



INCARCERATION OF CHILDREN IN ADULT JAILS: CAUSES AND NECESSARY INTERVENTIONS

A session organised
by iProbono

iProbono

BACKGROUND

The Juvenile Justice Act 2015 (alongwith its earlier version of 1986 and 2000) was enacted as a beneficial legislation to provide care, protection and rehabilitation to children who commit offences under the law. The objective behind instituting an independent child-friendly legislation to try children separately from adults was to shield children from the harmful effects of the adult criminal justice system and instead shift focus to rehabilitating them.

The Indian Jail Committee Report, 1919 was the foundational document on juvenile justice law in India. It talked about incarceration of children in jails and how the law should focus on reformation. Since then, the issue of rights of children in conflict with law (CCL) and the incarceration of children in jails has come up every now and then. The Supreme Court in all its major judgments on jail reform - *Sunil Batra v. Delhi Administration & Ors*¹, *Gopinath Ghosh v. State of West Bengal*², *Sheela Barse & Ors v. Union Of India & Ors*³ etc - has touched upon this issue. When the continuing practice of incarcerating children in jail was once again brought before the Delhi High Court in 2012, extensive directions were passed, reflecting the gravity of the issue. The Delhi High Court directed nearly every stakeholder involved in the criminal justice system, including the police, to protect the rights of children.⁴

However, neither the Supreme Court's intervention in 1986 nor the Delhi High Court's directions in 2012 seem to have halted the practice which continues unabated to this day. As recently as 2020, the Delhi Government on the directions of the Delhi High Court placed on record that over 800 children were under detention as on the date of their submission in Tihar jail.⁵ Unfortunately the issues that persisted in 1919 continue to haunt us even in 2023.

iProbono's ongoing study

In order to understand the extent of the problem of incarceration of children in adult jails, iProbono filed RTI applications with the Director General of the Prison Departments of 20 states and two Union Territory between April 2022 and January 2023. The information requested covers a five-year period between 2016 and 2021. Details were sought for the following two questions:

1. The number of children in conflict with the law transferred from all the district and central jails in State X to juvenile homes in State X between 2016 and 2021.
2. The number of visits made by the juvenile justice board (JJB) in all the district and central jails in State X between 2016 and 2021.

As per the data received from 9 states and 1 union territory more than 5000 children were transferred from jails to juvenile homes during this period.

1 AIR 1980 SC 1579.

2 1984 Supp SCC 228.

3 (1986) 3 SCC 596.

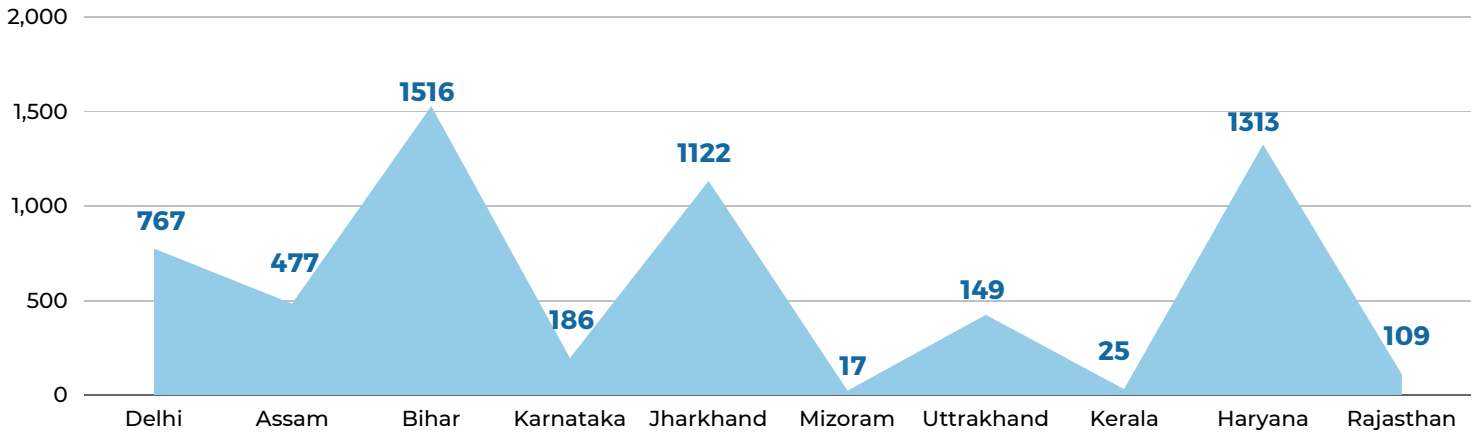
4 Court on its own motion v. Dept of Women and Child Development, WP No. 8889 of 2011

