The London School of Economics and Political Science

The Prospect of Restorative Juvenile Justice in India: Insights from Youth Justice in England and Wales

Pupul Dutta Prasad

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Declaration of Authorship

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

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Abstract

The juvenile justice law in India emphasises rehabilitation and reintegration of children who have committed an offence. In practice, however, juvenile justice seems to serve primarily deterrent and punitive functions. This contrast indicates the need to consider reform. In recent decades, many countries have adopted a restorative justice (RJ) approach to youth justice. RJ envisages a relatively informal process where the main parties involved, namely, the offender, the victim and the community, have an opportunity to be active participants. It promises a less punitive, reparative and reintegrative response to crime. All this makes RJ potentially relevant to juvenile justice in India. Yet, there is little research on whether it might be desirable and feasible to introduce RJ-oriented interventions with offending children.

This qualitative study makes an original contribution to the existing literature by investigating the need for and possibilities of RJ initiatives as a potential means of reform in the Indian juvenile justice system. It also explores whether it might be useful to draw any lessons from RJ-inspired referral orders in England and Wales. It is based on 89 semi-structured interviews with an array of policymakers, practitioners, opinionmakers and experts in India.

The respondents offered a range of new insights into both the current workings of juvenile justice and into the prospects for progressive change. The rigorous analysis of their accounts of operations in policing, adjudication and correction establishes the need for wide-ranging reforms. The majority thought that RJ, or elements of it, hold great promise and found prospective policy learning from abroad useful, with important qualifications. They identified potential means for institutionalising RJ and highlighted the role of actors seen as key to the process. The findings also reveal that there are significant barriers to RJ and reform might prove difficult. While there is much in RJ that might be beneficial, the study argues for caution against some of its latent dangers in the Indian context.

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List of Abbreviations

CCI	Childcare Institution
CCL	Children in conflict with the law
CJS	Criminal justice system
CRC	Convention on the Rights of the Child
CrPC	Code of Criminal Procedure
CWPO	Child Welfare Police Officer
DCPO	District Child Protection Officer
DWCD	Department of Women and Child Development, Government of National Capital Territory of Delhi
FGC	Family Group Conference
FIR	First Information Report
ICP	Individual Care Plan
ICPS	Integrated Child Protection Scheme
IPC	Indian Penal Code
JJB	Juvenile Justice Board
JJCPA	Juvenile Justice Care and Protection Act
JJS	Juvenile justice system
MACR	Minimum Age of Criminal Responsibility
MWCD	Ministry of Women and Child Development, Government of India
NCPCR	National Commission for Protection of Child Rights

NCRB	National Crime Records Bureau
NHRC	National Human Rights Commission
PIL	Public Interest Litigation
POCSO	Protection of Children from Sexual Offences Act
PSC	Parliamentary Standing Committee
RTI	Right to Information Act 2005
SJPU	Special Juvenile Police Unit
UNICEF	United Nations Children's Fund
VOM	Victim-offender Mediation
YOP	Youth Offender Panel
YOT	Youth Offending Team

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Chapter 1

Introduction

The Origins of the Research

A Sunday night incident in late 2012 proved to be a watershed moment for juvenile justice in contemporary India. At about 8.30 p.m. on the 16th December, a female physiotherapy student along with a male friend took an off-duty chartered bus home after watching the award-winning movie *Life of Pi* at a South Delhi theatre (Hollingsworth et al. 2020). The couple were taunted, harassed and beaten up by six men (including the driver) already on the bus. Then, while the bus was moving, the men dragged the woman to the back of the bus and raped her one by one. The perpetrators inserted an iron rod inside her vagina and pulled it out with such force that her intestines were ripped out of the body (Mosbergen 2012). After the assault, gangrape and evisceration, the victim and her male companion were dumped on the side of the road. The 23-year-old victim who came to be called 'Nirbhaya'[1] (literally 'fearless' in Hindi) in the media died two weeks later while undergoing treatment.

All the accused persons were arrested and charged with rape and murder of the victim. One of the six perpetrators was a 17-year-old juvenile. While the adult offenders were tried in a court of session where they faced (and were subsequently awarded) the death penalty, the juvenile was referred to a Juvenile Justice Board for inquiry under the then existing Juvenile Justice (Care and Protection of Children) Act 2000. The maximum punishment that he could have received—and later did upon conviction—was three years of detention in a special home.

The Nirbhaya case and the reactions to it shone an unprecedented spotlight on juvenile crimes and the specialised system to deal with them. The barbarity and viciousness of the crime shocked the public conscience and sparked one of the biggest gender related movements ever seen in India demanding justice for sexual violence against women (Bakshi 2017; Rana 2020). Simultaneously, a lot of the public and media attention focused on the differential treatment

[1] A pseudonym was used because under the Indian Penal Code disclosure of identity of the victim of rape is an offence.

accorded to the juvenile in the case although he was just a few months away from turning 18, the age of majority (Chandra 2020). Media stories that characterised him as the most barbaric of the lot—inaccurately and irresponsibly, as it turned out—further ignited public outrage over the juvenile getting a lighter sentence (Anwar 2015). In massive protests that took place in Delhi and other parts of the country, there were calls for children who committed heinous offences to be prosecuted and punished in the adult system.

There was further public outcry led by Nirbhaya's parents in 2015 when the offender was released after three years spent in an institution. The sustained public pressure is considered to have resulted in Parliament passing a new juvenile justice law the same year which enabled 16 to 18-year-olds accused of heinous crimes to be prosecuted as adults (Bedi 2015).

I lived and worked (at the National Human Rights Commission) in New Delhi at the time of the Nirbhaya incident and witnessed the unfolding events. The anger of protestors who descended on the city wanting 'justice' was palpable. Many advocated extreme punishment; hanging or chemically castrating the guilty became a rallying point. However, I also came across people demonstrating with placards opposing the use of the death penalty ('Death Penalty is Not Justice'). One simply asked, "Are We Not Responsible?". Though not dominant, in my view they were indicative of a complex problem that defied easy, quick-fix solutions especially in regard to juveniles. In short, the crime became something of a 'condensation symbol' evoking multiple emotions, ideas and feelings (Graber 1976).

My interest in juvenile justice was further piqued by what I saw as the emergence of two opposing camps of commentators in the wake of the legislative change. One claimed that the new law was necessary to prevent and deter violent crimes by children (Bedi 2015). The other argued that subjecting children to long-term imprisonment like adults was a straightforward repudiation of the ideals of reformation and rehabilitation which ought to guide juvenile justice (Kumari 2014). The debate ultimately boiled down to the question of how to address the offending behaviour of children from a legal and moral point of view. And yet, it was being looked through—quite narrowly and unhelpfully, in my opinion—the prism of an extreme and rare case like Nirbhaya, neglecting the bulk of the cases which involve low level offences. From what I had observed of juvenile justice during my work at the NHRC, there was a need to evolve a more humane way of intervening with juvenile offenders than rehabilitation through institutionalisation. All of this

prompted the idea to research the need for and possibilities of a restorative justice (hereafter, also RJ in short) approach to juvenile justice in India.

Here by way of setting the scene I offer a brief introduction to 'the juvenile justice system' and the larger political, legal and social environment which sustains it. I outline the need for this research and explain the focus on a specific restorative justice intervention in youth justice in England and Wales. Finally, I introduce the research questions and underline the purpose and scope of the thesis. I close with an overview of the chapters that follow.

The Juvenile Justice System and Its Settings: An Introductory Overview

The Indian Constitution establishes a parliamentary system of government within a broadly federal framework. Legislative and executive powers are divided between the union or central government in New Delhi (the word 'federal' has not been used in the Constitution) and state governments. There are currently 28 states, which have a system of government similar to that at the union-level, and 9 union territories that are directly administered by the central government. A unique feature of the division of powers between the 'centre' (as the central government is usually known) and the states is that it is tilted heavily in favour of the former. The Constitution sets out two lists of subjects called the 'Union List' and the 'State List' over which the centre and the states exercise exclusive legislative and executive powers, respectively. Yet, under specified and exceptional circumstances, the Union Parliament can legislate on a state subject. Then there is a 'Concurrent List' of subjects over which both the centre and the states have jurisdiction. However, in the event of an inconsistency between a central and a state law, the central law prevails to the extent of the inconsistency. The primacy of the centre over the states has a direct bearing on the architecture and functioning of the criminal justice system.

'Criminal law' and 'criminal procedure' are enumerated under the Concurrent List, which means that the legislature in each state can pass its own laws relating to crime. But notably, what brings about a basic uniformity in Indian criminal justice is that three laws which form its cornerstone are central acts and apply to the whole country. India has two major codes: the Indian Penal Code 1860 (IPC) that deals with substantive criminal law and the Code of Criminal Procedure 1973 (Cr.P.C.) that covers procedural aspects of criminal law. The third is the Indian Evidence Act of 1872 which lays down the law of evidence. Besides these primary and general

laws, there are a number of special laws which address specific offences or a particular class of individuals. The juvenile justice law belongs to the latter category (I will come to that shortly). Another important point to bear in mind when trying to comprehend the criminal justice system is that most of its functions such as law enforcement, order maintenance, prosecution, sentencing and punishment are the responsibility of state governments and territorial administrations (Unnithan 2013). This naturally results in diversity in practices. Still, a considerable degree of cohesiveness is built into the system by means of a unitary judiciary.

A fundamental feature of India's judiciary is that it has a three-tiered, integrated structure (Moog 2002). At the apex is the Supreme Court, the country's highest court which sits in New Delhi. The High Court stands at the head of the judicial administration in each state. Below the High Court are district-level courts (a district is a basic administrative division of a state). The three tiers form a single hierarchy. Appeals are allowed to progress up from the bottom to the apex, with the law laid down by the Supreme Court being binding on all courts. The structure of the Indian courts is also unitary in the sense that they administer both central and state laws—the Constitution does not contemplate distinct federal and state courts as in the United States. Under the given set-up, the Supreme Court and the High Courts are recognised as the higher judiciary, whereas courts in districts are referred to as the lower judiciary, subordinate to the ones above them. The higher judiciary, the Supreme Court in particular, plays a central role in the Indian political system (Robinson 2016). That said, the district judiciary, along with other actors like the police, hold particular significance in the administration of criminal justice. Generally, a criminal case is initiated by the police in whose local jurisdiction the offence was committed, and, after investigation, it is tried by a court of the district concerned. It is also at the district level that a distinct, parallel criminal justice structure and process to handle only crimes committed by children has been created.

The juvenile justice system

The special legislation that currently governs the juvenile justice process is the Juvenile Justice (Care and Protection of Children) Act 2015. Again, it is a central act that extends to all the states and union territories. The Act establishes a legal framework to provide for care, protection, development, treatment, social re-integration, and rehabilitation of children, whether 'in conflict with the law' or 'in need of care and protection', by adopting a child-friendly approach in the

adjudication and disposal of matters pertaining to them. Of these two categories of children, my work focuses on children in conflict with the law.[2] A 'child in conflict with the law' is defined as a child under the age of 18 years who is alleged or found to have committed an offence (Section 2(13) of the Act). In India, the minimum age of criminal responsibility (MACR) is set at 7 years which means that children under that age at the time of commission of an offence cannot be prosecuted.[3] The cut-off age is, however, much lower than 12 years recommended by the United Nations. Significantly, the lower the threshold of criminal liability, the wider the boundary of juvenile justice.

The only source of national-level crime data in India is the official statistics compiled by the National Crime Records Bureau (NCRB), an institution under the central government. The NCRB releases crime statistics for each year in the form of its annual report, *Crime in India*, which contains a chapter on juvenile crimes. Table 1.1 below depicts the incidence of juvenile crimes under the Indian Penal Code along with the percentage they constitute of the total crimes under the IPC from 2008–2020.

The figures show that the share of crimes committed by children has been consistently and remarkably low over time—figures all the more stark given India is home to 444 million children in the age group of 0–18 years constituting 37 per cent of the total population (Banerjee 2018). The proportion declined even further in calendar year 2020 to touch a historic low of 0.6 per cent of the total crimes. This raises the question of whether the number of juvenile crimes is indeed as relatively negligible as the data seem to suggest.

[2] In common parlance, they are variously called juveniles, juvenile offenders or delinquents—terms now avoided in the law due to their stigmatising effect. In this thesis, I have also referred to them as simply the 'child'.

[3] The juvenile justice law does not mention the MACR at all. In its absence, the provision in the general law (the Indian Penal Code (IPC)) that nothing is an offence which is done by a child under 7 years of age applies. The IPC also incorporates the presumption of *doli incapax* regarding children above 7 but under 12 years. Children in this age group are protected from criminal responsibility on the presumption that they are not sufficiently mature to understand the nature and consequences of their actions. But this presumption is rebuttable unlike the presumption of criminal incapacity applicable to children under 7.

Table 1.1 Incidence of juvenile crimes under the Indian Penal Code (IPC) (2008–20)

Year	Juvenile crimes	Total crimes	Juvenile crimes as a proportion of the total (%)
2008	24535	2093379	1.2
2009	23926	2121345	1.1
2010	22740	2224831	1.0
2011	25125	2325575	1.1
2012	27936	2387188	1.2
2013	31725	2647722	1.2
2014	33526	2851563	1.2
2015	31396	2949400	1.1
2016	33697	2975711	1.1
2017	30909	3062579	1.0
2018	29024	3132954	0.9
2019	29126	3225597	0.9
2020	26399	4254356	0.6

(Source: NCRB)

Scholars have time and again pointed out several problems with crime statistics (Kumari 2004; Mukundan 2016; Rukmini 2021). The data are based on First Information Reports (FIRs) registered when complaints about crime are made to the police. In other words, they capture only police recorded crimes, and are likely to considerably underestimate overall crime levels (Chakraborty n.d.). Verma (2016) observes that the sense of fear and distrust towards the police is so high that people do not wish to visit a police station to file a complaint unless the offence is serious and there is no other option. Another persistent problem is refusal by the police to register FIRs in order to 'dress up' crime statistics (Deswal 2013 p. 361). Taking both non-reporting and non-registration of crime into account, a study estimates that less than 10 per cent of crimes in the society might actually be getting registered (TISS 2016).

Though it is difficult to estimate the so-called 'dark figure of crime', there are grounds to infer that it may be more significant in the case of juvenile crimes. Minor offences of theft and causing hurt comprise 45 per cent of all crimes under the IPC reported against children (NCRB 2020). It seems entirely plausible consequently that such recorded crimes are only a fraction of the total given the reluctance of victims to approach the police for such crimes. Further, a survey of Indian police personnel found that 37 per cent of the respondents thought the police themselves should hand out a small punishment for minor offences rather than adopt a legal process (Common Cause & CSDS 2019). This tends to confirm the anecdotal evidence I know of which suggests that many petty offences by children are either ignored or dealt with informally by the police. In short, the NCRB data significantly underestimate the magnitude of juvenile crimes in the country.

Children brought into the system for their offending behaviour belong overwhelmingly to socially and economically marginalised sections of the population. The NCRB report shows that one third of children apprehended in 2020 had either never attended school or had education only up to the primary school level. In 2015, the latest year for which such data is available, 70.6 per cent of the children apprehended came from families with an annual income up to 50000 rupees (about 500 pounds) only. Parackal and Panicker's (2019) research revealed that 90 per cent of children in detention centres in four states (including Delhi) were from lower castes. They rightly caution against taking this as evidence that children from so-called higher castes are not involved in offences or unlawful acts. Rather, a low presence in the detention centres might suggest that many of such children are shielded from experiences in the deep end of the system through negotiations and settlements.

The gist of the juvenile justice structure and process

The provisions of the 2015 Act apply to all matters concerning children in conflict with the law including apprehension, detention, prosecution, penalty, rehabilitation and social re-integration. Thus, the Act is both a substantive and procedural law which prevails over much of the Cr.P.C. and the IPC in its area of operation; any matter on which it is silent is still covered by the two general laws. Under the juvenile justice law, the focal point of the distinctive system of dealing with children is the Juvenile Justice Board in each district (henceforward, the Board), which is very much part of the three-tiered judicial structure I described earlier.

The Board is the competent authority for adjudicating and disposing of cases involving children in conflict with the law. Set up to be more sensitive to the needs of children, each Board is a bench of three persons: a Judicial Magistrate of First Class (referred to as Principal Magistrate) who heads it and two social worker members. Children are entitled to special procedural rights. For example, a child must not be put into a police lockup. When the child is produced by the police before the Board, they have a right to be released on bail irrespective of the nature of the offence. The Board's proceedings are required to be simple and conducted in a child-friendly atmosphere. Importantly, a fundamental principle laid down in the 2015 Act is that the child shall not be placed in institutional care unless required as a measure of last resort. While much of the law envisions a system that is beneficial for rehabilitation and reformation of children, there is also a provision in it, as I mentioned earlier, to enable transfer of children in the 16–18 age group who are involved in heinous offences to a criminal court for trial and punishment.

The Need for the Research

Despite the stated objectives of the law, a number of sources paint a different picture when it comes to how juvenile justice works in practice. Studies show that in many cases children are handcuffed, beaten up, forced to confess, falsely charged and kept in police lockups for days alongside adult offenders (Srinivasan 2010; Parackal and Panicker 2019; Tripathi 2021). It is argued that children commonly find the atmosphere and procedures of the Board to be intimidating and confusing (Shastri and Thukral 2009), frustrating the objective of the law to facilitate child participation in the judicial process. Reports also suggest that there is a general tendency in the juvenile justice system to institutionalise children with the result that deinstitutionalisation has remained an unmet objective (Shastri and Thukral 2009). At the same time, institutions are seen as functioning more as centres of detention than rehabilitation where often the child's basic rights may not be protected (Ramaswamy and Seshadri 2020; Asian Centre for Human Rights 2013).

This gap between theory and practice highlights an apparent need to consider reform in juvenile justice. RJ has in recent times attracted a lot of international interest as an approach with the potential to address the lacunae in conventional criminal justice, especially in court-centered, adversarial systems for children (Van Ness, Morris and Maxwell 2001). Though RJ is defined in many ways, it is premised on the understanding that crime causes harm to victims, offenders and communities. Its goal is to repair harm usually through practices involving direct or indirect

communication between the offender, victim and others in a relatively informal setting, reparation of some form to the victim, and reintegration of the offender into their community. The primary concern is 'the restoration into safe communities of victims and offenders who have resolved their conflicts' as opposed to harsh punishment of the offender in order to incapacitate them (Van Ness 1993 p. 258). *Prima facie*, RJ seems to have an answer to the apparent need for an inclusive, participative and constructive approach to juvenile justice in India.

That said, both the potential of RJ to bring about positive change and the prospect of its introduction require empirical examination. However, research is generally lacking (though see Raha 2020) being based on secondary sources (Vijayalakshmi 2017) or quite limited, finding conditional support among a few victims for participating in a restorative process with the offender in child sexual abuse cases (CSJ and NLU 2018). There has been no examination of the desirability, practicability or prospects of RJ as a reform measure in Indian juvenile justice, nor of what kind of RJ programme or practice might fit Indian conditions? This study aims to begin to fill these gaps, additionally examining the potential to learn from elements of the restorative youth justice model associated with referral orders currently in use in England and Wales.

Why Look at Youth Justice in England and Wales?

In recent years, lesson-drawing and learning from abroad is said to have become common in nearly all areas of public policy (Rose 1991; Evans 2010). In criminal justice policy, youth justice and restorative justice are among a handful of specific issues on which attempts to learn from elsewhere have been made and studied (Jones and Newburn 2019). Very recently, it has also been argued that there might be a case for exploring the *potential* for policy learning/transfer ('prospective policy transfer') in addition to the more traditional retrospective approach (Jones and Newburn 2019). My research on RJ takes this newly proposed route of enquiry. A prerequisite for prospective policy learning research is making a decision as to which specific policy might hold promise for an investigation: here the referral order in England and Wales.

The choice is guided by a combination of four factors. First, the modern Indian legal system is founded on common law practices imposed by the British which were later said to have become 'firmly rooted in the Indian soil' (Law Commission of India 1958 p. 24). The adversarial system of justice and the procedural and substantive codes bear the stamp of the common law. The higher

judiciary in particular has continued to frequently rely on decisions from courts in the UK (Balakrishnan 2008). India is regarded as 'an interesting and ultimately successful' case of the transplantation and adaptation of English common law (Joireman 2006 p. 199).

Second, English statutes and enactments too have strongly influenced Indian laws. The Supreme Court of India's observation that the bulk of India's corpus juris is 'a carbon copy of English law' (Supreme Court of India 1978) may be exaggerated, but there are still abundant examples of legal borrowing including where juvenile delinquency is concerned (Hartjen 1995). It is argued, for example, that the Juvenile Justice Act of 1986 established a juvenile justice regime very much on the lines of the Children and Young Persons Act of England and Wales, 1933 (Connors 1990).

A third, linked, factor is the peculiar hold legal knowledge of English provenance has had on legal professionals in India. Notwithstanding the problematic colonial context, Indian elites, especially those belonging to the legal profession, have often marvelled at 'the precision and perfection' with which they thought the British had codified civil and criminal laws (Prashad 1964 p. 79; Setalvad 1960) and there are still many who hold such views. The language used in most courts and in the authoritative legal texts is English, and bodies set up by the government for law reform too are considered to have exhibited their 'Anglophilia' (Baxi 2003). For example, the report of the (Malimath) Committee on Reforms of the Criminal Justice System (2003) suggested introducing legislation on the lines of the Powers of the Criminal Court Sentencing Act 2000 in the UK to address the need for new and innovative alternatives to custodial punishment, such as community sentences and reparation orders.

This unique historical, political and cultural context make elements of RJ in contemporary English youth justice an apposite reference point. It also brings me to the fourth and final factor, which is the sheer scale of the RJ experiment taking place in youth justice in England and Wales. In brief, since the enactment of the Youth Justice and Criminal Evidence Act 1999, the principles of restorative justice have been institutionalised in England and Wales in the form of referral orders. They are the primary sentencing disposal for all young people aged 10–17 pleading guilty for the first time (Home Office 1999). Their purported aim is to encourage children and young people to understand the consequences of their behaviour, make amends and re-join the law-

abiding community. From an Indian perspective, the youth justice system in England and Wales seems to have acquired considerable experience of implementing RJ.

Significant commonalities between the legal systems in England and Wales and India due to the common law and a prolific history of policy transfers from the former to the latter render English youth justice particularly relevant for this research. Additionally, juvenile justice policy seems to be area where India has already shown a proclivity to draw inspiration from England and Wales. All this creates a fertile ground for prospective policy learning.

The Purpose and Scope of the Research

Policy towards children in conflict with the law has an enormous impact and is of considerable concern in India's social and political life and yet the literature is largely dominated by texts using a doctrinal approach (see for example Kumari 2004; Kumari 2017; Bajpai 2017, though see Parackal and Panicker 2019; CSJ and NLU 2018). In general, there is a dearth of qualitative studies, and there is a near absence of qualitative studies of a restorative justice approach to juvenile justice, much less of the potential of learning from abroad. My research is thus the first qualitative study to investigate the need for and possibilities of restorative justice as a potential means of reform in Indian juvenile justice.

The enquiry is constructed around three main questions.

1. To what extent is India's juvenile justice system felt to be in need of reform?

Though the existing literature suggests that juvenile justice requires reform, it does not illuminate to what extent, and in which respects, changes or improvements are considered vital by policymakers (broadly understood) and practitioners.

2. To what extent might restorative justice meet the reform needs? An integral aspect of investigation here is to develop an understanding of how respondents perceive and interpret RJ.

3. To what extent would the referral order in England and Wales be a helpful model?

Finally, the study assesses whether features of the referral order could serve as an example from which lessons might be drawn about incorporating RJ in the Indian context. I am also

concerned with factors that might promote or hinder the introduction and implementation of any RJ-inspired innovations.

The Structure of This Thesis

The thesis has nine chapters. Building on the political, legal and social context of juvenile justice introduced in this chapter, the next will discuss the historical, social and political underpinnings of juvenile justice in India from the period of British colonial rule up to the present time. Drawing on existing literature, it offers a detailed account of the gap between law and practice and reinforces the rationale for considering RJ. Chapter 3 outlines relevant literature on RJ, policy transfer and the referral order in England and Wales. Along with the previous chapter, it furnishes the materials essential for the empirical analysis.

Chapter 4 presents the methods used in collecting and analysing the data to address the research questions, covering the research design, selection of the fieldwork site (Delhi), access to respondents (n=89) and the nature of interviews. I also outline the thematic analysis of the interview data and my reflections on reflexivity involved in the entire research process. In Chapters 5 to 8, I discuss the empirical findings emerging from this research. Accordingly, Chapter 5 takes the omission of the term 'restorative justice' in the law as its point of departure and critically examines the view held by a few respondents that RJ is implicitly recognised in the law and even present in practice. It then turns to the majority view which sheds light on not only the absence of RJ, but also delineates important and distinctive ways in which current practices fall short of the standards explicitly laid out in the law.

Against the background of strong dissatisfaction expressed about the actual workings of the system, Chapter 6 deals with specific reforms most respondents felt were needed. It focuses on the attractions of RJ and the referral order. Chapter 7 offers a granular analysis of four concrete mechanisms highlighted by respondents as having the potential to facilitate the introduction of what they interpreted to be restorative practices. In Chapter 8, I address the impact civil society, the judiciary and the perceived rise in punitiveness may have on the prospects for RJ. In addition, I consider arguments against RJ. The final chapter of the thesis brings together the main research findings. I close with some reflections on the role of RJ, albeit limited, as an instrument or vehicle of reform in juvenile justice.

Chapter 2

Juvenile Justice in India: Historical Context and Current Landscape

The term 'juvenile justice' refers to a system of laws, policies and practices intended to regulate 'the processing and treatment of non-adult offenders for violations of law' (Shoemaker and Jensen 2021). In this study, I have used it interchangeably with 'juvenile justice system'. In India, prior to the enactment of the Juvenile Justice Act by Parliament in 1986, mechanisms for delivering juvenile justice had existed in a piecemeal fashion. So, a juvenile justice system, at least in the sense of 'a uniform normative structure' throughout the country, is considered to have emerged only after that law came into effect (Kumari 2004 p. 132). Since then, juvenile justice policy—expressed mainly through legislation, but also to be found in government programmes and judicial decisions—has undergone important changes. Juvenile justice practices have moved on too, in principle, towards delivering policy reforms.

An examination of the contemporary policy, politics and practice of juvenile justice is essential to my investigation into the possibility of future reforms. A review of its longer-term history is equally imperative primarily because information about the past will contextualise the present and facilitate a better understanding of the progress made and the action needed. A longue durée view of juvenile justice is crucial also in order to avoid overemphasising change at the expense of stability, and relatedly, assuming the translation of policy change into a change in practice. It is easy to overestimate a particular policy or practice as a revolutionary change or something of a U-turn unless one is critically aware of what had been happening before.

Based on a review of the existing literature, this chapter aims to map juvenile justice policy and practice in India from the latter half of the 19th century to the present. The first section is a brief examination of the colonial beginnings of juvenile justice under the British rule. The second, third and fourth sections will delineate the development of the policy and the contingencies that drove it, marking the laws passed in 1960, 1986, and 2000 as milestones, respectively. In the fifth section, I outline the social, legal and political context in which the current juvenile justice law was introduced in 2015. This is followed by a discussion of the central features of the existing legal provisions, what is practised, and the gaps found between the two. The chapter concludes by

reflecting upon what the literature reveals about the nature of the juvenile justice system and key areas which require more analytic work for a deeper understanding.

The Genesis of Juvenile Justice in India in the Latter Half of the 19th Century

The origins of the juvenile justice policy in India are rooted in its colonial history. The British rule was the conduit through which Western ideas and developments in the field of prison reform and juvenile justice shaped experiments in India (Kumari 2004). In mid-19th century, social reformers, like Mary Carpenter, advocated for juvenile penal reform in Britain arguing that prison was unsuitable for children. Such reformers, comparable with American child-savers, viewed juvenile delinquency as a problem driven essentially by poverty and a corrupt environment (Platt 1969). Their campaign led to the passage of a law in 1854 to establish reformatory schools for convicted juvenile offenders. From the late 19th century onwards, separate detention centres for young people were created (Morgan and Newburn 2012). The establishment of the juvenile court in 1908 in Britain was another important landmark toward the conception of the child as a special category (Garland 1985). These attempts at separating young offenders from adults, and the discourse that underpinned them, influenced developments in India. However, scholars, particularly historian Satadru Sen (2004), have persuasively claimed that the influence was mediated by the colonial context so that changes introduced in the colony differed from those pursued in the metropole.

Until the 1860s, children convicted by British Indian courts were incarcerated with adult prisoners. It is argued that juvenile offenders came to be seen as a model target for low-risk intervention by a colonial administration conscious of the need to demonstrate that it was a caregiver and protector moved by the plight of its subjects (Sen 2004; Clark 2015). However, Indian juveniles were conceptualised as different from their counterparts in Britain. Unlike in Britain where criminality among children was attributed mostly to poverty, native children were constructed as criminals because they often belonged to 'the supposedly incorrigible and hereditary sections of the criminalised population' (Sen 2004 p. 84). They were criminalised not so much because of any criminal act they had committed, but because of their criminalised social identity and marginality (Sen 2004). Altruistic motives, if any, of colonial experiments with juveniles were accompanied by the desire to subordinate and control them as both criminals and native subjects. It is also pertinent, as Sen (2005) points out, that middle-class Indians broadly accepted the dominant British notion of the relationship between class and criminality.

The first step towards making juveniles a distinct category of offender was taken by the colonial government with the introduction of the Apprentices Act 1850. Under the Act, children between 10 and 18 found to be destitute or guilty of committing minor offences could be bound over to private masters as apprentices by the magistrate (Sabnis 1996). The declared purpose of the law was to give orphans and poor children an opportunity to pick up a trade or craft which they could use later to earn a living without having to resort to crime. However, it was very much an example of the colonial government seeking 'to control and mould Indian juveniles while simultaneously distancing itself from the responsibility in the event of failures due to the supposed incorrigible nature of native children' (Clark 2015 p. 131).

The Apprentices Act was followed by the Indian Penal Code 1860. The provisions it made regarding the minimum age of criminal responsibility and the presumption of *doli incapax* formalised the principle that juvenile offenders were to be dealt with differentially from adult offenders. The Code of Criminal Procedure 1861, the main procedural criminal law, gave discretionary power to magistrates to send convicts younger than the age of 16 to reformatories rather than adult prisons. The concern with ensuring segregation was however undermined by, among other things, British assumptions about the nature of Indian children as well as skepticism about infrastructural capacity (Sen 2005). As segregation failed to take off, corporal punishment was rationalised as a cheap, quick and effective alternative to reformatories, and the use of flogging remained widespread up to the 1930s (Sen 2005).

The idea of reformatory schools for juvenile offenders in India based on the model used in England continued to be advocated by reformers. It came to fruition with the passage of the Reformatory Schools Act 1876. The Act was amended in 1897 to lower the age limit from 16 to 15. 16-year-old juvenile offenders were considered too hardened to be suitable for a reformatory (Sen 2004). Likewise, the Act excluded children who were seen as habitually criminal or belonging to criminalised communities ('criminal tribes'). Thus, colonial administrators sought to segregate juvenile offenders not only from adult offenders, but also from other sub-categories of juvenile offenders which reflected a perception within colonial criminology that 'some child offenders were more marginal than others' (Sen 2005 p. 56).

In addition to a differentiated approach to native delinquency, the focus of reformatories in India was on moulding juveniles into disciplined subjects (Clark 2015). The rigid discipline and

conformity enforced there was alleged to be almost punitive rather than reformative (Sethi 1983). The implementation of the Act floundered further in the absence of new reformatories, and juvenile offenders continued to be either sent to prisons or flogged.

A Fragmentary Provincial System Until the Children Act of 1960

The next milestone in the history of juvenile justice in India is the *Report of the Indian Jails Committee (1919–20).* In line with the British practice, the Committee distinguished between children defined as persons under the age of 14, and young persons defined as persons who were at least 14 but under 16; individuals between the ages of 16 and 21 were not considered to be children. Along with recommending that children and young persons be kept away from adult prisons, the Committee proposed the creation of children's courts for trial of all cases against them.

Meanwhile, taking a cue from the Children Act of 1908 in Britain which introduced juvenile courts, some of the states in India had begun enacting their special delinquency legislation from the early 20th century (Hartjen 1995). This wave of legislative action was led by the Madras Children Act 1920. The Indian Jails Committee's report gave an impetus to these efforts by recommending that several of the provisions in the Madras Children Act be generally adopted throughout India. Thereafter, several Indian states passed legislation that broadly replicated the Madras model. The trend of provincial enactments continued until after India's independence in 1947.

Although the Children Acts of this era shared several provisions in common, such as those regarding establishment of separate children's courts, detention facilities called junior or senior certified schools (a new nomenclature in place of reformatory schools) and the use of probation in lieu of confinement, the most significant issue on which these laws varied was the cut-off age for defining a child (Kumari 2004). It created a confounding situation where the same person within the country could be a child in one state and an adult in another. A major step towards nationalisation of juvenile justice was taken when the central government enacted the Children's Act 1960. While this law applied only to areas designated as union territories directly governed by the central government, and not to the states, it was supposed to serve as a model to be followed by them in the enactment of their respective legislation (Kumari 2004).

