assist public prosecutors, which can immensely facilitate and speed up justice delivery.

Of late though, there has been an effort to minimise backlogs, mainly brought about by Section 14 of the JJA which says, “The chief judicial magistrate or the chief metropolitan magistrate shall review the pendency of cases at the board at every six months, and shall direct the board to increase the frequency of its sittings or may cause the constitution of additional boards.” This system of monitoring is welcome, but can also be problematic. In a place like Delhi, there are two distinct and dedicated JJBs with a First Class Judicial Officer designated as the Principal Magistrate. But in many states the charge lies with the Chief Judicial Magistrate (CJM) who holds the additional charge of the JJB. How can they review their own performance?

Apart from the Chief Metropolitan Magistrate, this review also happens, as in Delhi, through the intervention of the High Court Committee on JJ, where the chairperson of the committee, calls for reports from the JJBs, CWCs and other related departments and individuals. When the pendency of cases was found to be exceptionally high, Bal Adalats on the pattern of Lok Adalats were held to dispose of cases of compoundable and petty offences.

Faster, not better

Are Lok Adalats useful?

In Delhi and Maharashtra, Bal (Child) Adalats brought forth cases of boys who had been in observation homes for more than seven years. Some of these boys left the juvenile justice system only as fully-grown adults. One of them was 22, having lost a big chunk of his life to the impersonality of homes.

Following a visit by the Chairperson of the High Court Committee for JJ, who found several children stuck in the Observation Home for several years and many suffering from contagious diseases, the first ever Lok Adalat for JJ cases was organised in Delhi on 3 March 2007. It settled 33 cases, including one of a boy who was being provided legal aid by HAQ. He had been charged with eve teasing and the case was settled after discussion.

Lok Adalats follow a process of arbitration. Negotiations between two parties in a case are directed towards arriving at a compromise, leading to cancellation of charges and thus a smaller backlog. Such adalats are not meant to be about plea bargain, where the accused pleads guilty and bargains for a lesser sentence. They hear only petty compoundable offences, i.e., offences where “culpability” or guilt need not be attributed to the crime going by the nature and intensity of the offence. In other words, a child who is booked for committing murder will not come before these adalats and they will have to go through a trial (rather, inquiry) as murder involves culpability, and therefore the JJB. So getting these small offences cleared by the Lok Adalats sounds fine till you consider that “culpability” cannot be attributed for any kind of offence as per the principles and the overall spirit of juvenile justice. Is it then fair to allow one child to receive justice through the Lok Adalat and deny access to this process to another child who may have allegedly committed a more serious offence?¹⁰¹

Another question that arises over Bal Adalats is should we even try to create an alternative to an alternative, given that the JJ system is meant to be an alternative justice mechanism for children vis-à-vis the general courts? A more important issue is if a compromise can really be arrived at. Who makes the compromise? Withdrawal of a case by the complainant can put him or her in legal jeopardy and therefore the complainant doesn't want that. Does it then mean that the child must admit to have committed the alleged offence and apologise in order to get rid of the charges? That

101 Bharti Ali: Report sent to the NCPCR on the Maharashtra Visit, HAQ document

goes against the best interests of the child as laid out in the CRC. Yet that is what usually happens. Parents happily accept the decision since that would mean freedom from the frequent rounds of courts and long delays and getting on with the child's life.

One could argue that the Lok Adalat is a useful mechanism to deal with compoundable offences since it implies that the charges against a child get cancelled, obviating a criminal record for the accused. Often, at the JJBs, harassed parents are likely to accept guilt as a price for freedom from the long hand of the law, thereby putting the child's future in jeopardy. Not only does the child get in the books of the police (the child acquires a 'police record', so to speak), they become innocent fodder for dishonest officials on the lookout for names to "solve" cases and improve their stations' performance.

Such police behaviour actually goes against the JJ Act, which clearly says that no record of the child is to be kept. The Model Rules for implementation follow the 'principle of fresh start', a new beginning for the child and erasure of his past records. How does the Lok Adalat then serve a special purpose? More important, why can't the JJBs act more like Lok Adalats by swiftly disposing of petty cases?¹⁰²

In June 2007, the NHRC sent a notice to the Maharashtra government about more than 3,000 cases pending before the Pune JJB as well as disposing of cases via a Lok Adalat where out of 171 cases, 33 were dispensed within four hours. This followed a complaint by noted child and human rights advocate Sheela Barse who argued that organising Lok Adalats to dispense with juvenile cases was unlawful and did not follow the spirit of the JJ Act. She said, "7 minutes and 27 seconds were devoted on an average by the JJB and the social workers' team on each case, when the law clearly says that these cases should be decided over 3 to 4 months between which a social worker or a police officer is required to study the case and file a report".¹⁰³

Out of the 33 cases, 31 were resolved because the accused pleaded guilty. Clearly, "juveniles and their guardians in their anxiety to get rid of litigation, make a confession before the Lok Adalat and thus unwittingly bring a stigma to themselves for life", Barse said.

In reality then, the Lok Adalat process has failed to provide a fair opportunity to the children. This is because the police often fail to inform all the parents/guardians of the children and the complainants whose cases are listed. Even for those who do manage to show up, justice is not necessarily assured. A good example of this delayed justice is the case of Saurabh Chaudhuri, a 13-year-old boy from Bihar who was working as domestic help in Paschim Vihar, Delhi. He was beaten up very severely by his employer, the lady of the house, and was taken to the CWC and a complaint registered with the police station by Childline. HAQ got involved with the case at the request of the CWC, which sought legal support from HAQ for Saurav. However, since the case went to the Lok Adalat, HAQ had a tough time convincing the court of the culpability of the employer and the need for justice for the boy. The magistrate was keen on a compromise solution and sought to impress upon HAQ the futility of proceeding against the lady. It is only after both the boy as well as HAQ insisted on filing charges that the magistrate gave a new date of hearing. HAQ managed to give the boy an increased amount of compensation, but only after the case dragged on for about a year more. Saurav's case proves that speed at Lok Adalats come at a cost.

Lok Adalats or Bal Adalats held in Delhi and Maharashtra have not been able to meet their targets, though they have cut down the time spent on each case. Unfortunately, Lok Adalats are often overhyped and turn into a media event, though one wonders if there should be a celebration of failure and delayed justice at all. Having drawn flak, Lok Adalats are now held under the name of 'special hearing', with less media attention.

¹⁰² Ibid

¹⁰³ <http://cities.expressindia.com/archive/city-news/4/6/2007/>, as accessed on 9 March 2009

Not my children after all

A confused, apathetic system

As we have seen so far, the failure of the JJ system across the country can be blamed on several reasons, ranging from inadequacies in law, lack of knowledge of the law and confusion in its interpretation to lack of infrastructure to a debilitating attitude of the implementing persons and bodies. Each of this needs more discussion.

Confusion about interpretation of the law

The statutes of the law, as they are currently drafted, lend themselves to confusion and interpretation. The result is petitions in the high court and Supreme Court seeking clarifications or modifications of court orders as well as issue of repeated court orders on thorny sections.

For instance, in a judgement on May 6, a Supreme Court bench comprising Justices Altamas Kabir and Cyriac Joseph said all accused in the age group of 16-18 years convicted or still facing trial as criminals across the country, would now be treated as juveniles. This was done to explicitly clear the confusion that still prevails over treatment of children below 18 whose cases are still pending under the JJ Act 1986. One would have thought that the new laws, the JJ Act 2000 and the amended one of 2006, would have automatically taken precedence over the old Act. But lawyers and activists welcomed this judgement as it cleared all doubts that “all persons who were below the age of 18 years on the date of commission of the offence, even prior to April 1, 2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the commencement of the Act and were undergoing sentence upon being convicted.”¹⁰⁴

Similarly, the Delhi High Court has recently passed a judgement saying that a child (person below 18 years) cannot be made to sign a confession or statement before the police under Section 161 of the CrPC, given their status as minor. This was based on a suo moto notice taken by the High Court on the basis of a letter received from two child welfare workers stating that police was compelling the children to sign statements made to the police officers, and further, is relying upon these statements before the JJB. The court reiterated the provisions of the law regarding production of the child in conflict with law “without any loss of time” before the JJB and that the child cannot be kept in a jail or lock-up.¹⁰⁵

Even more confusion is created with the JJA requiring children’s homes being run by private agencies or NGOs as fit institutions. Children in need of Care and Protection need to be housed in a protective and child-friendly environment. Many NGOs have been running care institutions with different philosophies for many years, one of which is children must not be confined to a “lock and key” institution but be located in an open house where they are free to come and go. However, the JJA clearly lays down certain parameters that must be complied with for any institution to be fit institution, and complying with them clearly calls for it to be run as a custodial home.

Lack of sensitivity and knowledge

One of the most troubling discoveries by HAQ during its years of work is the general absence among government officials of a sensible, innovative and empathetic attitude towards the children they come in contact with. There are a few sincere and proactive members in the JJ system, but they appear to be rare and change in attitude has been very slow in coming. Even according to officials serving at children’s homes, which are virtually untouched by the rapidly changing globalising India, things have started improving only in the past year or so. Even this is more an impact of the Supreme Court directive, and in Delhi the monitoring by the High Court Committee, rather than a sense of justice and empathy for the children.

¹⁰⁴ Hari Ram vs. the State of Rajasthan and other, Criminal Appeal 907 of 2009

¹⁰⁵ WP (C) No. 8801/2008. Court on its Own Motion vs. NCT of Delhi

That little has changed in state apathy towards child offenders is clear from what the NHRC had to say as late as in November, 2007, reviewing the implementation of the JJ Act, “the Juvenile Justice Board should protect the best interests of the juveniles and in no way function as a criminal court. Under no circumstance, a juvenile or a child should be lodged in a police lockup or a jail and at least one police officer should be designated as the juvenile or child welfare officer and trained suitably. The Special Juvenile Police Unit should be in touch with a member of JJB, the probation officer, the parents/ guardian of the juvenile placed under their charge.”¹⁰⁶

The insensitivity and lack of interest is reflected in many insidious ways throughout the system, from the jargon used to the way children are picked up for care or justice and to the way laws and programmes are implemented.