5 Court on its own motion vs State, 2020, Delhi High Court, Crl. Ref. 1/2020 (Ind)

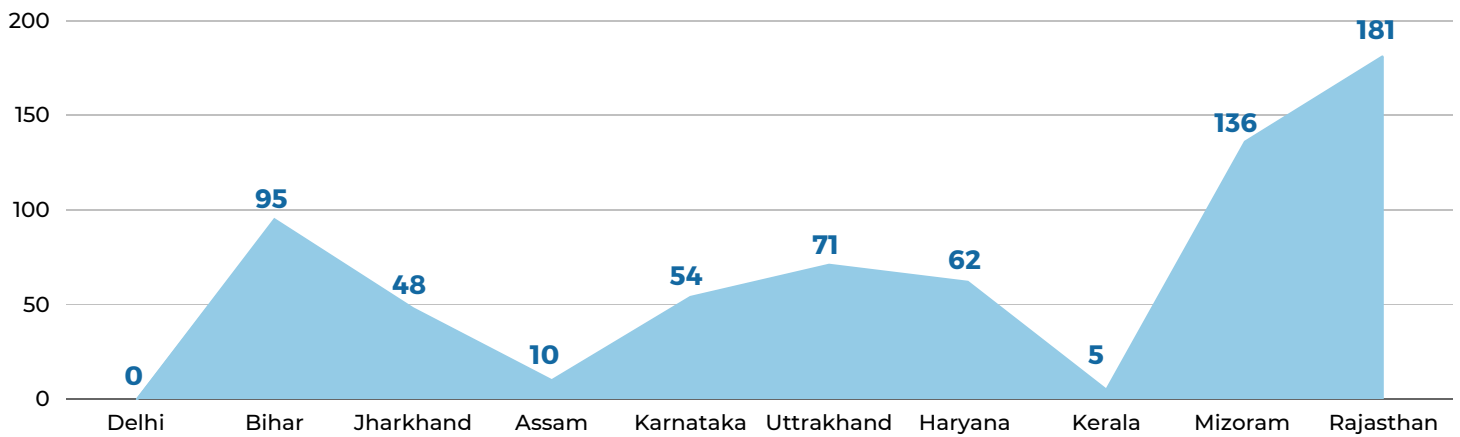
6 Assam, Bihar, Jharkhand, Chhattisgarh, Karnataka, Tamil Nadu, Maharashtra, Nagaland, Punjab, Gujarat, Haryana, Uttar Pradesh, Rajasthan, Mizoram, Kerala, Odisha, Uttarakhand, Sikkim, Tripura, Telangana

7 Delhi and Jammu & Kashmir.

Children in Adult Jails (2016-2021)



Number of visits made by JJBs in Jail (2016-2021)



Note: This study is still ongoing and a report will be published later this year.

Session with stakeholders in the juvenile justice space

On 17 March 2023, iProbono organised a roundtable discussion on this practice. The panelists - Anurag Kundu (Chairperson, Delhi Commission for Protection of child rights (DCPCR)), Anuradha Shukla (Secretary, Delhi High Court Legal Services Committee), Anant Kumar Asthana (child rights lawyer), Avneesh Kumar (Second Chance Fellow) and Gitanjali Prasad (Advisor, iProbono) - discussed the ground realities, practical limitations and substantial challenges around this endemic issue. Here are some key takeaways:

Stay in jail makes reformation of children difficult

One of the primary reasons why the juvenile justice system (JJ system) fails to meet its stated goals is due to the continued incarceration of children in prisons. The emphasis of the JJ system is on reformation; however, a child's stay in jail reduces the chances of reformation drastically. During the session, Anant Asthana shared that there was an upsurge in incidents of violence at Delhi's child care institutes (CCIs) in 2009. A disciplinary committee was constituted to look into this. It came to light that the CCL who engaged in violent behaviour were the ones who had spent some time in prison. They had lost faith in people and the system, and had learnt tough survival tactics, making them resistant to the approach of the JJ system. They also started to have a negative influence on the other CCL, creating a jail-like environment and impeding CCI functioning. This is a glaring example of how such failures might damage the overall health of the child protection system.