The Children Act 1960 differed from the pre-independence Children Acts passed by the states in some significant ways. First, it introduced a gender-differentiated definition of the child. A boy aged under 16 and a girl under 18 were defined as children. Second, the Act provided for the constitution of two separate adjudicatory bodies, namely, the children's court to deal with delinquent children and the child welfare board for neglected children. Third, it provided for the establishment of three categories of institutions for residential care of children: (i) observation homes for keeping children regarding whom proceedings are going on under the Act; (ii) children's homes for the reception of neglected children; and (iii) special schools for children found to have committed an offence. Another provision in the Act which indicated a shift in policy from the past was the complete prohibition on the use of imprisonment as a method of dealing with delinquent children (Kumari 2016). Their temporary detention in police lockups was also prohibited.

Though subsequent enactments have made several changes to the scheme introduced by this Act, some of its normative features have since been integral to Indian juvenile justice. 'Rehabilitation' became one of the stated aims of juvenile justice. Along with the terms 'care', 'protection', 'treatment', and 'development', it was considered to have laid down a welfare, non-penal approach to children (Kumari 2009a). The Act even avoided terms like 'punishment' and 'trial' whose use might remotely be construed to be contrary to the philosophy of non-criminal treatment of the child offender (Mishra 1991; Kumari 1993). However, some key provisions about the procedure for 'adjudication and disposal of matters' relating to juvenile delinquents revealed that elements of a 'justice' approach existed together with the welfare-oriented perspective (Jayaram 1997).

Nevertheless, the Children Act 1960 and relevant laws enacted by states either remained unimplemented or were only partially implemented (Sabnis 1996). The specialised machinery envisaged under the Act was largely non-existent. Rehabilitation of juveniles continued to be accorded a low priority in the country's development plans (Sabnis 1996). Meanwhile, the list of states enacting their own version of juvenile justice legislation continued to grow, and with that grew the variation in practice and procedures. By the mid-1980s India's juvenile justice had an incoherent patchwork of laws: some states had Children Acts that were modelled on the Madras Children Act 1920, others had Children Acts that followed the example of the Children Act 1960, while a few still applied the Reformatory Schools Act 1897 along with provisions of the Code of

Criminal Procedure 1973 (Kumari 2004). These three sets of laws varied widely in terms of age definitions, judicial procedures and dispositional alternatives (Hartjen 1995).

The Juvenile Justice Act of 1986: A Uniform National System

Although the need for uniform national standards in juvenile justice had been emphasised in various fora for quite some time, the Supreme Court's (1986) decision in *Sheela Barse v. Union of India* brought some urgency to the matter. In the *Sheela Barse* case, a social worker and journalist filed a public interest lawsuit seeking release of 1,400 children below the age of 16 detained in jails in different states of the country despite statutory provisions to the contrary (Kethineni 2017). Recognising the problem arising out of differential treatment of children in different states, the Court recommended that Parliament should bring uniform legislation for the whole country. In the same year, Parliament enacted the Juvenile Justice Act 1986 that applied to all states except the state of Jammu and Kashmir.

The 1986 Act was described as 'a replica of the Children Act 1960' (Jayaram 1997 p. 52). According to Hartjen (1995), the 1986 Act was essentially an extension of the 1960 statute to India's states. It represented the same 'modified justice approach' with elements of both justice and welfare approaches which characterised the previous law (Chakraborty 2002 p. 271). It also retained the child-friendly terminology of the 1960 Act except for substituting the word 'juvenile' for 'children' in the title and all its provisions. There was, however, scepticism whether simply bringing a uniform, nationwide law could address the lack of implementation that had afflicted the old law (Jayaram 1997).

The general problem with implementation did not go away with the introduction of the 1986 Act. While the concern of the Supreme Court for a uniform law had been met, many of its orders passed in the *Sheela Barse* case regarding implementation of the said Act did not seem to elicit the same kind of response from the central government (Gupta 1989). Gupta suggests that the Supreme Court did not take any radical steps to overcome the inaction on the part of the executive, with the result that the case did not reach a satisfactory conclusion. A wide gap between the principles laid down in the law and the actual practices on the ground continued to bedevil juvenile justice in the 1990s (Kumari 2004). In most of the states, the basic infrastructure needed for dealing with juvenile delinquents consisting of juvenile courts, observation homes, special

homes (previously called ‘special schools’ under the 1960 Act) and aftercare homes had either not been set up or were ill-equipped to meet the needs of juveniles (Pawar 1993; Kumari 2004). In the circumstances, adult criminal courts and prisons or separate juvenile wards created within prisons remained the default options to deal with children. Non-institutional care did not receive much attention and dispositional alternatives like probation were hardly utilised; the emphasis was still on institutionalisation (Chakraborty 2002). The overall situation was a reminder that legislation on juvenile justice in itself is no guarantee of a separate system of justice for children in a real sense.

The Juvenile Justice (Care and Protection) Act 2000 and its Amendment in 2006

The dissatisfaction with the state of juvenile justice led to national consultations involving various stakeholders on how to improve the situation (Kumari 2004). Once again, it seems that the debate mostly revolved around the question of getting the policy right. A significant development that likely had a bearing in this regard, at least in official circles, concerned India’s ratification of the UN Convention on the Rights of the Child (CRC) in 1992. Upon considering India’s first periodic report on compliance with the provisions of the CRC, the Committee on the Rights of the Child (2000) recommended that India review its law so as to meet the standards prescribed in the CRC and other international instruments. Its recommendations included enlarging the definition of juvenile to cover boys under 18 years, just as in the case of girls, so that boys between 16 and 18 years were not tried as adults. In response, but also in light of the debate over the unsatisfactory functioning of the juvenile justice system, Parliament enacted the Juvenile Justice (Care and Protection) Act 2000 to replace the 1986 Act.

Interpreting the 2000 Act as a step change in policy, Kumari (2004 p. 92) described it as a move ‘from welfare to rights’, meaning that henceforth the child ought to be treated as a bearer of distinct rights rather than a passive object of welfare. But, rather oddly, the author’s assessment also was that ‘its provisions fail to reflect that policy change’ (Kumari 2004 p. 305). Other scholars were of the view that the 2000 Act continued to adhere to the welfare model with an emphasis on adopting a child-friendly approach (Bajpai 2003; Kethineni 2017).

Although the basic scheme of this Act remained the same as in the 1986 Act, it introduced some significant changes (Gupta 2015). The most far-reaching of them related to age. In conformity with the CRC, it defined a juvenile as a person who has not completed the age of 18

years irrespective of their gender. At the same time, it used the term 'juvenile' to refer exclusively to children who are in conflict with the law, thereby reinforcing, some might argue, the negative associations the word had acquired. It replaced the term 'neglected juvenile' used in the 1986 Act with the term 'child in need of care and protection'. Another reform was the introduction of the Juvenile Justice Board in place of the juvenile court. The Board was a bench consisting of one magistrate and two social workers. Though there had been a provision for a panel of honorary social workers to assist the judicial magistrate of the children court and the juvenile court under the 1960 Act and 1986 Act, respectively, the 2000 Act laid down for the first time that social workers and the judicial magistrate shall be equal members in the decision-making process in the Board. This represented an advance in recognising the importance of social work in promoting the statutory objectives.

The 2000 Act, however, did not seem to make a big difference on the ground, as the state of its implementation, much like that of its predecessor, remained poor (Kumari 2017). The elaborate administrative machinery it envisaged was far from a reality. As per the literature, paucity of funds and apathy continued to be serious obstacles in creating the required basic infrastructure (Gupta 2015). Even in the perfunctory quantitative sense of establishing the required number of authorities and institutions prescribed in the law, implementation was inadequate (Kumari 2015). Furthermore, evidence collected from juveniles in Delhi-based juvenile homes revealed that corporal punishment at the hands of the police and the home officials was a common experience for them (Snehi 2004).

The neglect afflicting juvenile justice once again prompted social activists and organisations to turn towards the Supreme Court in the hope that it might ensure implementation of the law. Human Rights Law Network (HRLN), an NGO, filed a writ petition (*Sampurna Behura v. Union of India and Ors.*) in 2005 on behalf of Sampurna Behrua, a social activist. The petition drew attention to the failure of state governments to implement the provisions of the 2000 Act and highlighted the appalling condition of homes for children across the country (HRLN 2018). The case went on for 12 years in the Court. In several hearings that took place during that period, the Supreme Court grappled with various practical issues of implementation and passed multiple orders and asked for their compliance from state authorities, though it is not clear with what result.

This provides another notable example of the highest court's continuous engagement with juvenile justice as well as the limits of its powers to effect improvements.

The Supreme Court and the development of juvenile justice law and practice

In one of the other cases that came before it, the Supreme Court (2005) held that the date of commission of the offence was the relevant date for determining whether the offender was a juvenile or not, thereby resolving a contentious issue on which the law was silent. An amendment brought in the 2000 Act in 2006 incorporated the Supreme Court's decision into the statute. The Supreme Court (2000; 2004) also affirmed the applicability of the juvenile justice legislation to all cases involving offending by children including those where they are accused of committing serious crimes punishable with death or life imprisonment under the IPC or any special law. Again, a clause was inserted to this effect in the 2000 Act by way of an amendment in 2006.

The higher judiciary's engagement with juvenile justice also took a new form outside the statutory framework. Until 2006, the Supreme Court and the High Courts had dealt with matters that had come up before them through petitions and appeals on the judicial side. Perhaps acknowledging that effective implementation of the law required regular monitoring of administrative action of the states which could not be accomplished through delivering judicial decisions, a conference of Chief Justices of the High Courts under the aegis of the Supreme Court in 2006 for the first time included juvenile justice in its agenda. Under the heading "The Plight of Juvenile Delinquents" the following resolution was passed in the conference:

> That High Courts will impress upon the State Governments to set up Juvenile Justice Boards, wherever not set up. The Chief Justices may nominate a High Court Judge to oversee the condition and functioning of the remand/observation homes established under Juvenile Justice (Care and Protection of Children) Act, 2000. (Registrar General 2010)

In response to this, each High Court constituted a Juvenile Justice Committee with the broad mandate of overseeing juvenile justice. The Supreme Court set up its own Committee on Juvenile Justice in 2013. While these Committees continue to provide leadership and supervisory oversight in juvenile justice (Kumari 2017), one legal scholar (Asthana 2020a) has called for greater clarity on various aspects of their role given their non-statutory status.

The above developments contributed to the formal growth of the juvenile justice system, but they still did not address the problem of lack of funds faced by the states in implementing the law (Kumari 2004). It was not until 2009 that the central government sought to tackle it when the Ministry of Women and Child Development (n.d.(b)), responsible for the administration of juvenile justice in the country, launched the Integrated Child Protection Scheme (ICPS). I will discuss the scheme in detail in Chapter 7.

The Legislative Change in 2015 in the Aftermath of the Nirbhaya Case

The 2000 Act lasted only till 2015 when it was replaced by a new law. It is important to briefly unpick how this change came about especially since the previous law had been described as 'a fairly progressive law' (Manoharan and Raha n.d. p. 20).

In 2012, India's criminal and juvenile justice systems were shaken by the Nirbhaya case (see Chapter 1). The central government's response to the incident and the ensuing public protests came most notably in the form a three-member committee constituted under the chairmanship of Justice J.S. Verma, former Chief Justice of the Supreme Court. The committee was mandated 'to look into possible amendments of the criminal law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault of extreme nature against women' (Verma, Seth, and Subramanium 2013 p. 425).

The committee considered whether there was a need to lower the maximum age of a juvenile from 18 to 16. There had been significant public and media pressure for such a change amid uncorroborated reports that the juvenile accused was 'the most brutal' among the six rapists (Pradhan and Deka 2013; Mander 2015). All the perpetrators were seen by the victim's parents and angry protestors as deserving of nothing less than capital punishment (Bhuyan 2016). That the maximum the juvenile accused could face was three years of detention in a special home was considered a failure of juvenile justice. The Verma Committee, however, came down against such a reduction (Verma, Seth, and Subramanium 2013). Instead, it emphasised the need for stricter implementation of the 2000 Act.

In line with this recommendation, the 2000 Act was left unchanged in the Criminal Law (Amendment) Act 2013 passed three months after the Delhi gang-rape. But the challenge to the 2000 Act was not over. In the wake of the gang-rape case, eight writ petitions were filed in the

Supreme Court, some of them demanding a reduction of the age of juvenility from 18 to 16 years, and others calling for the 2000 Act to be declared unconstitutional. The central government defended the law as it stood. The Supreme Court (2013) ruled in favour of the government and held that any interference with the statute was unnecessary. It decided the same way in another case in 2014 (Supreme Court 2014). Subsequently, things took a turn.

The change of national government in 2014: The shift in policy and its contestation

The growing concern for the safety of women became an issue in the general election held in April-May 2014. The Congress party which had been running the central government since 2004 lost power and the nationalist Bharatiya Janta Party (BJP) won a landslide victory. The new government responded to the demand for deterrent punishment of serious juvenile offenders by introducing the Juvenile Justice (Care and Protection of Children) Bill 2014 in Parliament with the objective of replacing the existing juvenile justice law (Pillai and Upadhyay 2017; Pande 2014). The bill included a provision, which might be called 'the waiver provision', for enabling trial of children in the 16–18 age group as adults if they committed a heinous crime.[4]

The Supreme Court, too, seemed to have come around the view that the 2000 Act was unduly soft. The Court's implicit critique of the statute was reflected in a case where it upheld the conviction of a 17-year-old juvenile for the rape and murder of a 7-year-old victim, observing, "but for the protection available to him under the Act, the Appellant may have deserved the severest punishment permissible under law" (*Darga Ram v. State of Rajasthan*, para. 16, Supreme Court 2015a). In another case, the Court explicitly called for a new law: "The rate of crime and the nature of crime in which the juveniles are getting involved…have increased. A time has come to think of an effective law to deal with the situation…at least in respect of offences which are heinous in nature" (*Gaurav Kumar v. State of Haryana*, para. 8, Supreme Court 2015b).

The Juvenile Justice (Care and Protection of Children) Bill 2014 was referred to the Parliamentary Standing Committee on Human Resource Development (PSC). In its report, the PSC (2015) raised objections against the waiver provision, stating that it was in contravention of

[4] In jurisdictions like the United States, such a power to exclude juveniles from protections under juvenile justice is exercised by a juvenile court judge, and hence called a judicial waiver. For convenience, in the Indian context I will refer to it as 'the waiver provision' since the Board is not made up of the judicial magistrate alone.

the Indian Constitution, international laws and the stated purpose of the Bill itself. However, the Union Cabinet overrode the objections, and the Bill eventually became the Juvenile Justice (Care and Protection) Act 2015, coming into force in January 2016.

The Statement of Objects and Reasons accompanying the new enactment explained that, as per crime data collected by the NCRB, crimes committed by children in the age group of 16–18 had increased in previous years especially in certain categories of heinous offences. The new law was needed, this Statement suggested, because the 2000 Act was ineffective in tackling the increasing rate of such crimes. The note prepared by the Ministry of Women and Child Development (2019) for the Union Cabinet on the proposed law provides more details of the rationale behind the law.[5] It mentions that, as per the NCRB data, the proportion of offences committed by children in the age group of 16–18 in the total crimes committed by children across all ages had increased from 54.2 per cent in 2003 to 66.3 per cent in 2013. Further, when questioned by the Parliamentary Standing Committee over the need for introducing the waiver provision, the Ministry acknowledged that the number of children above the age of 16 committing heinous crimes was miniscule. But it pointed to the NCRB data to contend that the percentage of crimes committed by such children, especially against women, had increased substantially in the past few years (see the table below).

Table 2.1 Headline offences committed by children in the age group of 16–18 (2010–2013)

Crime head	2010	2011	2012	2013	Percentage change over 2012
Murder	600	781	861	845	-1.8
Rape	651	839	887	1388	56.5
Kidnapping and abduction	436	596	704	933	32.5
Dacoity	105	142	207	190	8.2
Robbery	475	576	730	880	20.5
Assault on women with intent to outrage her modesty	154	438	488	1150	135.6

(Source: MWCD 2019)

[5] I have accessed this document from the Ministry under the Right to Information Act 2005.

In addition, the Ministry highlighted that the Delhi gang rape in December 2012, the Shakti Mill rape case in Mumbai in July 2013 and the Guwahati rape case in September 2013 had triggered a debate across the country about the inadequacy of punishment awarded to children who committed heinous crimes.[6] According to the Ministry, the waiver provision was intended to act as a deterrent so that the growing trend of child offenders committing such crimes was arrested. It also claimed that the stronger measure was aimed at providing a sense of justice to the victims of such offences.

Many stakeholders contested these arguments before the Parliamentary Standing Committee. They voiced well-known concerns with the reliability of the NCRB data (see Chapter 1) along with questioning the selective manner in which they thought the Ministry had used the data (PSC 2015). The Parliamentary Standing Committee noted that the NCRB reports themselves showed that, from 1990 to 2012, juvenile crimes ranged between 0.5 to 1.2 per cent of total crimes committed in India. Furthermore, violent crimes, such as murder and rape, were a small percentage of crimes committed by juveniles. The Committee also found that the statistics cited by the Ministry to project that violent crimes committed by children in the age-group of 16–18 had gone up exponentially needed to be viewed in their context. It pertinently observed that after the Protection of Children from Sexual Offences Act 2012 (POCSO) came into effect in November 2012, increasing the age of consent to sexual activity from 16 to 18 years, sexual activities earlier treated as consensual were criminalised. It became mandatory to report the offences covered under that Act. Since cases related to sexual exploration concerned mostly adolescents, the number of rape and kidnapping/abduction cases involving children in the age-group of 16–18 shot up rather dramatically. It was not as if these children were, as Kumari writes, 'running amok committing heinous crimes making everybody unsafe' (2014 p. 304).

In the absence of evidence on the ground to support the view that crimes committed by juveniles had reached unprecedented levels, there was little doubt that in bringing the legislative change the government had acted to assuage public sentiments expressed in favour of deterrent punishment following the Nirbhaya case. At the same time, the government maintained that the law was in tune with the underlying principles of juvenile justice such as reformation and

[6] Though the incidents of rape in Mumbai and Guwahati did not spark off the kind of nationwide protests and demonstrations witnessed in the aftermath of the Delhi gang-rape case, they renewed public outrage over sexual violence in India.

rehabilitation and adhered to the relevant international instruments in this field. It further claimed that treatment of children in conflict with the law under the waiver provision was still soft, and therefore, distinct from the penal approach under adult criminal justice in important ways (MWCD 2019). Thus, the apparent shift in the juvenile justice policy was accompanied by a reiteration of the dominant ideology and rhetoric.

Apart from singling out children in the 16–18 age group involved in heinous offences for special dispensation (to be discussed in more details in the next section), the 2015 Act is akin to the 2000 Act in terms of its ideological and philosophical underpinnings. The long title and the preamble of the 2015 Act, like those of its predecessor, refer to the need to ensure that (a) the basic human rights of children are protected, (b) the best interest of the child is secured, and (c) a child-friendly approach in the adjudication and disposal of matters is adopted. It requires that the state in exercise of its *parens patriae* function to the child take all positive measures for promoting their well-being. Taking into account the risk of children being abused and victimised in institutions, the Act makes it incumbent upon the state not to place a child in institutional care unless required as a last resort.[7]

The introduction of the 2015 Act evoked strong reactions among some scholars and activists. The waiver provision is stated to be in violation of the principles of juvenile justice contained in the CRC and several other treaties and international instruments (Nagpal and Singh 2015; Kumari 2015). It has been decried by critics as a victory for retribution, not justice (Sharpe 2015; Agnihotri and Das 2015). From a historical perspective, some authors view the 2015 Act as a 'legislative retreat' on child rights (Balakrishnan 2016 p. 79), and 'a regressive step' that takes India's juvenile justice 150 years back (Kumari 2014 p. 306). Every enactment since the Apprentices Act 1850, it is claimed, had been a progressive step toward increasing the scope of juvenile justice (Kumari 2016). As a result of those successive steps, it is argued that the juvenile justice system had 'completely severed all ties with the penal response of the criminal justice system' (Kumari 2015 p. 170). The 2015 Act is said to have reversed India's progressive philosophy of juvenile justice (Kumari 2017).

[7] Section 3(xii) of the 2015 Act.

To analyse to what extent, if at all, has the 2015 Act undermined the so-called forward march of India's juvenile justice, it is necessary to consider the operations of the current juvenile justice system. In the following section, I draw on the available literature to examine key aspects of current law and practice in juvenile justice.

Current Law and Practice in Juvenile Justice

As with juvenile justice systems elsewhere (Morgan and Newburn 2012), there is an obvious tension between two objectives that Indian juvenile justice seeks to balance: welfare and punishment. On the one hand, it needs to treat the child with due consideration for their care, development and protection. On the other hand, it focuses on addressing the law-breaking behaviour of the child while accounting for their developmental immaturity and reduced culpability. This involves subjecting them to a proportionate punishment (or however else it might be termed) with a view to promoting their ultimate reform and rehabilitation. In practice, there does not seem to be any precise way of assessing whether juvenile justice processes and interventions have found a balance between the competing objectives of welfare and punishment. In effect, then, the essence of juvenile justice comes to be seen in the extent to which it departs from the procedures and practices of adult criminal justice.

In laying out the justice process for children in conflict with the law, the 2015 Act provides how juvenile justice is intended to be distinct from the adult criminal justice system in three primary areas of its operations: investigation (the police), adjudication (the Board) and correction (childcare institutions).

The police: Law and practice

As in the case of adult offenders in the criminal justice system, the first criminal justice agency the child tends to come into contact with is the police. In the criminal justice system, the police set the justice process in motion by registering a First Information Report (FIR) and enjoy extensive powers to make arrests. On both these counts, the juvenile justice law restricts police powers, thereby seeking to make the early experience of the system less onerous for the child. No FIR is to be recorded against the child except where their offence is heinous[8] or has been committed

[8] The 2015 Act, in a departure from all the previous laws on the subject, classifies offences committed by children into three categories/levels of gravity: petty, serious and heinous. This classification is based on the length of

jointly with an adult.[9] As to 'arrest', the statute uses 'apprehend' in its place, perhaps to help soften the harshness and stigma attached with the former term (Gupta 2015). In effect, apprehension is the same as arrest. More substantively, the police can apprehend a child only for a heinous offence, unless it is in 'the best interest' of the child. Since it is the police who decide what the child's best interest is, it is more of an illusory restriction on their arrest powers, as will be seen. In every case a child is apprehended, the police are required to furnish a report to the Board on the social background of the child and circumstances of their apprehension; adult criminal justice in India does not have an equivalent provision. Legal scholars and commentators emphasise the importance of the 'social background report' not only in identifying the child's reformative and rehabilitative needs, but also, somewhat worryingly one might feel, as an aid to the Board in deciding whether to place the child in an institution, and further in adjudicating their case (Goel 2020; Kansal 2015).

After apprehension, the statute again attempts to shield the child from the regular police. The 2015 Act mandates that as soon as a child is apprehended by the police, they shall be placed under the charge of the special juvenile police unit (SJPU) or a police officer designated as the child welfare police officer (CWPO) whose duty is to produce the child before the Board within 24 hours of their apprehension; detaining the child in a police lockup is explicitly forbidden. The special juvenile police unit, of which child welfare police officers are members, has been described by one author as the 'cornerstone' of the juvenile justice law (Kansal 2015). Officers of this unit are supposed to have appropriate training and orientation so as to be able to handle cases of child offenders with a humane approach. It is also considered crucial for the child's welfare that they are not interviewed at a police station or under circumstances which may give an impression of their being under custodial interrogation (DWCD 2009a).

While efforts to engender a sensitive approach among police officers towards the child seem to have become a greater policy focus in recent years (DWCD 2009b), the literature suggests that policing of children in conflict with the law continues to be an area of major concern. It is

punishment prescribed for each offence in the IPC or any other special or local law. Heinous offences, the highest level on the scale of gravity, includes the offences for which the minimum punishment under the IPC or any other law is imprisonment for 7 years or more.

[9] The Juvenile Justice Model (Care and Protection of Children) Model Rules 2016, which is a piece of subordinate legislation enacted by the central government to carry out the purposes of the 2015 Act, restricts the use of FIR in the case of children, presumably to ensure that the police treat them differently from adults.

claimed that the police follow a set pattern of working and their attitude remains punitive whether the apprehended person is a child or an adult (Thilagaraj 2002). In fact, the police are reportedly quite inclined to misrepresent the child as an adult to avoid answering any questions that may be asked about compliance with procedural protections (UNICEF 2007; Kansal 2015).

A recent study by an NGO reports that the police have 'little time for planned, structured dialogues with CICL (children in conflict with the law) or for cooperative processes to help children identify sources of difficulties or concerns that he or she is experiencing' (HAQ 2020 p. 70). This begs the question whether the social background report completed by the police provides a proper appraisal of the child's situation. As regards the special juvenile police unit, Kansal (2015) suggests that such units are mostly either non-existent or dormant in practice. Further, there are several accounts of police brutality and abuse of power including, most commonly, wrongful arrests and coercive interrogation techniques often bordering on torture (Rickard 2008; Verma 2012). Studies show that in many cases children are handcuffed, beaten up, forced to confess or falsely charged, and kept in police lockups for days alongside adults (Srinivasan 2010; Parackal and Panicker 2019). A news report based on interviews with children in Delhi reached the conclusion that "Despite the provisions in law for sensitivity training, separate juvenile units, and different procedures and use of language for apprehension of children, the police, in reality, often see a child in conflict with law, simply as a 'criminal'" (Tripathi 2021).

Provisions regarding the Juvenile Justice Board

The Board is the sole authority with original jurisdiction to deal with all offences involving children below 18 years of age, except cases of children in the 16–18 age group accused of committing heinous offences where it is part of a two-tier structure along with the children's court (more on that a little later).[10] Unlike the ordinary criminal court, the Board consists of not one but three members: a judicial officer and two social workers who are to be appointed on account of their active involvement in health, education, or welfare activities pertaining to children. The idea behind this composition probably is that the Board will be sensitive to the needs of children if its judicial authority is moderated with inputs from social workers (Rickard 2008). To wit, decisions

[10] Under the 2015 Act, the children's court is a court of session chaired by a single judge. As a criminal court, its main function is to deal with adult offenders who have committed offences against children.

in the Board are to be taken by majority. The radical implication is that if the two social work members agree on a decision, their opinion shall prevail over that of the principal magistrate.

The Board is expressly required not to look like the ordinary criminal court. Concomitantly, it is intended to function as a simpler and less adversarial forum than the criminal court. The law prescribes that the Board maintain a child-friendly environment at all stages of its proceedings with a focus on facilitating the child's participation in them. A brief chronological enumeration of the main stages can help in elucidating the central role conferred on the Board in juvenile justice:

(i) Review of apprehension of the child: Every child apprehended by the police has to be produced before the Board within 24 hours so that it can review the reason for their apprehension.

(ii) Custody of the child prior to bail proceedings: Before considering whether or not to grant bail to the child, the Board has the authority to send the child to an observation home/place of safety, or to place them in the custody of the parent or any other 'fit person'. Police custody on remand, a standard practice in adult criminal justice, is not an option in the case of the child.

(iii) Age determination proceedings: The Board is required to confirm the age of the child before it can exercise its jurisdiction.

(iv) Bail proceedings: In a departure from adult criminal justice, no distinction is made between a 'bailable' offence and 'non-bailable' one based on the gravity of the offence.[11] This means that irrespective of the nature and gravity of the offence every child is entitled to be released on bail as a matter of right. The child's right to bail can be denied by the police or the Board only where their release would (i) bring them into association with a known criminal, or (ii) expose them to moral, physical or psychological danger, or (iii) defeat the ends of justice.[12] The point to note here is that although bail is mandatory for children, the grounds for refusal of bail are quite broad and leave a lot of discretion in the hands of the police and the Board.

[11] Under the Code of Criminal Procedure 1973, offences are divided into 'bailable' and 'non-bailable' offences. A person arrested for a bailable offence has a right to be released on bail by the police; whereas a person arrested for a non-bailable offence does not have such a right. Bail in a non-bailable offence can be granted at the discretion of the court.

[12] Section 12 of the 2015 Act.

(v) Inquiry: Consistent with the preference for non-stigmatising words in relation to children, the 2015 Act uses the word 'inquiry' in place of trial. In the spirit of less adversarial proceedings, the emphasis in the inquiry process is not so much on whether after examination and cross-examination of witnesses the guilt of the child has been proved beyond reasonable doubt or not, but rather on whether the Board is satisfied as to whether the child has committed the offence or not.

As per the legislative scheme, the Board is expected to take into consideration two investigation reports, one prepared by the police ('social background report', which I mentioned earlier) and the other by the probation officer ('social investigation report') in deciding how to 'reform, rehabilitate and reintegrate' the child. The aim of the social investigation report is to obtain information regarding social circumstances of the child and to analyse risk factors that are supposed to have played a role in their alleged offence. Though the two reports sound alike, it is argued that they should not be equated (Goel 2020). Whereas the social background report is described as 'more or less a collection of information' that should not take much time for the police to prepare, the social investigation report is understood to be a deeper study (Goel 2020 p. 210). Like with the social background report, the social investigation report does not have a parallel in the adult criminal justice system either.

Having regard to the importance accorded in international instruments on juvenile justice to expeditious processing of cases, the 2015 Act stipulates that the Board shall complete inquiry proceedings within a period of four months from the date of their commencement. However, this period can be extended by two months if required for completion of an inquiry, and also beyond that if offences involved are serious or heinous.

On completion of the inquiry, if the Board arrives at the conclusion that the child has committed a petty, serious, or heinous offence, it enjoys wide discretion to choose from a range of orders with respect to the child.[13] Such orders are termed 'dispositional orders' instead of 'punishment' in keeping with the principle of using non-criminal justice terminology under the law. The orders include custodial detention up to a maximum period of three years (such as the one passed in the Nirbhaya case). Non-custodial sanctions that may be passed by the Board, not

[13] Section 18 of the 2015 Act.

necessarily as alternatives, are: allowing the child to go home after advice or admonition, participation in individual and group counselling, community service, release on probation, and payment of fine by parents or the guardian of the child. Every dispositional order must contain an individual care plan prepared by the probation officer to facilitate the rehabilitation process.

(vi) The waiver provision: Where a child in the 16–18 age group is alleged to have committed a heinous offence, the special dispensation under Section 15 requires that the Board first conduct a preliminary assessment as to whether the child should be tried as an adult, or whether they would be dealt with by the Board. It may take the assistance of psychologists or psycho-social experts for this purpose. Based upon the preliminary assessment, it may decide to retain the case and proceed with conducting an inquiry as per the procedure it adopts common to other cases. However, where the Board is satisfied on preliminary assessment that the child had the mental and physical capacity to commit the heinous offence, and had the ability to understand the consequences of the offence and the circumstances in which they allegedly committed the offence, it may order transfer of the child's case to the children's court for trial as an adult.

This waiver is not complete unless the children's court upon receiving the case from the Board reassesses the preliminary assessment and agrees with the finding of the Board that there is indeed the need for trial of the child as an adult. The child will then go out of the juvenile justice system, and the children's court will conduct their trial and pass a sentence. However, the court cannot still sentence the child to death or life imprisonment. In case it does not see the need to try the child as an adult, it will conduct an inquiry and dispose of the case following the same procedure as that of the Board.

The Juvenile Justice Board in practice

The provisions relating to the Board are quite elaborate and could be said to represent the core of a distinct juvenile justice system envisaged under the law. Predictably, the nature of the system to a great extent is shaped by how these actually work. In practice, there are several ways and varying degrees in which the Board derails from the course ideally set out for it, even to the extent that it has been characterised as 'a deficient, second-rate, marginalised criminal court' (Bajpai 2017 p. 572).

The literature suggests that the Board's composition has, *prima facie*, not realised its potential as it seems to have been let down, among other factors, by non-meritocratic selection of social workers. It is alleged that instead of picking qualified sociologists, psychologists and childcare specialists, state governments, which are the appointing authorities, choose candidates on 'political considerations' (Agrawal 2019). An NGO activist cited by the author argues that state governments tend to regard memberships of the Board as 'low-priority jobs' that can be handed out as favours to 'people who need to be gratified politically', such as party political actors or their allies (Agrawal 2019). Even where the Board has not been compromised by such 'political appointments', it is generally believed that judicial officers are not used to being overshadowed by social workers (Kumari 2004). There is evidence that the Boards in many cases are predominantly run by the magistrate and the social members are sidelined (Mukundan 2017; HAQ 2006).

The location and the physical ambience of the Board seem to vary both across and within states (Parackal and Panicker 2019). For example, some Boards may be housed in separate buildings near observation homes, and some may conduct proceedings from within court complexes. While some Boards hold their sittings in rooms that have all the trappings of an ordinary courtroom, there are others which seek to play down the likeness with a court by dispensing with witness boxes, raised platforms for members and similar (Parackal and Panicker 2019). However, Rickard (2008) observes that these outward changes do not significantly diminish the sense of formality and criminal suspicion that characterise the proceedings. She further claims that 'regardless of the location of the proceedings, the overwhelming feeling imposed on the child is that of intimidation and fear' (Rickard 2008 p. 157).

The bail provision also does not seem to work in the liberal and child-focused way that one might presume from a bare reading of the law. The deviation from the law starts with the police. The power of the police to grant bail to the child is, in theory, as extensive as that of the Board. Yet, it is reported that there is reluctance on the part of the police to release the child on bail presumably due to social pressure from the victim's side, media, etc. (UNICEF 2016). However, it is not clear from the literature whether this reluctance is perceived even in petty offences where the police should not ordinarily be apprehending children in the first place, and if yes, why. Again, when it comes to the Board, there is no reliable information on the number or percentage of

children who are able to obtain bail from it. One study indicates that while the Board does release the majority of children to their families, many are left in observation homes throughout the duration of the proceedings (Rickard 2008). Magistrates are said to be reluctant to grant bail when they are not confident that children will be present at future hearings (Rickard 2008). It is argued that the punishment-oriented mindset of judicial magistrates poses a difficulty in children accused of committing a heinous offence being granted bail (Kumari 2015). Another study offers a more disturbing assessment suggesting that detention is a norm: "All too often, children are taken into custody and held indefinitely" (HAQ 2020 p. 5).