Under law, the JJB magistrate must have special knowledge or training in child psychology or child welfare and the social workers must be actively involved in health, education, or welfare activities pertaining to children at least for seven years. In practice, these could be political or bureaucratic appointments. The magistrates usually belong to the regular judicial system—there is no effort to make a separate stream as in the case of SJPU. Many see being on the board as “punishment posting” and a hindrance to improved career prospects. Because there is no special training that they need to undergo before taking on this position, they learn on the job, experimenting as they go along. By the time they have somewhat understood their role and are ready to deliver, it is time to leave.

A few of them are interested and initiate innovative interpretation and creative implementation of law, while the rest simply mark time till they can swing a posting out of the board. One magistrate in Delhi has experimented with using art as a medium of expression for children and peer counselling for children in conflict with law, another has consistently tried to hear and decide cases with empathy and occasional creative interpretation of law. Both have since moved on, leaving the incumbents to experiment on their own. One cannot expect consistency nor ensure a “quality control”.

A visit to the Juvenile Justice Boards across the country is adequate to gauge the apathy meted out to children by the very structure and functioning of the Boards.¹⁰⁷ To be child friendly, and not a “Court” but a special mechanism for children, it must appear to be such. How can it be child friendly if the Magistrates in most boards continue to sit on an elevated platform, as in adult courts?¹⁰⁸ Or the police are in uniform and the lawyers come in their black coats and white neckbands? Worse, children are brought in vehicles meant for adult prisoners and have to wait till they are called in, in a waiting room that resembles a prison with iron grill, often the entire day till all the cases are heard, and carted back to their institution. This defies the very reason the juvenile justice boards were formed, that is to give children an opportunity to get into the reform process so that they move back into society, in a friendly environment, as opposed to criminals brought in a court.

The story of Meena, a seven-year-old who was raped, tells how even the judiciary is often insensitive to the fundamental principles of the JJ Act. This incident happened in 2007. The application for recording the statement of the girl was moved, for the first time, on June 6 in the court of the Metropolitan Magistrate, Rohini. This was however transferred to another MM, who postponed the hearing of the statement two days later. Both these magistrates were women. Between June 8 and July 18, the statement recording was postponed six more times. In between, the MM even asked the child to be sent to Nari Niketan, which is strictly for girls above 18 years of age. What happened with Meena was in blatant violation of the law, which says the statement in a sexual abuse case should be recorded as soon as possible, and also caused untold harassment to the girl who was actually the victim, not the perpetrator of the crime!

In the case of sexually abused children, the whole process of denial of justice begins well before a victim of crime reaches the court. The medical examination itself scares children and their families. For girls, it is even more humiliating. The gynaecological examination continues to follow the traditional methods of insertion of fingers to examine hymen

¹⁰⁶ <http://nhrc.nic.in/dispatcharchive.asp?fno=1372>

¹⁰⁷ See also the section on states: *Many Laggards in States*, Page 28

¹⁰⁸ See Rule 9(2), Rule 24 (3), Rule 75 of JJ Rules

tear and internal injuries. Imagine the fear and trauma of a child, often as small as four to five years and one who has already gone through agony and humiliation of physical abuse, during such an examination. But she cannot refuse a medical test because in the present criminal justice system, the medical examination report establishing sexual abuse is the bedrock on which the guilt of the offender can be established and justice given to the abused child.

The other traumatic experience happens when child victims are taken to the Court for recording of their first statement in the same vehicle along with the accused. The law says that at no time should the child and the accused should come in contact with each other, so that the victim's trauma is not compounded. But police never have adequate vehicles for their use or they do not see the necessity to take them in separate vehicles. Instead of creating an enabling environment to ensure that the child is able to present her case without fear and further humiliation, the very first journey of the child to the Court puts her one step behind in her journey towards justice.

Even societal attitudes influence the quality of the child's participation in the judicial system. In Indian society, children are often found to be tongue-tied, nervous and shaky in front of an adult, especially people in uniform, and children from poorer and disadvantaged families more so. In the case of sexual abuse as well as conflict with law, children and their families are usually intimidated by their interaction with the system, especially when asked for physical proof of abuse and harm on the body, or are pressured to withdraw the case. Police often do not file a report in cases where no physical damage is seen. This has forced the Supreme Court to say, in a judgment on 23 February 2006, that 'genuineness or credibility of the information is not a condition precedent for registration of a case.' Quoting an earlier decision, they said a police officer should register a case on a complaint of a cognizable offence and the police could not pre-judge the issue. "At the stage of registration of a crime or a case on the basis of information disclosing an offence, a police officer cannot embark upon an enquiry whether the information is reliable or not," the Bench said.¹⁰⁹

Two cases brought to HAQ by the police, are typical examples of how crucial evidence can be lost, making it difficult for sexual abuse victims to get justice. Ten-year-old mentally challenged Babita was called into the house by the 40-year-old neighbour and raped. She came running home crying and told her 16 year old sister. The parents were not at home. In her wisdom, this sister gave her a bath and washed the clothes to clean her of the filth (*gandagi*) of the rape, without realising that she was washing off vital evidence. Similarly, when a teenaged neighbour raped nine-year-old Manju, her parents gathered up the courage to report the incident only after a month, partly due to embarrassment and partly due to intimidation by the neighbour, by which time the evidence was lost. Lack of knowledge in poor families and fear often leads to the victim being washed or not reporting the assault for a day or two. Even if the evidence is available and collected (a genital swab, for instance), it is physically carried, often uncovered, by the police officer for submission. There have been several instances where the HAQ team has found the Investigating Officer being handed over an uncovered slide by the hospital to be carried to the laboratory, and who knows how long it lay there unattended! This is not only scandalous and negligent but also ensures that the victim never gets justice or must fight a particularly tough battle for it.

Lack of clarity regarding role

Apart from a judicial magistrate, the JJB consists of two social workers. This is aimed at bringing about a change in the very nature of the inquiry and decriminalising the administration of juvenile justice. In reality, however, the two social workers play a limited role. A study on child protection by HAQ found that in Delhi, the social workers are hardly ever present for the judicial proceedings. Even when they are present, they are usually silent. Nor are they encouraged to be active by the Magistrate whose is the only voice to be heard and who takes the ultimate decision. In Orissa, the Magistrate would send the final order to be signed by the Social Workers, even though the order was made without any consultation, because "that was the proper way". Since the social worker member of the Board refused to sign an order for which she had not been consulted, there was a lot of tension forcing her to ultimately resign. In most

¹⁰⁹ <http://www.hindu.com/2006/02/23/stories/2006022313540100.htm>

cases however, the members say that they have no authority or role for themselves as the JJB deals with criminal legal matters and the social worker members are not empowered to undertake judicial proceedings or pass orders, although their signature on the final order is a requirement. Clearly, they do not follow the statutes or don't know how to read and interpret the statutes. They are completely at sea in matters of law and its interpretation by the Magistrate or its legal and social implications for the child. Neither are they very enterprising in communicating with the children regularly nor cognizant of their best interests. There are JJBs in the country that have no social worker member or the members have either left or choose to abstain from attending, because there was no clarity on their role and they felt redundant.

The government is supposed to address these various problems through training, sensitisation and other capacity-building programmes at various levels. However, in practice it has only been able to follow up with training of the Judicial Magistrates through the National/State Judicial Academies. For the rest of the people involved in the delivery of justice, such training is rare and ad hoc. This frustrates the very objectives of the law, leaving children with a feeling of anger and hatred for the 'system'.

Members of the judiciary concede the problems. One of the reasons for such decision-making, they say, could be lack of sufficient experience or authority in a magistrate trying serious crimes. For instance, in Delhi, as a rule, serious offences are tried at the session courts and magistrates at the JJB, who are junior to the sessions judges, may not have sufficient experience to try such cases when these are shifted to them. Also, in respect to such crimes, especially murder, judges outright rule out the possibility of completing the trial in four months, as mandated by law, or even a year, because there are many procedures to follow. Also, they say, speed in settling cases can come only with more courts to try those cases.

When the JJB finds the child has indeed violated the law, it may pass any of the following orders: release after due admonition and counselling for him/her and the family; keep the child under the supervision of parents/guardian/probation officer/fit person/fit institution; impose a fine; send for community service; order group counselling; send to a special home. No child may be sent to prison in default of payment of fine or producing sureties. If the child is above 16 years and is found guilty of a very serious offence, and thus cannot be kept with other children in their interest as well as his/her own interest, the JJB can order him to be in a Place of Safety instead of a Special Home. In principle, a child dealt with by the JJB does not suffer any disqualification attached to conviction for an offence.

In reality, all these provisions are flouted with impunity. Use of provisions requiring release of children on advice or admonition is sparse. Only 11.6 per cent of the apprehended children were so released in 2005¹¹⁰ and less than 13 per cent in 2007¹¹¹. Even in the case of bail, a matter of right, law is erratic. Some magistrates are reluctant to grant bail or grant it after much deliberation because they say this would result in the boy getting involved in anti-social activities. In the current progressive legal climate, when the Supreme Court itself favours allowing bail to all adults involved in minor offences, partly to reduce the pressure on prisons, why should children be denied it at all?

HAQ has had cases where despite the child spending over three years in the home, the bail pleas were turned down by the JJB for no apparent reason. In some of these cases that are still pending, HAQ has been forced to shift the matter to the sessions court. For instance, in the case of Zaheer of Sangam Vihar, Delhi, in judicial custody since July 2005, all his bail applications were rejected by the JJB, and HAQ had to file an appeal at the Additional District and Sessions Court to get bail. HAQ has successfully challenged in higher courts several cases where bail has been refused by the JJB.

It is as if these unfortunate children have no option but to serve time in an observation home for three years, whether or not they have committed any offence, before they can be free. And even then, that freedom is rarely available automatically; it has to be accessed with legal assistance and cooperation from a child-friendly organization outside the system.

110 Crime in India 2005, National Crime Records Bureau, Ministry of Home Affairs, Government of India

111 Crime in India 2007, National Crime Records Bureau, Ministry of Home Affairs, Government of India

Lack of legal representation

The JJ law overrides the CrPC in providing bail irrespective of the seriousness of the alleged offence. Children do not have the legal capacity to sign on their own vakalatnama, but the CrPC allows appointment of a lawyer as ‘amicus curiae’ to take the case forward. This provision can be applied where parents are not available. Somehow the JJBs have failed to do so and the law is silent on how long the JJB should wait for parents or guardians to be traced.