Age inquiry and age investigation: no straight jacket formula

The process of age investigation comes with its own set of challenges. Anurag Kundu identified several checkpoints where suspicion can be raised and an inquiry can be conducted. The first stage is at the time of apprehension. The most obvious method of identifying children at this stage is based on their appearance. At the time of apprehension, when the person being arrested claims to be between 18-21 years of age, or appears to be a minor, investigation officers (IO) must necessarily ask for age proof. The second checkpoint is the magistrate before whom the person is presented after apprehension. If any person suspected of being a child is presented before any regular magistrate, they are duty bound to inquire into the person's age. The third checkpoint is production before District Legal Service Authority (DLSA) of any person who's age is upto 21 years. This checkpoint was added by the Delhi High Court judgement in W.P 8889/2011. However, he shared that both the investigating officer as well as the Secretary, DLSA are often unaware of the provision to ask for an immediate age enquiry. Additionally, jail authorities also have the power to raise this issue when an undertrial prisoner in their custody seems to be underage. Even the National Commission for Protection of Child Rights (NCPCR) has been directed by W.P 8889/2011 to make regular visits to identify CCL in jails. If any one of these checkpoints works efficiently the child will not end up in jail. This also means that presently all these checkpoints are failing.

Mr Asthana identified another challenge in the age inquiry process. According to the JJ Act, 2015, 3 documents are recognised as proof of age - the birth certificate issued by the school, the matriculation certificate issued by the relevant examination board, and the birth certificate issued by a corporation, municipal authority, or panchayat. The documented age of many CCLs is often inaccurate - especially of those coming from rural and underprivileged backgrounds. The magistrates and police, while aware of these problems, lack specific guidelines to investigate the age of a suspected minor. Gujarat was the first state to issue rules on age investigation in 2019, however they are not a comprehensive solution. While the Supreme Court has passed orders regarding this issue, a conclusive universal formula seems impossible and even arbitrary, given the various issues surrounding age documentation on the ground level.

Lack of awareness and sensitisation

There is a lack of awareness about child rights and child-friendly justice administration across the board - from children and their families to stakeholders like the police, magistracy, and the DLSA. Avnish Kumar who had spent five years in Jail No. 5 of Tihar Jail, shared that children sent to prisons often are unaware that they are not supposed to be there, or sometimes even where they are and why. Anuradha Shukla from her experience highlighted that there is lack of awareness among the stakeholders in terms of their roles and responsibilities.

Hierarchy of judges

The law mandates JJBs to conduct regular visits to prisons to identify juveniles that may be incarcerated there. Ms Shukla suggested that this may not be the most efficient route. She pointed out that the judiciary is organised hierarchically. The Principal Magistrate (PM) of JJB is subordinate to the Sessions Judge who has the jurisdictional power to remand CCL to prisons and before whom the trial may be underway. While PMs are mandated to make visits, prepare a list of suspected minors and share them with the Sessions Judges, they are in no way empowered to direct for a transfer of the identified CCL to CCIs. The DLSA is similarly mandated to conduct visits for identification of CCL. The transfer itself can only be effected when the relevant Sessions Judge passes an order to this effect. Moreover, this is a departure from judicial duties, and closer to investigation, which is not something judicial officers are empowered to do. For an overburdened judiciary, this task becomes onerous and interferes with their main job of adjudication.

Challenges faced by the system

Ms Shukla further mentioned that a drawback of the judicial system is the mechanised manner of allotments and transfers. Frequent transfers and a substantial administrative workload prevents judicial officers from specialising on a particular subject area and implementing long-term system reforms. One frequently sees that judges, very soon after becoming subject matter experts in their assigned post, are reassigned to a very different subject area.

Lack of faith in the system

Due to its various implementational failings, there is an abject lack of faith in people on the JJ system and the criminal justice system at large. Both the police and the judiciary are affected by this mistrust and resentment, which discourages them from performing their responsibilities with diligence. Subversion and execution of due process in unlawful ways are commonplace. For example, incidents of IOs recording higher ages and knowingly putting CCL in jail to wield “justice”, often at the inducement of families of the victim, are not uncommon. These reactions are amplified in heinous cases of sexual violence and crimes against children. Mr Kundu substantiated this point by referring to the celebration around the encounter of alleged rapists in Hyderabad in 2019, where perhaps a more hopeful citizenry would outrage against the blatant breach of due process.