Contrary to the ideal enshrined in the law, the general picture emerging from the literature is that the Board's proceedings broadly resemble an adversarial trial (Parackal and Panicker 2019). A prosecutor representing the case brought by the state against the child is an integral part of the adjudication process. If the child or their parents are unable to afford a lawyer for their defence, the Board has the responsibility to provide them free legal representation. One study suggests that the focus in the Board proceedings remains on questioning the child, recording their statement, ascertaining evidence, understanding arguments of both sides and passing judgement (HAQ 2020). Further, the study reveals that, not unlike an ordinary court, the Board functions under a lot of pressure to reduce pendency of cases (HAQ 2020). In these circumstances, the view is that the Board, in general, devotes little time or effort to ensure that the social investigation report and the individual care plan are prepared and used meaningfully for the child's rehabilitation (HAQ 2020).

As regards the kinds of dispositional orders passed by the Board, the NCRB figures reveal that institutionalisation remains a frequently used option. Table 2.2 below presents the breakup of dispositional orders made by all the Boards in the country in 2018. Two thirds of cases ended with a disposition of 'released', or 'sent home after advice and admonition', or 'acquitted or discharged'. Nevertheless, a quarter of children were sent to special homes for custodial detention. Other options such as counselling, probation, and community service either seemed to have been disregarded or not captured in the data. The level of institutionalisation appears to be much higher than would have been the case had the use of institutions actually been a measure of last resort. Moreover, the official figures do not help in understanding the full extent of the use of detention because they do not throw any light on the period of detention the child undergoes in observation homes prior to the passing of the dispositional order. Processing delays or denial of bail in effect

means that children, regardless of guilt or innocence, spend up to months locked up in observation homes (Rickard 2008; Vesvikar and Sharma 2016). Therefore, without considering pre-trial and under-trial detention of children, which might be called the 'dark figure of detention' since not included in the data, any analysis of the extent of the use of institutionalisation in juvenile justice will be incomplete.

Table 2.2 Dispositional orders passed by the Juvenile Justice Boards in 2018

Type of dispositional orders	Number of dispositional orders passed	Percentage of total dispositional orders
Released as offences uncommitted, quashed, etc.	5144	15.1
Sent home after advice or admonition	13987	41.1
Sent to Special Home or Fit Facility	8660	25.5
Fined	2393	7
Acquitted or discharged	3810	11.2
Total dispositional orders	33994	100

(Source: NCRB)

The considerable use of institutionalisation is perceived as evidence that juvenile justice continues to operate on the conventional principles of detention and punishment associated with adult criminal justice (HAQ 2020). The waiver provision is thought to have further blurred the boundary between the two systems (Pillai and Upadhyay 2017). The idea of the waiver provision seems to have come from the example of judicial waiver existing in the United States (MWCD 2019). However, the waiver provision incorporated in the 2015 Act may still be interpreted as a watered-down version as it excludes some of the features usually associated with the US models, for example, automatic/blanket/mandatory waiver and prosecutorial discretion. Those in favour of the waiver provision highlight the preliminary assessment by the Board, the reassessment by the children's court and the option to appeal against their orders as important 'checks and counter checks' available under the law to protect the child against its misuse (Phansalkar-Joshi 2020 p.

103). Further, it is asserted that implementation of the provision so far indicates that it has been used sparingly (Phansalkar-Joshi 2020).

However, critics of the provision do not deem the attenuation of waiver sufficient to guard against the risk of arbitrary decisions inherent in it (Kumari 2017; Pillai and Upadhyay 2017). In the absence of a feasible or scientifically accurate method to evaluate whether the child who committed a heinous offence had the maturity of an adult, it is argued that cases of children are liable to be transferred arbitrarily for trial as adults (Ganguly and Ali 2020). The authors point out that although official data on the transfer provision is not available, 'anecdotal evidence collected shows that most JJBs find it easier to simply transfer 16–18-year-olds who have committed serious offences into the adult system' (Ganguly and Ali 2020 p. 155).

The waiver provision is clearly contentious. If convicted by the children's court, children face life-long disqualifications attached to the conviction and a greater risk of being labelled as criminals for offences they committed before the age of 18. Considering India's juvenile justice law until the introduction of the 2015 Act, critics may be justified in focusing on the retrograde nature of the waiver provision. That said, it does not affect children under 16 at all, nor a substantial section of those above 16 but under 18. So, it seems a bit hyperbolic to pronounce that the waiver provision has destroyed in 'one fell swoop' the reformative fabric of juvenile justice (Mehta 2014). Moreover, to claim that juvenile justice had been all about reformation and rehabilitation until the introduction of the waiver provision is to deny some of the realities of juvenile justice.

Childcare institutions: Law and practice

The law provides for three kinds of institutions for the 'care and protection' of children involved in offending: observation homes, special homes and places of safety. The rationale behind this scheme is to segregate children on the basis of age and the status of their enquiry. Observation homes are for the stay of children who have not been released on bail during adjudication. Upon being found to have committed an offence, children can be sent by the Board to special homes that are intended to be homes for rehabilitation post-adjudication. Places of safety have been devised to separate younger children from more mature ones, or those who cease to be children during the enquiry process. These institutions are meant for children/persons who are between the age of 16 and 21 whether during the pendency of their enquiry or after sentencing.

Although improvements in the living conditions of children in institutions have been made over the years, the overall reality is quite sobering (Supreme Court 2018; HAQ 2020). A recent study has found that only a few states have even established the mandatory number of institutions in every district (Parackal and Panicker 2019). The general impression provided by the literature is that homes suffer from a severe lack of facilities and infrastructure. An NGO's study reported that "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" (Shastri and Thukral 2009 p. 52).

It is pointed out that the nature and conditions of institutions undermine the stated purpose of their existence (Vesvikar and Sharma 2016). In several cases, they are seen as *prima facie* closed and penal in character, and bearing a strong resemblance to adult prisons (Parackal and Panicker 2019). According to Sharma (2013), there is a stigma attached with being held in a juvenile facility which hampers rehabilitation and social reintegration. Children are known to routinely refer to juvenile homes as 'jails' (Tripathi 2021). In police circles, '*bachhon ka jail*' (jail for children) is common parlance. Cases of abuse, torture, exploitation and ill treatment of juveniles at the hands of those entrusted with the responsibility of their training, treatment and education frequently surface and shine a light on the state of juvenile justice (Agrawal 2019; Shastri and Thukral 2009). Reports of poor living conditions and violence against children in homes have prompted their description as 'hell holes' and 'homes of horror' at the same time (Asian Centre for Human Rights 2013; Raza 2015).

Conclusion: Towards Conceptualising the Juvenile Justice System in India

Through the literature review in this chapter, I have attempted to offer 'a grand tour' of the history of juvenile justice in India as well as an up-close look at contemporary law and practice. The historical account shows the gradual, contingent and contested nature of policy development which has taken place within a particular social and political context. While on the surface it might seem like everything has changed since the first pieces of 'juvenile justice' legislation emerged in the late 19th and early 20th centuries, closer scrutiny reveals significant continuities from one law to the next. For example, the Juvenile Justice Act 1986 Act was described as 'a virtual re-enactment' of the preceding law, the Children Act 1960 (Kumari 2004 p. 133). Similarly, the 2015 Act, except

for the waiver provision, may be interpreted to be largely the outcome of repairing and reassembling of the 2000 Act, as will be clearer from Chapter 5.

Significantly, these and other policymaking developments noted in the current chapter seem to reflect considerable emphasis placed on getting the law right in respect of its mechanisms, technicalities and semantics. But whilst legislative efforts are undoubtedly important, they do not alone suffice to ascertain the degree of 'progress', or reversal of 'progress', in juvenile justice. When delinked from practice, such progress or regression may appear more momentous than it actually is, as this chapter has demonstrated. Relatedly, it seems to have been easier for the government to effect legislative change, and for the Supreme Court to have influenced such change, than it has been for either of them to deliver actual change towards an improved, child-friendly system of justice. Practice in juvenile justice has proved to be far more tenacious than law.

The existing literature on operations of the three key areas in juvenile justice, namely, the police, the Board and childcare institutions, indicates a wide gap between what the system proclaims to be its purpose and how it actually deals with children. As Tripathi (2021) says, "The law reads 'care and protection', but practises punishment and indifference." Criminal justice terms such as arrest, investigation, trial, sentencing and imprisonment have been substituted with 'politically correct' phrases, but with seemingly little or only marginal mitigation of the impact of these processes on the child. This situation is aptly captured by the expression 'semantic mystification' which has been used to describe a typical attempt to camouflage the real experiences of the child with criminal justice by euphemisms (Cappelaere 2005). The police and the Board are usually said to function in punitive and adversarial ways that have been longstanding features of adult criminal justice. The idea of custodial institutions as mechanisms for the delivery of protective, rehabilitative and reformative services envisaged for children has also been known to generally break down in practice (Agrawal 2019).

In the end, this literature review draws attention to two critical ideas relevant to understanding the nature of juvenile justice in India. One, in practice juvenile justice is not nearly as distinctive as is often supposed or presented. Notably, it does not have its own specialised cadres of core functionaries like magistrates, police officers, probation officers and public prosecutors, but rather draws them from the adult criminal justice system on relatively short tenures. The police, in particular, have multiple duties and seldom exclusively deal with cases of children (Tripathi

2021). It may be argued that the boundary between juvenile justice and adult criminal justice in other countries happens to be porous too (see, for example, Morgan and Newburn (2012) on youth justice in England and Wales) and that a rigid separation between the two is perhaps not feasible. However, the point in the Indian context is that adult criminal justice influences seem to loom over juvenile justice in ways that threaten to undercut the latter.

Two, the discussion and analysis in this chapter calls into question the conventional portrayal of India's juvenile justice as welfarist. Winterdyk (2015), in his six-fold typology of models of juvenile justice, places India along with Scotland and a few other countries under 'the welfare model'. Undoubtedly, like all ideal types, juvenile justice typologies come with a 'health warning' (Dignan n.d.). They are best understood as devices that set out to 'capture' some important distinctions between a number of different approaches to dealing with children in trouble with the law. In practice, in no country can juvenile justice be said to correspond exclusively to any one model. It has been argued, and rightly so, that juvenile justice in India, like elsewhere, combines features from not just the welfare model but also from 'justice' and other models (Kumari 2004). Yet, this is not precisely the point here. The suggestion that 'welfare' might somehow be the dominant element among a combination of different elements in Indian juvenile justice so that it may be held up as an exemplar of the welfare model seems to do violence to both the model and the realities of the Indian situation. At least in official terms, much about the system speaks to what might broadly be characterised as 'penal welfarism'. But this is mitigated by 'justice'-oriented features, including high levels of institutionalisation, which are deeply entrenched in it. Thus, the 'welfare model' might not be a good fit given the dominance of punitive characteristics often seen in the system.

Moving forward

The historical mapping and analysis of juvenile justice law and practice based on the extant literature has yielded immensely useful information on the subject. But it has also left three main questions essential to moving forward in my research largely unaddressed. First, the bulk of prior studies have relied mainly on legislation, policy documents and court judgments. I was not able to find any rigorous study undertaken in the form of qualitative research which could provide an in-depth analysis of the world views of key policymakers, practitioners and implementers about policy and practice in juvenile justice. This knowledge gap needs to be filled in order to develop a

deeper understanding of the actual workings of the system. Second, the existing studies have mostly concluded that the current system is marked by serious 'implementation gaps' between law/policy and actual practice. This no doubt contributes to how the system might be conceptualised. However, the literature on the problem of implementation is often neither connected to the detail of context nor to key actors' perspective on it. In the absence of these vital elements, it may not become fully clear what the gaps are and what they signify other than simply a failure of implementation.

Third, another limitation of the literature is that it tends to assume a clear distinction between 'policy' and 'implementation'. Adopting a legalistic and top-down approach, juvenile justice policy is generally presented as authoritative 'inputs' into the system, whereas implementation is regarded as a technical process/exercise to execute policy into 'outputs' in practice. This 'input-output' view (recalling David Easton's (1957) input-output model in policy sciences) fails to acknowledge empirical evidence that implementers and street-level workers may give multiple meanings and interpretations to law/policy even where its mandate is explicit (Lipsky 1980). Not completely distinct from policymaking then, implementation/practice may appropriately be understood as a social and political process in which the power, interests, values, and beliefs key actors have are central. For instance, their perceptions of the child's offending behaviour and what the purpose and aims of intervention are has the potential to hamper or aid juvenile justice policy and practice.

Little attention has been paid to the foregoing issues in the available literature. In later chapters, I attempt to address them as part of an empirical investigation into the prospect of restorative juvenile justice. But before that can be done, it is necessary to become familiar with RJ, policy transfer and the referral order in England and Wales—three other bodies of literature on which this project rests.

Chapter 3

Restorative Justice, Policy Transfer and the Referral Order

A central question I have explored in this study is the prospect of restorative justice as a vehicle for reform in Indian juvenile justice. An important context to this is the growing popularity and visibility of RJ as an 'alternative' approach to criminal justice in recent decades in other jurisdictions, especially in the West. RJ has appealed to policymakers and practitioners particularly in the realm of youth justice (Johnstone 2003). Viewed as offering constructive ways of responding to youth offending, restorative programmes have spread rapidly to several countries and become indispensable to debates about reform of youth justice policy and practice. Their increased prevalence seemingly indicates the presence of policy transfer (Cunneen 2010). In England and Wales, one of the most significant examples of RJ is to be found in the youth justice arena in the form of referral orders (Earle and Newburn 2001). This study focuses on the referral order to empirically assess its potential as a source of policy learning for juvenile justice in India. As such, that implies a form of (prospective) policy transfer.

The chapter aims to provide an understanding of the meanings and significance of the relevant concepts, and, just as crucially, their limitations. In the first two sections, I discuss the development of restorative justice, the main forms in which it is practised, and how it may be defined concretely in the absence of a consensus on its definition. The third section critically examines the sharp distinction advocates tend to make between restorative justice and conventional criminal justice approaches based on the notions of retribution and rehabilitation. The fourth section situates my investigation regarding the prospect of policy learning from the referral order within the broader literature on policy transfer. This is followed by two sections that deal with the referral order, its restorative features, the evidence on its actual workings and its critiques. In conclusion, I draw out the main points of the chapter.

The Origins and Development of Restorative Justice

One common narrative about RJ is that it is not new. Advocates claim that the origins of restorative justice lie in indigenous justice practices, many of which pertain to non-Western cultures

(Braithwaite 1999; Blagg 1997). While elements of traditional justice have been used as exemplars in the RJ literature, it is acknowledged that RJ in its modern format has achieved widespread prominence only over the past four decades (Morris 2002; Daems 2019). From its modest beginnings largely in North America in the 1970s, RJ is considered to have 'morphed into a global justice metaphor for a kinder, gentler, more reasonable, hopeful and negotiated justice: a 'good' justice' (Daly 2004 p. 500). A short account of the historical background, intellectual origins and evolution of modern-day RJ will be helpful in exploring this phenomenon.

Since the 1970s, there has been an extensive critique of mainstream criminal justice in a number of countries. This was mainly on account of its excessively punitive nature and counterproductive effects, and formalities of the court-based systems that allowed little scope for participation by non-professionals (Cosemans and Parmentier 2014). Scholars, activists, practitioners and policy makers called for more innovative and informal criminal justice processes in which individuals—whether offenders or victims—have opportunities for direct participation to resolve disputes (O'Mahony and Doak 2017). Alternative ('new') justice forms, variably referred to as informal justice, community justice and alternative dispute resolution (ADR), came to be proposed with a view to seeking reform or replacement of 'older' ways of doing justice (Daly 2011). By the 1990s, RJ emerged as the frontrunner among such 'new justice' ideas and has since continued to be viewed as a persuasive alternative to the conventional criminal justice process in various parts of the world (Daly and Proietti-Scifoni 2011).

The remarkable rise of RJ in contemporary times has been nurtured by influential thinkers who have contributed to its innovative, if not entirely new, theoretical underpinnings. The term 'restorative justice' is itself a relatively recent construct. American psychologist Albert Eglash is believed to have been the first to use it in a series of articles in the late 1950s. Eglash defined RJ as a type of criminal justice based on the technique of 'creative restitution' in which an offender is required to make amends for an offence by undertaking an effortful, constructive act relevant to the damages done (1977 p. 91). He distinguished creative restitution from retributive and rehabilitative models. Similarly, Barnett (1977) put forth 'pure restitution' as an alternative to punishment which, he claimed, left the harm suffered by the victim unredressed. As per his proposal, reparations paid to the victim should constitute justice, not the conviction and punishment of the offender.

Along with the need felt to move crime victims to the centre of criminal justice, the discontent with the alienating and over-professionalised conditions of formal criminal justice proceedings provided another impetus for the development of RJ (Woolford and Ratner 2008). The Norwegian criminologist Nils Christie (1977) suggested that conflicts, like property, are something to be owned and used by individuals as opportunities for participating in tasks that are of immediate importance to them and their communities. Instead, he argued, in modern criminal trials conflicts have been 'stolen' from the parties directly involved and turned into the property of the state, or primarily lawyers. Christie outlined an alternative court procedure aimed at restoring the parties' rights to find a solution to their conflicts between themselves without dependence on professionals.

Apart from these and other ideas of RJ exponents at the foundation of contemporary RJ, there is a fairly well-known view that RJ theory has emerged from alternative practices of dispute resolution initiated at grassroots level (Zehr 1990; Ashworth 2002). RJ has been interpreted to be a practice-led approach (Ashworth 2002). The roots of the contemporary RJ 'movement' are conventionally traced to Canadian experiments with victim-offender mediation in Elmira, Ontario in 1974. The narrative goes that in a particular case where two young men had pleaded guilty to vandalising 22 properties, a Mennonite (a Christian sect) probation officer proposed to the judge that the offenders meet their victims (Zehr 1990). The judge agreed, and the offenders visited their victims and reached restitution agreements with them (Zehr 1990). This experimental initiative was replicated through the Mennonite community in other parts of Canada and the US leading to the development of several victim-offender mediation (VOM) programmes (Zehr 1990; Liebmann 2007).

Howard Zehr (1985; 1990), a Mennonite himself, was among the pioneers who popularised such practices. Using an evocative imagery of 'changing lenses' from photography, Zehr claimed that restorative justice offers a new way—a metaphorical lens—of looking at crime and justice which is radically different from, and morally superior to, a retributive justice 'lens'. He called for crime to be conceived as a violation of one person by another, rather than as an offence against the state. According to him, RJ responds to crime by promoting repair, restitution and reconciliation, instead of inflicting pain.

While Zehr's work focused on the victim-offender reconciliation programmes, since the early 1990s two significant practices emerged which were guided by a more community-based approach. One was family group conferences (FGCs) putatively informed by indigenous Maori justice practices, which were introduced by legislation in New Zealand's youth justice in 1989. FGCs are meetings held in relatively informal settings between an admitted offender, victim, and their supporters and other relevant participants facilitated by a youth justice coordinator. The aim is to collectively decide an appropriate response to the offence, encourage offender accountability, and make amends to the victim (Maxwell and Morris 2001).

Family group conferencing has proved to be particularly influential in the international restorative justice 'movement', shaping both practice and theory (Crawford and Newburn 2003). The New Zealand model has been adopted by a range of other criminal justice systems across North America, Europe and Australia (O'Mahony and Doak 2017). Police-led community conferencing that became popular in Australia—often called the 'Wagga Wagga model', after the small city in New South Wales where it originated in the early 1990s—was an important variant of the New Zealand FGCs. The 'Wagga Wagga model' was also strongly influenced by John Braithwaite's (1989) concept of reintegrative shaming. Braithwaite argued that disapproval of crime through shaming of the offender by their family and community is a powerful form of social control and that under certain circumstances it could be used positively, as a means of reintegration.

The second notable initiative was a series of different restorative circles that derive from aboriginal peacemaking practices in North America. Gathering in a circle to discuss important community issues is believed to have been a part of the ancient tradition of the Native American people (Pranis 2005). In line with rituals associated with this tradition, the circle process has a facilitator or 'keeper' and often uses a 'talking piece'—a symbolic object passed from person to person in the circle giving the holder permission to speak. One of the main forms of circles is a sentencing circle pioneered in Canada in 1992 (Zernova 2007). It involves concerned community members taking part in a discussion of why the offence occurred and what needs be done to meet the needs of the victim, hold the offender accountable and prevent similar incidents in the future (Zernova 2007). The judge then has the authority to pass a sentence based on what has been recommended by the circle. In contrast with a sentencing circle, which is part of the formal justice

system, there are a few variants that tend to operate outside it. A healing/talking circle, for instance, is intended to simply allow personal storytelling and expression of emotions in a ritualised, safe environment (Pranis 2005).

At the centre of all such conference-style, community-oriented practices is the idea that justice in any meaningful sense cannot take place unless there is a role in it for the community. The recognition of the community as a stakeholder in the justice process is closely linked with the preference among some RJ scholars for the kind of informal dispute settlement processes that were developed by premodern societies (Dignan 2005).

An important takeaway from the history of particular practices (VOM, FGC and circles) is that, by and large, they did not originally call themselves 'RJ'. Since the 1990s, when the term began to take hold in developed countries, such practices have increasingly become subsumed or sought to fit, in some ways, under the general title (Daly 2016). But partly for the same reason, while each and all such practices might be taken to be indicative of something linked with RJ, none, on their own, necessarily equal RJ. Conceptions of RJ are also associated with multiple theoretical perspectives, some of which I have briefly discussed. Thus, RJ seems to have developed as an amalgam of different and innovative practices, ideas and ideals.

Defining Restorative Justice

'Restorative justice' suggests a form of justice which is centred on the notion of restoration of those affected by crime. Yet, there is no settled definition of what restoration actually is, with the result that the impression of coherence the term gives is rather misleading (Daems 2004). McCold notes that "restorative justice has come to mean all things to all people" (2000 p. 358). RJ is described as 'a capacious concept' which has been applied not only to adult and juvenile criminal matters in the domestic criminal justice system, but also to disputes in other settings such as family, school, the workplace, macro-level social relationships and international affairs (Daly and Immarigeon 1994 p. 22; Dignan 2005). Within criminal justice itself, there is significant internal diversity in RJ interventions. In addition to taking various forms, such interventions may take place at different stages including pre-court (diversion), in conjunction with court proceedings, pre-sentencing, sentencing and post-sentencing with prisoners. While this extraordinary range contributes to the appeal of RJ, it also makes it hard to define in concise terms.

Advocates disagree over whether RJ ought to be defined in terms of a process, an outcome, a collection of values or principles or, indeed, a mixture of all of these (O'Mahony and Doak 2017). The process-based conception has been outlined and advocated by McCold (2000) under the label of the 'purist' model of RJ. It is considered 'pure' in the sense that it claims to include only elements of the restorative paradigm and exclude goals and methods of the punishment and treatment paradigms. McCold (2000) approves the definition offered by Tony Marshall (1999 p. 5), which is also perhaps the most commonly-accepted definition: "Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future."

Marshall's definition highlights two core elements of RJ, namely a stakeholder-centred process and a participatory and deliberative approach. Consistent with this definition, the purist model insists that for a programme to be legitimately called restorative, it must involve victims, offenders, their supporters and other members of the wider community in face-to-face meetings and put key decisions in their hands. It is also argued that the process should be voluntary with minimal or no use of coercion. As per the purist understanding, victim-offender mediation programmes, family group conferencing and sentencing and peace/healing circles satisfy the requirements of RJ.

Those who subscribe to the outcome-focused perspective have criticised the so-called pure model of RJ on the grounds that it is process-centric and makes no reference to the nature of outcomes that are intended (Dignan 2005). In contrast, they propose an outcome-oriented definition: 'restorative justice is every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime' (Bazemore and Walgrave 1999 p. 48). The basic contention is that no matter how empowering it might be for stakeholders in a crime to come together to discuss feelings and share information, if no effort to repair the harm occurs, RJ cannot be said to have taken place.

Proponents of the outcome-focused model agree that where stakeholders are willing to engage in a face-to-face meeting, restorative outcomes are best achieved through such a process (Bazemore and Walgrave 1999). However, in situations where voluntary reparation of harm is not possible in that way, the model requires judges to adjudicate upon offenders and order reparation. By including all practices that focus on 'repairing' the harm irrespective of whether they are based

on voluntary face-to-face meetings or not, the outcome-based model embraces a wide range of practices within the fold of RJ—hence also known as the 'maximalist' as opposed to the 'pure' model. Court-based sanctions, such as compensation orders or reparation orders for victims, and community service orders (as reparation to the wider community) are all described as restorative (Crawford and Newburn 2003).

Some scholars have attempted to resolve the tension between the process-oriented and the outcome-oriented understandings of RJ by combining the two. According to Dignan (2005), restorative practices share three core features: (i) the *goal* of putting right the harm caused by an offence, (ii) a balanced *focus* on the offender's personal accountability, and (iii) an inclusive and non-coercive decision-making *process* that encourages participation by key participants in determining responses to an offence. Dignan's proposition is that conceptualising RJ in terms of these three elements not only accommodates the full range of practices associated with a 'restorative justice' approach, but is also helpful in distinguishing them from other victim-focused initiatives which may be inconsistent with restorative justice values. Van Ness and Strong (2015) offer some guidance on what such values may be. They claim that RJ possesses four 'cornerpost values': (i) inclusion of all affected parties in restorative processes, (ii) an opportunity for the parties to meet and discuss the offence, harms and the appropriate responses, (iii) repairing the harm to the extent possible, and (iv) an opportunity for the parties to reintegrate into their communities. Importantly, these values encompass processes as well as outcomes.

Thus, both process-based and outcome-based conceptions seem crucial to grasping RJ. Yet, if for the sake of clarity, it was necessary to whittle RJ down to one indispensable feature, I would argue, drawing on Rossner and Bruce (2016), that meaningful participation and empowerment of the offender and the victim (and community) is at the core of what distinguishes RJ from other approaches. A reparative outcome may very well be achieved without involving any stakeholder in criminal justice proceedings in a way that is empowering for them. But to characterise such an outcome as RJ seems to be terminologically inaccurate, as the discussion on the central importance of the process has shown. It might also be misleading, if nothing else, for failing to acknowledge that reparative and restitutive measures are also available in conventional criminal justice.

Another key aspect that needs to be borne in mind in seeking conceptual accuracy around the term 'restorative justice' is that few interventions labelled as restorative are, in practice, fully

and truly consensual, inclusive, participatory, reparative and reintegrative. Programmes are likely to be different in their degree of commitment to restorative processes and outcomes/values. Some will apply both processes and values, others will apply only restorative processes, and still others only restorative values (Roche 2001). Further, it is not necessary that interventions assessed to be restorative in *intent* against a set of carefully designed criteria of processes and values will turn out to be just as restorative as they were intended to be (or, indeed, at all) in their *actual workings*. Due to such practical problems in applying the term to an intervention, it is correctly suggested that restorative justice should not be viewed in 'either/or' terms: either something is restorative justice or not (Zernova and Wright 2007). Rather, the question to be asked is how restorative an intervention is and in what ways (Roche 2001). In other words, it is perhaps best to think in terms of degrees of restorativeness, as McCold (2000) and Van Ness (2002) have proposed. On this view, programmes can be rated along a continuum of lesser to greater restorativeness, that is, minimally, moderately or fully restorative, based on their adherence to restorative processes and outcomes (Van Ness 2002).

It follows from the same reasoning that there are processes and outcomes which are not restorative at all. In principle, therefore, it ought to be possible to make a distinction between restorative and non-restorative practices. In fact, the portrayal of RJ as different from the aims, approaches and mechanisms associated with the existing criminal justice system has been central to its conceptualisation. But this claim needs to be examined, especially because most RJ programmes are implemented within conventional criminal justice.

Restorative Justice and Conventional Criminal Justice

Howard Zehr's initial writings, among others, were probably the most influential in popularising the depiction of restorative justice as a completely new paradigm that has little in common with the old paradigm of criminal justice (Dignan 2002). Zehr (1990) postulated that contemporary criminal justice is essentially a retributive model of justice whose bedrock is that offenders must be punished. Often in this kind of narrative, retributive justice and punishment are thought to be synonyms—'dirty words' that signify all the alleged failures of conventional criminal justice (Roche 2007). It is claimed that RJ does not involve imposing punishment, whether as a means of deterrence, denunciation or retribution (McCold 2000; Walgrave 1999).

The retributive-restorative duality, however, does not withstand reasoned analysis from two main angles. First, it fails to appreciate that a purely retributive criminal justice system hardly exists anywhere. Although conventional criminal justice systems pursue the goal of retributive punishment through prosecution, trial and adjudication, in most cases they also contain elements of welfare, rehabilitation and restitution. Examples of such elements include provisions for education, training and counselling of the offender, victim compensation and victim impact statements. It is, therefore, a distortion to characterise the whole set of practices and outcomes of conventional criminal justice as "retributive" or "retributive justice" (Daly 2016).

Second, even advocates who contrast RJ with punishment concede that offenders may experience restorative processes and outcomes as painful and burdensome (Walgrave 2003). In other words, it is not believed be a 'soft' option. In RJ, an offender may be confronted by their victim with the full details of how the crime harmed the victim, expected to take responsibility for their wrongful behaviour, and asked to do something to repair the harm, such as, to apologise, make reparation and attend a counselling programme. Regardless of how constructive these are intended to be, empirical evidence from multiple sources suggests that the offender may view them as daunting tasks imposed on them (Umbreit and Coates 1992; Schiff 1998). To this extent, it seems disingenuous to choose not to refer to the act of purposely putting an offender through restorative interventions known or likely to be painful for them as punishment (Johnstone 2002).

Some scholars (for example, Duff 2002; London 2011; Daly 2012) see RJ and punishment as compatible with each other, and quite rightly so. Daly suggests that punishment has a place in RJ because the moral imperative that an offender should pay for their wrong cannot be 'willed away or made to disappear' (2012 p. 368). To recognise this is not necessarily to undermine RJ practices. Rather, it is to approach punishment as a social phenomenon that has a multidimensional role, including one that is of practical and symbolic value, such as communicating 'what we (are supposed to) value' and 'how we should respond to certain acts' (Daems 2021 p. 96). From another perspective, a specific criticism of RJ writers has been that they tend to avoid the word 'punishment' when talking about 'holding offenders accountable', 'repairing the harm' and 'reintegrating offenders' even though 'punishment as an idea and practice is omnipresent, hovering' in all such measures (Daly 2012 p. 368). Calling out this euphemism in the advocacy

literature, Hudson (2003) points to the parallel with rehabilitation, which uses the term 'treatment' when what is imposed in the name of treatment is experienced as punishment by the offender.

In addition to drawing a sharp retributive-restorative contrast, some RJ advocates also seek to differentiate RJ from rehabilitation (see Bazemore 1996; Walgrave 1995; Zehr 1990). They describe the rehabilitation model as 'offender-focused and one-dimensional' which pays little attention to the needs of victims and victimised communities (Bazemore and Day 1996 p. 4). Rehabilitative justice is termed as identical to retributive justice in its underlying belief, allegedly, in imposing coercive measures on the offender (Walgrave 1995). On the other hand, it is claimed that RJ is three-dimensional in its agenda involving a balanced focus on the needs of offenders, victims and communities (Bazemore and O'Brien 2002). RJ is depicted as an effective alternative to the insularity and individualising tendencies of most treatment/rehabilitative mechanisms (Bazemore and O'Brien 2002). The opportunity for active involvement of victims, offenders and communities in the decision-making process in RJ is again said to set it apart from the traditional treatment model (Bazemore and Bell 2004).

Just as a part of RJ overlaps with retributive justice, it also shares similarities with rehabilitation programmes. The emphasis of RJ on repairing the harm and addressing the victim's need for restoration is considered to be intertwined with the promotion of offender rehabilitation and reintegration (Bazemore and Dooley 2001). Some scholars suggest that the idea of reintegration is grounded in a distinctive and, perhaps, stronger vision of rehabilitation of the offender—'a restorative model of rehabilitation' (Bazemore and O'Brien 2002). Here the expectation is that the offender will accept responsibility for their action, make reparation and be admitted back into the community with the support of members of that community. Apart from this affinity at the conceptual level, it is also pointed out that most of the practitioners tend to lean heavily toward pursuit of rehabilitative needs of the offender, at times treating the victim as an afterthought (Bazemore and O'Brien 2002).

Clearly, the sharp contrast some RJ advocates wish to draw between restorative justice and conventional criminal justice does not hold. RJ incorporates elements of retribution and rehabilitation, and, in my view, it is no poorer for this intermingling since the other two remain widely accepted goals of criminal justice. As Daly wisely says, a just and appropriate response to crime is hardly ever 'a singular thing' (2000 p. 45). Still, if RJ offered nothing else but a

repackaged form of retribution and rehabilitation, there would arguably be very little real necessity for it. But as the previous section has demonstrated, there are indeed elements and values associated with RJ which give it 'a unique restorative stamp' (Daly 2000 p. 35). Accordingly, when using the term 'RJ' in the remainder of the thesis, I hold two ideas in mind at the same time: first, it has features that are distinct enough to be separated from other approaches; and second, it also has aspects that are similar to punishment and rehabilitation.