Even the system outside is vulnerable. HAQ’s experience shows how difficult it is to find lawyers willing to dedicate enough time to children’s cases in lower courts or matters connected to juvenile justice. The few that agree want to restrict their appearance to the minimum in order to devote more time to more paying clients. One of the problems faced by children stuck in long-running cases is the lack of continuity posed by frequent change of lawyers arguing their case, which contributes to the delay and often weaken their case.

The poor quality of services offered by the lawyers empanelled on the Delhi Legal Services Authority and failure to network with them forced HAQ to raise the issue of free legal aid services at the Kingsway Camp JJB before the High Court committee. This resulted in the setting up of FLAG (Free Legal Aid Group), with a few lawyers motivated by senior judges. Even though there is a need to set up another such group at the second JJB at Delhi Gate, it transpires that the FLAG lawyers at Kingsway Camp were not following up a case till the end and their services are limited to the stage of bail. Clearly, juvenile justice for children already bypassed by society is not an attractive option for lawyers. Indeed, pro-bono representation seems to have become a thing of the past with more and more legal firms going corporate. This underscores the urgent need to encourage and build a dedicated legal cadre at the level of colleges and institutions and for concerted efforts by the government as well as the judiciary towards this end.

Juvenile delinquency is a modern term for what we did when we were kids.

Anonymous

DON'T JUST REFORM, INNOVATE

8

The 1986 Act marked the introduction of a uniform normative structure for implementation of juvenile justice in the whole of India, except in Jammu and Kashmir. Yet, says Ved Kumari, in practice it seemed to be a re-enactment of the Children's Act 1960 as there was almost no difference between the two.¹¹² "Apart from substituting the word juvenile with child, the JJA had made the modifications in the definition of neglected juvenile, substituted the provision relating to drugs and aftercare, and introduced five new provisions."¹¹³ This law was replaced by the 2000 Act, which was again amended in 2006 and rules made.

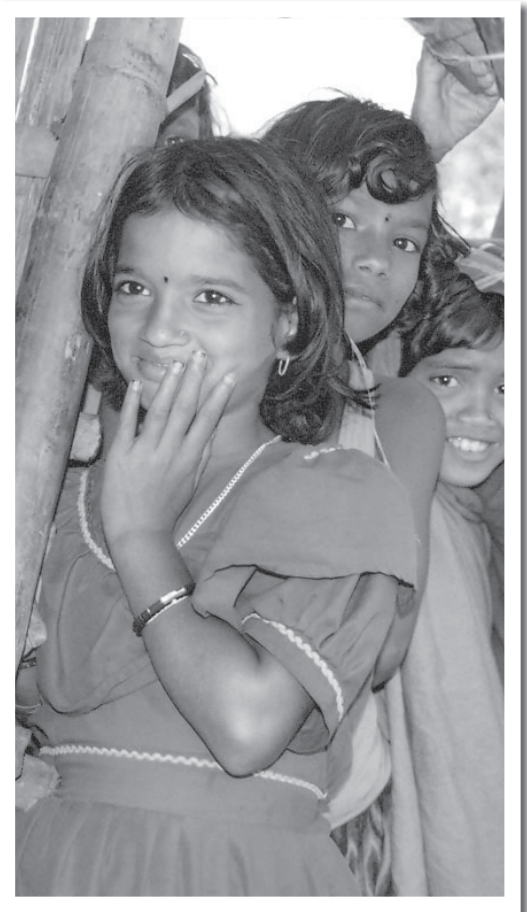
"While the legislation has been made with the best of intentions, it has been criticised for its unprofessional and tardy drafting. Its implementation, also, has been piecemeal."

*Ved Kumari, Professor of Law, University of Delhi,
Info Change News & Features, June 2007*

Beyond letter and spirit

Contradictions abound

Yet, the more things changed, the more they remained the same. Several contradictions and inadequacies continue to exist in the law and its application. Says Dipa Dixit, member, NCPCR, "The JJB and its procedures are as though for an adult, and therefore harsher for a child. The system is not child-centric at all." While the JJ Act lays down a different adjudicatory mechanism for children, particularly for those in conflict with law, the system continues to rely on the IPC defining what constitutes an offence, as it doesn't have a separate procedural code of its own. In fact, it continues to rely on the CrPc for procedural mechanisms [section 2(y)]. Therefore, while a child may be "apprehended" instead of arrested, the police continue to use the same arrest memo. Whether or not the child will be considered a child in conflict with law will be based on the IPC or as "an offence punishable under any law for the time being in force" [section 2 (p)] depending upon the act committed. In the case of the CNCP, the child will continue to be part of the adult trial proceedings if the accused is an adult. This contributes to a whole lot of problems starting with the time a child is apprehended for an offence committed by him (or approaches police for justice for an offence committed against him or her) till the child is produced before the relevant authority such as the JJB (the CWC). The need for FIRs,



¹¹² Ved Kumari, *The Juvenile Justice System in India- From Welfare to Rights*, OUP 2004, Page 182.

¹¹³ Ibid, Page 133

filing of charge sheet, unnecessary procedures for age verification, conventional methods of bail, an inquiry nothing less than a trial etc – all become *de rigeur*, which only increases the trauma for the child. This also helps perpetuate the perception of these children as criminals in the mind of the police who cannot go beyond the boundary of their knowledge of these two codes. Having the CrPC does not prompt or facilitate a change in the attitude of the police and the judiciary, who keep working to the letter of the law without appreciating its very spirit.

The Central Model Rules framed by the Union Government for implementation of the law emphasize the use of non-stigmatizing semantics, decisions and actions as a fundamental principle in the development of strategies, interpretation and implementation of the law. (Rule 3) Principle VIII of the JJ Rules 2007 clearly states, “The non-stigmatizing semantics of the said Act must be strictly adhered to, and the use of adversarial or accusatory words, such as arrest, remand, accused, chargesheet, trial, prosecution, warrant, summons, conviction, inmate, delinquent, neglected, custody etc. is prohibited in the process pertaining to the juvenile or child under the said Act”. The preferred words in the legislation therefore are ‘apprehension’ instead of arrest, ‘inquiry’ instead of trial, ‘children in conflict with law’ in place of juvenile delinquents, ‘special home’ instead of ‘remand home’ and so on.

A simple reading of the Act and the Rules however reflect just the opposite. The lack of political will to change and the restrictive attitude of the government show up in the continued use of terms such as ‘detention’ and ‘release’. This cardinal principle of non-stigmatizing semantics and action holds no meaning as long as the procedures of the Criminal Procedure Code (CrPC) are to apply in matters of juvenile justice. If using the CrPC, use of chargesheet, trial, prosecution, warrant, summons, conviction etc. are inevitable. This inherent contradiction in our juvenile justice legislation has therefore failed to treat children separately from adults and they continue to be sent to ‘judicial custody’ by the JJB instead of being placed in safe custody as required under the law.

The fact that the JJ law allows the Criminal Procedure Code (CrPC) to be followed in dealing with matters concerning children reflects the lawmakers’—and enforcers’—reluctance to rethink and innovate for children. It also raises doubts if the law was made to suit the needs of a few law enforcement officials, especially since the CrPC itself requires reforms for violating human rights principles. In a criminal justice system that does not establish distinct and specific legal procedures for children, ensuring justice to children will not be easy. In fact, there is no purpose served by the JJ Act if it continues to rest on criminal procedures for adults. A separate set of procedures for children must be drawn up forthwith, and till that’s done, there must be a set of child-friendly procedures to settle matters where the alleged offence is not serious.

Even in the law, there are several areas lacking in both conceptual clarity and procedural transparency. For instance, the 2000 Act prescribes that children in “conflict with law” be first taken to observation homes, where they would stay till their production before the JJB for inquiry. Yet, children are found to be staying at least one night, sometimes even five, in a police station. This is fraught with risk; the children might be abused, violated, kept hungry, a statement may be taken from them by intimidation, and so on. The law also says that no arrest can be made after sundown but police violate that on the pretext that the child might run away. Because the law says the children must be produced before the JJB within the next 24 hours, they even post-date their reports to the Board to hide the stay in the police station.

On March 2, a division bench led by Chief Justice A P Shah in Delhi severely cautioned police, asking them to immediately stop taking child offenders to stations and making them sign statements. “There will be no signatures or thumb impressions taken from these children... Any officer who does so will be exposed to contempt of court,” it said. But the law is not clear on where police will keep the child if the Observation Home authority refuses to admit the child without a paper signed by a senior official or if such an official cannot be contacted or on a holiday, which is a very common occurrence. Section 12 says, “When such person having been arrested is not released on bail under subsection (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.” But this “prescribed manner” does not find

a mention anywhere in the Act or the Rules. Nor is it clear if taking a written order of any Member of the Board for placement in an observation home is a “prescribed manner”. Section 8 of JJ Act says that every juvenile who is not placed under the charge of parent or guardian and is sent to an observation home, shall initially be kept in a reception unit of the observation home. The application of the law so far has been that a member of the JJB sends the child to the home and the reception unit is not prepared to receive any child till his/her first production before the JJB.

It is understandable why homes do not want to take in children without a written order. For one, the law says a child can be placed with a fit person or in a fit institution and only the JJB has the power to declare the ‘fitness’. Secondly, since the responsibility of the child admitted falls on the home, the home may be reluctant to admit the child without an order or a valid record, especially if he or she escapes or something happens to the child before production before the JJB. The law too underscores the care and responsibility part; section 222 says “...who has escaped from a special home or an observation home or from the care of person under whom he was placed under this Act...”

The law now requires only children apprehended for serious offences or those who have no parents/guardians, to be sent to an observation home immediately after apprehension. In keeping with the spirit of such provisions, the need for a written order should be done away with and instead a new set of measures can be adopted to ensure the safety of a child.

Another way out can involve the Special Juvenile Police Units (SJPU) that are coming up in Delhi. Once the Department of Women and Child Development provides two social workers one of them a woman by law, to these units, children can remain under their supervision. The social workers can be kept on alternate duties to ensure that at least one of them is available anytime. This is an administrative issue, require no legal change and can be followed in states too.