ACTION POINTS

The discussion ended with each of the panelists sharing a suggestion for a way forward, to bring about some change, however small, to the system. iProbono's goal is to work with relevant stakeholders to make these action points a reality.

DCPCR monitoring and legal education

The primary subjects and beneficiaries of JJ Act, children and adolescents remain uninformed about their rights. Mr Kundu suggested that adding rights and protections available to children under the law to school curriculums will not only empower them with information and make them cautious of violations, it will also cultivate a culture of sensitivity by rooting these principles in our basic education standards.

The nodal agency for policy implementation of juvenile justice is the NCPCR/DCPCR. Mr Kundu volunteered that in his capacity as a chairperson, he would focus on strengthening its monitoring and compliance of these emerging positive suggestions with the aid of civil society and other experts.

Compensation

Mr Asthana suggested that an effective way to hold the state accountable for its failures is to make it pay - by way of compensation. There are various schemes and judgements providing for monetary relief from the state in case of violations of fundamental rights. Demanding compensation for violations of this sort (along with other advocacy efforts) will generate pressure on the State to be cognizant of its shortcomings and reform them. In cases where dereliction is revealed on part of officials, disciplinary action can be taken.

Medical examination

Gitanjali Prasad, suggested that a major checkpoint for juvenility can be the Chief Medical Officer (CMO). When an accused is presented before them prior to their admission in jail, the CMO can make note of suspected juvenility which will then instigate an age enquiry before trial.

Posters outside jails informing about JJ

A simple yet effective solution is to disseminate information about the law prohibiting the incarceration of children in jails in areas CCL are most prone to come across - such as jails, police stations, courtrooms, etc. Mr Kumar suggested that through this practice, CCL who are unaware that their incarceration in jails is prohibited can be made cautious prior to their admission.

Incarceration of children is the first step towards the failure of the Juvenile Justice System. In the past, Juvenile Justice Acts have failed which led to the coming of new Acts at regular intervals. If the system wishes to ensure an actual implementation of law it has to ensure that no child ends up in jail.

ABOUT OUR PANELLISTS



Anurag Kundu

Chairperson, DCPCR

Anurag Kundu is the Chairperson of the Delhi Commission for Protection of Child Rights (DCPCR), Government of NCT of Delhi. As the chairperson, he is responsible for monitoring the implementation of the rights of the nearly 5.5 million children in Delhi, commissioning research studies, inquiring into specific complaints/violations of the rights, and advising the government on policy matters.



Anuradha Shukla

Secretary, Delhi High Court Legal Services Committee

Anuradha Shukla was the Principal Magistrate at JJB – I for over three years. During this time, she passed a detailed order about a child detained in jail for more than a month, which was referred to in the Delhi High Court's judgment in WP 8889/2011. She was previously the Secretary of Karkardooma DLSA and is currently the Secretary of the Delhi High Court Legal Services Committee.



Anant Kumar Asthana

Child Rights Lawyer

New Delhi-based child rights lawyer. Anant has years of experience litigating issues that impact children, and many of the judgments he has been involved in have shaped the law as it stands today. He is also a member of the "Core Group on Children" of the National Human Rights Commission.



Avnish Kumar

Fellow, Project Second Chance

Avnish Kumar works on the reintegration of prisoners into society after their release. Post his arrest in an unexpected event in 2015, he served a jail term of five years, during which he faced many difficulties. Since his release from prison, he has been working for the rights of the prisoners and children in conflict with the law.



Gitanjali Prasad

Advisor, iProbono

Gitanjali Prasad is guiding iProbono's study on the incarceration of children in adult prisons. She works at the Azim Premji Foundation's Access to Justice vertical. Before this, she was a Constitutional Values Fellow at the School of Democracy. She has worked as Advocacy Lead at iProbono, and at the Centre for Equity Studies.



MODERATOR

DEEKSHA GUJRAL

India Program Director, iProbono

A human rights lawyer who studied law at Cambridge University, Deeksha has experience in civil and criminal litigation as well as refugee law. She leads iProbono's programs in India.