Another issue that has received extensive attention in the literature, and which is of central concern to this study, is the use of RJ schemes in juvenile justice. Ever since the victim-offender reconciliation meeting involving two young offenders in Elmira, Ontario, Canada in 1974 became a prototype for such programmes elsewhere, the conventional wisdom has been that juvenile justice and RJ are a good fit for each other. This is borne out by the fact that the starting point for RJ in most countries has been their youth justice systems (Van Ness, Morris and Maxwell 2001). By one estimate, close to 100 countries utilise RJ in addressing crime, and in many of them juvenile justice is the primary area of its operation (Van Ness 2005).

The expansion of the idea of RJ is presumably underpinned, among other things, by a process whereby ideas, policies and practices travel beyond their places of origin. Scholars have studied the phenomenon of cross-jurisdictional policy movement over the years which has led to the development of 'policy transfer' and other cognate concepts and their considerable literatures. A specific issue under examination in my research is whether Indian juvenile justice could potentially draw any lessons from restorative youth justice-based referral order in England and Wales. The scope of the enquiry can be more clearly delineated with reference to some key aspects of the literature on policy transfer.

Policy Transfer and Lesson-drawing

The world of public policy is said to be getting smaller as policies of nation-states across a range of issues, including criminal justice, increasingly share common features (Evans 2019; Jones and Newburn 2019). Part of this policy convergence may occur unintentionally, for example, due to coincidence or harmonising effects of macro socio-economic forces, such as neoliberalism and advances in communications and technology associated with globalisation. At the same time, a great deal of convergence is ascribed to intentional processes, whether voluntary or coercive,

through which ideas, policies and programmes spread globally (Evans 2009). This latter type of agent-driven activity, which nevertheless may be conditioned by the same systemic globalising factors, is the subject matter of police transfer studies. Though much scholarly work in this field is concentrated on areas of public policy other than criminal justice, in recent years criminologists and socio-legal scholars have begun to pay greater attention to the role of policy transfer in informing and shaping domestic penal policymaking (Jones and Newburn 2019).

Dolowitz and Marsh (2000 p. 5) define policy transfer as "the process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system." A key concept related to policy transfer, which is of direct relevance to this study, is 'lesson drawing' or 'policy learning'. In fact, before the term 'policy transfer' gained currency in the 1990s, the process of drawing on foreign ideas and models as a means of improving national policy was referred to as 'lesson-drawing'. With policy transfer emerging as an overarching concept in some of the policy analysis literature, lesson drawing now tends to be treated less as a phenomenon by itself, and more as a mechanism of policy transfer (Jones and Newburn 2007; 2019). All the same, it is not uncommon to find policy transfer, lesson-drawing and policy learning being used interchangeably.

The lesson-drawing literature focuses upon specific programmes that a government may adopt from another government based on a political judgment about the desirability and practicability of implementing the same in its own context (Rose 1991). Lesson-drawing involves understanding under what circumstances and to what extent policies or practices effective in one place might work in another (Rose 1993). Giving his interpretation of how the idea of lesson-drawing emerges and the path it takes, Rose (1991) argues that policy-makers' dissatisfaction with the status quo provides the stimulus for change. National policymakers then look abroad to learn from how their counterparts elsewhere have responded to a similar problem. It is claimed that in their search for lessons, policymakers tend to be biased towards foreign sources they regard as cognitively proximate (Rose 1993). This notion of proximity may arise from a range of factors such as habits of mind, historical preference and shared language and culture.

Policy transfer and lesson-drawing offer useful frameworks for analysing action-oriented, intentional activity involving the movement of ideas and practices between states. There is

empirical evidence to show that self-conscious and purposive 'learning' has been an important mechanism of attempted policy transfer in some areas related to criminal justice (Jones and Newburn 2019). Policy innovations surrounding RJ across jurisdictions are regarded as successful examples of this phenomenon (Maxwell 2008).

Despite its significant contribution to policy analysis, the policy transfer literature has limitations. A major criticism is that much of the work is underpinned by overly rationalist assumptions about the actions of national policymakers which are hardly borne out in reality (Jones and Newburn 2007). Recognising this shortcoming, Dolowitz and Marsh (2000) suggest that in practice most instances of policy transfer lie along a continuum that runs from lesson-drawing (the rational and voluntary end) to direct imposition of a programme (the irrational and coercive end). But there is still the question about how much policy transfer actually occurs or is attempted. Research findings indicate that replication of concrete practices and policies are rare (Jones and Newburn 2021). Instead, the authors point out that policy ideas, symbols and rhetoric appear to travel more easily in criminal justice. Support for this view comes from the field of RJ itself where it is the idea of RJ that has proved to be most transferable (Cunneen 2010).

Another limitation of traditional policy transfer approaches is that they are focused almost exclusively on the study of policy transfer between developed countries (Evans 2019). And within that study, the bulk of the policy transfer relationship is presumed to involve political actors/state officials (Stone 1999). As a result, efforts to share knowledge, ideas and practices by actors such as non-official policy experts, scholars, NGOs and social movements often do not get sufficiently acknowledged. These actors, forming part of what are described as 'epistemic communities', not only have contacts cutting across institutional and geographic boundaries, but they also help create links between different levels of government (Rose 1993). Relatedly, less organised and more serendipitous processes of policy learning too seem to have received little attention so far. All that said, in more recent studies important exceptions to the preoccupation with formal, conventional sites of policy transfer have been noted (Stone, Porto de Oliveira and Pal 2020).

The fundamental concepts in the policy transfer literature and their limitations, drawn largely from political science, are relevant for my research in an obvious way. The idea of examining the referral order would not make much sense if policy learning and transfer was inconceivable. Yet, to be precise, this study is not about policy transfer itself. The focus of my

research is on considering the desirability of and possibilities for policy learning/transfer, rather than, say, explaining the processes and outcomes of efforts already made towards policy transfer. In this regard, two issues the research is particularly interested in exploring are: (i) what, if any, do actors find attractive in the referral order, and (ii) what might be expected to constrain or facilitate prospective policy learning? The *prospective* approach to policy transfer taken here stands in contrast with the *retrospective* nature of most of the studies in this field (Jones and Newburn 2019).

One feature of the prospective policy transfer research in this study, however, which some may find problematic is the North-to-South direction of the potential learning. Given the history of colonial and neocolonial imposition of laws and policies on nations of the global South, concerns about any policy transfer that appears to privilege a Northern source are understandable. Yet, I think that there are important factors that mitigate, if not neutralise, such concerns about this study. The first is that the study explores whether *Indian* policymakers and practitioners identify any elements of the referral order as worthy of emulation. The crucial thing to note is that it is *their* views on the referral order, rather than the referral order itself, which are being centred. Second, unlike in previous eras, cases of South-to-South, local-to-global and even South-to-North learning are becoming more common (Lewis 2017). As the global travel of ideas and practices begin to assume a multidirectional character, thinking in terms of the North-South binary in this field may not be helpful anymore. This is especially so in the case of RJ where some policies and practices to implement it in the global North are seen as heavily reliant on elements borrowed or coopted from indigenous communities in the global South (Tauri 2014).

Finally, in one sense it seems to matter little whether a policy has its origins in the North or the South as long as it is considered beneficial and it pays due respect to indigenous culture, practices and institutions. For the very process of transferring a policy to a contrasting socio-political context is likely to lead to its reinvention or transformation, not least because of adaptations that may be necessary for successful introduction. With a view to developing a more nuanced understanding of this process, some scholars in fact prefer using the term ‘policy translation’ to ‘policy transfer’ (Lendvai and Stubbs 2009). An idea central to policy translation is that a policy rarely exists as a ‘package’ that can be transplanted from one setting to another. The

referral order, which is the focus here as a model of restorative youth justice in order to explore prospective policy transfer, should be no exception to this.

The Referral Order in Youth Justice in England and Wales

The foundation of the current youth justice system in England and Wales was laid by the New Labour government when it passed the Crime and Disorder Act 1998 (CDA). One of the most significant reforms introduced by the CDA was restorative justice-influenced disposals such as reparation orders. A new law passed in 1999 represented a more radical attempt to incorporate elements of RJ into youth justice.

The referral order as a step towards restorative justice

The Youth Justice and Criminal Evidence Act 1999 introduced the referral order as a mandatory sentence (with a few exceptions) for 10–17-year-olds pleading guilty and convicted for the first time. The referral order (now provided for in the Sentencing Act 2020) was piloted in 11 areas across England and Wales between March 2000 and August 2001 before a national roll-out took place in April 2002 (Newburn et al. 2002).

In a referral order the court 'refers' the child to a youth offender panel (YOP) and requires them to attend meetings of the panel and enter into a contract with the panel to undertake rehabilitative activities for a period of between 3 and 12 months. A YOP is comprised of at least two trained members from the local community and a member of the youth offending team (YOT) who acts as an advisor (Home Office 2002). The YOT is a multi-agency team established by a local authority to work with children who have offended, alleged to have offended or, are at risk of offending. It is required to operate on the basis of inter-agency partnership and must include representatives from police, probation, social services, health and education. It has the responsibility of recruiting and training community panel members, administering panel meetings and implementing referral orders.

The declared aim of the referral order is 'to prevent young people offending and provide a restorative justice approach within a community context' (Ministry of Justice 2009, p.7). The community panel members are supposed to take the lead in the panel meeting and one of them will chair (Ministry of Justice 2009). If the young offender is under the age of 16, at least one

"appropriate person" (a parent or guardian, for example) is required to attend all panel meetings along with them. At the same time, the young offender is not allowed to have a lawyer to represent them at panel meetings (Youth Justice Board 2018). The stated rationale is that the young person should be encouraged to speak and take responsibility for themselves during the panel process.

In addition to those ordered by the court to attend, the panel may invite other stakeholders to attend its meetings. A central feature of the referral order is the intention that the victim's voice is heard, that they are in a position to ask questions and receive an explanation and any direct reparation. The victim is therefore invited to participate in the restorative process as per their wish and informed consent.

Contract

Panel meetings are required to be held at an informal venue in order to encourage the child to engage fully in discussion around their offending and take an active part in negotiating a contract (Youth Justice Board 2018). The terms of the contract, which constitute the sentence for the child, should include two core elements: (a) reparation to the victim or wider community and (b) a programme of interventions/activities with the aim of supporting the child towards living a safe and crime-free life. The programme may include one or more of a range of interventions, such as mediation, community service, school/work attendance and avoidance of specified places or people. By adhering to the contract during the period of the order (determined by the court based on the seriousness of the offence), the child is supposed to have made amends for the offence and served their sentence.

If the child refuses to participate in the referral process, or no contract can be agreed, or the child does not sign the contract, or the child does not comply with the terms of the contract to the panel's satisfaction, they will be referred back to the court. If the court considers the referral back to be justified, it has the power to revoke the referral order and resentence the child in any way in which they could have been sentenced for the offence had the referral order not applied.

Conditions necessary for the use of the referral order

There are two important conditions attached to the referral order. First, it is necessary for a young offender to plead guilty to be considered for the referral order. Second, the referral order is not

available where the offence is so serious that it warrants a custodial sentence, or where the sentence is fixed by law to be something other than a referral order.[14] Subject to these requirements, the power of a youth court or other magistrates' court to impose a referral order on a young offender is mandatory or discretionary depending on other conditions in relation to the offender and the offence. A youth court must impose a referral order on a person aged under 18 if they plead guilty to an offence punishable with imprisonment and they have never been convicted by a court.[15] Where compulsory referral conditions are not met but the child pleads guilty to an offence, the youth court has discretion to make a referral order.

The referral order is not a direct alternative to a custodial sentence. This is clear from the fact that an exception to the mandatory referral of young offenders concerns the possibility of a custodial sentence. In the sentencing tariff, the referral order falls between a custodial sentence and a fine. Yet in most cases where a child enters a guilty plea to an imprisonable offence and is before the court for sentence for the first time, the only practicable sentencing option will be a referral order or custody.

The Referral Order in Practice and Concerns About Restorative Justice

Though the referral order has now been in operation for more than 20 years, its evaluation in 11 pilot areas in 2000–01 undertaken on behalf of the Home Office (Newburn et al. 2002) remains the most comprehensive study on it to date. The evaluation report reached an overall favourable conclusion on the actual workings of the referral order. One of its findings was that the panels had 'established themselves as constructive, deliberative and participatory forums in which to address young people's offending behaviour' (Newburn et al. 2002 p. 62). It also found that the participants in the referral order process appeared both to support it in principle and to be broadly satisfied with the way in which it had been implemented in practice. Along with the largely encouraging findings of the initial evaluators and also of others subsequently (for example, Wilcox and Hoyle 2004; Shapland et al. 2006), there are a number of critical views on the referral order. Below I examine some of the main critical perspectives in order to get a fuller sense of the referral order and, more broadly, of RJ in practice.

[14] Section 84, Sentencing Act 2020.

[15] Section 85, Sentencing Act 2020.

First, the YOP's potential to be restorative has been called into question over low levels of victim involvement in the process (Haines and O'Mahony 2006). Newburn et al. (2002) noted that victims attended in only 13 per cent of cases. In a more recent study covering 39 panel meetings, Rosenblatt (2015a) found that only one of those included a participating victim. Without the victim, panel meetings lose the potential to be 'fully restorative' (McCold 2000). The lack of uptake among victims is known to be a problem common to RJ initiatives across the world (Dignan 2005).

Closely related to the issue of victim's absence is skepticism over whether the referral order takes care of their interests. The victim is neither a party to the contract between the YOP and the young offender, nor has a veto power over the terms of the contract (Crawford 2003). A recent inspection of referral order practice by HM Inspectorate of Probation (2016) indicates that most of the reparative activities recommended at the panel meeting involve undertaking community service rather than direct or indirect reparation that satisfies the victim's specific request. Rosenblatt's (2015b) study found that the referral order process tends to focus on rehabilitative measures for the young person at the expense of reparation for the victim, but which are often packaged as 'reparation'.

Second, some criticisms are centred around principles of due process and proportionality (Newburn et al. 2001). The denial of legal advice and representation to the child in the panel meeting is said to be in contravention of the CRC and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (Ball 2000; Goldson 2000). Concerns about proportionality extend to the possibility of YOPs producing contracts that are over-intensive with reference to the harm caused in minor offences (Crawford 2003; Smith 2003). Critics argue that the referral order simply deals with low level offenders for whom lenient disposals such as warning and fine would have been sufficient (Newburn et al. 2001; Smith 2003). The fear is that young people involved in cases where there is insufficient evidence to sustain a conviction following a trial may end up being convicted and sentenced to serve referral orders on the basis of their guilty pleas. Consequently, the referral order is presumed to carry the risk of bringing more young people at a higher point on the sentencing tariff into the remit of the criminal justice system (Muncie 2006)—a phenomenon referred to as net-widening (Cohen 1985).

A third criticism of the referral order is that its coercive and compulsory nature offends 'cherished restorative ideals of voluntariness' (Crawford and Newburn 2003 p. 239). Apparently, children are caught between a referral and the provision for their referral back to the court for re-sentencing on the failure to reach an agreement in the panel. For some critics, this raises the possibility of young people feeling forced into agreeing contracts to avoid being sent back to the court (O'Mahony and Doak 2017).

Fourth, doubt is cast on whether the referral order is suitable for children, especially those in the younger age bracket. Newbury found in his research that referral orders did not work for the very young offender in that they were 'complex, process-oriented and laden with language, and requirements for conference-style meetings, beyond the grasp of most 10, 11 or 12-year-olds' (2011 p. 97). This is notable and should be viewed in the context of an inherent power imbalance that is likely to exist between the offender and other participants, including the facilitator (Young and Goold 2003). The power imbalance can be exacerbated in a situation where the child, not to mention a much younger one, faces 'a room full of adults' Haines (1998, p. 99). Their limited developmental and cognitive capacities may make them particularly susceptible to unfair outcomes (Suzuki and Wood 2018). Having said that, one could argue that instead of demonstrating that conferencing may be unsuitable for children across the board, what these observations underline is the need to give attention to specific vulnerabilities related to children. It also seems evident that a one-size-fits-all strategy cannot be relied upon to address such difficulties.

Fifth, another critique is that although the referral order is presented as a community-based intervention, the introduction of the YOP has failed to bring about genuine inclusion of the community (Hoyle and Rosenblatt 2016). Rosenblatt's (2015a) research shows that panel meetings are usually held in the YOT premises as opposed to community venues. It is claimed that community panel members have normally never met the young offender before the panel meeting and are not members of the young person's community (Stahlkopf 2009). There is evidence that over-reliance on a core of more experienced panel members has created a new class of 'quasi-professionals' (Crawford 2000 p. 214; Rosenblatt 2015a). Further, research findings suggest that the form of reparation in the contract is picked from a 'set menu' of reparation activities based on the YOT member's recommendation (Rosenblatt 2015a p. 178). As such, it appears that administrative convenience takes precedence over reparation to the community. Rosenblatt

(2015a) draws the conclusion that despite the involvement of community members the referral order does not live up to the model of 'a restorative justice approach within a community context' (Ministry of Justice 2009 p. 7).

Criticisms of the referral order and shortcomings in its implementation discussed so far are all substantive. Yet, it may be argued that most of them could be addressed by adopting protective measures and good practices and that, as such, they do not controvert the underlying potential and legitimacy of the referral order. I want to conclude this discussion by drawing attention to one final perspective that harbours deep suspicions about restorative justice initiatives such as the referral order.

Restorative justice and neoliberal penality

Some scholars find the rise of RJ in the last quarter of the 21st century to be linked with the broader neoliberal penal trends (see Cunneen 2003; O'Malley 2006; Xenakis and Cheliotis 2019). It is claimed that neoliberal politico-economic strategies, epitomised by economic deregulation, the application of managerial and actuarial (relating to the prediction of risk) rationalities to social problems, and the retraction of the welfare state, have brought 'a neoliberal penal policy complex' into existence (Muncie 2005; Gray and Smith 2021). Under this penal framework, the focus of juvenile justice in Western-style democracies is said to have shifted from a welfare-aligned rehabilitative approach to a justice-oriented approach with an emphasis on deterrence and retribution (Cunneen 2012). Critics assert that restorative justice practices have been introduced as part of neoliberal crime control strategies, and their borderless appeal is to be understood in the context of the ascendancy of neoliberal politics in a globalised world order (Muncie 2005; Cunneen 2012). RJ is considered to be infused with the core tenets of neoliberal penality such as an emphasis on individual and community responsibility ('responsibilisation', to use Garland's (1996) term), managerial performance targets and risk reduction (Muncie 2005). Further, looking at RJ as aligned with more punitive processes of incapacitation, Cunneen and White (2007) argue that by being generally tied to minor offences at the soft end of the juvenile justice spectrum, restorative practices legitimise and reinforce the logic of the hard end of the system.

Much the same charges are levelled against the referral order. New Labour youth justice policy, of which the referral order was the flagship, pursued a 'law and order' and 'crime control'

agenda. Under the banner of preventing crime, the policy was underpinned by a diverse set of principles including responsibilisation, managerialism, risk management and an appeal to community engagement (Newburn 1998). The referral order/RJ is regarded by some scholars as fitting well with neoliberal and neoconservative rationalities of punishment in which the child's welfare and rights are not central (Goldson 2000; Pitts 2000).

It is indeed important to recognise neoliberalism as a vital factor shaping penal policies and practices in countries across the globe. Yet, one should be wary of attempts to explain criminal justice policies solely by reference to neoliberal politics. As more sophisticated views on penal developments suggest, neoliberalism can only ever be one amongst many influences on policy (Muncie 2005). Social democratic, welfare, humanitarian and other inclusionary values do not vanish with the emergence of neoliberalism, rather, conceivably, counter, contest or negotiate with neoliberal tendencies. In addition, there are inevitably a number of divergent national and local forces that mediate neoliberal pressures on penal policy in particular jurisdictions. Therefore, I agree with O'Malley (2006 p. 223) that RJ cannot simply be taken to be 'the creature of neoliberalism' having a singular identity. While RJ has the capacity to be deployed for punitive and exclusionary goals, this does not necessarily negate its reintegrative and constructive potential.

Concluding Comments

Restorative justice is a major development in contemporary criminal justice. Although there is a lack of consensus about its definition, scholars converge on conceiving it in two main ways. One, RJ is thought of as a relatively informal criminal justice process that provides an opportunity to the parties affected by the offence to be directly involved in the discussion of the offence and in the decision-making regarding an appropriate response/sanction. As against this process-centred viewpoint, the second conception focuses on outcomes that RJ aims to achieve, such as victim reparation, offender accountability and reintegration. For a well-rounded understanding, it is best to combine the two, and to develop an ideal type against which particular examples can be judged 'fully' 'mostly' or 'partly' restorative (McCold and Wachtel 2002). Thus, practices that fall short of the restorative ideal may still be 'restorative' to a lesser degree.

Having said that, if the term 'restorative justice' is to be meaningful, it should be capable of being distinguished from other types of 'justice'. But this does not require exaggerating the

differences between RJ and other approaches and playing down their similarities (Dignan 2005). Neither ought it involve making grandiose claims about healing and closure (see Acorn 2004), or as Daly (2002a p. 70) puts it, selling a "'nirvana' story of repair and goodwill". In my view, what truly marks RJ out among competing alternatives is a more informal process that empowers the key parties by giving them some control over how best to deal with the offence (Morris 2002). Such a process may not necessarily 'restore' or 'create justice', but it has a humanising potential that is all its own (Christie 2013).

RJ interventions usually take the forms of victim-offender mediation, family group conferencing, sentencing circle, healing circle and, less convincingly, court-based restitutive and reparative measures. These are typically concerned with the sentencing stage of the criminal justice process and, as such, have been adopted alongside conventional criminal justice. Within that, RJ has found its most prominent application in juvenile justice where it has proliferated worldwide. This can be seen as a potential example of policy transfer—the spread of ideas, policies and practices in criminal justice across jurisdictional and national boundaries.

Like RJ, the nature of policy transfer is also contested. Policy transfer analysts find it difficult to establish whether a lesson has been drawn or transfer has taken place (Evans 2019). Yet, the bulk of policy transfer research in criminal justice has been concentrated on assessing, retrospectively, the extent to which some form of policy transfer may have occurred (Jones and Newburn 2019). In addition, it has been preoccupied with studying policy transfer activity at the level of nation states located largely in the global North (Jones and Newburn 2019). In comparison to these predominant features of much existing work, my research is prospective in design. It explores whether key respondents in India consider any elements of the restorative justice-inspired referral order operational in England and Wales desirable and worth learning from in a particular local context.

The analyses of the relevant literatures in this chapter underpin the empirical chapters to follow in three fundamental ways. First, the question of what restorative justice stands for in the Indian context will be a recurring theme in the data collected from respondents. Having explained what I have in mind when I refer to RJ, I am in a position to examine their interpretations of RJ. Second, the part of my research concerned with prospective policy transfer is clearly informed by key findings of the existing policy transfer research. One finding in particular that provides overall

guidance is that transfer of policy initiatives lock, stock and barrel is rarely successfully achieved, or even attempted (Jones and Newburn 2007). Finally, the chapter demonstrates that there is much that is progressive and enlightened in the referral order. No less importantly, it underlines the need to problematise any attempt to integrate restorative justice ideas and values into juvenile justice practice. In the next chapter, I discuss the methods used in collecting and analysing the data in this study.

Chapter 4

Methodology

If social science research is interpreted as an intellectual craft, noted American sociologist C. Wright Mills wrote in *The Sociological Imagination*: "Without insight into the way the craft is carried on, the results of study are infirm; without a determination that study shall come to significant results, all method is meaningless pretense" (1959 p. 121). His observation is as relevant today as when he wrote it. Its essence is that no end of methodological sophistication can make up for the lack of a sensible, socially relevant research question. Results, of course, must be achieved in careful and systematic ways if they are to be sound enough to address the research problem. Not only this, but it is also incumbent on the researcher to give a full account of the research process—how they actually conducted their study—so that the reader has the information necessary to assess the rigour of the study and, therefore, the claims that are made.

This chapter offers a discussion of the particular set of tools, techniques and procedures, in short, methods, which I have used to obtain and analyse data and answer the research questions. In addition, it contains a reflection on the justification and limitations of the methods. An analysis of methods is referred to as methodology—a term that is usually taken to encompass all facets of how the research project does or should proceed, including methods and the reasoning behind them (Mayan 2009). By setting out the activities and tasks undertaken in the research process, as also difficulties and challenges negotiated, the chapter aims to demonstrate the robustness of research methodology employed in this study.

I will begin by explaining the choice of a qualitative research design, the make-up of respondents and the method used for collecting data. I will then discuss how I planned the fieldwork, from deciding on Delhi as the research site to recruiting a diverse sample of key informants and practitioners. Next, I provide a description of the manner in which interviews were conducted including the reflexivity practised in the process. I finish the chapter by outlining the methods deployed in analysing the data.

The Research Design

The overarching aim of my research is to explore the prospect of RJ-influenced interventions in response to offences committed by children in India. This necessitates in-depth understandings of two interrelated issues. First is a grasp of perceptions and attitudes of key actors who shape or influence juvenile justice policy and practice about RJ in terms of its potential to effect reform, and whether introducing it is desirable and practicable. Second, in order to empirically investigate this, I did not think it was sufficient to seek views and opinions of influential players on RJ only at a conceptual level. The practice of RJ, tricky as it often is to be pinned down, also needed to be made accessible to them with the help of a working model. An equally critical dimension is that the adoption of RJ policies and practices in several countries, as we saw in the literature review, is often believed to be influenced by policy learning/transfer. In this study, the referral order operating in England and Wales served as an illustrative and interesting example of restorative youth justice in practice as well as a potential source of policy learning. The idea was to understand whether key actors considered it might be useful to learn from any features of the referral order.

The rationale behind choosing a qualitative methodology

It became clear to me as the research problems took shape that they could best be investigated with an approach that allows entering the area of study (or the 'field') with an 'open mind' regarding discovering and analysing relevant facts. Openness towards the matter under study is a characteristic feature of qualitative research (Flick et al. 2004). Braun and Clarke (2013) argue that the purpose of qualitative research is to understand or explore meaning and the ways people make meaning, rather than to prove or disprove a theory. While this study examines the theory of RJ in the particular context of juvenile justice in India, it does not propose any hypotheses to be tested empirically. Instead, finding out what meanings and significance were attached by key actors to RJ as an idea of reform, and developing an understanding of implications their attitudes and perspectives have on the prospect of RJ in dealing with child offenders is the core of the research. Both the research questions and the research design I formulated naturally inclined toward a qualitative approach.

Further, the questions under investigation were likely to encounter a range of insightful responses with a considerable scope for variability of meaning which could hardly be captured or

explained in the form of fixed-choice attitudinal answers. I required an approach that would enable me to pay close attention to the context and listen in detail to the people who hold the key to the answers I was searching for. A major feature of qualitative methods is their facility for contextual research. It offers the opportunity to unpack issues and explore how they are understood by those connected with them (Ritchie and Ormston 2014). This is precisely the goal of my research, and a qualitative methodology was an ideal match for it.

Another important condition necessitating use of qualitative enquiry arises when information is being collected from individuals who have a singular or specialised role in society (Ritchie and Ormston 2014), as was the case in this study.

Identifying key informants and practitioners

Key informants are expert sources of information. Due to their personal skills, professional experience or position within a society, they can provide more information and a deeper insight into matters relevant to the subject of research than ordinary informants (Marshall 1996; Payne and Payne 2004). Policymakers or those who influence policymaking definitely come in the category of key informants. Practitioners are also key informants in the sense that they are an essential part of a field of activity and are richly endowed with domain knowledge. I have used the term 'practitioners' to refer to individuals performing different functions in the Indian juvenile justice system. Practitioners have an insider's view of the system. From that vantage point, they can give insights into the innermost recesses of the system and its culture which may be inaccessible to others.

My criterion for defining key informants in this study was that they should be those who make or influence juvenile justice policy. Of course, there was no ready list of such policymakers available which I could refer to. 'Policymaker' is a broad term that covers multiple, diverse policy actors both within and outside government. Also, the process of policymaking, as scholars of public policy remind us, is often characterised by complexity, non-linearity and 'muddling through' (Lindblom 1959; Turnbull 2018). Khan and Unnithan (1984) argued that criminal justice policy in India was made more through situational compulsions and incidental means and less through formal planning and standard procedures of internal consultation. It follows that the identity of relevant players and the extent of power they wield on the process may not be easily

determinable, at least not precisely. While valuing these qualifications, I was able to settle on groups of individuals that could be categorised as policymakers for the purposes of this study.

Given the institutional settings (outlined in Chapter 1) in which the juvenile justice system is embedded, there was little doubt that politicians, bureaucrats and judges of the Supreme Court and High Courts have a direct or indirect role in deciding the course of juvenile justice policy. Next, the Indian news media industry has a strong effect on public opinion and debates around criminal justice policy through its round-the-clock—often overzealous—coverage of crime and responses to crime (Law Commission of India 2006). Estimated to be one of the largest in the world, the country's news media landscape is dominated by 392 news channels and over 100,000 newspapers (Reuters Institute 2021). These are linguistically diverse and mostly privately-owned. Another non-state actor whose role is important in policymaking are NGOs. As I will discuss in greater detail in Chapter 8, NGOs contribute to policymaking and implementation processes and seek to put issues on the policy agenda (agenda-setting) through their advocacy work. And, crucially, they attempt to force policy changes by pushing for court's intervention in cases where there appears to be no political will to act. Thus, I considered politicians, bureaucrats, judges, journalists and NGO representatives to be the key informants.

Identifying practitioners within the juvenile justice system who were critical to data collection was a straightforward exercise in comparison. Those I found of most interest were Principal Magistrates and members of Juvenile Justice Boards, police/special juvenile police unit officers, superintendents and staff of childcare institutions, public prosecutors, defence counsel and probation officers. Each of them performed specific roles under the juvenile justice law. They were advantageously placed to give informed opinions on the reform requirements of juvenile justice and on whether adopting a restorative justice approach might help in some ways. Their views were also vital for exploring barriers and facilitators to prospective policy learning from the referral order in England and Wales.

In sum, my assessment was that the key informants and practitioners mentioned above had 'a disproportionate weight and role' in the conduct and outcome of this research (Bloor and Wood

2006 p. 110). Information about their beliefs, attitudes and perceptions regarding the issues under study promised to give me data most appropriate to addressing them.

The method of data collection

As to the best method of obtaining information in this context, the choice for me was simple. For any qualitative researcher interested in seeking answers to questions by going out and asking people directly about their points of view, in-depth interviews are regarded as a powerful method (Yeo et al. 2014). At the heart of interviewing research is the idea that perspectives of those who have knowledge of or experience with the problem of interest deserve our serious consideration (Seidman 2006; Rubin and Rubin 2012). Significantly, key informants typically provide information through interviews (Fetterman 2008). Interviews are also considered to be a more efficient means of obtaining rich insights into elites' opinions, values and attitudes than other methods such as questionnaires and focus groups (Harvey 2010). Therefore, interviewing key informants and practitioners was the most suitable method of data collection for me.

Furthermore, the participants in my research possessed a complex stock of knowledge which was more likely to be expressed in an openly designed interview situation. The semi-structured face-to-face format of interview is open enough to take advantage of knowledge-producing potentials of dialogues and structured enough to enable the interviewer to focus the conversation on issues that they deem important in relation to the research project (Brinkmann 2013). It allows scope for new, unexpected and surprising things to be said. It also lets responses be probed in greater detail. Taking these into account, the interviews I conducted were based on the semi-structured format.

Before I come to the actual conduct of the interviews, I need to put it in context by describing the work undertaken to prepare for them.

In Preparation for the Fieldwork

It was obviously necessary that in-person interviews for this research were carried out in India. I must add here that the data collection phase took place at a time when the world had not been impacted by the Covid-19 pandemic. As travel and close contact with people went on normally, less ideal (virtual) options for doing interviews did not engage my attention. The focus at the preparatory stage was on selecting the fieldwork site as well as sampling and recruiting key informants and practitioners.

A basic question arose as to whether I should undertake fieldwork at more than one site. In a country of India's size and diversity, juvenile justice issues and their governance in local jurisdictions may vary with changes in specific contexts both across and within states. It was possible then that, owing to such variations, views of key informants and practitioners at one location concerning matters under investigation might not always be entirely pertinent to other locations. A multiple-site study could provide insights into similarities and peculiarities in attitudes and perceptions of central actors pertaining to a larger swathe of the country. However, in view of the limitations of time and funds associated with the doctoral study, fieldwork at several sites did not seem feasible.

Alongside these constraints, an equally important consideration was that fieldwork focused on a single site, if done well, could conceivably serve the aim of the research to the full. My judgment was based on the following three points. First, the sheer lack of empirical work to understand RJ and analyse its prospects in the context of juvenile justice in India meant that the potential of such a study to fill the critical gap in knowledge did not rely as much on the number of fieldwork sites as it did on the quality of data collected and the quality of analysis. Second, and relatedly, crucial to the aim of this qualitative study was a diversity of perspectives (Braun and Clarke 2013) which could be achieved through a carefully selected sample of respondents even at one research site. Finally, the juvenile justice law is the same for the whole of India. To that extent, it was likely that data collected from one site would be found relatable to various other sites.

Overall, the balance of considerations favoured fieldwork at a single site on the assumption that it was possible to collect high quality data from such an exercise. After reflecting on the suitability of a site and the practicality of gaining access to key actors, I chose Delhi to conduct fieldwork in.

Delhi: The research site

Delhi is a bustling city which contains India's capital, New Delhi. The city stands out for its dual identity: it is not only the centre of the powerful national (also called union or federal) government, but also the seat of the state government, officially known as the Government of National Capital Territory of Delhi. As a result, three tiers of government—central, state and local—together with their respective legislative, judicial and executive branches are uniquely concentrated in one metropolis. The disproportionately influential position of the city extends to sectors outside the government. In particular, the national capital is proclaimed as 'the media hub of India' (Agrawal 2013 p. 76) and news media outlets operating from there are often viewed as 'the national media'. Delhi is also home to numerous NGOs working on a wide variety of issues including children's rights and juvenile justice.