The CICL is innocent till proven guilty. Yet, HAQ had cases where firearms were found implanted on children by police. As per some chargesheets, the recovery was shown on a much later date from the house of the child. This is a serious issue because a child may not get enough legal assistance later to prove he was falsely indicted. Ideally, the Probation Officer should be at the station as soon as he/she receives the information about a child being apprehended. But since there are few such officers, some formal process to safeguard the interest of a child at all times, especially when he is at the police station, is urgently needed.

A similar confusion exists on the issue of whether police should call on the child at his or her home for investigation or the child and family members should be called to the police station. Again, is it necessary for child to be represented by a lawyer? If the accused and the victim are both children, should there be a public prosecutor present in the Board? In Lucknow, for example, the State Government has said while legal aid can be provided to the CICL, no Public Prosecutor shall be provided since the JJB is meant to hold an “inquiry” and not a “trial”¹¹⁴. In Delhi, on the other hand, there is a public prosecutor and children without lawyers are supposed to be represented by the legal services authority. It’s another matter that this rarely happens.

Delhi is on the verge of finalising its State Rules, which makes it a good time to finalise the changes for greater clarity on many such issues. This can serve as a model for the rest of the country.

Having the CrPC as the base also works against children languishing in observation homes for months on end because of non-availability of parents. Bail is a matter of right and more so in the case of children, where the law overrides the CrPC clearly providing for bail irrespective of whether the alleged offence committed by the child is bailable or non-bailable. But bail actually has become a prerogative of a few who can afford it, who have someone to legally represent them.

¹¹⁴ Based on telephonic conversation with Sessions Judge in charge of JJ in the District.

The incongruity of using the CrPC is evident in another area: while the JJ Act requires the completion of inquiry in four months at the most, the charge sheet under CrPc can be filed in 90 days or more, allowing the latter to frustrate the goal of speeding up the process. Secondly, the presumption of innocence is a crucial element of criminal judicial proceedings in India, but becomes complicated in juvenile proceedings. According to the Committee on the Rights of the Child, the presumption of innocence “means that the burden of proof of the charge(s) brought against the child is on the prosecution.” This is a conundrum for the JJB, which does not have a separate prosecutor, and is expected to act as both arbiter and prosecutor. Moreover, the fact that guilt and retribution are not intended to be elements of the proceedings means that for any crime, all children receive the same punishment (if any)¹¹⁵. This makes the JJB “ineffectual” in the eyes of the police and often influences the latter’s decision to anyhow send apprehended children, whom they suspect/know to be offenders, to adult prison.

Some other contradictions in the JJ Act are:

- Though it is the law on juvenile justice, it does not clearly lay down protocols or procedures for dealing with children who are victims of criminal acts such as rape, abduction, violence or trafficking. For instance, in the case of children who are in need of care and protection under the Act, the CWC can decide a place of safety, aid in prosecution and further the cause of rehabilitation of such children. But for child victims of crime, such procedures are not clearly laid down.
- The JJ Act is also not clear about the procedures for regular follow-ups. There is no childcare officer or social welfare officer as in the developed countries to monitor events post-release. Thus, there is no scope for children who are unhappy with their placement/ restoration to express their dissatisfaction.
- There is a problem with age-specific interventions too. The space between seven years, the age for criminal liability in India, and 18 years, is too vast in terms of growth and maturity of children.
- Charge sheets are delayed, beyond six months and sometimes even longer. There is no legal provision that says that cases should be closed if the charge sheet is not filed within the stipulated time.
- Since no records are to be maintained of cases involving children in conflict with law, how do police make an entry of stolen goods found on children or recovered from them?
- For promoting diversion, the law stops petty offences and non-serious offences committed by children from being registered in the form of an FIR. In this situation, if a person’s passport and such other important documents get stolen in robbery or theft committed by a child, how will he/she be able to make an application for issue of fresh documents without a copy of the FIR?
- Similarly, there is a grey area in the law as to how to deal with children in conflict with law if they are intercepted at the age of say, 17 and a half years and during the course of the enquiry and/or stay in observation homes, they become adults. Magistrates and advocates have to go by precedents.
- Segregation in terms of crimes is left to the State. Those having committed heinous crimes are placed together with those who are first time offenders or having committed petty offences. Special offences against children have been introduced in the law and the CWC and the JJB are empowered to take “cognizance”. But it is unclear what that means and where the trial will take place.
- When families cannot be traced, the magistrates fail to use other powers under the CrPC to initiate the inquiry in the absence of parents/guardians, for instance, by appointing amicus curiae. Even the law is silent on how long the Board should wait for parents/guardians to be traced.
- There is no universality of implementation, nor are there universal rules. For instance, in some areas, children are getting bail for an amount ranging from Rs 10,000- 50,000, while in some other areas the bail is as low as Rs 5,000-10000. The

115 Erika Rickard, J.D. Candidate, Harvard Law School, 2009: Paying lip service to the silenced: Juvenile justice in India, Harvard Human Rights Journal, Vol. 21, Issue 1, 2008

process of verification of surety is further delaying bail. Nowhere has a child been released on bail without surety although the law itself doesn't say it's a must.

- There is a lack of clarity if the JJ Act overrides local laws relevant to children. For instance, Delhi has the Women's and Children's Institutions Licensing Act 1955 or Kerala has the Probation of Offenders Act 1958. A plethora of legislations simply worsens the delays that are so endemic to Indian bureaucracies everywhere.
- The JJ Act mandates setting up a fund by the state government, but it is not clear on what it should be used except "for the benefit of the children." For instance, an official might decide to buy a car with the money to go around and visit homes. Will that really benefit children?

Let me speak !

Children's voices in court

A singularly laudable development in the past few years has been the efforts to allow children to be heard in court. That is true for both CNCP as well as CICL.

The most significant among them is the in-camera trial for sexually abused children encouraging the victim to speak freely without fear or inhibition. But the implementation of this has been more in spirit than in letter. The trial courts often do not pursue the matter as per the guidelines of the highest court, mainly because no court has the facilities.

In one case, the mentally retarded girl child, who had been raped was present in court with seven lawyers in the defence team, each one trying to question her, apart from the Judge and the Public Prosecutor.

The courts still do not provide other child-friendly procedures laid down by various courts such as video conferencing, screen between the victim and the accused, translators and interpreters, and so on. The 'in-camera' trial is interpreted as holding the trial in a closed room where the child, judge, accused, defence lawyer, public prosecutor and the administrative staff are all present. This scarcely provides for an "in-camera" environment where the child feels secure and free.

HAQ's experience with Priya, a four-year-old girl who was sexually abused, eloquently brings out the general apathy. In April 2008, a police officer brought her to us. She had been abused by a boy who was working as a helper in her mother's boutique. In an effort to verify the identity of the child, the metropolitan magistrate, a woman, first ordered her to be produced in court. Then, since she could not see the small child from her seat, she ordered Priya to stand on the table in front of her, right in the centre of the open court. Then the Metropolitan Magistrate asked her to speak out her name loud. So there she was, little Priya, standing on the table, as if she had been punished in classroom, shouting out her name, whereas in reality it was she who was the victim and needed to be treated with care and not ordered around. Why didn't the MM simply ask her to come to her chamber for questioning? At 2 pm, the court was overflowing with people coming in for bail matters and other fresh hearings, and little Priya squirmed at being the centre of attention of so many. Later the MM transferred her case to a colleague, a man. Fearing further embarrassment, HAQ's counsel fought to get the case transferred to another woman magistrate, who finally took the child to her private chamber to record her statement. HAQ also felt it necessary to register a complaint in the way the law was disregarded in the case of Priya.

Even the JJBs are not child-friendly. This distancing from the child begins at the beginning with the way the board is seated, on an elevated platform in an ornamental chair with two social workers sitting on one side in ordinary chairs. To the far left sits the reader who gives the case files to the magistrate/social workers, along with a clerk. On the right are two typists to take down the statements from the defendant and the order from the magistrate. Then, there are the public prosecutor and the defence counsel standing in front of the board. To worsen matters, police in uniform are used to bring the child from the waiting room to the court after his or her name is called out loudly in the open. The

child must stand before the magistrate like an adult criminal as long as the hearing continues. The entire scene broadly resembles that of a regular trial court with the sprinkling of a few children.

It was a real struggle to ensure that the new JJB in Delhi at Delhi Gate was “constructed” without the platform and to ensure a more comfortable wait for children to be heard. The social workers cannot play their role of facilitating the child’s right to be heard as they are either not present or are unclear about their role. Not surprisingly, the child hardly ever gets to voice his/her point of view. One of the boys HAQ represented had to miss his final school examination as he was not heard on time. This meant he lost an entire academic year. So much for restorative justice!

In this context, the issue of **family courts** become important. What are the rights of children when parents can no longer live with each other? Who is to decide what the child needs? In the acrimony surrounding the parents’ separation and divorce, children’s voices are sometimes completely lost. Matters are more complicated by the fact that marriage, divorce, maintenance, custody and guardianship are governed in India by personal laws or codes formulated on the basis of religion. A review of petitions/orders passed by the family courts in Mumbai reveals that:

- Children’s concerns are never the primary or major concerns in any petition.
- There is no follow-up of the orders relating to children.
- There is no set of standards/guidelines laid down to deal with children in family courts.
- The judges, lawyers, counsellors, and other court personnel are not trained to adopt a ‘child-centred approach’.
- The orders depend on the perception of individual judges as to what constitutes the ‘best interest of the child’. Some judges interview the child personally; others leave it to the counsellors.

As in the case of the JJB, children find the atmosphere of a family court intimidating and confusing when they are brought for an interview. There is no direct provision in the Family Courts Act for the psychological recovery and social reintegration of the child. The links with social service agencies and childcare professionals are inadequate. The workload in the family courts is so high that in many instances it is not possible to consider the child’s special concerns and needs. Recently, Chief Justice of India K R Balakrishnan said many more such courts were needed to clear the backlog of cases.¹¹⁶ After the enactment of the Family Courts Act in 1985, only 138 courts were set up all over India.

Many alternatives, few work

Diverting kids from institutions

The spirit of the 1986 Act was custodial in nature and so it concentrated on rehabilitation through institutions, an idea that lost currency over the years as poor conditions at government homes made headlines frequently. Nor were governments keen to shoulder such responsibilities in the face of criticism and corruption. The new Act, it was hoped, would create fresh methods of rehabilitation, and see institutionalisation as the last option. As rehabilitation of a child in an environment conducive to its growth and development is the primary objective of the JJ Act, chapter IV has been incorporated to exclusively deal with rehabilitation and social reintegration. In that backdrop it is disheartening that the phrase “ultimate rehabilitation through various institutions” occurs in the preamble of the Act, though fortunately different options have been considered in the main text.¹¹⁷

Institutionalization is still the first option depriving children of their right to liberty. Ratna Saxena, former Superintendent of Prayas OHB at Delhi Gate, says, “The state government is simply not interested in diversion, restoration or innovative alternate care methods. There is just too much of a preference for status quo.”

¹¹⁶ <http://www.hindu.com/2008/12/22/stories/2008122255681400.htm>

¹¹⁷ Maharukh Adenwala: The Juvenile Justice (Care And Protection Of Children) Act 2000. Unpublished text

Community service, state after care, adoption or foster care – whatever the manner of rehabilitation, it should ideally depend upon the facts and circumstances of each case and the best interest of the child should be of paramount importance while deciding the mode of rehabilitation. Thus, in what other ways can the child be assured of justice and restoration? The JJ Act brought in the idea of placing children in conflict with law into community service as a substitute for institutionalisation. As a concept, community service is held in much esteem but in reality, abused. The discussions among policymakers and the bureaucracy would not go beyond, for instance, getting a child to work in a hospital, not as a help to the doctor or for data entry or other office assistance, but as a floor-cleaner!

In fact, in the absence of a very well thought-out programme, which ensures that the child's dignity and self-respect is maintained and he or she is not stigmatised further, the community service clause in the law will only be seen as a punishment by both the person who gives such orders as well as by the children, who are placed in some of the most socially rejected and undignified forms of labour, making their lives a worse drudgery. One principal magistrate proudly narrated how she was using a child offender for community service at a police station, seemingly unaware of the fact that the boy was simply running errands, in effect acting as unpaid child labour! Besides, given the attitude of the police to children in conflict with law, how far they will be assisting in the 'reform' of the child remains a big question. Can this form of community service ever change the children's lives? Although there are adequate examples of police abuse and highhandedness, there are efforts on to place a child for community service at police stations. HAQ strongly feels such proposals should be immediately dropped.

There are also no mechanisms highlighted in the JJA for selection, monitoring and evaluation of foster care or sponsorship programmes, after care and adoption. There are very few aftercare homes in the country. Delhi has three, but children from homes run by NGOs don't find room there. Mostly, at 18, if he doesn't have a family, the child is let loose on the streets, with little education and few skills, to undertake life's difficult journey helpless and on his own. In the case of children whose families are far away, the JJ system makes little effort to trace them for restoring the child. Repatriation of children to their home states or countries, especially of those belonging to neighbouring countries like Nepal and Bangladesh – and their number is quite high – is very poor.

Adoption and foster-care is the other alternative to be considered by the CWC in appropriate cases. The CWC is to declare a child free for adoption. While the amendment to the law in 2000 gave power to the JJB to carry out investigations and give the child in adoption, this power has subsequently been taken away through the 2006 amendment. This is following the Supreme Court's intervention on adoption matters. Only a District or High Court is now empowered to give a child in adoption.

Who will bell the cat?

Adoption and foster-care

Allowing adoption of all children who are in need of care and protection through the JJA Act was a revolutionary step. It opened the doors for avoiding institutionalisation even while allowing many adults to offer a new life and hope for the neglected children.

Even though foster care has been popular in the developed west, it has not been explored or adequately understood in India yet, despite inclusion in the JJA. Foster care has been prevalent in India after a fashion, where it has worked more as kinship foster care. This is when a homeless or parentless child is taken into the fold of his nearest family, such as with the aunt, uncle, sibling etc. A few states, such as Rajasthan, have been funding such care. This scheme is called Palanhaar and was launched in 2004-05. Near relatives or grandparents who keep the child get a financial assistance of Rs 500 a month till age five of the child, and Rs 675 after school admission from age 6 to 15. There's also an annual assistance of Rs 2000 for buying books, uniform etc. The state government says it spent over Rs 5 crore on the scheme

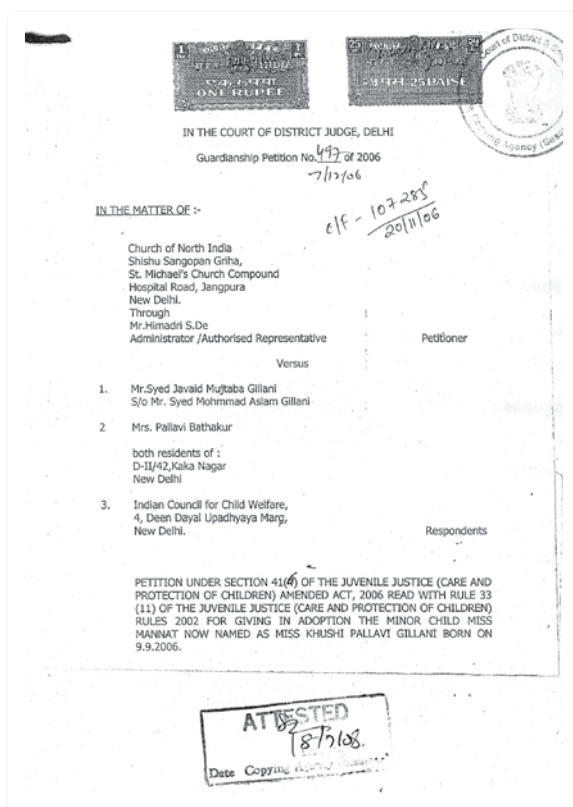
in 2007-08. Other states however have done little in this regard. The Delhi social welfare department, for instance, is sitting on the foster care scheme, drafted after much consultation in 2003. The WCD department however claims that it allowed 24 children to be placed under foster care in 2006-07.

Compared to foster care, adoption, both intra-country and inter-country, has caught on better. One unexpected impact of the new policy has been that inter-country adoptions have become a fertile ground for child trafficking. The Delhi state WCD department says it allowed 235 domestic adoptions in 2007 and 230 in 2008. Kerala, the best performing state in this regard, saw 300 adoptions in 2006.

Still, a vast number of children in need of care and protection are waiting to be adopted. Even the list of parents who are keen to adopt them is growing longer every year. D Githa, an advocate based in Chennai and an adoptive mother herself, says, "About eight lakh children are orphaned every year, putting them in need of permanent substitute families. But a huge vested interest group is at work to keep children in institutions, denying them a chance to lead a happy family life." India has no centralised list of children offered for adoption nor is it possible to know how many families are waiting patiently in the queue. According to Githa, only 18 states in India have a good adoption programme. States such as Bihar are practically virgin states in terms of adoption, with few agencies registered for the purpose.

The Central Adoption Resource Agency (CARA), under the Union Ministry of WCD, which has been working as a centralized coordinating agency since 2003, tells us that 3264 adoptions took place in 2007, including 770 inter-country adoptions, compared to 3831 adoptions (including 1298 inter-country ones) in 2001. Unfortunately, that's about all the figures it has. Also, this figure doesn't include other domestic adoptions conducted through licensed adoption agencies recognized by state governments.

The main issue surrounding adoption is the role and legitimacy of the adoption agencies, most of who continue to function without licenses or registration, never bringing in the child through the JJ system. This is the biggest challenge before the JJ system today. In this connection, the recent Gillani case in Delhi holds out a lone beacon of hope for adoptable children and the use of the JJA in facilitating such adoptions. Syed Gillani and wife Pallavi's two-year attempt to adopt a baby girl from the childcare home run by the Church of North India finally met with success when the final order clearing the adoption was passed in October 2007.¹¹⁸



A leaf from abroad

JJ system in other countries

The CRC has set the standard where childhood is defined as below the age of 18 years, but countries are allowed reservations against commitments. In the US, which has signed but not ratified the CRC, the age of criminal responsibility is set by state law and only 13 states have set the minimum age ranging from 6 years to 12 years. The rest rely on common law, which holds that children of 6-14 years bear no criminal responsibility.¹¹⁹

¹¹⁸ Church of North India vs. Syed J M Gilani and others, Guardianship Petition No.497 of 2006

¹¹⁹ www.unicef.org/pon97/p56a.htm - 13k

In **Japan** offenders below the age of 20 are tried in a family court, rather than a criminal court system.¹²⁰ In all **Scandinavian** countries the age of criminal responsibility is 15 and adolescents below the age 18 are geared towards a system, which is social service oriented and incarceration is usually the last resort.¹²¹

In **China**, children of 14-18 years are dealt with by the juvenile justice system compared to 7-18 years in India. But unlike India, China allows life imprisonment for particularly serious crimes. In most countries of **Latin America**, the reform of juvenile justice legislation is under way. The age of adult criminal responsibility has been raised to 18 in Brazil, Colombia and Peru and children of 12-18 years are sent before the juvenile justice system.

There are currently 14 countries known to permit the sentencing of juveniles for life without a possibility of release: Antigua and Barbuda, Australia, Brunei, Burkina Faso, Cuba, Dominica, Israel, Kenya, Saint Vincent and the Grenadines, the Solomon Islands, South Africa, Sri Lanka, Tanzania and the United States. Outside of the US, there are believed to be no more than 12 child offenders serving life sentence.¹²² In Iran and Saudi Arabia child offenders may be sentenced to death.¹²³

The **United States of America** celebrated the centenary of the JJ system ten years ago--the first juvenile court was established in Illinois in 1899--but towards the end of the last century, it started moving towards adult-oriented criminal law jurisprudence. Separate courts for children have existed there for over a hundred years, with a focus on rehabilitation--as opposed to punishment--through liberal sentencing and options for release and probation. This system, however, came under increasing threat in the nineties with the rise in juvenile crime and many privileges have since been taken away.