The city's socio-demographic characteristics and, more to the point, its weighty impact on matters of juvenile justice nationally makes it a particularly fascinating 'laboratory' for this research. According to the latest available data, Delhi had a population of 16.78 million in 2011, around 37 per cent of which was under the age of 19 (Census of India 2011). Its population represents a microcosm of India's diversity—and also its disparity. A multitude of people pour into the city from all parts of the country looking for employment and education opportunities (Economic Survey of Delhi 2020-21). The magnetic appeal of Delhi, however, is perceived to exist side by side with an exclusionary culture that seeks to keep the poor and migrants at social and spatial margins (Dupont 2011; Govinda 2013). The marginalised often tend to be portrayed in political, media and police circles as being responsible for an increase in violent crime in the city (Govinda 2020; Hindustan Times 2019). So, interestingly, even as the presence of large numbers of poor migrants has earned Delhi the distinction of being 'the migrant capital' (Times of India

2018), the same people are blamed for making it India's so-called 'crime capital' (Ghosh 2020). Crimes committed by children have increasingly been at the centre of this narrative.

The recorded juvenile crime figures in Delhi for 2019 was the highest of all the metropolitan cities in the country (NCRB 2020). The city alone accounted for 8.6 per cent of the total number of recorded juvenile crimes in the country in that year (NCRB 2020). Anecdotal evidence I had collected in my interactions with some juvenile justice functionaries prior to the fieldwork suggested that the high incidence of offences by children was a key factor, along with the profile of the city as the capital, behind juvenile justice issues receiving more attention in Delhi compared with other parts of the country. A related observation was that developments there, good or bad, influenced policy and practice in other states. A stark example of this in the recent past was of course the Delhi gangrape case of 2012 and its ramifications for the country's juvenile justice system (see Chapter 2).

On the whole, Delhi offered unmatched opportunities for fieldwork on the subject of this research. At the same time, I knew that obtaining access to the kind of informants I was looking to interview would be difficult. Those among them who had an exalted social and political standing (elites) were likely to be especially challenging to approach. But on the upside, I had had first-hand exposure to how Delhi worked. I had lived there as a student (a migrant to the city, I might add) and, later, had served at the NHRC in New Delhi for over six and a half years. I personally knew several judges, lawyers, bureaucrats, police officers, journalists and NGO representatives who could either be potential participants or were likely to know potential participants and put me in touch with them. Thus, I expected the cumulative experience and the network of relationships built over the years to stand me in good stead in recruiting participants for the research. This proved to be the clinching factor in my decision to choose Delhi as the research site.

Sampling and recruiting key informants and practitioners

I used purposive sampling to select participants who, by virtue of their work and position, had a significant role in collectively shaping juvenile justice policy and practice. This, as it is, ensured that my sample came from a diverse field of actors described earlier. In addition, I sought to

promote a plurality of perspectives within the pool of respondents by drawing politicians and journalists from political parties and media operations, respectively, which fell on different points along the normal right and left-wing spectrum. I also tried to secure a broad gender balance in the sample wherever possible.

The principal method of recruitment employed in this study was to approach potential respondents, provide them verbal and written information about the study, and invite them to join it. I reached out to them directly, largely through email, but also through phone calls, text messages and social media (Facebook and WhatsApp). In several cases, I did so on the back of reference made to them by those in my network of personal and professional contacts who knew them. Judging by the literature (see for example McDowell 1998; Odendahl and Shaw 2001), my reliance on such connections to gain access to senior officials and high-status individuals was par for the course. While access to most of the respondents turned out to be quite smooth, I found it difficult, as anticipated, to get all my first preferences among current or former ministers and sitting judges to sign up for the research despite making several attempts. As a way out, I expanded recruitment to a wider circle of these groups, namely, prominent party leaders and retired judges, without any notable consequence for data collection.

Among the target population of key informants, I was able to recruit six politicians from four different political parties: the Bharatiya Janata Party (BJP), the Indian National Congress (INC), the Aam Aadmi Party (AAP) and the Communist Party of India (Marxist-Leninist) (CPI-ML). Of the four, the BJP has been in power at the national level since 2014 and is considered to be a right-wing party, whereas the INC is a main opposition party which professes to be centre-left. The AAP, having a broadly centrist position, has been running the state government in Delhi since 2015. The CPI-ML occupies the far-left terrain of India's multi-party democracy. The politicians recruited from these parties included two former ministers who had handled the portfolio dealing with juveniles in the last 10-15 years. One had been in charge of the Ministry of Women and Child Development at the national level, and the other had headed its analogous department at the state level in Delhi.[16]

[16] Ministries at the state level are known as departments.

The group of government officials/bureaucrats in the sample comprised of Joint Secretary[17] who was assigned the responsibility of juvenile justice in the central government, their counterpart and other officers in the department concerned at the state government level, and functionaries belonging to four governmental bodies that work in the fields of child rights, human rights and child development. These are the National Commission for Protection of Child Rights (NCPCR), the Delhi Commission for Protection of Child Rights (DCPCR), the National Human Rights Commission (NHRC) and the National Institute of Public Cooperation and Child Development (NIPCCD)—all based in Delhi.

From the ranks of the serving and retired senior judiciary (district judges and above), nine respondents joined the study. These included four recently retired judges of the Supreme Court, one of whom had led the Supreme Court Juvenile Justice Committee. The sitting chairperson of the Juvenile Justice Committee of the Delhi High Court was also one of the interviewees (see Chapters 2 and 8 for the role of these committees). Next, as regards journalists, I drew cases from English and Hindi news media since the two have the widest reach. Senior columnists, specialist reporters and editors who had covered juvenile justice issues in print and electronic media constituted my sample of journalists. They were affiliated with different media organisations, namely, Hindustan Times, The Indian Express, The Times of India, The Wire, Aaj Tak and Times Now. Mindful of observations in media studies about the oligopolistic character of the news industry (Chadha 2017; Thakurta 2012), that is, the dominance of the market by a few big companies, I also drafted a noted freelance journalist into the sample.

Again, another group of key informants, NGO representatives, were enlisted to participate in the research from ten prominent NGOs working in the area of juvenile justice: Bachpan Bachao Andolan (BBA), Prayas, HAQ, Counsel to Secure Justice (CSJ),[18] Yuva Ekta Foundation,

[17] Joint Secretary (along with Special Secretary and Additional Secretary) is the second highest non-political executive rank behind Secretary in a ministry of the Government of India (Department of Personnel and Training 2007).

[18] Since its inception in 2012, CSJ claims to have provided 'direct legal and psychosocial support to more than 220 children during criminal proceedings in Delhi trial courts' (CSJ n.d.). I will discuss some activities of CSJ particularly relevant to this study in Chapter 8.

Childline India Foundation, Leher, Society for Promotion of Youth and Masses (SPYM), Ashiyana and Enfold India.[19, 20] The respondents were mainly founders, directors or members of the core team of the said NGOs. Rounding off the sample of key informants in this study were academics and experts who had deep, complex understandings of juvenile justice. It should be added here that I would have missed some of these individuals had it not been for snowball sampling, by which I mean suggestions made by persons interviewed on who else ought to be interviewed.

Coming to individuals whom I call practitioners, the justice system concerning children in conflict with the law in Delhi which is centred around six Juvenile Justice Boards and seven childcare institutions provided an ample source for such respondents. Besides roping in the practitioners I have mentioned earlier, I incorporated counsellors and a District Child Protection Officer into the sample since their roles (discussed in Chapter 7) appeared to be significant too.

In the end, I conducted 89 interviews during fieldwork in Delhi from 1 August 2019 to 30 January 2020. In order to have an adequate, yet manageable, number of respondents across all the groups of key informants and practitioners, I had intended to adhere to a minimum of 6 up to a maximum of 12 participants in each group while planning the study. As the table below shows, I achieved the minimum target in all except two groups where I felt that those interviewed had already served the purpose.

Interviewing Key Informants and Practitioners

Interviews were conducted in accordance with the guidance on research ethics laid down by the LSE. At the beginning of each interview, I explained its purpose to the participant, made them aware of how data collected from them would be used, and obtained their informed consent for involvement in the research process if they were happy to take part. This was done both verbally

[19] All these voluntary organisations describe themselves, in the main, as child rights organisations. Within that umbrella category, some prioritise working with 'children in conflict with the law' (for example, Prayas and CSJ), others focus more on 'children in need of care and protection' (for example, BBA). But few NGOs seem to draw a rigid line to separate the two areas of operation.

[20] Of these, Ashiyana and Enfold India are based outside Delhi, in Mumbai and Bengaluru, respectively. I reached out to them after some respondents from other NGOs specifically cited their practices as having the potential to be restorative for children.

and by providing them a detailed participant information sheet along with an informed consent form to read and sign.

Key informants	Number
Politicians/Ministers	6
Bureaucrats	10
Judges	9
Journalists	8
NGO representatives	13
Academics/experts	4
Practitioners	
Principal magistrates and social members of the Boards	12
Police officers/Special Juvenile Police Unit officers	8
Probation officers/welfare officers, counsellors, District Child Protection Officer	9
Prosecutors and legal aid counsels	7
Superintendents of Observation/Special Home/Place of Safety	3

Though it had been my intention to maintain anonymity across the whole data set, this was not feasible in relation to some respondents who could be indirectly identified from the specific positions they held in the juvenile justice system in Delhi; particularly so because removing all of their personal identifiers would have meant losing key aspects of the insights they offered. There were also a few others whose identities, in my opinion, required to be disclosed given that the salience of their evidence was inseparable from their high profiles. In both scenarios, I asked respondents whether they agreed to be identified in research outputs. All except two gave their written consent. Needless to say, I have completely anonymised the two who declined. Even where the assurance of anonymity was not a concern for respondents, I told them that I would rather that they were not identified and would anonymise their names and organisations and refer to them by codes as far as practicable.

The interviews took place mostly at the homes and workplaces of respondents depending on their convenience. The average duration of the interviews was about 50 minutes, with the shortest being of 21 minutes and the longest lasting for 2 hours 15 minutes. I audio recorded the interviews with the respondents' prior consent. Although I had a topic guide, it did not prove necessary to use it a great deal. Interaction with the interviewees was conversational in nature, only gently guided by the specific themes I wanted to explore with them. In fact, I thought being able to steer the discussion along the main questions of investigation without constantly referring to the topic guide, which was already in my head by that point, was helpful in carrying on with a fairly natural, free-flowing exchange of information.

Reflexivity

A fundamental feature characterising the interview process in this study was conscious and critical self-examination, or 'reflexivity' (see Bourdieu 2004). For a qualitative researcher, the term captures the essential importance of being cognisant of social and political origins of one's own perspective (subjectivity) as well as those of the researched (Patton 2002). While reflexivity has been rightly emphasised as 'an epistemological necessity' (Grenfell 2012 p. 224) all through the research process, I found it to be especially relevant at the interview stage. In a study that relies heavily on analysing the points of view and perspectives of those interviewed, it was vital that I accounted for my positionality, the impact it had on the research process, and particular positions from which the participants contributed to the evidence produced.

I identified my position to be that of an 'insider-outsider' in a way (Dwyer and Buckle 2009). By this I mean that as a serving police officer, I was an insider, loosely put, to the Indian criminal justice system from which several respondents were drawn. At the same time, I had the status of somewhat of an outsider on account of my role as a doctoral researcher at a university in London, and also because I did not share the commonality among most of the respondents based on their work relating to juvenile justice issues in Delhi. The insider-outsider perspective itself

seems to be rare in the literature on juvenile justice in India.[21] But what makes it more significant in this study—not to put too fine a point on it—is that using a reflexive approach I was able to negotiate the insider aspect of my positionality to the advantage of the interview process.

For example, with regard to functionaries in the India criminal justice system, I was aware from first-hand experience that many of them often worked under various constraints and pressures. From their point of view, in spite of doing a difficult job, they frequently found themselves at the receiving end of criticisms by different stakeholders. In that context, they were likely to be poorly motivated to open up and offer penetrative observations if it appeared to them that the interview was about uncovering their failings or showing them in a bad light. Therefore, drawing on Liebling et al.'s (1999) method of 'appreciative inquiry', I sought to establish a dynamic with the interviewee whereby they had confidence that they could share their stories and opinions without feeling judged or criticised. The initial acceptance I had as 'one of them' which I further built on through empathetic listening as the interview progressed certainly formed a bedrock of this relationship. So much so that a former child welfare police officer, describing how children are treated by the police in daily practice in contrast to the legal provisions, did not hesitate to say that "We do bring the children to the police station after arrest. And sir, as you would know very well, we do sometimes beat them up left and right when necessary." Of course, the role of anonymity is not to be minimised, but, as I saw it, that was intertwined with the rapport I struck with practitioners.

Interviewing key informants who were in the top echelons of social and political life presented a different challenge and evoked new reflections. To be sure, the basic aim and character of the interview remained the same with respect to people with status, power and privilege. Yet, they constituted that part of the research field where I exercised less control over the spatial and temporal aspects of the researcher-researched encounter and felt more distance from the researched. There are bits and pieces of notes in my field journal which illustrate the shift I perceived. One such entry was about the experience of what I described as 'the hierarchy of waiting spaces': I waited 'in a reception room' first, then was invited by the respondent's secretary to wait

[21] In fact, in my review of the literature, I did not come across any qualitative research on juvenile justice in India which was done by a practitioner like me.

in ‘an immaculate anteroom’ before being finally ushered into the respondent’s ‘imposing office’ where they appeared after a few minutes’ wait. ‘The pressure to wrap up the interview’ before the interviewee called time on it was another observation I noted about some meetings.

Although manifestations of the power asymmetry in a few instances were a source of unease and stress for me, they did not end up becoming detrimental to data collection. First of all, for participants, whether powerful or not so powerful, to have control over what they said and how they said what they said was crucial to the success of this study. Indeed, such choice is often thought of as characteristic of semi-structured interviewing (Brinkmann 2013). The influence they had on the conditions under which the interview took place was not a setback either. Taking a reflexive view, I considered it to be natural and normal (albeit less favourable to me) under the circumstances. In fact, my focus in dealing with the power differential was limited to ensuring that elite respondents did not take charge of the interview agenda and put it off the track. Using my prerogatives of posing the questions, critically following up on the answers, probing and moving on from one topic to another (Kvale 2006), I managed to nudge the interview in the direction that was desired for a meaningful interaction. No doubt, my preparations for conducting the interview, institutional affiliation and professional background helped to strengthen my position in the eyes of the interview subjects. I also think that it mattered, tactically, that I chose to interview practitioners first, where I was more relaxed, before approaching elite interviewees. The experience gained in the former interviews made me better equipped going into the latter.

In addition to being integral to the data generation processes, a reflexive approach underpinned the methods I applied to sort, organise and interpret what was said and think through what claims I could make on the basis of my examination.

Data Analysis

Some preliminary form of data analysis had begun during fieldwork. But it was not until finishing all the interviews that I became fully engaged in putting the empirical data in a form that was useful to address the research questions. The task called for identifying common themes in the wide range of opinions, views, attitudes and experiences shared by the respondents regarding the prospect of

RJ in juvenile justice, exploring their implications and drawing conclusions from them. I deployed thematic coding and analysis to do this work. As a method cut out for 'identifying, analysing, and reporting patterns (themes) within data', it had the potential, if used rigorously, to produce an insightful interpretation of the large, complex data set that had emerged (Braun and Clarke 2006 p. 79). I broadly adhered to the following 6-phase guide to performing thematic analysis: 1. Familiarising myself with the data 2. Generating initial codes 3. Searching for themes 4. Reviewing themes 5. Defining and naming themes 6. Producing the report (Braun and Clarke 2006 p. 87).

The foundation of thematic analysis is interview transcription. Transcription is a time-consuming and laborious process. There is no single approach to it which works for everyone. However, the choice is broadly between full and selective transcription. The sheer magnitude of the data collected and the need to translate a large portion of it from Hindi to English made full transcription particularly daunting as far as this study was concerned. Instead, I found it far more reasonable to transcribe only as much and only as precisely as was required for the purposes of the investigation (Flick 2009). My research required analysing viewpoints and perspectives of respondents rather than the finer details of their speech (Brinkmann 2013). There seemed to be really no need to spend valuable time transcribing verbatim portions of interviews I considered not informative enough upon listening to the recording. In my view, selective transcription by picking out relevant passages, particular quotations, examples, etc. (Robson and McCartan 2016) and paring down the rest of what was said to the gist was likely to suffice for this study's purposes.

Even if selective transcription is preferred, it is advised that the first few should be fully transcribed (Fielding 1993). Accordingly, to start with, I fully transcribed twelve interviews— one each from different categories of interviewees—in order to get a feel of the range of issues raised. The initial full transcripts were also important in that I derived codes from them. These codes used in conjunction with others deductively obtained from the conceptual framework of the study and research and interview questions formed the basis of selective transcription of the rest of the interviews. My decision to selectively transcribe was, however, flexible; I switched back to doing full transcription whenever it seemed necessary in the case of any interview. In the end, about one third of the interviews were fully transcribed and the remaining two thirds partially transcribed.

The interview transcripts abounded with complex insights on manifold topics. At the same time, they were unruly from the point of view of discerning patterns and connections, not least because of ambiguities and contradictions within the data. As I went over the transcribed interviews several times and made within and across-case comparisons, new coding categories emerged through a process of analytic induction which reflected the depth and breadth of the data set (Ayres 2008). Organising the data into meaningful groups by utilising both inductively and deductively derived codes was the crucial next step in analysis. This involved reviewing my codes along with the collated data relating to each code, and then, examining whether two or more codes were linked and revealed a broader theme. By doing so, I identified similar and overlapping codes which, when incorporated into a single group, formed a main theme of the empirical evidence. If a particular code was large and complex by itself, I used that as a theme (Braun and Clarke 2013). Having developed themes in this manner, I refined and prioritised them (discarding some which seemed less prominent) keeping the analytic objective in mind. Thus, coding and classifying with a reflexive approach was a constant feature of data analysis.

In writing up my analysis, I have looked at the research questions through the lens of the data and addressed them with the help of detailed and specific findings. This process is much harder than it may sound. A key challenge here has been to strike a delicate balance between following the empirical evidence wherever it leads, and yet retaining my authorial voice both to render the evidence accessible to the research audience and to ensure that the research issues are dealt with. I have sought to approach this task by scrupulously describing the findings and, simultaneously, making meanings, claims and arguments which establish my presence in the text. In other words, the aim of this thesis to report on the qualitative study of the prospect of RJ for children has required not only creating an accurate picture of the responses given by the participants, but also presenting my interpretation of them.

Having explained the process of research, I turn now to consider the empirical data on which this study is based. I will start with the evidence on the actual operations of Indian juvenile justice.

Chapter 5

Restorative Justice in Indian Juvenile Justice: Aspiration and Reality

The review of the literature in Chapter 2 identified the disjuncture between juvenile justice in law and juvenile justice in practice. Juvenile justice as per the law promises to address the need for rehabilitation, reformation and reintegration of children in conflict with the law. The juvenile justice system built around the law is intended to be qualitatively different from the adult criminal justice system in its nature and procedures. However, critical studies on its functioning suggest that, in general, it serves primarily deterrent and punitive purposes, and that it differs much less from adult justice than might be anticipated. This is explained by most scholars to be the result of practice departing from law and is treated as a problem of implementation.

My aim in this chapter is to develop a more in-depth and nuanced understanding of law and practice in juvenile justice than may be afforded under the reductive logic of the extant literature. That juvenile justice in action, to paraphrase Roscoe Pound (1910), does not match juvenile justice in books is a familiar, though an important, story. It forms the background in which I set out to investigate the prospect of RJ in this study. Indeed, as will be shown, the majority of respondents confirmed the contrast existing between the law and the practice. But more valuably, they offered a range of insights into the current operations of the system which shed new light on what the gap consists of, and, at the same time, unsettle and complicate the 'gap' approach to the study of juvenile justice.

In what represents a significant case in point, a minority of the respondents took the view that RJ is implicitly provided in the juvenile justice law. A smaller minority claimed that RJ is not only implied in the law, but it is also already being practised. Neither of these arguments slot easily into the predominant 'law versus practice' dichotomy thesis for the simple reason that restorative justice is not enshrined in the law. The focus of that thesis on the written law has probably also meant that the circumstances and factors which may have contributed to the omission of RJ in the law have been left unstudied. From my perspective though, an examination of the minority views will be an apt point of entry into the rich, granular narratives put forward by the majority of

respondents about the actual workings of the system. The chapter presents and analyses all this empirical evidence with a view to deepening our understanding of the response to juvenile crimes and thereby enabling a more rigorous conceptualisation of juvenile justice.

The structure of the chapter is as follows. The first section offers an account of the issues surrounding the non-inclusion of RJ in the current legislation. I briefly trace the process and politics of consultations which went into the making of the law and the influence some contingent factors had in shaping it. The particular relevance of such consultations for this study is that they were an opportunity for some stakeholders to recommend the express inclusion of RJ in the law, a few of whom had taken inspiration from the example of South Africa. In the next section, I discuss the perceptions of the respondents that the law implicitly recognises RJ. I also critically analyse the claims that RJ is being practised by some Boards. Following on from this, I put together the evidence on how children are perceived to be treated by the police, the Board and the institutions. The final section offers an overview of the main arguments of the chapter and touches upon how they necessitate moving beyond the oft-repeated, generic conclusion of a slippage between law and practice in juvenile justice.

Restorative Justice in the Law: The Story of its Omission

The commonly shared view among the interviewees was that the juvenile justice law in India has made great strides in recent decades. They described the law, especially as it existed until 2015, as 'model', 'ideal', and 'progressive' in its intent and spirit. Though the changes made in 2015 had supporters as well as detractors, even the more trenchant critics of the 2015 Act in my sample opined that the provisions for children below 16 remain the same as in the 2000 Act, and therefore the new law is still progressive in respect to them. Judging by their own thoughts on the previous law, several scholars would agree that, insofar as the current law retains the old (which it does almost fully, not considering the waiver provision), it not only conforms to the standards prescribed in the key UN instruments on juvenile justice, but also incorporates some of the best practices identified internationally (Kumari 2009a; Manoharan and Raha n.d.).

It is laudable that the law contains high ideals that have been compared well with the global yardsticks. And especially because this is so, it seems a bit intriguing that the law leaves out a direct commitment to the principles of RJ. It is of course a reflection of the growing appeal of RJ

as a potentially non-adversarial, child-sensitive approach to juvenile justice in recent years (see Chapter 3) that its absence rather than presence should be conspicuous. As it turns out, the omission of RJ was not due to any oversight by lawmakers. It happened in a particular context of law-making which is notable for its deliberation over RJ.

Consultations on law-making

Respondents attributed the impressive features of the current law to the inclusive approach to policymaking followed in its case. A senior bureaucrat remarked:

> It (the 2015 Act) was not designed only by bureaucrats. Normally all the laws are drafted by the Ministry/Department concerned. This is one Act which has evolved through very deep consultations among the judiciary, activists, commissions, department, experts and others. It is a very healthy development that there has been so much of dialogue. (Bur7)

NGO professionals associated with the process of the making of the 2015 Act agreed that the law was the result of several rounds of consultations with a range of stakeholders which included inter-ministerial consultations, regional consultations with state governments and national consultations. Though the new Act came into being in 2015, the process to amend the law had started in 2011. Giving an insight into the background of the consultations, an experienced NGO professional (Ngo5) explained that the Ministry of Women and Child Development did not actually set out to frame a new law in 2011. After all, the 2000 Act had been in effect for only a little over a decade and within that period it had already undergone amendments in 2006 and again in 2011. Still, the ink was barely dry on the 2011 amendment when the consultations on bringing new changes in the law were initiated.

When I questioned this apparently quick change, the same respondent (Ngo5) claimed that the implementation of the 2000 Act did not really start for almost a decade because the new infrastructure necessary for it had not been funded. With the launch of the Integrated Child Protection Scheme (ICPS) in 2009, state governments began to get funds from the central government for the establishment of Boards, homes, etc. As per another respondent (Ngo7), by 2011 the implementation of the 2000 Act had picked up and 'many good things' had started to happen. Along with that, shortcomings in the implementation also became clearly visible. Such problems had been raised by state governments and NGOs on various occasions; consequently, it

was felt necessary to address them by bringing some substantive changes in the law (Ngo7). The previous amendment made in 2011 had not dealt with problems of implementation and was not considered to have been 'substantive' amendment of the law (MWCD 2019).

Against this background, the Ministry constituted a review committee in September 2011 to propose changes in the 2000 Act. The committee was headed by an Additional Secretary of the Ministry and consisted of various stakeholders including members of the Juvenile Justice Board, academics, legal experts, representatives of state governments and civil society. Over the next months, the committee held 'participatory and comprehensive consultations' with the aim 'to address implementation and structural issues in the legislation, especially those highlighted by implementation of the Integrated Child Protection Scheme (ICPS)' (MWCD 2019). These issues included the police and the other components of the juvenile justice system not working in cooperation with each other, inadequate facilities in institutions and increase in reported cases of abuse of children there.

Based on the report the review committee, the Ministry prepared a working draft to amend the law. However, a well-informed respondent (Ngo5) said that as the proposed amendments numbered more than a hundred, the Ministry in the last quarter of 2012 decided to repeal the existing law and reenact a comprehensive law by introducing a new bill based on the draft under discussion.

The effort to incorporate restorative justice and learn from the South African example

According to practitioners who worked closely with the Ministry during the consultations, one of the ideas floated by several civil society organisations and child rights activists for inclusion in the law was RJ. These NGOs and activists had long felt that the existing rehabilitation system was deeply flawed and had persistently failed. They did not find putting children in institutions to be either 'child-friendly' or a solution. In their view, children often came out much worse than they were when they went into the homes, and in some cases, they kept coming back to the system. These reflect concerns about what has been recognised in the literature since at least the 1960s, but more increasingly in the recent past, as the iatrogenic, stigmatising and labelling impact of juvenile justice (Cicourel 1968; McAra and McVie 2007; Goldson 2007). In their desire for reform, child rights activists viewed RJ as a constructive alternative to the longstanding adversarial

approach of responding to child offending. RJ was seen as a useful way of encouraging the child to accept responsibility for the wrong that they have done. On the assumption that it has the potential to hold the child accountable without subjecting them to the negative consequences of detention and external control, a restorative approach was considered to offer much better prospects for rehabilitation and prevention of reoffending.

One respondent (Ngo7) revealed that an example that was often spoken of during the consultations was the RJ approach adopted in juvenile justice by South Africa. This revelation was of particular interest to me because one of the issues that provoked my study concerns the prospect of policy learning from abroad. When asked to explain the interest in the South African example, the respondent mentioned that there happened to be some mutual exposure visits of official and non-official stakeholders of the two countries at the time when the consultative process was going on. Looking for more information, I contacted Dr Ann Skelton, a leading expert on juvenile justice and RJ in South Africa. She referred me to Arlene Manoharan, a consultant who has been working on juvenile justice in India for several years.[22]

Arlene Manoharan recalled her first-hand experience of a visit by the South African Law Commission to India in 2004.[23] She said that during its visit, the Commission engaged with children and communities through focus group discussions to understand what works for children alleged to have committed crime. Her account confirmed that the idea of the South African approach as a model worth emulating emerged from interactions such as the one she described. Another contributory factor was that the first juvenile justice legislation in that country—based on the recommendations of the South African Law Commission (2000)—included provisions to enable RJ (Ngo7).

South Africa's first separate law for children who committed crime came into effect in 2010, not long before the exercise to consider changes in the extant Indian juvenile justice law began.[24] The South African law offers several programmes built around RJ principles at the pre-

[22] Dr Ann Skelton, Email correspondence (22 July 2020).

[23] Arlene Manoharan, Email correspondence (27 July 2020).

[24] Child Justice Act 2008.

trial stage and in the midst of a trial as diversion options for the child (Swanzen and Harris 2012; Skelton 2002). An RJ approach is also reflected in the sentencing options. These diversion and sentencing measures involve the child offender, the victim, the families concerned and community members coming together to identify the damage as well as the needs and obligations that arise as a result of the child's act (Department of Justice and Constitutional Development 2020). The law has provisions for handling this process through a family group conference, a victim and offender mediation process and/or another RJ process.

Some civil society actors in India evinced interest in learning from RJ provisions of the South African law. And this flowed into the ongoing deliberations over introducing RJ in the Indian juvenile justice law. Manoharan argued for drawing on the South African experience to devise diversion programmes that provide adequate legal protections to the child.[25] A few others were more inclined towards the idea of incorporating the South African RJ model into the sentencing stage as an order of the Board (Ngo7). The NGOs maintained that though the extant Indian statute offered several interventions for the child's rehabilitation, none of them enabled a face-to-face restorative meeting between the two parties. To address this gap, it was suggested that a specific dispositional order to facilitate an interaction between the child, the victim and/or their families be put into law (Ngo7). However, in the end neither any diversion programme nor any such order was included in the bill that was passed by Parliament in December 2015 and became the new law—more than four years after the consultations had been initiated. (There were a host of reasons for the protracted process of law-making in this case which are not necessary for me to go into here.)

Why was RJ not included in the law?

It is difficult to establish precisely what led to this outcome, more so in the absence of any official record that refers to discussions over the issue. According to one respondent (Ngo5), the Ministry felt that the juvenile justice system needed to be prepared for RJ before a leap of faith was taken to enshrine it in the law. A Board sensitive to the needs of the parties was considered to be a necessary prerequisite in this regard. At the same time, the Ministry's position was that if any

[25] Arlene Manoharan (n.d.), "Recommendations for Reform of the Model Rules and for State Rules under the Juvenile Justice (Care and Protection of Children) Amendment Act 2006", Centre for Child and the Law, National Law School of India University, typescript.

Board was keen on the idea of trying RJ out, it could do so by taking recourse to the principle of diversion laid down in the statute and the dispositional orders already available to it. On this view, advice and admonition given to the child by the Board could be based on RJ, and it was also possible to link the order of community service to RJ. As the previous respondent (Ngo5) said, "It all depends on the wisdom of the magistrate heading the JJB." But how exactly could it be done, and how it qualified as diversion was not spelt out. So, on the one hand, an express provision in the statute to enable RJ practices was not made apparently because it required preparatory work prior to its introduction. On the other hand, the Ministry seemed to be making allowance for RJ by indicating that if the Board felt ready for RJ, it could still practise it without explicit legislative backing. These suggest an ambiguous policy line concerning RJ.

A key factor in understanding why the effort to have RJ included in the law did not come to fruition is the Nirbhaya incident. The incipient discourse on RJ during the consultation process coincided with a massive public outcry triggered by the brutal gang rape and murder of the young female student in Delhi in December 2012. Many who took to streets in protests demanded the death penalty for the persons accused in the case including the minor. In some sections of the media, public opinion at the time was shown to be against giving a second chance to juveniles involved in gender-related crimes.[26] Amidst these calls for retribution, the government took the position that the law was ineffective in preventing Nirbhaya-like cases from happening again.

A skeptical reading of the situation could be that presumably the government's concern was being seen to be insufficiently 'tough' so that it could not be easily blamed if something similar did happen again. At any rate, the focus of the law-making process turned on ensuring that the law was made more deterrent for a certain category of children in conflict with the law. "And that is when (the prospect of) RJ got affected", one of the NGO activists (Ngo7) observed. It is significant to note that there was nothing against RJ per se, not in the open at least, particularly in the case of minor offences. But the prospect of bringing a provision in the law about it seemed to have become a collateral casualty of the predominant focus, towards the later stages of the law-making process, on toughening the law to deal with children in the 16–18 age group who committed heinous offences. In an environment where strongest measures were being demanded against children, RJ

[26] In a readers poll conducted by the Hindustan Times (2015) on "Does the Delhi gang-rape minor deserve a second chance?", 89 per cent voted he did not.

might have appeared to some policymakers to be too soft an intervention to contemplate, or too big a concession to make.

Soon after the culmination of the legislative process, another important component of law-making, delegated or subordinate legislation, began for framing rules under the 2015 Act. As in the case of other laws including the 2000 Act, the Parliament, through a section in the 2015 Act, has delegated its legislative powers to the government to frame rules or regulations to supplement the statute (Abraham 2019). The Ministry constituted a multidisciplinary committee headed by a judge to draft the model rules (Scconline 2016). Some representatives of civil society organisations working in the field of child protection and an officer working in the Department of Women and Child Development in the Delhi Government who were part of the committee took the opportunity to advocate for incorporating RJ in the model rules (Bur5; Jud8). But judicial members in the committee had reservations about both RJ itself in the Indian context and the idea of its inclusion in the proposed rules (Jud8). I will take them up in detail along with other views skeptical of RJ in Chapter 8. However, it is pertinent to mention one of the issues here, raised from a legal-technical point of view, which worked against RJ at the rule-making stage. A judge, who was part of the drafting committee, revealed, "I was the one who resisted including RJ as a provision in the rules. One reason obviously was that the Act itself did not provide it" (Jud8). Under Indian law, one of the conditions of the validity of a rule is that it must be on a topic mentioned in the substantive sections of the Act (Bakshi 1994). Eventually, the new Model Rules that came into force in September 2016, replacing the Model Rules 2007, did not make any reference to RJ.

Thus, the incontrovertible fact is that the term 'restorative justice' does not appear anywhere in the Act or the Rules. But significantly, some practitioners did not see this as representing a repudiation of RJ in the law. In fact, they were of the view that the principles of RJ are immanent in the spirit of the law, and possibilities of their practice are embedded within the letter of the law. I explore this position in the next section.

"We already have RJ!"

Before proceeding further, it is worth noting that the words 'restore' and 'restoration', having the same root as 'restorative' in 'restorative justice', have been used in the 2015 Act in several instances. But restoration has been defined rather particularly to mean restoration of abandoned or

lost children to parents or guardians. And in application of this restrictive meaning, restoration is used in the Act to refer to restoration of children in need of care and protection, and not that of children in conflict with the law. One official found the definition to be odd: "Handing children back into the custody of parents or guardians is reunion, not restoration" (Bur5).

If we dig around a bit more, we can find some contemporary references to RJ in juvenile justice, which contextually connote something different from and wider than reunion, but without a clear articulation of what RJ is supposed to mean. The now-repealed Model Rules of 2007 provided that the principle of the best interest of the child shall be the primary consideration in all decisions taken for the administration of juvenile justice. It further stated that the best interest of the juvenile "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 (my emphasis)." In the same Rules, there was a provision that detention of children should be "in line with the principles of *restorative justice* (my emphasis)." The Model Rules 2016 have done away with these references without any apparent consequential change in juvenile justice indicating that they were probably nothing more than ornamental phrases. At the same time, the fact that they were used in the first place also suggests that they were, at the least, seen as something chiming well with the rest of the legal framework.

Another source in which particular attention to RJ has been called is a couple of judgments of the Supreme Court. The Court (2013) in *Salil Bali v. Union of India* observed: "The essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed there under in 2007, is *restorative* and not retributive, providing for rehabilitation and re-integration of children in conflict with law into mainstream society (my emphasis)." Again, in *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India*, the Supreme Court's (2017, para. 45) interpretation of the law puts RJ at the centre of juvenile justice:

> The importance of rehabilitation and social re-integration clearly stands out if we appreciate the objective of the JJ Act which is to foster restorative justice. There cannot be any meaningful rehabilitation, particularly of a child in conflict with the law, who is in need of care and protection unless the basic elements and principles of restorative justice are recognised and practised.

Here, the Supreme Court implies that the triumvirate of rehabilitation, reintegration and restorative justice are mutually interdependent. By extension, it is being suggested that to acknowledge one

of them as a goal of juvenile justice is to accept an implicit presence of the other two. And read along with the Court's observation in the *Salil Bali* case, the assumption is that rehabilitation, reintegration and restorative justice belong to a family that does not admit of retribution. This dichotomous understanding of RJ and retributive justice is along the lines of what early advocates of RJ claimed, as discussed in Chapter 3. A more nuanced approach is preferred by other scholars (for example, Daly 2000). Similarly, while some RJ scholars strenuously resist the lumping-together of RJ with rehabilitation (McCold 2000), there are others who appreciate that RJ may share common ground with rehabilitation (Walgrave 2000). Reintegration, on the other hand, is very often looked at as an essential component of RJ (Braithwaite 2002).

Echoing a view of RJ that considers it to be inextricably linked with reintegration, a judge (Jud9) of the Supreme Court, now retired, observed that the juvenile justice law cannot be said to have excluded RJ simply because it does not mention the term. After all, they argued:

> Reintegration *is* mentioned in the law (original emphasis). Reintegration is an umbrella term. The law need not explain how it is to take place. One way of reintegrating is to simply take the juvenile out of the institution and drop them to their parents' house and say that we have reintegrated the juvenile. That's the end of our mandate. That's a very narrow way of looking at it. There is another broader way of looking at it where for the purpose of reintegration we help the child come to terms with the fact that they are either accused of committing an offence or have committed an offence and have been found guilty and sentenced. That by itself requires a lot of other things to happen on the side or otherwise, such as counselling, probation and a face-to-face meeting between the child and the victim so that the child gets an opportunity to realise that what they have done is wrong.

The arguments here need sorting out. One of the respondent's points of emphasis was useful employment of a repertoire of different techniques—all of which need not necessarily be provided in the law—rather than dividing them into neat categories. Second, the current legislation was seen to permit the use of various techniques of reintegration including one in which the offender and the victim encounter one another. As a result, it was not considered to be an issue that RJ is not written down in the law in so many words. The third point was the recognition that RJ as one of the potential responses to the offending behaviour can be used in combination with other measures (Jud9). All the three arguments are linked by the underlying perception that RJ is a technique—and one of many—rather than a fully-fledged alternative method of doing justice. This

interpretation does seem to have the advantage of enabling integration of RJ into conventional criminal justice.

The view that RJ is built into the law was also shared by a few practitioners who did not belong to the judiciary. However, the most articulate exposition of this position came from some magistrates who were part of the Board and applied the law in their everyday work. In the next two subsections, I delineate the views of two principal magistrates (PM6 and PM4, respectively) who claimed that RJ is very much being practised in their respective Boards: in one case involving a face-to-face meeting between the parties, and in the other even without it.

Claims about restorative justice involving face-to-face interactions

One of the magistrates (PM6) favoured adopting a purposive as opposed to literal approach to interpreting the statute. The purposive approach requires the legislation to be interpreted in terms of its purpose rather than its words alone. The respondent argued:

> The term "RJ" may not be there. But look, how do we read a law? We go by the basic principles, the underlying principles. If we read all those underlying principles in Section 3 and the preamble, what do we gather? We gather that the child has to be restored, reintegrated, and rehabilitated…My interpretation of the law is entirely conducive to RJ.

In fact, it occured to the magistrate that the procedure they followed in the case of their Board bears a marked resemblance to the referral order. They said that the referral order as such is of course not provided in the Indian law, but the Board itself is akin to the youth offender panel (YOP) to which a referral is made. It was argued that just like the members of the YOP are from the community, the social members are social workers; they do not belong to the judiciary (PM6). To emphasise that the Board is not court-like, the magistrate added: "I do not have absolute authority to take decisions in the Board. Any decision regarding the child is to be taken by majority. It is a different matter that we (the magistrate and the social members) come to a consensus."

Elaborating on the procedure, the respondent said that if the child admits that what they have done is wrong, and the Board feels that there is a need to talk to the victim to see if the case can be settled, it explores that option by calling the victim, if required, along with their family to the Board. The probation officer talks to the two parties to see if they could talk to each other. It was claimed that in many minor crimes the child apologises to the victim who forgives them and

asks them not to repeat the offence. If the child agrees, the Board releases them on probation and the case ends there. In the event that nothing comes out of the process of settlement, the case goes back to the sentencing stage. Also, as per the magistrate, if the child at the outset says that they have done nothing wrong or have been falsely implicated, the Board proceeds with the enquiry deciding that 'there is no need for the RJ process'. So, the understanding was that a guilty plea is necessary for initiating such an intervention.

The procedure described above takes place at the Board during the course of its daily proceedings. On observation, I found the atmosphere of the room where the Board conducted its proceedings to be far less crowded and aggressive than was typical of a courtroom. The pace of activity was not frenetic. However, spatially and physically the Board seemed to be organised like a court (see Berti (2011) for a description of a trial court). The three Board members sat on a raised platform flanked on either side by a reader and a transcriber. While the reader called out the name of the case and kept the record of the proceedings, the transcriber took down the principal magistrate's dictation. The floor below the raised platform facing the three members was occupied by the rest of the persons in the room. These included lawyers, probation officers, police officers in plainclothes, and the child whose case was being heard along with their parent. Some of the persons were in a sitting position, but invariably stood up on being spoken to by the Board. While interacting with the child, the Board members smiled and tried to put them at ease. The respondent (PM6) claimed:

> Because of the way we interact with children, they do not feel that they are coming to a court… The structure is like this (referring to the raised platform and the witness box) because earlier a family court used to function here. We could not completely take out the old furniture and get a new set…But we create such an atmosphere in the JJB that children can come in, go out, and sit freely. They are free to say whatever they wish to. Once a child asked me, "*Madam, naam kya hai apka? Naam batao*" ("Madam, what is your name? Tell me your name.") You cannot expect this in a formal atmosphere. In a regular court one has to take permission of the magistrate before doing anything.

The Board's character can vary hugely depending upon several factors including its physical arrangement, the attitude of its members and the nature of its proceedings. Certainly, the Board in this particular case was less formal and less intimidating than a regular court. But when it comes to considering whether the practice followed by the Board to settle minor cases represents RJ in any recognisable form, there are at least two questions at issue. The first is an obvious but

necessarily limited question, which is, to what extent the Board thinks of its own practice as being RJ. On this, the principal magistrate's foregoing account of what occurs at the Board is helpful, even though it is naturally self-conscious. The second—and vital—question is whether the Board's practice matches some set of RJ principles, such as relative informality of the forum, participative processes and restorative outcomes. This calls for an objective assessment. But before attempting it, I will discuss the views of the other magistrate.

Claims about restorative justice without face-to-face interactions

Not every magistrate who held the view that RJ is implicitly provided in the law regarded direct face-to-face interaction between the two parties as indispensable to RJ. One of the magistrates (PM4) considered interaction *with* the child and the victim as important as interaction *between* them:

> To serve the best interest of the child, we (the Board) need to interact with them and know why they came into conflict with the law. We have to work for reformation, rehabilitation and social reintegration of the child. RJ is part of all of that…A face-to-face meeting (between the two parties) should happen in most of the cases, but it is incorrect to say that there is no RJ where such a meeting does not take place. What is important is that we interact with both the child and the victim. The victim should be asked what they need. We should not presume what they need.

Once again in evidence here is the tendency to consider RJ as implied in the objectives already set down in the law. Besides, according to this respondent, the key to RJ lies in the Board's interaction with the child and the victim. There is of course a risk here of setting the bar for RJ so low that almost any interaction with the parties can be termed RJ. But in the Indian context it also draws attention to the need, at the minimum, of the child and the victim being listened to by the adjudicating authority, and their problems and needs being acknowledged—something several practitioners contended did not usually happen, as I mention in the next subsection.

The magistrate's (PM4) conception of RJ builds on the interaction the Board is ideally supposed to have with the child. They outlined how the Board seeks to weave what in their assessment are elements of RJ into its proceedings:

> If the child pleads guilty and is remorseful, the JJB asks them in what ways they want to atone for the crime and minimise or repair the harm done to the victim and society. Children usually say that they will do whatever I tell them to do. I ask them if they feel they owe any responsibility to their parents, the victim, or the nation.

> They say that by committing the offence they have in a way deceived their parents who want them to be on the right path in life. Then, first and foremost, I say that they should apologise to their parents. Some children have done that in the JJB in my presence. Then come the victim, the society and the nation. In order that they fulfil their responsibility to the society, in almost 90 per cent of my dispositional orders I ask them to plant trees, take their photographs and show them to us. I tell them to nurture those trees also so that they realise how their parents have nurtured them too.

A striking thing about this approach is that it appears to be top down and didactic where the magistrate/Board endowed with coercive authority secure the child's 'willing' compliance to outcomes they pronounce to be the best for the latter. Nevertheless, it is revealing that it was thought to be illustrative of 'RJ' and helpful in achieving rehabilitation and restoration of the child. The respondent also considered their intervention 'a win-win situation' because they believed that it addresses the victim's needs too:

> The victim wants to be heard. They want the offender to be held accountable. If the victim is poor and the offence has caused them monetary harm, they want some sort of monetary reparation either from the offender or the state. It matters little to the victim whether payment comes from the state or out of the offender's pocket. In case the victim is economically sound, they do not always seek monetary reparation. What they say differs from crime to crime. But in my experience, in most cases the victim does not want more than the offender to acknowledge their guilt in the victim's presence. (PM4)

Much like the approach to RJ delineated by the magistrate (PM6) in the preceding subsection, this magistrate's (PM4) idea of RJ underlines the importance the victim attaches to symbolic reparation in the form of the child making an apology to them. It also suggests that the victim's attitude towards monetary reparation has a correlation with their economic status and the nature of the offence. To that extent, it represents a more qualified finding than that found in studies reporting the victim's categorical preference for apology over money (Strang 2006 et al.). However, in practice regardless of the victim's preference, the Board focuses exclusively on symbolic reparation as there is a consensus among its members that they are not authorised by the statute to facilitate or order monetary reparation by the child or their family to the victim.[27]

In addition to apology, the magistrate (PM4) cited community work of planting trees as an example of RJ. I will discuss community service as a potentially restorative practice in Chapter 7.

[27] The victim is eligible though to receive compensation from the state under certain conditions.

Here I turn to critically evaluating the common themes that emerged in the claims made by this and the previous magistrate about practising RJ.

A critical evaluation of the claims about restorative justice

First, to a very large extent the two magistrates in laying out their claims concentrated on their purported success in ensuring that children are treated with dignity and respect and that the justice process is more accessible for them. The priority given by the Board to this key area, if truly a norm, is entirely desirable. Yet, such a child-friendly attitude is the very starting point of any approach to juvenile justice. Needless to say, RJ when applied to children also ought to embrace this standard minimum rule. But on its own, child-friendly justice does not add up to RJ for it is conceivable for a practice to be child-friendly without exhibiting values that are deemed to be essential to 'restorativeness' of a process.

All the same, going by the perception shared by the majority of non-judicial respondents—presumably more objective than the magistrates talking about their own procedures—it cannot be said that the Board in general always shows friendliness towards the child, or conducts judicial proceedings that are attuned to their needs. Though I will consider evidence on the actual workings of the Board in detail in the next section, it still seems important to touch upon the assessment of some of those 'impartial' practitioners.

The founder of an NGO that works with children in homes (Ngo6) said that it was all too common an experience for children, often placed in observation homes, to be simply given the next date of 'hearing' by the Board once every fortnight during the course of the enquiry. And when children appear before the Board, it was claimed that many times no actual hearing takes place, and they are sent away only to be called for another 'hearing' after a fortnight (Ngo6; Bur5). The NGO founder observed: "None of the JJB members engage one-on-one with the child. There are occasions when they are not even spoken to" (Ngo6). It was said that sometimes cases come up for the actual hearing in the Board 'after 3–4 months', but the proceedings do not last for more than '2–5 minutes' (Exp5; Bur5). One defence lawyer (Exp5) remarked that the Board, by and large, displays an 'obsession with disposal of pending cases' which conflicts with the need that the members take sufficient time to hear and understand the child.

It should also be noted that the efforts that are ostensibly made to introduce child-sensitive practices in the judicial process are embedded in a profound power imbalance between the child and the Board. That may be further accentuated where the Board looks like a court due to its formal settings. Studies suggest that children generally find the atmosphere and procedures of the Board to be intimidating and confusing (Shastri and Thukral 2009). For the victim too, who is often a child in juvenile crimes, being a witness in the Board can be just as daunting and stressful as being so in a court (Ngo11; Baxi 2014). This atmosphere can hardly be said to be conducive to face-to-face deliberation aimed at fostering mutual understanding between the parties.

The second element of the claims by the two principal magistrates that they were using a restorative approach was the practice of apology. It bears reflecting a little on this as issues involved intersect with some key debates in RJ and apology.

While one of the magistrates (PM6) focused on the verbal apology rendered to the individual directly affected by the crime, the other (PM4) talked about the child apologising to indirect victims as well. Though not all scholars of RJ consider apology to be a prerequisite for restorative processes, it is accepted that apology can aid both the victim and the offender in making a personal recovery in appropriate situations (Allan et al. 2014). Also, apology to redress the harm caused by the offence may be made to a wide variety of individuals, not least members of the offender's community and family since they are also believed to have been harmed to some extent. In a multidimensional conceptualisation, apology may consist of both self-focused (focused on the needs of the apologiser and their family) and other-focused (focused on the needs of the victim and the rest) apologies (Allan et al. 2014).

At the same time, in much of the RJ literature a meaningful apology presupposes participation of the offender and victim (including the community) in a voluntary process of communication (Sherman et al. 2015). Of course, by a relatively less exacting standard a practice which involves only one of the stakeholders can be 'partially restorative' (McCold and Wachtel 2002). Yet, in the case of the Board's practice, regardless of whether one or more stakeholders are present, the conditions of participation and voluntariness appear difficult to be met given the top down, coercive nature of its proceedings. The child apologising to the victim and the latter accepting that apology while both are standing and facing the Board—that is, remember, perched

atop the raised platform in the court-like room—is hardly a satisfactory example of a participatory process by any standard of stakeholder participation.

It may be argued that a Board-ordered, rather than a voluntarily-agreed, apology may still be useful; it can potentially serve a communicative function by censuring the child's act and making it clear to them that they owe an apology to those wronged. In his influential theory of punishment, Antony Duff (2002; 2003) proposes that confession and apology, even when not voluntary or consensual, do have the potential to constitute restorative punishment provided they are sincerely expressed. But then this tends to loop back to the question of the quality of the process. A sincere recognition of the wrongdoing and remorseful apology by the offender have been found to be linked with processes that are likely to facilitate their emotional engagement (Sherman et al. 2015). In the absence of appropriate engagement, as in the case of the child merely apologising in the presence of the Board, there is a risk of it all turning into a command performance. The child might feel that they are obliged to cooperate or at least pretend to cooperate to earn a reprieve from the Board.

Another scholar (Bennett 2006) attempts to avoid different problems posed by the insistence on the sincerity of apology in RJ by taking the position that sincerity does not constitute a necessary aspect of apology. On this view, apology is valid and has value regardless of whether it is sincere. Its importance stems from being a ritual having a formalised character. RJ itself is conceived as 'an apologetic ritual' (Bennett 2006 p. 127). It is argued that the victim can find a ritualistic apology satisfying for it provides public recognition that they have suffered a wrong. For the offender, the benefit is seen to lie in the fact that they have done, however insincerely, what the state asked them to do, and the matter can be considered closed.

Essential to understanding the above formulation of RJ is that as a ritual it is expected to have ingredients (semiotic and material) that constitute a ritual. Rossner (2011; 2017) identifies some distinctive elements of an RJ ritual. First, participants sit in a group with a clearly defined boundary around who is participating in the ritual and who is not. There is no hierarchy in the seating arrangement, and this sets it apart from an adversarial staging of a court. Second, the physical proximity is designed to maximise interaction. Third, the group is characterised by mutual focus of attention and shared mood. This is usually achieved with the help of a facilitator who devotes considerable time and effort preparing all participants for what is about to take place. It is

quite evident that the practice of the child's apology described by the magistrates (PM6 and PM4) does not incorporate any of these elements of an RJ ritual.

Finally, one might think that the outcome is perhaps the redeeming feature of the Board's practice since it is claimed that a large number of minor cases are disposed of through mutual resolution using that particular practice. However, it has to be remembered that for many minor crimes the Board in any case tends to release the child after nothing more than 'advice or admonition' when they accept their mistake, apologise and promise not to repeat the mistake (PM6; see also Chapter 2). It is then not clear how the so-called RJ practice adds anything distinctively restorative to that disposition considering that participation of the parties in the practice may be as weak and superficial as is outlined above.

The above discussion shows that the core essentials of RJ are not present in the Board's practice, certainly not in a systematic and regular way at least. The importance of organising and conducting an RJ meeting with greater 'preparation' was acknowledged by the Board members. One of the magistrates (PM6) mentioned that their Board had in the last few months started taking the help of trained facilitators from a Delhi-based NGO called Counsel to Secure Justice (CSJ) to bring the two parties together. They claimed that the facilitators had been able to do so in a couple of cases (PM6); I will return to this in Chapter 8. When asked about the method they preferred, the magistrate candidly stated: "If you ask me if it is better to have a meeting with the child sitting down across the table in a closed room as CSJ facilitators do, I would say, yes, it is better" (PM6). This admission again reflects that the Board's practice in its present form is not designed to address the key requirements of a restorative justice process.

In the process of offering a critical assessment of some specific practices in the Board, this section has already given some strong intimations of the divergence in juvenile justice not only between law and practice, but also between theory and practice. I say this because I do think that for the purpose of fully appreciating the complexity of the empirical evidence it is useful not to confuse the gap between *law* and practice with the gap between and *theory* and practice. The former in this study, as is obvious, refers to the nature and extent of the failure of juvenile justice practice to meet the standards laid down in the juvenile justice law. On the other hand, the latter might be taken to imply the nature and extent of the lack of correspondence between what is or is not intended/supposed to happen in theory (may or may not be stated in the law) and what actually

happens in practice. For instance, certain aspects of the Board's proceedings may be child-friendly in theory. However, the evidence obtained from the respondents suggests, as I shall further examine in the following section, that in general children seem to experience them as arduous in practice.

For a detailed overview of the practical workings of juvenile justice, it is necessary to look at other key dimensions of the Board's functioning in addition to broadening the focus to include two more sites of practice, the police and the institutions, which are crucial to how the system operates.

Empirical Evidence on How Juvenile Justice Works

That RJ is being practised in juvenile justice was far from the predominant view among interviewees acquainted with the idea of RJ. For the majority, RJ is not provided in the law, and it is certainly nowhere to be seen in practice. Several informants painted a picture of juvenile justice which looks rather bleak and provides a contrast to the model of a restorative system. A senior police officer put it a bit bluntly, "Though everybody claims that they are doing a good job, the fact is we are still struggling with the basics of getting the JJ Act implemented, let alone RJ" (Off1). This struggle to uphold at least the basic minimum standards was seen by the informants to be common to the three core areas of juvenile justice: the police, the Board and institutions.

A key concern running through most of the interviews was that the system in its treatment of children is markedly different from what the law mandates it to be. In the words of one respondent, "The fault (for this situation) lies with all the agencies concerned with dealing with juveniles. And it starts with the police" (Ngo1).

How the police work

The reason most frequently cited by the respondents for having a bad opinion of the police is their failure to demonstrate sensitivity towards the child, not only when they deal with them but also when they choose not to—sins of omission as well as commission. The issue underlying either scenario is the exercise of discretion which is considered in the police literature to be inherent in much police work (Wilson 1968). The meaning of exercise of discretion is most often closely bound to non-intervention: to say that the police exercise their discretion is to say that they need

not intervene or invoke the criminal process where it might justifiably be done (Goldstein 1960; LaFave 1962). In the context of juvenile justice, such use of discretion by the police could result in keeping children out of the criminal justice system. This in itself may be considered to be of great advantage by those who are convinced that contact with the legal system all too often has a damaging impact on children and young people (McAra and McVie 2007). Some respondents were indeed inclined towards the idea of the police using their discretion to divert children away from the system, and I will examine their views in a little more detail in the next chapter. But the majority of the respondents interpreted police discretion rather differently.

They looked at police discretion in a more optimistic light and expected it to be used virtuously and proactively to intervene and help children in difficult circumstances. For example, it was suggested that the police should take the initiative to curb drug abuse among children due to which many of them are believed to be criminalised (PM2). There is of course a lot about the police functioning that gave the respondents reasons to be concerned about, yet they shared a view, no doubt born out of hope, that police powers can be exercised for the benefit of children. This view is quite akin to the interpretation of police discretion on which programmes of problem solving and community policing depend (Westmarland 2008).

Contrary to the expectations however, the police were considered by most of the respondents to be least inclined to get involved in reducing and preventing juvenile crimes. The sense was that the usual response of the police is to simply overlook the problem. According to a senior newspaper editor specialising on juvenile justice issues, the police at the end of the day come from the same bureaucratic culture that characterises the rest of the governmental machinery:

> They may not have the sensitivity that is required. I feel a lot of policemen look at it (child offending) as a less important issue. They either want to return to a posting where they can be in mainstream policing or look at juvenile justice as a very patriarchal, coercive way of dealing with the child. (Med4)

Evidence of the police refusing to exercise their authority even in apparently serious offences concerning children is found in Beatrice Jauregui's (2016) ethnographic work on the Indian police. The author points out that physical abuse of children in the family is widely considered by many in the police to be a less serious offence not worthy of their attention.

As gatekeepers to the juvenile justice system, deliberate non-intervention by the police was seen to be a practice that is fraught with risk. As one respondent who ran an NGO argued:

> When the police come across any offence committed by a juvenile, even if committed by a child less than 7 years old, even if no FIR (First Information Report) is to be registered, the police are not supposed to look away. Today a large number of crimes committed by juveniles are not coming on record. It does not mean that juvenile crimes do not exist. In fact, crimes by juveniles are increasing. It will blow up someday in a big way. It has blown up already! Non-registration of FIR becomes an excuse for the police. Truth be told, the police would not like to get into it. (Ngo1)

Thus, the police were criticised for their reluctance to intervene not only in matters where the criminal process can legally be invoked, but also for avoiding situations where their intervention might be extralegal and yet was thought to be important—in other words, for using their discretion in the classic sense of the term.

Where the police do intervene, questions were asked about whether the police action is lawful at all. Many interviewees expressed concern about abuses of police power which can come in different forms including falsely implicating innocent children, illegal detention and use of illegitimate means to solve crimes. For instance, a senior politician from an opposition party observed, "There is generally this tendency to pick someone up, treat them badly, and torture them into making a confession especially when the police are under pressure to do something in a high profile case" (Pol6). Children are considered to be particularly vulnerable to police excesses in India (Common Cause and CSDS 2018). Among children too, it is those who belong to poor and marginalised families who were perceived to be more likely to be on the receiving end because the exercise of police powers was said to be largely concentrated on such children: "The majority of the children who are proceeded against are deprived and poor" (Ngo1).

Assuming, however, that the police intervention is legal and necessary, several interviewees focused on the dynamics of the police-child encounter, police handling of the child and the profound effect it has on them. One journalist astutely remarked, "What happens in the first two hours of the child's initial contact with the police to a large extent lays the foundation of their course through the juvenile justice system. It is so crucial for the child's confidence and will" (Med1). It was almost as if the early stages of contact with the police constituted, to use a term associated with the medical profession, 'the golden hour' that determines whether the child

survives the system contact relatively unscathed or is lastingly affected. Yet, the majority view was that from the beginning the police behave with the child in the same confrontational way they behave with any adult accused. As another journalist phrased the point, "For them, if the child has acted in a certain way, the child needs to be punished. Period" (Med4). Speaking from their experience of having covered numerous incidents as a crime reporter, the journalist I quoted before (Med1) revealed:

> There is a sense of aggression towards the child: *we have arrested you, you have to come to the police station, you are not a good person*. There is a presumption of guilt against the child which is the absolute opposite of what the law requires. I have not seen any sense of providing comfort to the child. The perception that the child will not be able to return to the society as a reformed individual prevails over a large segment of the law and order machinery.

The contact with the police is specifically singled out for the absence of any consideration and support given to the child. The same respondent noted:

> Children don't know the meaning of most of the words the police use. The police throw sections of the IPC (Indian Penal Code) at them. The police tell them what they will have to go through. Whatever happened to the child welfare police officer the law provides? Of course, there are officers who are designated as child welfare police officers. But do they feel that they have a duty towards these children? I can say with absolute confidence that most families whose children are facing any process haven't even heard of the term.

A common perception among the respondents was that the police, in contravention to the law, frequently arrest children even for minor offences. The police attitude and procedure after taking the child into custody, as the above quotations suggest, was considered to be equally alienating, intimidating and distressing for the child. The general understanding also was that the police for various reasons choose not to exercise their power to grant bail to the child (Exp5).

One possible explanation for the police propensity to arrest alleged juvenile offenders and then deny bail to them seems to lie in the belief among some in the police that ensuring punishment is a central responsibility of the police (Human Rights Watch 2009). This is encapsulated in lay terms by a police officer quoted in the report: "Even a child is told that if he does wrong, he will be punished by the police…After all, the teacher has the right to reprimand an errant student. A father can punish his son. Why should the police be restricted from performing that function in society?" (p. 85). Police studies scholars have found that the sense among the police that they are

fulfilling their legal mission and serving the public interest is one of the motivating factors behind the punishment or pain they seek to deliver to individuals (Harkin 2015; Belur 2010; Fassin et al. 2018). The consequent use of force may be manifested in a wide spectrum of forms from arguably legal and mild to patently illegal and lethal. The denial of bail to the child by the police which results in their being lodged in an observation home may belong to the milder end of the spectrum, but it seems to be underpinned by the same desire to punish. This is reflected in what a child welfare police officer had to say: "If released on bail children might feel that despite committing a crime, they didn't have to face any consequence" (Off8).

A second explanation is that the police, being accustomed to the way the criminal justice system works, are said to prefer treating bail, especially in serious and heinous offences, as the territory where only the judiciary can intervene (Asthana 2020b). Another practical consideration, according to a senior police officer (Off7) who had worked in the area of juvenile justice, is that the police do not wish to be burdened with the duty of tracking down the child should they not appear before the Board after being released on bail by the police. The task was said to be particularly challenging because children often belong to poor families that do not have a permanent address in Delhi:

> How will the police search them? Their addresses are difficult to find because of a lot of migration, both inter-state and intra-state. Once a child is gone, it's very tough to get them back. If the police produce the child before the JJB, somebody from the child's family will come to get them released. The police then are on the safer side. The JJB itself will give instructions to the family without bothering the police. (Off7)

The result ultimately is that bail which is the child's right irrespective of the nature of the offence is denied to them and they are instead taken by the police to the Board.

It was argued that the manner in which the police produce the child to the Board is indicative of how the system regards the child:

> We are so scared of the children. The system is terrified. They (the police) really see the children as gangsters. The police are not allowed to handcuff them, but they would clutch the children so tightly *(gestures in order to show interlocked arms and fingers)* when taking them to the JJB. (Ngo4)

Use of handcuffs and chains by the police for apprehending the child is prohibited as per the Model Rules 2016 framed under the 2015 Act. In fact, the rule against the use of handcuffs, chains or

ropes by the police in order to restrain a person has been in existence since 1978 when the Supreme Court observed that the practice violates basic human dignity and is permitted only in exceptional cases.[28] The juvenile justice law does not permit even an exception to be made. The general view was that this is not violated in Delhi. However, one officer found mere formal compliance with the law insufficient in the case of the child: "In a city like Delhi, the police don't use a chain or handcuff. But I can't fathom how the way the police clutch the child is any different from handcuffing. Clutching the child in that manner, the police wait for the case to be heard by the JJB" (Bur5).

Some researchers as part of their study of Indian juvenile justice have reported police treatment of children from the latter's perspective (TISS n.d.; Parackal and Panicker 2019; ECHO 2014). Their findings include the use of abusive language and physical violence towards children in everyday policing, children being wrongly implicated, kept in the police station lock-up, tortured and forced to confess. These reinforce what the respondents told me about the lack of correspondence between what the law requires should happen and what actually happens.

How the Juvenile Justice Board works

We have already seen that the claims of the Board adopting RJ principles are hard to sustain in the face of strong evidence to the contrary. However, given that RJ is not explicitly part of the law, it may be argued that the Board cannot be faulted for failing to adhere to standards not yet set. The same argument is of no avail when it comes to the provisions made in the law. A feature that stands out about the Board is that the law intends it to be very different from the criminal court. But several interviewees were of the view that in practice, except for its name, the Board is like a criminal court. One of the arguments in support this view was that proceedings of the Board are subject to the same kind of lengthy delays that are endemic to the criminal court:

> Contrary to the JJ Act, JJBs function like courts only. A timeline has been given for the JJB to enquire into a matter. Enquiry into a petty offence is to be concluded in four months. You can check the status across the country. The data is not maintained mainly because JJBs fail to adhere to the timeline… Even in serious and heinous offences, the enquiry cannot be extended beyond six months without the permission of the CMM (Chief Metropolitan Magistrate) or CJM (Chief Judicial Magistrate). Again, you won't find any instance of this procedure being

[28] *Sunil Batra v. Delhi Administration and Ors*. (1978).

> complied with. What is the message to children and their parents who come to the system and believe that they don't have to go through procedures of a regular court? They expect to be heard differently. That expectation is not fulfilled. (Bur5, officer)

Expeditious processing of cases is key to operationalising the principle of child-friendly justice. If it is accepted that contact with the criminal justice system has adverse psychological and other consequences, avoiding undue delay deserves the highest priority in cases where children are involved. This is simply because delay has a bigger impact on them compared to adults—the same length of time accounts for a larger proportion of their life. Speedy proceedings carry an especially critical dimension in the Indian context where pre-trial and under-trial detention of children is rampant. Looked at in this light, the greater the delay, the greater the possibility of a longer duration of detention.

Yet, in the absence of data, it is not known precisely what percentage of cases last longer than the prescribed duration and by how much. One defence lawyer surmised, "Once a case enters the system, the process takes at least two years" (Exp5). Cases lasting for four years—a year more than the maximum term for which the Board can send the child to an institution—is also not unknown (Bur5).

There could be several factors behind the delay in disposal of cases. Hypothetically, if part of the explanation of the delay was that the Board invested more time and effort to adjust its adult-dominated proceedings to account for the needs of the child, that would still have been some sort of justification. But as we have noted earlier, the perception of many respondents was that the Board's proceedings are often so briskly conducted as to leave little time for a detailed hearing of and interaction with the child. The lack of the child's participation is confirmed by Parackal and Panicker (2019 p. 207) who in their study on children and crime found that:

> The children remained silent during the process; all of the questions were posed to the legal advisor. In many instances, the children were bewildered and did not comprehend what was happening. However, it is clear from the silence observed by the children in front of the JJBs and the legal advisor that children played no role in the adjudication process, except that of mere presence and silence.

Still, this leaves the question as to what exactly occupies the Board's time, not just from a legal-procedural point of view, but in terms of interactions and practices that collectively make up its day-to-day proceedings. Despite the fact that the Board is the pivot around which juvenile justice

revolves, there is little in the literature which examines its daily operations. Scholars have mostly been focused on the history and content of the law, court judgments, implementation of the law and the functions of various actors within the system (Kumari 2004; Kumari 2017; Bajpai 2017). A study that is immersed in the minutiae of the everyday practices in the Board is sorely missing. My own research does not seek to provide an in-depth study of the Board based on direct observation, though I did observe a few Board sittings to familiarise myself with the field. With all this being said, the daily practice in the Board is not exactly a mystery. The Board to a large extent is considered to provide nothing more than an alternative system of trial by the magistrate as children 'wind their way through a full adjudicatory system' (Parackal and Panicker 2019 p. 209). By implication, ethnographic studies on Indian lower courts (Bertie 2011; Baxi 2014) become germane as windows onto the Board practices.