The USA also disproportionately sentences child offenders to life without parole. With an estimated 2,225 child offenders serving the sentence, and 42 of the 50 states plus the federal government permitting the sentence, the US is home to over 99 per cent of youth serving the sentence in the world.¹²⁴

In most countries of the world, the juvenile justice system deals only with children in conflict with law, while other social and state-specific laws are used for children in need of care and protection. In both cases however, individual care plans are developed for children. Each child has a social worker attached to her/him, unlike in India where such a system is beyond imagination. The task in India may be huge, thanks to the sheer numbers of children involved and hence daunting. Yet were we to have such a system, we would not find enough social workers for the job. It seems either our institutions have stopped producing social workers willing to be with children or the government has ceased to appoint them. Few students opt for working in the field of social welfare in India, though they wouldn't mind taking up such offers from the UN or the private corporate sector and MNCs. Even psychosocial care or counselling services are highly inadequate. Unless these children are counselled through their journey into the JJ system and out of it, in order that their self-esteem and confidence remains intact, their future remains bleak.

Even in terms of law change, we seemed to have proceeded in a bureaucratic manner, so much so that even 17 years after signing the CRC, we are still grappling with non-fulfilment of concepts such as diversion, restorative justice and best interests.

In India, there was no systematic collection of data, evaluation of comparative experiences or experiential learning, says Arvind Narrain. Research efforts were scant and the Ministry of Social Justice and Empowerment, in a hurry to produce a new law, seems to have neglected the reform of process.

¹²⁰ Ibid

¹²¹ Ibid

¹²² Child Rights Information Network (CRIN), Juvenile Sentencing: Written statement for the 4th session of the Human Rights Council 3/2/2007 Human Rights Advocates

¹²³ Ibid

¹²⁴ Ibid

For further change in the JJ Act, lawmakers can take a leaf out of the books of some countries¹²⁵ where the JJ system and laws are functioning well and in keeping with international standards. Of late, the JJ systems in countries such as South Africa, Scotland and the Netherlands have come across as shining examples, replacing countries such as the US, which were earlier the model.

For India, a better role model to follow would be some of the developing countries. The case of **Uganda**, which enacted its legislation on the care of children in 1995, reflects how a developing country with limited resources has successfully moved towards matching international principles with binding local law. For instance, paying great attention to the principle of diversion at the point of first contact, police in Uganda have been empowered to deliver a caution at the point of arrest and let the child go on a personal bond by guardian or parent. The police may also dispose of the case themselves without recourse to formal proceedings.

If the first tier of diversion does not work then the child goes through an innovative, non-criminal adjudicatory process, for instance, before the Village Resistance Committee Court that is empowered, regardless of criminal law, to enable reconciliation, compensation, restitution, apology or caution. Except for offences punishable by death and those committed jointly by adults and children that go before the magistrate, all other cases go to the Family and Children's Court. The maximum penalties here are detention for six and three months. Clearly, while Uganda has taken seriously the three cornerstones of human rights framework, diversion and deprivation of liberty, India has ignored them.

South Africa too ratified the CRC in 1995. Its legislation on juvenile justice and child protection, the Child Justice Act promulgated in May, 2009 is an attempt to learn from the best experiences around the world and apply it to the local context and provides a good example for India. The South African Law Commission's Issue Paper on Juvenile Justice closely studied the experiences of three countries, New Zealand, Uganda and Scotland before coming up with its own proposals. To begin with, the process of law reform in South Africa has been rich, extremely consultative, rich and democratic, ensuring fundamental clarity on conceptual issues like minimal age of criminal responsibility, expunging records, etc. The entire process, beginning with circulation of the Issue Paper to the submission of the policy to the ministry of justice, took three years.

An Act of Compassion

By international standards the (South African) Act is both sophisticated and radical, raising the age of criminal capacity (the age children are presumed to know the law), diverting arrested youngsters away from courts and prison to community-based structures and forcing wrongdoers to face their victims and to make reparations.

If South Africa's existing legal framework can be said to be punitive, the new legislation is restorative, favouring negotiation over punishment, reparations over imprisonment and community healing over social abandonment. . It should have been passed years ago, but official nervousness about its implications -- and a country baying for the incarceration of criminals -- saw it continually rewritten and sidelined in the parliamentary mill. It may hold the record in South Africa for spending the longest time between its inception and becoming law.

Dan Pinnock in Mail and Guardian Online, 3 June 2009

Here too, much emphasis is placed on preliminary inquiry, which aims to ensure that the case of each child is carefully considered and given maximum opportunity to be diverted out of the system, before proceeding to trial so that there is no pre-trial detention. However, for juveniles who commit serious offences, however, imprisonment is a sentencing option and they are also not eligible to have their criminal record expunged, similar to the system prevailing in the US, thus losing the chance to humanize them.

¹²⁵ The following discussion draws on Arvind Narrain: Juvenile Justice, A Critique, 2004

Some of the developed countries, especially Scandinavian countries, also stand out. The experience of Scotland, in particular, bears mention. The progressive Scottish system evolved independently of the CRC from a report, by Lord Kilbrandon in 1964, which recommended for the first time that the JJ system should “clearly separate two important functions: the establishment of guilt or innocence on one hand, and the decision on what measures would help each individual child on the other.” This means after the Sheriff determined the veracity of the charge, a citizens’ body would determine the treatment for the offender. This report also decided to treat all children as children in need of care and protection. The Scottish system also gives precedence to diversion. Not only has police the power to release the child with caution but before the child goes for the hearing, the Reporter must also be satisfied that there are sufficient grounds for it and if not, has the power to release the child. It is also the most radical system, going beyond the crime committed into the reasons behind it.¹²⁶

**There can be no keener revelation of a society’s soul
than the way in which it treats its children.**

Nelson Mandela, Former President of South Africa

ENDNOTE

9

A lot has been achieved in the course of HAQ's work on child protection of over four years. The biggest of these is that many more actors have come into play. "Stakeholders" is a term that has come to be criticised by many but there is no better way to describe these actors, who include individuals, lawyers, NGOs, Government agencies, police, judiciary, media as well as the Ministry of Women and Child Development.

The year 2005-06, when HAQ started working in earnest in juvenile justice, is also the year of many firsts in child protection in India. The Country Report on the UN Study on Violence against Children 2005 became the mirror for the Department of WCD to look at issues of child protection with greater focus and start thinking towards building a protective environment for children. Other significant developments include The National Commission for Protection of Child Rights Act, 2005, the new National Plan of Action for Children, 2005, and most important, the creation of an independent ministry for WCD in early 2006. Seeds were sown by the ministry for an Integrated Child Protection Scheme to improve the implementation of existing child protection laws and services, help set up a data management system to maintain information on children in difficult circumstances, and strengthen family support and counselling to aid vulnerable families for giving necessary care and protection to their children.

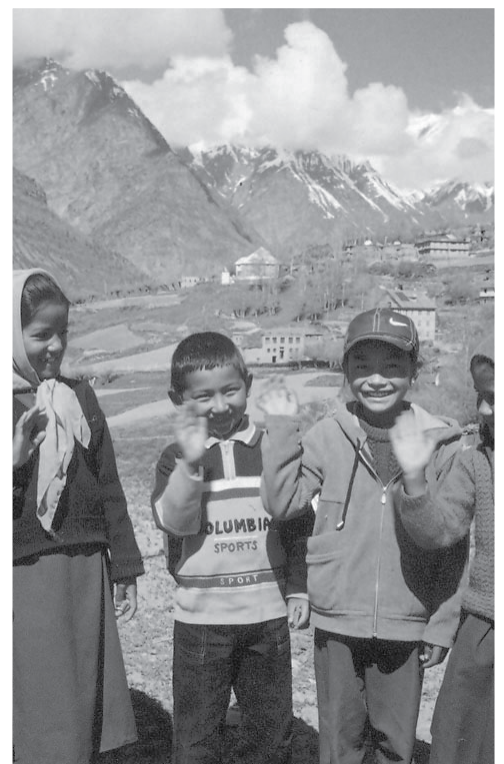
HAQ has played a very pro-active role in some of these historic developments, engaging with the government and raising concerns, hoping to drive bureaucratic thinking towards a more rights-based approach and action. High courts too have been active in pronouncing judgements and ordering steps to ensure justice to children and establish a child-friendly protection system. We have seen innovation by judicial officers in the face of scarce infrastructure, sensitivity towards the child, and courts ensuring translation and child-friendly cross-examination. The child is now given preference while the statement is recorded and even a parent, who is not a witness, is allowed to be present.

Justice for children

An unending battle

Yet, the more things change, the more they seem to be the same. Even as the Government has been engaging with the civil society and taking a fresh look at child protection, thousands of children are routinely falling out of the safety net.

In his new book *The Idea of Justice*, economics Nobel laureate Amartya Sen has argued for a new way of looking at justice. Speaking against



a “long-range search for perfectly just institutions” and a hunt for “spotless justice”, Sen says societies full of actual human beings will never agree on a final, perfect set of institutions and rules. The search for a perfect set of arrangements for society can distract us from tackling real-life, immediate injustices and “there are remediable injustices around us which we want to eliminate”. Thus, the starting point for any discussion on justice should begin with the current reality and then ask where do we go from here and how? “The working of democratic institutions, like that of all other institutions,” he writes, “depends on the activities of human agents.”¹²⁷

Nowhere is this truer than in the field of child justice in India. Asha Bajpai has described the implementation of juvenile justice as “a history of hopes unrealised and promises unfulfilled”. “The judges, the law enforcers, police, the probation officers and other staff have not carried out the spirit of the Act,” she says¹²⁸ and we agree. From the Pahadiya boys in the 1970s to the latest case before HAQ of eight-year-old Sheena, hospitalised for four days after brutal rape by a neighbour, things have changed radically yet remained the same in many ways. The law has changed thrice since 1986, when the first Juvenile Justice Act was promulgated, leading to greater awareness and knowledge, yet the children still get tossed around by the system and the victimisation never stops. It still doesn’t surprise us that parents, even children themselves, choose silence and humiliation over reporting and lodging complaints.

The thinking on and understanding of juvenile justice across the world, as it is in India, is still at a very nascent stage and evolving. With rapid changes in society, especially with information technology shrinking the world and bringing countries and peoples much closer, the nature of offences committed against and by children also adopts different dimensions, requiring changes in law and understanding how to deal with it. Caught between the old and the new, justice for children is both delayed and diminished.

For the police, children are just so much trouble!

Police remains the first point of injustice in the justice delivery system for the child. Even as this chapter was being written, Sheena’s case came to HAQ. Her parents were away at work when a 20-year-old forced himself on her at 12.30 in the afternoon. The frail eight-year-old kept bleeding silently till 6-6.30 pm when finally somebody called 100 and police arrived. Yet, no medical attention was available to her until 10 at night when she was finally hospitalised and put on oxygen supply. What was the police doing all this while? Probably completing formalities and waiting for a female colleague to take charge, as required by law.

It was only 24 hours after the incident that the police woke up and informed an NGO, in this case HAQ. When a counsellor and a lawyer from HAQ went to the hospital and met the child, her mother and the police, the first statement spoken by the male police person accompanying the female case-in-charge was that the child had been giving conflicting versions. “She first said she was bitten by a dog, then she said she got hurt by a pipe while playing”, he said nonchalantly.

Unclear about what he was suggesting, the counsellor asked if he thought the child had not been raped. “No”, said the cop, adding to the confusion, “I don’t mean that. She has been raped but we don’t know what to believe. We cannot arrest anyone since the child doesn’t know the name of the accused. All she knows is that he is from Bihar and stays in her building.”

But was this not a good enough clue for the police to carry out an investigation and begin interrogation and search? The girl came from a locality full of people from West Bengal, so finding a few Biharis in a particular building didn’t really seem a herculean task to us. But police had their own logic and pace of work. So yet again, we had to call a senior police official to intervene and ensure a proper investigation and all possible help for the child.

¹²⁷ Amartya Sen, *The Idea of Justice*, Penguin UK, 2009

¹²⁸ Asha Bajpai, *Child Rights in India: Law, Policy and Practice*, OUP, 2004, Page 287

Despite several trainings and sensitisation programmes by NGOs such as HAQ, where gender or child protection issues are discussed threadbare, very little seems to be getting translated into action. When a child is apprehended and booked for committing a crime, the police act immediately, even subjecting young boys to torture at the police station to get them to admit to the crime, whatever the facts of the case. Yet, when a child is abused and an adult accused has to be caught, they slow down. Why the delay in necessary investigation and interrogation for an adult? This general apathy worries us greatly since incidents of crime are routine in the capital, where the Special Police Unit for Women and Children (earlier the Crime against Women Cell), is sincerely trying to activate Special Juvenile Police Units at all district level police stations and designate two police officers as Juvenile Welfare Officers at every station.

Progressive law, regressive procedures

The problem with India's juvenile justice system lies in the structure and content of the law, which covers both children in conflict with the law and children in need of care and protection, as well as its interpretation and implementation. This is partly because the understanding as well as the discourse and jurisprudence around juvenile justice are still developing across the world and there's really no uniform understanding. Also, there is no consensus on if there is a need for a separate law on offences against children or a separate chapter within the Indian Penal Code (IPC) to address all forms of violence, abuse and exploitation of children.

The IPC is the main criminal law that defines offences and provides for punishment, a copy of it lies in every police station, so police find it easy to relate to it. Special legislations are treated as secondary to the IPC, especially if they are on women and children, which are soft subjects for the politician or police. Yet, proponents of a special law for child abuse argue that without it, children's issues will remain at the periphery and child-friendly procedures will be compromised for procedures meant for adults.

"A situation I found very peculiar in Ethiopia as a lawyer was that children were receiving what is in effect a punishment irrespective of their culpability - they had to go to the rehabilitation centre sometimes for a couple of years and there were sanctions if they didn't comply. I suspect there has been a rush to diversion for all the right reasons but this aspect has not been a priority or fully built into the system.

The Beijing rules say that there should be a process of review of the child's decision to admit responsibility but I have not seen this in practice and it is not clear what or who would trigger this review. Certainly in Ethiopia children were almost never represented and would follow what they were told to do in the child protection units (for the lucky ones who were arrested in an area where there was a child protection unit), so it is not the case that the child would be following legal advice or that their lawyer would demand a review of their admission. Otherwise it would just be in the hands of a well-meaning police officer to do this and in the circumstances this would be highly unlikely.

I interviewed lots of children who said they had not actually done the offence they had been 'diverted' for, but who usually agreed that they were close to being in serious trouble with the police in more general terms so in that sense the diversion was a very positive outcome for them."

Frances Sheahan, UK-based Child Rights Consultant

HAQ feels as long as police use the archaic Criminal Procedure Code to deal with children, they will remain far from justice. A separate procedural code for dealing with children, for both victims of crime as well as those in conflict with law, along with changes in the Indian Evidence Act are needed urgently to ensure a child-friendly legal system.

The concept of diversion and restorative justice, on which the entire international understanding of JJ is based, also differs from country to country. Under the Beijing Rules, voluntary admission of guilt is a precondition for diversionary measures to come into force and diversion can happen at lots of different levels - social worker, police station or judiciary.

There is a great deal of ambiguity in India on what is meant by diversion. Diversion as understood in international law cannot apply here since a child cannot be subjected to the rules of plea bargaining. The predominant concept is of diversion into a different justice delivery (trial) mechanism. It is not meant to be a trial, yet children in conflict with law continue to be subjected to it. The outdated CrPc makes it difficult to ensure that such a child is not meant to be treated as a criminal. This is despite a JJ law that has changed for the better, from retribution to restoration and towards diversionary measures such as group counselling, community service and release on advice or admonition.

Many fresh challenges

Several new issues are coming up both in law and practice, some of which might even necessitate a change in the law.

- **Signed statements:** The Delhi High Court has made it clear that police cannot ask children to sign any confessions/statements, but to no avail. Not only have police continued with the practice of recording confessionals, which is prohibited even by the CrPC, the JJBs too have sometimes admitted such statements as evidence in violation of

In Delhi, homes now have playgrounds, hot water, painting exhibitions...

Honest efforts by a few committed individuals can bring about a miracle. After the High Court Committee started work in Delhi, the juvenile justice system has improved radically, making it probably the best place to be in India for a child in conflict with law or needing care and protection compared to any other state.

- At the Alipur boys' home, living conditions and infrastructure are much better. There's enough room for the kids and hot water is available for use.
- Playgrounds have now come up for the boys at Alipur, Lajpat Nagar and Kingsway Camp homes. Matches happen regularly at Kingsway Camp. Sports Day and Holi were celebrated this year, and an exhibition of painting by the boys—some of them quite talented—was held.
- Once a month meeting with parents has now become once a week.
- Children being in observation home for more than three years, the maximum allowed by law, is now a thing of the past. Bails are readily given too.
- A medical unit has come up at Kingsway Camp and medical check-ups have begun in other homes.
- The Narela home was dilapidated and unfit for living, and in July 2008, the Committee ordered it to be closed by 31 December. It was another matter that a NCPCR visit there in September led to a stern report by the Commission, leading to wide media campaign. The closure deadline of 31 December was met.
- Registration of homes is almost over. A complete database of these homes, their staff, facilities and number of children is expected to be ready soon.
- Computerisation of data about the children in homes is in progress and will be completed by the end of the year.
- The number of cases pending before the Juvenile Justice Boards has come down from over 4,000 in 2007 to less than 2,000 now and could dip to 1,500 by yearend.
- Many children have been restored to their families, even those outside Delhi. All CWCs are working hard on this.
- CWCs are now attracting committed people. The working conditions have improved along with their honorarium.
- Delhi Police is taking child rights more seriously than perhaps any other police force in the country. They have developed a unique web platform providing information about lost and found children. A training manual has been developed and Special Juvenile Police Units have come up.
- The JJBs are now offering legal aid and a few facilities for these lawyers, such as a photocopier and a space of their own at Kingsway Camp.
- The biggest positive is the new awareness of children's rights. The upper judiciary is sensitized and the Judicial Academy is working on sensitizing the district judiciary.

the order given in response to action by an individual activist Minna Kabir. In Delhi, such statements are now called Child's Version and a format has been developed to record it just for police inquiry.

- **Interrogation and custody:** Police cannot “interrogate” a child in conflict with law nor ask the JJB for permission to keep him or her in custody for interrogation. But police feel they must do some questioning to solve the crime that the child is alleged to have committed, especially if it is a heinous offence. Some method of questioning by police thus needs to be worked out within the JJ framework. Once the SJPU, for instance, at all district level police stations in Delhi become active and the Department of Women and Child Development provides two social workers as per the law, they can hopefully ensure that children are questioned, preferably out of the station, without force or torture. Delhi Police will have to work out ways to ensure that the SJPU doesn't look like regular police stations and are situated outside one.
- **Conviction record:** The law clearly says any record of conviction of a child or a person as a child cannot be used to disqualify him from employment. In the case of some jobs where employers need to fill out a form for police verification of persons to be employed, especially children of 14-18 age group, as domestic servants, police often wonder whether or not to disclose the child's involvement in crime, if any. The employer has the right to this information for their own safety. But the juvenile justice law has tied the hands of the police and this grey area needs to be clear.
- **Charge sheets:** If children are not to be treated as criminals and no FIRs are lodged, there should be no charge sheets for children, right? But CrPc requires charge sheets, so the term charge sheet needs to change. In Delhi, there is a move to use Final Police Report or Police Investigation Report in place of charge sheet. Police have also been told that in cases involving non-serious offences requiring less than seven years' punishment, this report ought to be filed within a certain time, or else the cases would be treated as closed.
- **Community service:** Is the police station an ideal place for community service by children? How will exposure to police behaviour impact children? How is community service at a police station different from a child being in contact with the police as an offender, especially when the principal idea is to minimise contact between children and police? What kind of community service can they perform in the police stations? There are no answers to these yet and they need more discussion.