In her account of a rape trial in a district court in which a child was the victim, Baxi (2014) argues that the adversarial system and its conventions systemically produce distress and fear in the child witness so much so that it appears that it is they who are on trial. The child has to endure questioning divided into three main stages which may last for several hours: first, the examination-in-chief by the prosecutor who seeks conviction for the accused by establishing the veracity of the child's version; second, a cross-examination by the defence lawyer whose aim is to secure acquittal of the accused by attacking the credibility of the child's version; and third, a possible re-examination of the child by the prosecutor to address any damage to the prosecution's case arising out of the cross-examination. The author noted that the defence lawyer subjected the child to the same kind of hostile cross-examination that they would conduct if the witness was an adult.

Berti (2011) draws attention to another inescapable facet of the everyday practice of law which has implications for both the time taken in court processes and the experience of the witness who is alien to courts and yet find themself at the centre of the court action. It is the process of translating, transcribing and transforming the witness's oral replies into written court reports. The author points out that during a trial after each question and reply sequence, the judge translates the witness's response into English and dictates them to a transcriber. In this process, standardised information not voiced by the witness or contrary to what has been explicitly said is routinely added so that the testimony adheres to a certain narrative formula (Berti 2011). This process of transforming the oral question-reply into the witness's statement in the first person is time-

consuming. It also seems to privilege the production of court documents over the witness's individual experience, if not actually carrying the risk that their version is supplanted, advertently or inadvertently, by what the court thinks it ought to be.

The above studies offer sharp insights into the everyday nitty-gritty of court practices. However, the extent to which we may draw upon them to develop an understanding of the Board practices has to be examined. The evidence on the general practice followed in the Board gathered from a broad array of practitioners in my fieldwork, partly discussed earlier, provides some vital clues in this regard.

A lawyer who represented children in the Board argued, "The enquiry is almost like a mini-trial whereby the JJB decides whether an offence has been proved against the child. That takes a lot of time" (Exp5). The founder of an NGO with a strong track record of working with children in conflict with the law referred to the gap between the law and the practice in this context:

> Lawyers appear in the JJB although there is no place for them. Under the Juvenile Justice Act, there is no police investigation to be carried out, no evidence to be collected, no charges to be framed, no prosecution to be conducted, and no conviction to be done. If the law is this, what role do lawyers have? In practice, everything that should not happen is happening. JJBs are dealing with evidence, indulging lawyers, and hearing their arguments. Judges, lawyers and legal experts dominate the system which is self-defeating. They may have the best of intentions. I am not challenging their intentions. But the system is adversarial and accusatory. (Ngo1)

The juvenile justice law minimises or avoids the use of words and phrases associated with the general criminal law such as 'police investigation', 'framing of charges', and 'conviction'. The respondent's argument was that the letter of the law, however, does not prevent the practice from being largely similar to that followed under conventional criminal justice.

This gap is hardly lost on another critical cog in the criminal justice process, the prosecutor, who represents the state and works closely with the Board. An Assistant Public Prosecutor in the Board said:

> According to the JJ Act, a public prosecutor has no role to play. Still, we are appointed to streamline the justice process. The Act does not provide for a public prosecutor because the process adopted here is that of an enquiry and not a trial. However, I do not find any difference between an enquiry and a trial. (Pro2)

When asked if the role of the prosecutor in the Board was different from that in a court, the prosecutor's response again did not leave much room for doubt: "I am expected to ensure that children are held accountable and punished though to a lesser extent than is the case in the adult criminal justice system." The difference was thus said to be one of degree and not of kind.

The examination of witnesses in the Board has the same three stages to it which apply in a court under adversarial rules. This means that the child has to face an examination-in-chief, a cross-examination and a likely re-examination. A legal aid counsel (Leg1), who defended children in the Board, suggested that perhaps there are only two differences between the Board and the court in this regard. First, not all prosecution and defence witnesses are examined in the Board; only those considered to be prime witnesses among them are examined. This makes the process of recording of evidence less elaborate. Second, the respondent claimed that the atmosphere in which witnesses are examined in the Board is less formal and more open and friendly.

As to the way in which oral testimonies are turned into written documents, a principal magistrate (PM3) in the Board confirmed to me that the process adopted for it is the same as the one used in a court.

Another factor that needs to be taken into account in analysing the workings of the Board is that its daily proceedings may vary in intensity depending on how substantive or serious it regards a matter under consideration to be. As some respondents (Ngo6; Bur5) mentioned previously, the Board proceedings tend to be perfunctory when they concern the child in custody in an observation home being produced before the Board every fortnight as per a mandatory practice referred to in court vocabulary in Delhi as '*rehnumai*'—an Urdu word literally meaning guidance or counselling. This practice, which again is directly based on the criminal court procedure[29], is used by the Board for the limited purpose of checking on the child's welfare while substantive hearings in their case remain pending. On the other hand, the Board proceedings seem to take on the full force of a court trial when it examines witnesses and hears arguments from both sides in grave offences: "In theory, the enquiry by the JJB has to be conducted as an enquiry only and not as a trial, but in practice, in offences like murder and rape, theory remains theory" (Exp5, defence lawyer).

[29] See Section 309, the Code of Criminal Procedure 1973 (CrPC).

It is also helpful to have a bit of understanding of factors that contribute to this situation. A senior judge observed:

> There needs to be an understanding of what an enquiry is. Nobody is very clear about what the enquiry entails. You could certainly have an enquiry without any lawyers. You could also have an enquiry with lawyers. Now, which model do you want to adopt? Nobody knows. Because the enquiry is dominated by a magistrate who is trained in the judicial process, it tends to go into a trial mode. (Jud9)

The point that domination of the proceedings by the magistrate is the main underlying factor behind the functioning of the Board in a court-like fashion accords with what we have seen before in the literature review (Chapter 2). A social work member agreed that their position in the Board is unequal: "The composition of the Board suggests that there should be more stress on inputs from social members. But in practice, social members do not enjoy a level playing field" (SM4). There is then a question mark over the contribution social members are able to make to the Board's functioning. For the most part it seems the perception in this regard was not reassuring as reflected in one respondent's comment:

> I can speak for Delhi because that is where I have gone into the system and seen how things work. Even now the judicial magistrate's the ultimate authority. The other two members really perform more of a secretarial function in actual practice rather than give a technical input necessary for rehabilitation of the child. (Ngo4)

There are, however, indications that the judicial magistrate-social work member relationship is more complex, and that it might be unwarranted to hold the judicial magistrate entirely responsible for the de facto subordinate position the social work members are seen to occupy in the Board. One structural factor to bear in mind is that the magistrate is located in a policy subsystem where the higher judiciary has possibly called the shots for several decades (see Chapter 8). As a representative of the judiciary, the individual magistrate's elevated status, to large extent, seems to come with the territory. Another perspective on the issue that emerged in this study was that the social work members themselves might contribute to the unequal way in which their relationship develops. A defence lawyer (Exp5) suggested that in some cases hamstrung by their own unfamiliarity with writing orders which requires knowledge of the law and procedures, social work members are not in a position to assert themselves and play a more active role in the Board proceedings. It was also argued that there are instances where social work members behave 'like

puppets' in the hands of the magistrate, not because they are not competent, but because they prefer acting out of more 'practical' considerations:

> There is also a power dynamic at play. One of them (members of the JJB) is a judicial officer and the other two are not no matter how much they like to be seen as magistrates because of the power attached to it…Social members know that a lot of benefits, privileges, respect and dignity they enjoy in the JJB come to them only with the support of the principal magistrate. Why would they want to disturb that for writing an order? (Exp5)

A few other respondents alleged that social members are sometimes appointed by the government on 'political considerations', by which was implied the preference for favouritism over merit. An officer in the Department of Women and Child Development remarked, "Officers retiring from the government often find a job as a social member and thus get 'rehabilitated'. That is why they apply for the post, not because of their commitment, passion or experience. It is just that they want to work part-time" (Bur5). From these findings, it appears that multiple factors might play into how the judicial magistrate and social work members work together.

How childcare institutions work

Another vital aspect in which juvenile justice was regarded by respondents as having difficulties meeting its own standards concerns the least possible use of institutionalisation. More often than not, the term institutionalisation in juvenile justice is used to refer to placement of the child in an institution as a disposition (United Nations 1986), that is, as a matter of final disposal of the case where the child has been found guilty of committing an offence. However, as I have argued in Chapter 2, in the Indian context institutionalisation needs to be more broadly construed to include both pre-trial and under-trial detention. Evidence suggests that the principle of institutionalisation as last resort tends to unravel at the pre-trial stage itself:

> In case any child in conflict with the law taken into custody is not released by the police, they are produced before the JJB. And what does the JJB do? It first sends them to an institution! The provision on bail in Section 12 kicks in from the first day of production itself. Without looking into the merit of the case, you have to consider bail. It is not necessary that there should be a petition or an advocate to seek bail. This Act (2015 Act) is supposed to be different. Even if there is no advocate, the JJB has to decide the matter with the help of the probation officer, counsellor or social workers present there. But it is not done. That is the end of the principle of institutionalisation as a last resort. (Bur5, officer)

From what we have seen before, the enquiry into cases may go on in the Board for a considerably longer time than the prescribed time limit. The implication of this is that the child who is sent to an observation home on their first production before the Board and who is not granted bail during the pendency of the enquiry ends up being institutionalised without having been found guilty. The period of this pre-conviction detention may 'range from one day to three years' (Exp5). According to one principal magistrate (PM3), in several cases this period is set off against the period for which the Board directs child to be sent to a special home in its dispositional order.[30] However, the possibility of such set-off arises only in those cases where the Board actually resorts to detention in its final orders. Incarceration in the rest of the cases remains hidden in plain sight, not accounted for in any data.

The extensive use of institutionalisation begs the question as to its purpose. Under the law, the stated purpose of institutionalisation is the protection and welfare of the child. Despite this, some practitioners in the juvenile justice system did not shy away from asserting that the need to punish is part of the reason why custody is required. For example, a legal aid counsel for the child said:

> The nature of the offence and the background of the child are taken into consideration in deciding whether they require institutionalisation. If a child who has committed a grave offence is let off, a wrong message will go to the society and to potential law breakers. The child also needs to be taught a lesson. The law has to strike a balance between justice to the child and the larger interest of the society. (Leg1)

However, only a minority among those who justified detention did it in the name of the need for deterrence. The more commonly-held position in defence of custody was that it is in 'the best interest of the child' to be sent to an institution. Somewhat predictably, the magistrates in the Board who decide on sending the child to an institution were prominent among those who took this line. One of them argued:

> There is a purpose behind it. It is not that we are just keeping them there (in institutions/homes) for punishing them or curtailing their liberty. They are provided education, vocational training, and efforts are made for their behavioural change. If the child has been in the company of criminal elements or in a bad atmosphere for

[30] The magistrate derives this power from Section 428 of the Code of Criminal Procedure 1973.

> a long time, by keeping them in homes for a certain period and using counselling therapy and other methods efforts are made to modify their behaviour. (PM3)

There are at least three things going on here even as the child's best interest principle is being deployed. One is a welfare-oriented concern for the child's well-being, be that education or training, for example. Second is a reformative focus on counselling and other therapies. Thirdly, and presumably, even if the Board thought that institutionalisation was for welfare and reformation, the child might still experience it as straightforwardly correctionalist and punitive.

There was definitely a sense among magistrates and social members of the Board that in sending the child to a residential home they were primarily acting out of concern for the child's welfare. The rationale seemed to be that any negative consequences institutionalising the child may have are outweighed by its beneficial effects. It is not difficult to see that this penal welfare rationale functions in a certain context. The vast majority of the children entering the juvenile justice system are known to be from a background where they lack even the bare necessities of life. As a result, several practitioners believed, in an essentially paternalistic manner, that institutions provide such children conditions of living that are better than what they will otherwise have. In addition, members of the Board tended to subscribe to the idea that it is necessary for the child's reform and rehabilitation that they stay away from the environment, made up of their family, peers and others, which is considered to have been a 'bad influence' on them.

The juvenile justice system puts a huge onus on institutions/homes set up for children in conflict with the law. According to a superintendent of an institution, "a home is several things rolled into one" (Hom1). It is expected to perform a multiplicity of tasks including providing a protective environment with all the basic amenities it entails, addressing educational, vocational and recreational needs of children, and delivering counselling services and health care—all this on-site. Fulfilling this mandate would have been an enormous challenge even if adequate infrastructure and human resources to support it had been available, but when they are in fact lacking, as is widely acknowledged, it was regarded as somewhat of a 'non-starter' from the beginning:

> Juvenile justice is yet to take off in the sense that there is a mismatch of a huge degree between a progressive Act and the institutional paraphernalia to support it. As a result, the Act remains unimplemented. The institutions meant for reform and rehabilitation of juveniles are deficient in terms of resources, competence and

> professionalism…These institutions perform the custodial function very well. But they do not really contribute anything towards the juvenile's reintegration and rehabilitation. To me, it seems that the state is still looking at primarily maintaining the children in the homes rather than doing anything very proactively for their correction and reformation. At best, it provides a housing facility, food, education, and health. But it needs to deliver services beyond that. (Exp3, criminologist)

Not only do the objectives of reformation and rehabilitation seem to remain unrealised, but also, respondents argued, institutionalisation has a deleterious behavioural and educational impact on children. A social work member in the Board offered an insight into why this might be the case: "All children do in the home is to sit around, eat, sleep and discuss their modus operandi. All the energy of the staff at the home is directed at maintaining order and discipline and ensuring that children don't fight amongst themselves. That's it. Still there are fights" (SM3). A probation officer (Po1) was of the opinion that the home is often the place where children come into contact with others involved in different offences, form gangs and escalate to more violent forms of crimes.

There was also a perception among many respondents that the home environment exposes children to a range of negative experiences and health risks. Consistent with the academic evidence discussed in Chapter 2, it was revealed that homes have all the problems that are common to prisons. For example, a police officer stated, "Drugs are thrown into homes from outside by children's friends and associates…Some tough ones among the child inmates are tasked with enforcing discipline on others" (Off7). One journalist (Med1) pointed out that several children in homes have mental health issues that go unreported and untreated. Incidents of sodomy in juvenile homes were also alleged to take place (Med1). Another journalist (Med6) said that in the past there had been quite a few cases of children running away from homes. Picking up the same issue, a senior politician pointedly asked, "If they were not incarcerated, why would they run away? Clearly, they are running away from *something* (original emphasis)" (Pol6). A District Child Protection Officer (DCPO) summed up the situation of the institutions thus: "However bad the child's family may be, it is still going to be better than an institution" (Bur3).

Conclusion

Here, I have advanced three main lines of enquiry which shine a new light on several issues concerning policy, politics of policymaking and policy implementation in juvenile justice, and also on the nature of the juvenile justice system in India. First, I examined the somewhat puzzling

absence of RJ in the law. The empirical evidence shows that some civil society actors who participated in the policymaking process during 2011–12 advanced the idea of making specific provisions in the proposed law to enable restorative practices. However, the idea failed to gain sufficient traction with the government ministry. It was speculated, with good reason, that the apparent hardening of public opinion in the wake of the Nirbhaya incident against children involved in serious offending was one of the main factors behind the lack of interest shown by policymakers in incorporating RJ in the law.

Second, my enquiry brings to the fore the perception among a minority of respondents that even though an express provision is missing, the essence of RJ is present in the law. RJ was taken to be implied in the statutory objectives of reformation, rehabilitation and reintegration. Simultaneously, it was viewed as a technique that can be employed to pursue these aims. A few magistrates also claimed that their efforts to ensure child-friendly justice using, in particular, the practice of apology represent RJ in action. However, my examination of the Board's use of apology along with the circumstances surrounding it has found that in most cases it does not seem to promote meaningful participation and empowerment of either the child or the victim. This suggests that the Board is not in the position to claim that its practice approaches RJ, surely not with any degree of consistency and regularity.

Third, the analysis of the empirical evidence on the actual practices within the three components that collectively dominate juvenile justice, namely, the police, the Board and the institutions, gives us a sense of how the system seems to fall short of the minimum standards, leave aside any claims towards its restorative character. It reveals a stark contrast between the law's intent to establish a juvenile justice system responsive to the child's need for care, protection and rehabilitation, on the one hand, and the practical operations of the system which were seen to be insensitive, hostile and punitive, on the other.

It is important, however, to bear in mind, as some of the interviewees critical of the current practices themselves hastened to suggest, that on the basis of the evidence analysed in this chapter one cannot make any sweeping generalisation that the system works in the same way in every case, or that examples of good practices are absent. There are individuals in the police, the Board and the homes "who are sensitive, have the right ideas and are trying to do the right thing" (Pol6, politician). But as another respondent said, "It is a matter of chance for the child that they might

come into contact with an officer who is sensitive" (Med1). My focus (relating to the third line of investigation in this chapter) has not been on such cases that seem few and far between, but rather on how the system was considered to behave in the bulk of the cases.

Seen as a whole, I argue that the findings generated by the three strands of enquiry pursued in the chapter give a new perspective on law and practice in juvenile justice. The preponderant evidence certainly confirms the gap between law and practice which we knew about, but also illuminates the nature and scale of the gap. At the same time, this chapter demonstrates the limitations of the approach that rotates around the all-too-familiar axis of law/practice divide. An exclusive focus on the dissonance between the law and the practice in the juvenile justice system tends to overlook ways in which it might be similar to the adult criminal justice system. From another angle, the narrow approach may obscure a bigger gap that seems to be in evidence: the gulf between an aspiration for RJ and much of the reality of juvenile justice. It is the desire for RJ as part of multifaceted reforms to which I turn in the next chapter.

Chapter 6

Juvenile Justice Reform and Restorative Justice

The previous chapter has identified problems and gaps in the juvenile justice system. Although the consequent need for reform may have been implicit, it requires detailed analysis. Reform may be felt to be necessary to address different issues at multiple levels, to require a set of new measures and/or improvements to existing interventions at various points. It may involve radical, paradigmatic change, or it may favour gradual, incremental change. In other words, recognition of the need for reform still leaves the question of what shape reform might take unaddressed. This chapter turns to an exploration of specific reforms that are desirable as seen from the perspectives of key policymakers, practitioners and experts.

As can be expected in a dataset as large as mine, there is considerable diversity in respondents' views on reform together with their rationalisations and justifications. A small section of my interviewees, which included a few police officers, prosecutors, journalists and probation officers, was mainly dissatisfied with a so-called soft approach towards children deemed to have a pattern of repetitive and serious lawbreaking. These respondents seemed to share the mindset that juvenile justice will be better served by taking a tougher, 'less indulgent' approach to such children. However, the discourse on reform was dominated by a large majority of respondents across all occupational groups who were proponents of, broadly speaking, 'child-friendly', welfarist and rights-based approaches to dispensing justice. The chapter is centred on their narratives, not simply because they constituted the majority, but also because most of the reform ideas germane to my study emerged from them. The proposed interventions varied substantially in type, point of application, scope and method. The aim of this chapter is to piece together and analyse the salient reform ideas focussing on the ways in which the respondents found restorative justice, as they interpreted it, potentially useful in meeting the reform needs.

To structure the complex set of findings, I will go by the stages in which the justice process unfolds from pre-arrest/pre-trial to post-sentence. But I will begin with measures in children's lives outside these formal stages which were regarded by most of the respondents as critical in order to

prevent offending behaviour and subsequent contact with the system, and, therefore, indispensable to reform in juvenile justice. Accordingly, the first section of this chapter discusses a preventive approach to protect children from adverse socioeconomic and other environmental factors that are believed to be the pathways to crime in their case. The second section looks at the idea of early intervention that is motivated by a desire to deal with minor offences without involving the juvenile justice system. The third section introduces diversion and the need felt for operationalising it. This is followed in the fourth section by a discussion on diversion at the pre-arrest and pre-trial stages and the role envisaged for RJ in them. In the next section, I consider the perceived need to adopt RJ at the trial/enquiry, sentencing and post-sentence stages without involving diversion or with minimal diversion. I conclude with some observations on the key themes underpinning the reform agenda that seems to emerge from the examined evidence.

The Stress on Preventive Measures

Respondents across a range of groups expressed regret at the absence of programmes aimed at preventing delinquent behaviour from developing, or dealing with it at an early stage, certainly before the child has committed an offence. For instance, one probation officer (Po4), a frontline functionary of the juvenile justice system, opined: "The problem, above everything else, is that preventive aspects are completely ignored. The biggest drawback of our system is that any process regarding a child starts after either they have committed a crime or have been rescued." And significantly, this struck a chord at the highest echelons of decision-making attesting to the considerable appeal of prevention (Little 1999).

One of the senior-most bureaucrats looking after juvenile justice in the central government told me that they would like to prioritise preventive work moving forward: "We would like to focus on prevention which has not been squarely addressed as of now. It is there in the policy narratives. But there has to be a campaign for preventing violence against children" (Bur6). The preventive action advocated by this respondent and others is distinguishable from the concept of situational crime prevention that is concerned with reducing opportunities for crime by relying on potential deterrent effects of security measures like physical and electronic surveillance (Clarke 1980). In contrast to that strategy, respondents seemed to favour social crime prevention measures (Rosenbaum, Lurigio and Davis 1998). They considered children to be vulnerable to harm and violence in the broadest sense including being in situations where they might harm others. The

objective of prevention then, in their understading, is to alleviate the condition of children so that they do not come into contact with criminal justice. This is in keeping with the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (1990), which is, as the respondent (Bur6) implied above, part of the international instruments on juvenile justice that the Indian law seeks to comply with. The Guidelines affirm that the successful prevention of juvenile delinquency requires efforts on the part of the entire society.

Along the same lines, many of the respondents did not consider juvenile justice interventions alone to be sufficient for the prevention of juvenile delinquency. A senior politician emphasised the need to look at juvenile justice in a broader sense:

> Instead of seeing crimes, especially those committed by children, as individual moral failings, the state should take some responsibility and see them as social failings that have put children in a place where they are, in a sense, victims not perpetrators alone. Very often in Delhi slums you have a situation where there is no childcare, and the child is left in an extremely unsafe environment. Why is it that we can't invest in childcare and crèches that work for smaller children? We should ask ourselves why is it that education etc. begins to be talked about when the child is in conflict with the law, and not in general… It seems so obvious to say these things. But I feel that you can't address juvenile justice only by tinkering with the criminal system for juveniles. You have to have reformation across the board. (Pol6)

This is an acknowledgement of the limits of criminal justice. It underscores the fact that prevention of offending behaviour by children requires protection mechanisms outside the system of punishment. The underlying idea is that juvenile justice ought to be conceived, as the Beijing Rules recommend, 'within a comprehensive framework of social justice for all juveniles' (United Nations 1986). In the Indian context, this is also necessitated, presumably, by a recognition of some of the failings/shortcomings of the system I have detailed in the previous chapter.

Addressing 'risk factors' and assuming 'root causes'

A legal aid counsel put the importance of a preventive approach with eloquent clarity: "The aim of juvenile justice should be to ensure that children don't enter the juvenile justice system" (Leg1). As most children who commit offences come from a deprived and marginalised background, it was argued that addressing their deprivations and providing them with better economic, social and educational opportunities is the key to ensuring justice for children. A probation officer observed,

"The government needs to ameliorate the poor economic condition in which these children and their families live. It is for money that children most often commit wrong acts. In only a few cases the motive is found to be something else" (Po3). Though intuitively poverty can be expected to have a link with crime, the relationship between the two is complex.

In popular and political discourse across different countries including India, it is commonplace to cite socioeconomic structural factors such as poverty, inequality and unemployment as explanations of juvenile offending (Muncie 2004; ECHO 2014). Several criminological theories too posit a strong relationship between socioeconomic disadvantage and crime. The one regarded as a classic among them is Merton's (1938) strain theory. Its central thesis is that the pressure or strain experienced by individuals due to lack of fit between social expectations and opportunities predisposes them to behave in a deviant fashion to redress that strain. Such criminological theories, however, typically do not predict that socioeconomic deprivation in and of itself causes juvenile offending (Agnew et al. 2008). Evidence to establish a causal link between the two is difficult to find particularly because the effect of socioeconomic disadvantage on delinquency likely operates through a number of mediating factors such as adverse family, individual, school and peer situations (Wright et al. 1999; Fergusson et al. 2004). A sizeable body of research now deals with what tend to be referred to 'predisposing factors' or 'risk factors'—those variables that predict an increased probability of later offending (Loeber and Farrington 2011).

Yet, it is acknowledged in that body of work that there is no single risk factor that can adequately predict offending (Loeber and Farrington 2011). Newburn (2016) adds that risk factors tend to work cumulatively and in interaction with each other. They may be of limited utility on their own; it is when there is an accretion over time of a set of different risk factors acting in concert that they have greater impact. It is, understandably, complex to disentangle the various mechanisms though which risk factors may operate to be able to precisely determine the nature of the relationship between socio-economic status and offending. That said, there seems to be evidence to support both conventional wisdom and significant elements of criminological theory that poverty is an important contextual factor in offending among children (Newburn 2016).

In addition, research indicates that along with being at risk of offending due to the effect of poverty, "children from poor backgrounds are disproportionately selected into the juvenile

justice system and retained there by decision-making that is predicated on, amongst other things, their impoverished status" (McAra and McVie 2016). Consistent with this finding, the presence of poor children in overwhelmingly large numbers in the Indian the juvenile justice system suggests that those from the lower economic strata are more likely to be targetted and processed by the system (Parackal and Panicker 2019). Lifting children out of poverty and thereby reducing the risk they face of being caught by the system is naturally emphasised as a key aspect of preventing the criminalisation of children.

A problem believed to accompany poverty was the lack of parental care, support and supervision. One probation officer (Po3) estimated that almost 50 per cent of children in the system are either from broken homes or have lost one or both of their parents. Even in cases where children live with both parents, a journalist (Med1) said, the family is so preoccupied with just the daily struggle to put food on the table that children are often neglected. It was argued that the marital relationship of parents is often strained due to economic difficulties, domestic violence, non-working alcoholic father, etc. (Bur2). The same probation officer cited above (Po3) gave an instance of distressing incidents that sometimes take place in such situations: "I recently visited the home of a child who is accused of killing their own father. The father was an alcoholic and used to be very abusive and violent at home. The child in association with their friend killed the father in an act of revenge". This is of course an extreme case. In general, the thrust of the argument was that supervision by parents and emotional attachment with them which may act to constrain deviant impulses do not exist in the case of most of these children. This seems to be broadly consistent with particular versions of the social control theory of crime (Hirschi 1969; Gottfredson and Hirschi 1990) and past empirical research in the Indian context (Parackal and Panicker 2019).

In the assessment of practitioners interviewed in this study, some children have parents/family members who are involved in crime or have a problem with substance abuse, and children imitate and imbibe what they see people close to them doing (SM3). Offending children were often said to have peers who are deviant (Ngo8). Here the emphasis seems to be on explaining child's criminal conduct as behaviour learned in interaction with criminal peers and environments in line with the theory of differential association (Cressey 1952; Sutherland and Cressey 1974). Along similar lines, a respondent from the vantage point of running a drug de-addiction centre catering exclusively to such children revealed, "Use of drugs in their (deviant children's) company

is the most common entry point to crime for children. No child can do drugs, especially from the background they are coming to us, without committing crimes" (Ngo10). This was affirmed by a probation officer:

> 70 to 80 per cent of them commit offences solely because they are into drugs. Some children take *smack* (heroin) or *ganja* (cannabis) three-four times a day. It is expensive. They spend Rs. 200 to 1200 in a day. They commit crimes to be able to afford drugs. If, somehow, we can stop the proliferation of drugs in the society, then juvenile delinquency will reduce drastically. (Po2)

While it is important to recognise the harmful effects of drug consumption among children, the use of the causal language here is not substantiated by any conclusive evidence. A strong correlation between substance use and criminal behaviour among children has been reported in a study conducted with a sample of 487 children under enquiry in an observation home in New Delhi (Sharma et al. 2016). Findings of this study published in a short paper show that 86.44 per cent of the sample had a history of consuming an intoxicant or illicit drug. The study reports tobacco, cannabis, alcohol, opioids (including heroin) and inhalants as the main substances of abuse. From the extremely high rate of substance use found among those children, the study draws the inference that it plays a contributory role in criminal behaviour. However, it still cannot be said that the use of such substances directly leads to criminal involvement. For one argument against assuming a causative relationship is this: illicit drug use is likely to lead to contact with the police and contact with the police, in turn, is arguably iatrogenic. The study itself concludes that substance use and criminal behaviour among children are influenced by predictor variables (risk factors) such as 'poverty, broken family, and history of criminality in family' (Sharma et al. 2016 p. 182). And since risk factors, as we have seen earlier, are likely to be intimately interlinked in their operations, it does not seem feasible to isolate the effect of one and claim that, absent that, children would not have offended.

Adding to the mix of adverse economic and social environments facing children is the problem of educational deprivation and its debilitating effect on their life chances. A respondent drew attention to the nature and general trajectory of this deprivation which, in their perception, intersects with the child's additional adversities:

> When the child goes to school, they do not feel welcome there. The child feels alienated… When the child is not in a position to cope with the pace of the teaching, they need some special support. That is missing. They start drifting from the school.

> The parents being illiterate can't help the child with their homework or any learning disability. Violence against these children in the family is very high which is often not visible. They get alienated from the family. They start dropping out of school. And there are people waiting to get them into the crime world. A large number of children becoming drug users and committing crimes can be saved just by two things: first, making school a welcoming place, and second, going the extra mile in helping children when they are in trouble. (Ngo10)

Similarly, one social member in the Board (SM3) was of the view that dropping out of school is a major precipitating factor for the onset of offending behaviour, pointing out that many children in the juvenile justice system are 3rd or 4th grade dropouts. A District Child Protection Officer said: "I have seen from my own experience that barring some exceptions only those children get into crimes who have either not attended school or have dropped out very early" (Bur3). The connection between the lack of school education and offending behaviour, though not their direct correlation, is supported by previous research findings. According to a study conducted by the Delhi Commission for the Protection of Child Rights, "Disengagement or dropping out from the educational stream is found to be a hallmark of the children in conflict with law" (DCPCR 2015 p. 21).

Several respondents, especially from the media and the police, also observed that children from deprived backgrounds are susceptible to exploitation by adult criminals. A senior editor claimed that "There are organised gangs in Delhi which recruit juveniles to commit crimes for them. Juveniles are lured into crimes by being told that even if they committed murder, the punishment for them would just be 3 years of detention" (Med3). Further, it was argued that there are examples of children who turn into 'aspirational gangsters'. But even where children were perceived to have become hardened criminals, the respondents were of the view that such children would perhaps not have fallen into crime in the first place if their need for care and protection had been looked after.

Thus, as per the preventive approach espoused by the interviewees, risk factors associated with offending behaviour among children (often couched in the language of, or assumed to be, 'root causes') lie in the adverse socioeconomic conditions and contextual factors they have encountered. This is not to say, as a respondent insisted, that social or economic circumstances provide an excuse for committing crimes: "I am all for their accountability. For sure. But I also think that it would go a long way if we actually spared a thought for all the young children around

us and not just for those who are charged with crime" (Pol6). The argument was that juvenile crimes cannot be tackled adequately unless preventive and protective measures are taken to ameliorate the situation of children who are considered to be at risk of offending. Also, importantly from this perspective, it appears that the primary thing that requires reform is not the juvenile justice system itself, but rather, the larger social and economic domain in which it is embedded.

In congruence with the theme of relying on potential solutions outside the juvenile justice system and avoiding or minimising formal legal processes, respondents also advocated 'early intervention' to supplement the general preventive measures discussed so far.

The Need for Early and Non-adjudicatory Intervention

A significant proportion of interviewees expressed the need for alternative means outside the formal system of justice to deal with minor offences committed by children. The rationale was that, as an officer said, "The child's contact with the juvenile justice system is harmful for them. The fewer children come into contact with the system, the better" (Bur5). This resonates with the long-established position in criminology that exposure to the formal criminal justice system has damaging consequences for the child including being labelled and stigmatised (Becker 1963; Goldson 2010). The Beijing Rules (1985) emphasise the need to 'minimise the necessity of intervention by the juvenile justice system', which could, in turn, 'reduce the harm that may be caused by any intervention'. In many cases of non-serious nature, they hold even non-intervention to be the optimal response.

In the Indian context, non-intervention does seem to be a rather routine response whether out of good conscience or convenience:

> I think the number of cases that get by without being dealt with by the system are far more than the actual cases that reach the system. A lot of thefts, cases of drug abuse and thefts related to drugs are allowed to go because they are small, and the police are overburdened. The police scuttle a lot of real work that needs to be done at the preventive level. (Ngo4)

The police turning a blind eye to minor crimes and misdemeanours or letting the child go at their level, apart from being seen as arbitrary, was not considered to be necessarily a good outcome for the child (Ngo7). There was a perception that not doing anything about the child's offending behaviour may be counterproductive: "Crime has its own trajectory and cycle. Probably when

lesser offences are ignored, you graduate to more serious offences" (Ngo2). One respondent pointed to another potential danger of delaying an intervention for too long: "By the time the child comes into the juvenile justice system they are quite far gone and hardened. So, we need to start a lot earlier and not wait for it to get to the stage of institutionalisation" (Ngo4).