The Draft Guidelines for Police developed according to the orders of the High Court Committee on Juvenile Justice say: “As far as possible the Child in Conflict with Law should be interviewed at premises which do not give the child a feeling of being in a police station or under custodial interrogation. If the parents of the Child in Conflict with Law want the child to be interviewed at his or her home, it may be done. The summary of such an interview shall be recorded in the form of the “Version of the Child in Conflict with Law” and in case the summary reveals that the child has been subjected to any neglect/ abuse/ ill treatment etc. by anyone or forced to accept a situation of conflict, then necessary action should be immediately initiated against the perpetrator(s) of such acts”.

- **Family restoration:** The first priority under JJ Act is to hand over children to their family but home studies which should back any decision to send the child back home are faulty in many ways, such as forms being filled by Welfare Officers/Probation Officers without even visiting the family and making moral judgements on the character of the child. The principle of best interest of the child takes a back seat in favour of the paper work. Establishing and maintaining linkages with authorities in the state/district of origin is rare, and the CWC/JJB is often found consulting on its own with reliable NGOs in the child's home state to trace the family, restore the child and keep track.
- **Counselling services:** Mental health services such as counselling are yet to become an essential measure for rehabilitating children, due in part to dearth of social workers and trained counsellors. These are challenges that

India as country will have to overcome as, unknown to all, an increasing number of children are falling out of the social security and safety net.

- **Rehabilitation alternatives:** Measures such as foster care, sponsorship and adoption are mentioned in the JJ Act but little progress has been made on the ground. Follow-up is poor in the case of foster care and sponsorship, making it unattractive for civil society organisations. Adoption has assumed an ugly face with adoption agencies turning into rackets for selling children outside the country even as several parents are waiting in queue. That information too is not shared publicly.

During a visit to an observation home in Bangalore in December 2008, several children told Human Rights Watch that they were subject to electric shocks and beatings during questioning. A 17-year-old said he was beaten until he confessed: "They picked me from my house at 3 am. I was beaten up and kicked on my head, legs and back. I was also given electric shocks. I admitted that I had stolen the phone but they kept on beating me because they wanted me to say I had stolen some other phones also. But I had not stolen them." He was kept in police lock up for four days before being produced before a magistrate. Police listed his age as 19.

Broken system: Dysfunction, Abuse and Impunity in Indian Police, Human Rights Watch, August 2009, page 78, 1-56432-518-0 www.hrw.org

- **Stigmatisation:** Girl victims of sexual abuse face segregation in institutions and are treated as "bad girls", even disowned by families. Rehabilitation of children in conflict with law is particularly difficult as their record travels with them all their lives. Stigmatisation and lack of access to and/or poor quality of education and vocational skill programmes in institutions not only erode these children's self-esteem but also fail to ensure their social reintegration. Rehabilitation schemes of both government and private sectors have failed to touch their lives. The corporate sector can play a big role in helping these children through mentorship and rehabilitation programmes and with job opportunities, but it has not happened. This is the most crucial issue for children coming in conflict with law or sexually abused children.
- **No protection for children:** Child protection is an empty slogan in our polity and society. Judging by the number of questions asked in Parliament, protection of children gets the least priority. HAQ's own budget studies have shown that this has not only received the least attention from policymakers and politicians, coming after education, development and health, it also gets the least allocation in the budget. So far, there were only four central government schemes for street and working children, adoption and institutional care. All are now subsumed into the much-awaited Integrated Child Protection Scheme (ICPS), which was finally approved in February 2009. But the very small outlay of Rs 60 crore in 2009-10 and lack of information about the final version of the scheme, even with those who helped the Ministry prepare the draft, raise doubts about the ministry's commitment.
- The other worry is that full-fledged programmes like the ICPS too will now be run by societies registered under the Societies Registration Act. In an alarming trend of "burden-shifting", most of the flagship programmes for children are being handed over to private bodies and NGOs for implementation. The state has abdicated its responsibility of not only implementing them but also monitoring these new bodies, which should have been welcome only as visitors and consultants, providing technical assistance and management expertise.

The National Plan of Action for Children 2005 has provided more space for child rights to be heard. It has a chapter on child participation, in which the very first goal emphasizes promotion and respect for the views of all children, including the views of the most marginalized, especially girls, within the family, community, schools and institutions, as well in judicial and administrative proceedings. The goal talks about facilitating children's participation in all issues affecting them. This Plan of Action must be implemented forthwith in both letter and spirit and states and Union territories too must formulate and implement their own Plans.

An ideal child-friendly justice delivery system, with all its institutions and members, should be totally separate from the adult system and be more aware and child rights-oriented. For this to happen, the government as well as the juvenile justice system must urgently address the areas of concern summed up above and adopt the following measures (next page).

Major laws and policies for children

- Guardian and Wards Act, 1890
- Factories Act, 1954
- Hindu Adoption and Maintenance Act, 1956
- Probation of Offenders Act, 1958
- Bombay Prevention of Begging Act, 1959
- Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960
- National Policy for Children, 1974
- Bonded Labour System (Abolition) Act, 1976
- Child Marriage Restraint Act, 1979
- Immoral Traffic Prevention Act, 1986
- Child Labour (Prohibition and Regulation) Act, 1986
- National Policy on Education, 1986
- Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1987
- National Policy on Child Labour, 1987
- SC/ST (Prevention of Atrocities) Act, 1989
- Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 and its Amendment Act 2003
- National Nutrition Policy, 1993
- Transplantation of Human Organ Act, 1994
- Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- Information Technology Act, 2000
- Persons with Disabilities (Equal Protection of Rights and Full Participation) Act, 2000
- Juvenile Justice (Care and Protection of Children) Act, 2000 (now Amendment Act 2006)
- National Health Policy, 2002
- National Charter for Children, 2004
- National Plan of Action for Children, 2005
- Commission for the Protection of Child Rights Act, 2005
- Prohibition of Child Marriage Act 2006 and
- All State Legislations pertaining to children

Every child comes with the message that God is not yet discouraged of man

Rabindranath Tagore

General Measures

- Building a strong cadre of Juvenile Welfare Officers at the police stations and strengthening the Special Juvenile Police Units through regular training and interaction.
- More lawyers/organisations for children and free legal aid for the poor is the first step to ensure right to legal representation. Legal aid services for children unrepresented by a lawyer must become a necessary component of all enactments related to all children. At the same time quality of legal aid services must improve. Free legal aid should not lead to a compromise in the quality of service, as often happens now.
- New and additional infrastructure or change in the existing infrastructure in all courts dealing with children is required immediately. An enabling environment and change in the style of functioning of these bodies is an essential pre-requisite to let the child feel free and secure in order to express himself/herself.

Measures for child victims of sexual abuse and other crimes

The Supreme Court, in cases dealing with child victims, particularly victims of child sexual abuse, has in the past directed that:

- In-camera trials be held;
 - Use of video-conferencing or a screen between the victim and the accused be ensured so that at no point the victim has to come in contact with the accused or undergo the trauma of facing the accused;
 - No direct questions be put to a victim of child sexual abuse and questions for cross-examination must be given in writing to the presiding officer, who may pose them to the victim in a manner that is not embarrassing and not resulting in re-victimization;
 - Sufficient break be given while recording the testimony of a child;
 - Identity of the child be kept confidential and the victim be referred to as the prosecutrix and not by name during the trial;
 - Crisis intervention centres be established and counselling provided to the victims; and
 - Other methods be adopted for victims of sexual exploitation and trafficking that support principles of natural justice and fair trial.
- These directives need to be implemented immediately and all judges and lawyers must be aware of them. The Government of India must seriously invest in and plan the monitoring of the implementation of Supreme Court's directives.
 - All minor victims of crime are not necessarily children in need of care and protection of law. Courts must remember that every child who comes before them does not require to be institutionalised. At the same time, other than the trial, courts have no jurisdiction in matters concerning rehabilitation and social re-integration of these children. CWC is the authority to conduct all the inquiries for them, irrespective of whether or not they are victims of crime.
 - No court must order the child to be placed in an institution merely to ascertain "recording of voluntary statement of the child", except when parents are the accused.

Measures for Children in Conflict with Law

- There should be a ban on referring to previous cases against the child while other case/s are heard or using them to deny the child bail, prejudice the current case or victimize him/her in anyway.
- Age verification should happen at the earliest. In case of doubt, police should get the age certificate from the school, so that the child is not sent to an adult prison.
- If a child has been produced in the JJB in the past, the age proof of the previous case should be considered final.
- No court must detain a child in a place meant for adults.
- The Social Investigation Report should be made at the earliest. The job of making the SIR should also be given to credible NGOs.
- All children in homes who have completed three years' stay or attained 18 years should be released immediately without any hearing.
- Proper medical facilities should be immediately provided in the homes.
- Children need to be informed about their rights under the laws and in the legal system.
- Social workers in the JJB should always be the first point of contact for any child appearing before the Board. The child and/or the lawyer should be allowed to present their case before the Magistrate only after they have interacted with the social workers. The workers too must have a degree in law and special training in child rights and child psychology.
- Right from the point of arrest up to adjudication before the competent authority, as well as assessment, placement and everyday living within the institutions, the child's opinion should not only be heard but also given due weight in accordance with his or her age and maturity.
- The philosophy of 'best interest' underlying the administration of justice should be applied not just in letter but also in spirit.
- Children's voices need to be heard in family courts. A guardian ad litem or representative or a counsel in the family court should aid the child. This service should be totally free from hierarchical and functional interference and enlist assistance from experts in behavioural sciences. It must also act as the direct link between the children and courts and become the ultimate point of reference.
- Regular training must be held to build the capacities of the people in the JJB, CWC and related fields and improve their sensitivity towards children and understanding of child rights. The CWC should be able to easily get external help if necessary.
- Indian law does not recognise sexual abuse of boys. As one of the several petitioners, HAQ was fortunate to get the final Delhi High Court judgement on July 2 on reading down of Section 377 of the IPC under which cases of sexual abuse of boys are booked. Sec 377 actually deals with what the law terms as "unnatural offences" rather than sex between males/boys. Moving forward from this judgement, Parliament must demand a separate law on child sexual abuse.
- Improved probation services require not only more trained officers but also adequate investment to ensure proper supervision and follow-up.
- The environment in the JJBs should be child-friendly and very unlike a regular court. Doing away with elevated platforms for the magistrate and other members, lawyers and the staff in every JJB is just the first step towards that.