Thus, while respondents found it important to reduce the requirement of formal juvenile justice interventions, they also seemed to subscribe to the criminological axiom that early intervention is necessary to prevent children who are petty offenders from escalating into serious and chronic offenders (Farrington 2012). However, Moffitt's (1993) distinction between 'life-course-persistent' and 'adolescent-limited' offenders challenges this assumption and rightly suggests that a substantial subgroup of young offenders do not persist in offending upon entering adulthood. Leaving that aside, what the respondents had in mind was that the child's wrongful conduct should neither be ignored, nor should the child be exposed to juvenile justice where institutionalisation was seen as the norm. In other words, early intervention needs to be minimal: "The intervention needs to be much simpler and smaller" (Ngo4). And crucially, the stress was on avoiding an adjudicatory process for the purpose of this intervention.

The importance of being specific about the nature and scope of early intervention cannot be overemphasised given its potential, paradoxically, to lead to or intensify the very outcome it is intended to avoid. While the intention of early intervention is to reduce the possibility of children coming into contact with the formal criminal justice processes, early intervention practices may instead have the unintentional effect of drawing more children into the juvenile justice system (Goldson 2000), a phenomenon referred to as 'net-widening' and 'mesh-thinning'. Stan Cohen (1985 pp. 41–42) famously described this phenomenon with the help of a fishing metaphor where the criminal justice system, imagined as 'a gigantic fishing net', widens its reach, and often 'thins it mesh', to catch more individuals ('fish'). Because early intervention sounds benevolent, ameliorative and preventative, there is a temptation in the context of juvenile justice to extend it to children who have neither offended nor demonstrated problematic behaviour (Case and Haines 2015). Children can be identified by the juvenile justice system as qualifying for a pre-emptive intervention based on any potential need or failing (Goldson 2000). The resultant net-widening may leave many more children exposed to the negative impact of contact with the system (McAra and McVie 2007) than would have been the case in the absence of early intervention.

The concern about net-widening surfaced in this study in one of the interviews. A lawyer who worked with children facing an enquiry expressed wariness—quite pertinently in my view—of the tendency to expand formal control over children through a move that might ostensibly be motivated by a benign intention:

> In a case the Supreme Court has observed that the definition of a child in need of care and protection (in the 2015 Act) is illustrative and open.[31] Any child can be in need of care and protection. Now that's very alarming. The judge delivering the judgment makes every child potentially in need of care and protection. By doing so they think that they are helping children. But that's not the case always. You are also letting the state have control over a child's life. (Exp5)

Indeed, a child judged to be in need of care and protection qualifies for a range of measures for their rehabilitation including, if considered in their 'best interest' of course, being separated from their family and placed in a childcare institution. The child thus gets entangled in the very system that might label and stigmatise them leading possibly to deeper and longer system contact.

The fear that early intervention may turn out to be 'a monster in disguise, a Trojan horse' does not seem to be an overreaction (Cohen 1985 p. 38). At the same time, it is not inevitable that this fear will come true. Perhaps part of the answer lies in directing the focus of early intervention outside criminal justice. A key problem with early intervention in the context of juvenile justice has been found to be that it has tended to directly target the prevention of problems and negative behaviours rather than the universal promotion of children's rights (Case and Haines 2015). The corrective then could be to prioritise the delivery of universal generic services as distinct from individually targetted intervention (Clarke 2009; Goldson 2009). It may be argued that this way of rethinking early intervention in non-stigmatising terms dovetails nicely with the emphasis placed by the respondents earlier on taking general preventive measures outside the juvenile justice system. But, from another perspective, early intervention and prevention seem to become indistinguishable from each other. At any rate, respondents generally considered both these levels to be closely bound together.

[31] The case being referred to here is *Re: Exploitation of Children in Orphanages in the State of Tamil Nadu v. Union of India* (2017) decided by the Supreme Court.

Restorative justice as a preventive technique

A large section of the interviewees emphasised the role of three critical social institutions—the family, school and community—as being central to developing non-adjudicatory means of addressing the problems of children and the difficulties posed by them. One child rights activist (Ngo4), for instance, described the family, school and community as not only agents of socialisation of the child but also as spaces which are critical with respect to dealing with their delinquent behaviour at an early stage and preventing it from snowballing. It is precisely the lack of these starting points for taking care and control measures that was seen to make contact with the system difficult to avoid. As an officer working on juvenile justice in the Delhi Government put it: "Since we have neither equipped our families nor developed mechanisms to deal with deviance in the community, when a child commits an offence, we send them to homes" (Bur4).

Some interviewees held the view that RJ is needed within this specific context of crime prevention outside formal juvenile justice. RJ was seen as a potentially useful technique to help initiate dialogues on issues of common concern in situations that have not yet been tackled as criminal matters. In the words of a child protection specialist:

> RJ doesn't have to be in the formal legal system alone. One way of looking at RJ is to consider it as a good preventive tool for conflict prevention. In the context of at-risk communities, like slum areas, where generally there seems to be a lot of violence, peer violence, bullying in schools, etc., we are not dealing with crimes per se. I think RJ offers a really good opportunity for everyone involved to start talking about some of those concerns. (Exp9)

Though it is often the application of RJ by state institutions in criminal justice matters that grabs most attention, RJ scholars themselves have aspired to a much broader ambit of RJ (Braithwaite 2006). The potential of RJ practices is said to go beyond resolving specific incidents of criminal wrongdoing to providing 'a general social mechanism for the reinforcement of standards of appropriate behaviour' (Wachtel and McCold 2000 p. 114). In this context, it is significant, as noted in Chapter 3, that RJ has a close affinity with broader traditional approaches to conflict resolution outside the state, such as community mediation. In fact, it is pointed out in the literature that the community mediation movement in the United States in the 1970s arising out of growing dissatisfaction with a formalised justice system was one of the original sources out of which the campaign for RJ emerged (Harrington and Merry 1988; Johnstone 2002). Later, when the term

'restorative justice' gained pre-eminence in the 1990s, various forms of community dispute resolution often began to be put under the RJ umbrella (Roche 2006).

Given this compatibility of RJ with community-led justice, its use has been promoted in non-state institutions lying between the child and the state, namely the family and school (see, for example, Crawford and Clear 2001). Restorative practices focussing on strengthening and repairing relationships have been used to address issues of child and family welfare (Morrison and Ahmed 2006). RJ advocates also claim that RJ is proving to be an increasingly influential idea in programmes for the prevention of school bullying in different countries (Braithwaite 2006; Ahmed and Braithwaite 2006).

In tune with these developments, some respondents who worked for civil society organisations thought that introducing restorative processes in schools merits consideration. For example, a child rights activist said, "There are countries that have introduced RJ in schools for conflict resolution among children. I think that's a good place to begin" (Ngo2). Another respondent (Exp9) said that they had learnt that 'some Latin American countries' are using RJ practices in schools. A Bengaluru-based NGO references the following on its website as something desirable in India: "Schools in Australia, Brazil, Canada, New Zealand, UK and USA are using restorative practices to build a positive, respectful and caring culture. It is used to address bullying, exclusion, and disciplinary issues, but is not confined to just these" (Enfold 2020).

While social institutions, the school in particular, were highlighted by these interviewees as the initial level where the use of RJ can potentially be beneficial, there were others who believed that RJ is needed as a form of diversion from juvenile justice. But before I consider those views, it seems imperative to briefly look at how diversion is understood in the youth justice literature and by the interviewees.

Diversion in Juvenile Justice

Alongside early intervention, the practice of diversion and the philosophy behind it has had a profound influence on shaping responses to juvenile delinquency (Goldson 2000). The concept of diversion is primarily grounded in two different but influential theories of deviance (Wilson and Hoge 2013). The first, labelling theory (Becker 1963), when applied to juvenile justice contends that children processed through formal systems become labelled as 'delinquents' at a young age,

and, as a result, experience stigma and other negative consequences. Labelling theorists argue that the assignment of the label creates an expectation in both the 'delinquent' themselves and others about continued delinquency and becomes a self-fulfilling prophecy (Klein 1986). The second, differential association theory (Cressey 1952; Sutherland and Cressey 1974), suggests that system-involved children can learn antisocial attitudes and behaviours by associating with peers who exhibit such behavior. Diversion seeks to reduce the impact of labelling and association with antisocial peers by reducing the child's exposure to and contact with the juvenile justice system (Wilson and Hoge 2013).

The term 'diversion' has been used in diverse senses within academia and policy discourse (Kelly and Armitage 2015). A difficulty encountered at the very outset in defining diversion is whether it is a means to an end or an end in itself. Kelly and Armitage (2015) provide evidence that diversion has been used in both senses in youth justice in England and Wales. When used as 'diversion from the youth justice system' into alternative services, diversion is a means to pursuing a set of objectives such as protecting young people from the iatrogenic potential of criminal justice and reducing reoffending. On the other hand, where the reference is to 'diversion from crime', diversion is intended to be the end.

Another important reason for the lack of consistency in what diversion means is that there is considerable variability about the stage at which it is thought to be applicable in the criminal justice process. Diversion can be initiated before arrest. In fact, there is an argument that in the context of youth diversion this is the true and genuine form of diversion as it prevents the youth from being formally processed by the juvenile justice system (Farrell et al. 2018). In the eyes of some scholars, diversion presupposes formal system contact. But again, there are different opinions on what 'system contact' means. One view is that diversion programmes typically apply "at any point between a formally recorded apprehension and the formal acceptance of a petition by the juvenile court, but not beyond the point of juvenile court intake" (DeAngelo 1988 p. 21). Others prefer a broader conception that brings diversion from custody within its ambit (Newburn and Souhami 2005). Given that there is no consensus on a single definition of diversion, it seems safe to say that an individual can be diverted at any stage of their route through the criminal justice system. Even so, it might be helpful to conceptualise diversion from custody as the 'most minimal

form' of diversion, and diversion from formal criminal justice processes as its 'most far-reaching form' (Newburn 2017 p. 705).

Diversion is part of the general principles enumerated in the 2015 Act as central to the administration of the law. The term has been used in the sense of diversion of cases away from criminal justice processing and diversion towards any relatively light-touch process that does not involve judicial proceedings.[32] However, a common critique made by respondents was that the stated principle has not been operationalised. As an NGO worker said, "The principle of diversion is mentioned in the Act. But it's just there. That's it" (Ngo3). The respondent correctly implied that the law does not provide any mechanism for diversion to actually take place in terms of its apparent objective. It was also agreed that there are not any existing practices based on diversion either, unless the meaning of diversion is stretched to include those juvenile offences that the police choose not to process at all in the exercise of discretionary power they do not legally possess. Few respondents interpreted diversion in that sense.

But there were still differing understandings of diversion. One respondent had this to say:

> People differ on what diversion means. Some say that the juvenile justice system is itself diversion from the criminal justice system. There is therefore no need to create diversion within the JJ Act. I don't agree with that. We do not send children to the criminal justice system. The juvenile justice system would have been diversion if children had first been sent to the criminal justice system and then diverted to the juvenile justice system. But the fact is that the juvenile justice system is a distinct system by itself. I think there has to be a diversionary practice within the JJ Act. (Exp5)

This respondent clearly considered system contact following offending as a precondition for diversion. On the other hand, a police officer (Off3) argued that diversion needs to happen before the child has offended and come into contact with the police. These views reflect the contested understandings of diversion in the literature referred to earlier.

Another example in this study where diversion was interpreted rather differently, but again having a parallel with the previous discussion, relates to diversion being equated with 'diversion from crime'. A civil servant who dealt with juvenile justice matters referred to diversion as an outcome rather than a process: "To me diversion means diverting the child from a particular

[32] Section 3(xv) of the 2015 Act.

behaviour pattern that is wrong and harmful" (Bur5). However, in my view there are both analytical and practical reasons not to conflate 'diversion' with 'diversion from crime', even though the latter might be the ultimate aim of diversion. First, 'diversion from crime' seems to involve the idea of taking various measures to prevent crime and may be understood as essentially the same as the general preventive approach or early intervention discussed in preceding sections. So, the term 'diversion from crime' does not serve any additional analytical purpose. Second, again from an analytical point of view, treating diversion as an end in itself does not seem helpful in exploring non-adjudicatory interventions which can be used to pursue the objectives of juvenile justice. As for a practical reason, it sounds a bit premature to talk of diversion at a stage where there has not been any contact, formal or informal, with the system (Cappelaere 2005). Also, except for one respondent, I found that to the other respondents diversion implied much the same as defined in the law, that is, addressing criminal behaviour without putting children through formal criminal justice processing in the Board.

However, there was a divergence of opinion among the respondents about the point at which diversion is desirable, what types of offences could be diverted, and who might deliver a diversionary process. That said, the police and the Board emerged as the two points at which the respondents supported the idea of providing pre-arrest and pre-trial opportunities, respectively, for diversion. And at both stages, importantly, there was a preference for diverting as well as engaging in RJ.

Restorative Justice with Diversion

Before proceeding to analyse the concurrent use of diversion and RJ, it seems important to clarify that although the two practices are often linked with each other, they are different concepts (Doek 2013). Diversion by its nature may seem aligned to restorative processes, and the latter are no doubt used to divert offenders from arrest and prosecution. But the fact remains that RJ is only one of the approaches to dealing with diverted cases. Diversion does not necessarily imply an active interaction between the offender and the victim for the purpose of reaching a just outcome. On the other hand, RJ can be, but is not always, an alternative to prosecution as diversion is (Doek 2013). It can be used at all stages of the juvenile justice process including as part of the sentence given by a juvenile court. To put it simply, there can be RJ without diversion, and diversion without RJ.

The discussion below focuses on the interest among respondents in diversion into restorative practices.

Police-initiated diversion and restorative justice

A few respondents preferred that diversion occur right when the police get involved and RJ be used as an alternative to arrest and subsequent prosecution:

> The police can use a restorative justice approach to divert children involved in petty offences away from the enquiry process (in the Board). But I have found that whatever be the nature of offence the police produce the child before the Board. As a result, even a petty offence takes a long time to dispose of. (Exp6, defence lawyer)

The suggestion here seems to be not just that the police divert the child but also that they *use* a restorative approach to deal with the child. This was seen as a swift mechanism at the earliest possible opportunity to take the child out of the juvenile justice system. But it requires the police to put in more time and effort rather than simply release the child and do nothing. Certain countries do have experiences with the practice of police-led diversion based on an RJ approach. The Thames Valley Police in England is considered to have been in the forefront of promoting restorative measures for dealing with less serious youth offending by delivering police cautions in a restorative session/conference, though not as an alternative to court processing (Hoyle, Young and Hill 2002; Young 2001). This model was broadly based on the police-led RJ model that had developed in Wagga Wagga, Australia (Crawford and Newburn 2003; see Chapter 3 in this thesis).

However, few were in favour of the police-run conference model. A respondent who worked with an NGO that seeks to use restorative processes in cases involving children did not think that the involvement of the police in an RJ process is a good idea in the Indian context:

> The Wagga Wagga model was fairly controversial. The kind of distrust and lack of confidence there is in the police, I don't think we would want that at this stage. In fact, we would not want any person in a position of authority or in a position to make decisions vis-à-vis the people involved in the offence to be a part of an RJ process. (Ngo9)

At the same time, the respondent considered it important that RJ practitioners work with the police so that the principle of diversion can be operationalised and some cases are diverted to an RJ process. The police were seen to be well positioned to have the necessary inputs for correctly channelling suitable cases to RJ processes: "If the police find that a child is coming into the system

multiple times for the same type of offence, we could work with that child because they are going to graduate to a more intense level. The cooperation of the police is critical" (Ngo9).

There are two points here that need a little unpacking. First, the argument being made is that the role of the authority referring a case to a diversionary measure—the police in the above scenario—be kept separate from that of convenors and facilitators of the diversionary process itself. One of the concerns with the Wagga Wagga model was precisely that the police were considered to have too many roles in it (Troedson 1996). As for who might be suitable for the role of a facilitator of an RJ process, the respondent added: "All I would say is that they have to be people who are trained in restorative processes and who are aware of the impact of various factors on these processes and the possibility of implicit biases" (Ngo9). Perceptions of caste, religious and class prejudices among the police in India might be among the reasons for scepticism that the police will act as independent arbiters in RJ processes (Darapuri 2018; Cunneen and Goldson 2015).

A second point is that not all diverted cases may be suitable for a restorative process. The same respondent said, "Research shows that RJ is not appropriate for petty offences. For diversion to an RJ process, we would like to look at offences in the intermediate category, in between petty and heinous offences" (Ngo9). Certainly, studies show that a particular form of RJ called conferencing organised as a diversionary measure in some jurisdictions such as New Zealand is generally regarded as appropriate for relatively more serious offences or for young people who have been in trouble before (Daly and Hayes 2002). Connected to this, some scholars are of the view that the use of formal restorative processes is likely to be time and resource intensive (Wachtel n.d.), and, therefore, such significant interventions may be difficult to justify in the case of relatively minor offences (Tickell and Akester 2004).

In spite of arguments in its favour, the use of RJ in serious offences is rare; minor offences form the focus of much of RJ practice across the world including the referral order in England and Wales, perhaps also helping to explain why victim involvement in it tends to be so low. A countervailing consideration to contend with is that the public are perceived to be generally resistant to the idea of restorative responses in very serious offences (O'Mahony and Doak 2008). The respondent's (Ngo9) preference to explore the use of diversionary restorative options only in

the case of offences in the intermediate category may be interpreted as aimed at balancing different but interrelated rationales.

Diversion from the Juvenile Justice Board and restorative justice

Though diversion by the police is considered to be possibly the appropriate level in terms of protecting the child from a more intensive contact with the system (DeAngelo 1988), there are of course opportunities for a diversionary intervention even after that threshold has been crossed. To take an obvious example, diversion at the start of the court process can still possibly mean that the child avoids experiencing deeper adversarial contact with the system and its potentially criminogenic effect (McAra and McVie 2007). Several interviewees focussed on this sort of diversion and the possibility of using a restorative process in it. A social work member in the Board (SM4) argued that it is the failure to make a preventive intervention in the society which brings the child into conflict with the law in the first place. In this respondent's opinion, the answer to that failure may lie not in conducting adversarial proceedings in the Board, but rather in finding an alternative to it where appropriate:

> Having missed one intervention, if we do not utilise the second chance to intervene adequately when the child comes into the system, they will not find a positive alternative to crime and will stay in the system. They may graduate to higher level of criminality…The intervention we make at the Board is not enough at all. I would like RJ to be tried on an experimental basis in the Board. Scuffles between children in schools which end up in the Board are an example of cases where RJ can be applied. A trial can create more divisions between families who have known each other for years and who will again be seeing each other. (SM4)

As seen earlier in the case of police diversion, there is an endorsement of the idea of using RJ, on this occasion as a diversion from the Board. Significantly, the respondent (SM4, a female social work member) believed that RJ was suitable not only for low level crimes, but also for certain types of serious crimes:

> I would strongly recommend RJ for children involved in sexual abuse cases. Boys and girls who are 15-16 years of age often elope with someone in the same age group. But the boys are caught, and the girls are left free because the law says so. In such cases RJ will really work. The exploration of sex by adolescents and their infatuation with the opposite sex should not be seen with a criminal lens. It is mostly consensual.

However, a significant proportion of my respondents, especially those belonging to the legal profession, apprehended that RJ might be inappropriate for serious crimes. Their main concern was a well rehearsed one: if the child is dealt with 'too leniently', they might reoffend (Pro1, public prosecutor). The respondents perceived RJ to be 'a soft option' where the child had committed a grave offence and argued that it would send 'a wrong message' to the society and to potential lawbreakers (Leg1, legal aid counsel). To wit, a principal magistrate in the Board said, "In the case of serious offences, it may not send a good signal if it is left to the parties to decide. Juveniles will not be reformed if they think that their offence will be resolved in a meeting" (PM1).

Whilst the respondents who were supportive of RJ as a diversionary option had different views on the kind of offences they would like to see it applied to, they were bound by some common themes. The most prominent among these themes was the desire that the child avoids the experience of facing the enquiry proceedings in the Board and its likely negative consequences including ending up being labelled as a 'criminal'. The enquiry process was surely considered to have a deterrent value, but some respondents did not feel deterrence is essential for achieving the objectives of the law. As one respondent observed:

> By conducting an enquiry, taking children away from their families, and sending them to institutions, you think you are taking deterrent action. But that doesn't achieve the desired results. I don't think they will change if you give them punishment. I think they will change if you give them an opportunity. (Bur5)

Several interviewees proposed that instead of subjecting the child to an adversarial enquiry, the system should offer them an opportunity to interact with people who want to understand their feelings and needs, help them recognise the harm done and take steps to move forward. Face-to-face interactions between the child and the victim were seen as potentially an important part of this alternative:

> It is so important to have sit-down discussions. If a crime is not heinous, then a lot of times it is just about miscommunication and misunderstanding. For a child to sit down with the victim is enough to find out and address the problem. In institutional punishment, you do not know what the problem is; you think you are the problem. (Med1, journalist)

Another point on which there was some convergence among the interviewees was that the authority to divert suitable cases to a restorative process should lie with the Board. In support of this view, a social work member hypothesised that the decision to divert a case is more likely to

be acceptable to people if there is confidence that it has been taken in accordance with due process: "People recognise the court…I think an RJ process should take place only on the Board's order" (SM2). Ironically, this view was echoed by a police officer (Off3) for no better reason than simply that they did not trust the police to handle the discretion to divert cases in a fair and consistent manner.

To quite a few interviewees, the referral order operational in England and Wales seemed to have several features that might be utilised in the Indian context for administering diversion from the Board as well as applying the principles of RJ. Different interviewees underlined different aspects of the referral order. For a respondent working in an NGO, a key feature was that referral by the youth court is made as soon as the child pleads guilty: "An important thing to take away from the referral order is that RJ is offered at the initial stage itself" (Ngo11). Another NGO professional observed that "That there is no enquiry in the referral order is more important than the fact that children are not sent to institutions" (Ngo5). On the other hand, one respondent reasoned that "Practically, the referral order does have the advantage of bringing down the use of institutionalisation" (Ngo3). A judge emphasised the potential it has for facilitating meaningful interactions: "An attractive feature of the referral order is the range of discussions that can take place. Those discussions will give a lot of insights into the whole issue" (Jud8). In this regard, one of the respondents felt that having community volunteers in the youth offender panel is especially helpful as "the child has someone they might find easier to talk to" (Ngo11). To a social work member, the referral order overall appeared to be a good fit to address the lacunae of heavy use of institutionalisation, adversarial proceedings, and poor participation of the child, the victim and the community in the justice process:

> That's a very good model. That's what we want. But it doesn't happen in our system. We always blame the large number of cases in our system. In serious and heinous cases, the day the child enters the system, we send them to 14 days judicial custody. The damage is already done in the first 14 days. The child will be given bail only after that. Next the charge sheet is filed, and the charge is framed.[33] It is

[33] The terms 'charge sheet' and 'charge' mean different things in the Indian legal parlance. A charge sheet is the final report submitted by the police in the trial court if after investigation they find evidence to substantiate allegations of crime made against an individual in the First Information Report (FIR). On the other hand, the charge is framed by the trial court against the accused person if the court is satisfied that there is a *prima facie* case against them to be put on trial.

> only then the child is asked whether they plead guilty or not. And we never ask the victim what they want. We do not have any community participation. (SM4)

However, it is important to add a caveat here that the respondents' impressions of the referral order and how they would like to see any of its features being emulated in the Indian context were largely based on its ideal type. There are no doubt considerable gaps between the ideal and the practice as the discussion on the referral order in Chapter 3 has shown. To the extent that the respondents had not taken the actual workings of the referral order into account, their views may be seen as partially informed. But that need not necessarily take away from the insights into what they consider to be desirable in a diversionary intervention based on the principles of RJ by using the referral order as a reference point. Equally importantly, neither must it undermine concerns expressed by some respondents, in principle, about the referral order to which I will come in Chapter 8.

Not everyone in my sample of interviewees was convinced that diversion, whether by the police or the Board, is needed as a reform measure in juvenile justice. A large section favoured integrating RJ into current interventions at the enquiry, sentencing and post-sentence stages. I turn to this perspective in the next section.

Restorative Justice without Diversion or with Minimal Diversion

Some interviewees argued that instead of diverting cases from the Board, the present system could be improved by introducing elements of RJ to supplement the workings of the Board at the enquiry stage.

At the enquiry stage

In terms of details, the role of RJ envisaged at this stage seems to be, to paraphrase Cunneen (2010 p. 184), more of 'a peripheral add-on' to the main workings of the Board. Without upsetting the centrality of the enquiry by the Board, a few interviewees argued for exploring the possibility of a so-called restorative process under the supervision of the Board with a view to finding a settlement between the parties. For instance, a principal magistrate said, "A restorative meeting can be held *in* the Board (my emphasis). It can be facilitated by someone in whom the child reposes trust. Counsellors or probation officers can facilitate it" (PM4). Another magistrate went a step further and suggested direct involvement of the Board in a restorative process: "A restorative meeting can be done *by* the Board (my emphasis). One member of the Board could be given the task of sitting

down and having discussions with the parties concerned" (PM1). The term 'parties' here was used to refer to not only the child and the victim, but also their respective families and others who might have a stake in the dispute. It is worth noting that these opinions are all of a piece with those discussed in Chapter 5 where a few principal magistrates claimed, unconvincingly as we saw, that RJ was already being practised in their Boards alongside the enquiry.

A more nuanced use of RJ was recommended by a social work member in serious offences where an outright diversion from the Board was not deemed feasible:

> RJ can be used in incest cases. 30 to 40 per cent of child sexual abuse cases are incest cases. The initial reaction to such emotionally disturbing incidents by families is to file a legal case. When the case comes up for trial, families find themselves torn between fighting the case and keeping their family together. Children invariably turn hostile. All the time and resources spent on the case goes waste. That doesn't mean we want to pardon the young offender. But we need to bring the family together, counsel them, and let them come to grips with all aspects of the situation before proceeding with the case. Holding a circle with the family can be useful in this context. (SM4)

The approach articulated here is neither diversion, nor the deployment of a restorative procedure by the Board in pursuance of its own proceedings. Yet, it seems to align the Board more closely with the needs of the parties including the child than otherwise would be the case. At the same time, incest cases, given the seriousness and sensitivity they deserve, may or may not be ideally suited to holding a circle. But it seems conceivable that this approach could be applied to cases which do not involve the same level of difficulty.

At the sentencing stage

Some interviewees expressed the need for incorporating restorative practices in the dispositional order the Board passes after it has found the child to have committed an offence. The focus of these respondents was on the potential use of RJ as an alternative to detention. As such, interventions found desirable at the sentencing stage may be interpreted as a further form of diversion—this time from custody, hence 'minimal' as explained earlier.

At the sentencing stage, the argument in support of integrating RJ into juvenile justice centred mainly on the use of three measures the statute already empowers the Board to order as the final disposition of a case. These are: counselling, community service and probation. I will

explore counselling and community service in greater detail in Chapter 7, still it is important to briefly outline here the sense in which their use was advocated and the extent to which they were seen as restorative practices by the interviewees.

Referring to the three non-custodial interventions as having the potential to be restorative, a child rights activist emphasised that "RJ processes can be built into the current framework. We do have alternatives to institutionalisation. The problem is that our system is not using them, and it does not know how to use them" (Ngo2). The view that the Board does not order children, at least not in sufficient number of cases, to participate in counselling and to perform community service, or does not release them on probation of good conduct was shared by a number of civil society actors and observers. But this does not seem to reconcile with the claim made by some principal magistrates in the Boards that in majority of the cases the child is either counselled or asked to do community service. In addition, though the NCRB's report does not capture the number or percentage of cases where the Boards order these measures, the data for the year 2018 indicates, as noted in Chapter 2, that two-thirds of the dispositional orders were in fact non-custodial. Many of these presumably involved counselling, community service and probation, but did not get reflected as such because of the way the data is shoehorned into a limited number of heads of dispositional orders in the NCRB report.

What then lies behind the overwhelming impression among various stakeholders that such interventions are hardly used? This has quite plausibly to do with 'how' they are used—a point also raised by the respondent (Ngo2) above. It is a question involving both the importance attached to them and the quality of their delivery. From the evidence of the routinisation of pre-trial and under-trial institutionalisation which we have seen, there is a high probability that where such interventions are considered by the Board, they come on the back of at least some period of detention. That may not only severely limit their purpose, but also seems to be a big factor in generating the impression that the Board does not consider them to be significant alternatives to incarceration which need to be delivered in their own right.

Some interviewees underscored the importance of community service and probation and drew parallels between these and RJ, the referral order in particular. The superintendent of a childcare institution observed, "The referral order is without doubt very appealing. And quite interestingly, we have similar provisions in the JJ Act regarding community service, probation,

etc." (Hom1). In this regard, one of the NGO professionals (Ngo3) homed in on the research evidence that in most cases the victim does not participate in the panel meetings convened under the referral order, and that the meetings essentially end up being interactions between the panel and the child. The respondent's argument therefore was that in the Indian context if the enquiry by the Board is followed up with a community service sentence, it will not be much different from the referral order. In the case of probation too, a judge suggested that it bears a resemblance to the referral order: "A child being released on probation is similar to the referral order. The child is placed under a probation officer. The child's parent executes a bond for ensuring the child's good behaviour. The parent can be sentenced for a breach of the bond" (Jud8).

Some interviewees were, however, opposed to the solely outcome-focussed understanding of RJ and were unwilling to call community service and probation restorative outcomes unless they are grounded in a restorative process. Yet, there was a very strong sense that such diversionary interventions are still preferable to detention: "As long as you are trying to keep children out of institutions, not forcing them to live and grow up in the company of other children who have behaved in a similar manner, it is good enough for me" (Exp1, juvenile justice expert).

Post-sentence

Departing from the emphasis on the use of restorative practices as an element in 'most far-reaching diversion' or 'least far-reaching diversion' (as an alternative to custody), some interviewees were of the view that RJ is no less necessary post-sentence within institutional settings and after release. This was underpinned by the notion that incarceration despite all its problems will always have to remain an option, albeit one that is ideally used only as a last resort: "The current system cannot be dispensed with completely… Much as we would like to see children being dealt with in a restorative way without the process of enquiry and institutionalisation, it may not be possible in all cases" (Ngo3). As per another NGO professional, it is just pragmatic to recognise that "For some children depending on the particular situation, institutionalisation might be needed. To say that institutionalisation should be done away with will be an extreme position to take" (Ngo9). It was argued, for instance, that the child might need protection from negative influences in their own family, thereby necessitating detention as a means of providing them 'protective custody' (Bur5). Another scenario in which detention was considered to continue being relevant is RJ interventions failing to achieve the outcome that might have been intended: "In cases where RJ

has not been successful, we will still have to resort to the existing system" (Po3, probation officer). Here a custodial sentence was seen to serve the need for a more intense intervention.

That said, these interviewees were unanimous in their opinion that change is required in the approach with which most of the institutions work. It was not considered sufficient that children are not being "oppressed, exploited, labelled or stigmatised" there (Bur5). The probation officer cited above argued that to fulfil their mandate institutions need to move towards being care and support facilities rather than custody centres: "Institutions will have to be in the nature of residential hostels that are part of the mainstream, not the kind of homes we currently have" (Po3). One respondent asserted that the answer lies adopting a restorative approach:

> All these children who have had such terrible experiences in life, have been beaten up, and have internalised violence in so many ways should not again be treated with violence in institutions. Instead, we should create spaces where they can experience what is beauty, reflection and love. I think that's the only way to bring transformation. *Our institutions have to become restorative* (original emphasis). That's where we need to begin. (Ngo8)

In this regard, some interviewees recommended the use of counselling as an inbuilt component of institutionalisation. Enabling the child to perform community service during their detention was seen as another way of integrating RJ into the system. In addition, some practitioners regarded peacemaking circles to be a particularly helpful restorative practice within institutions "to enable children to talk about how they feel about what they have done" in a supportive environment (Ngo9). A circle process was expected to contribute towards the child's social and emotional learning and, thereby, help them move towards reform (Ngo9). These views seem to be in keeping with findings in the literature which suggest that 'restorative incursions' (including in the form of circles) into the largely non-restorative prison/custodial settings have received increasing attention in recent years in several countries (Van Ness 2007 p. 313). In Chapter 7, I will discuss at length how the circle process initiated experimentally in the Indian context works in practice.

Some respondents underlined the importance of addressing aftercare needs of the child. One described aftercare as 'the most neglected and totally unimplemented part of the juvenile justice system' even though so many children are being put back into the society (Ngo1). The superintendent of an institution said:

> Providing all services inside the home will not help until and unless we are also able to help children post-release…When children go out, they are again trapped in the same peer group and the same community. Sometimes their parents neglect them because of the social stigma. Children feel that they were better off in the institution. They again commit offences. (Hom2)

An NGO professional was of the view that a restorative approach on account of its emphasis on values such as reintegration, reconciliation and forgiveness may be uniquely suited to cater to the needs of all those directly affected by the post-release situation:

> We do not have anyone to carry the child back into the community and work with them. Here is where I really see a huge potential for a restorative approach to hold the child and help fit that child into the community. Help the child forgive themselves, and help the family accept the child. Only then will that child be able to move on. (Ngo4)

As Braithwaite (1999) argues, there are several dimensions of restoration: for example, restoring the offender to the community; restoring to the victim their sense of self and wellbeing; and restoring a sense of security to the community. Consequently, there are good reasons why RJ might be a useful thing both within custodial settings and after release.

Concluding Observations

The interviewees advocated major and wide-ranging reforms to how children are treated both outside and inside the domain of juvenile justice. A substantial part of what was on their agenda focuses, most notably, on improving larger social and economic conditions that concern children. Reforms suggested in these areas reflect a structural and 'risk factor'-oriented approach. Most respondents expressed their strong belief that the risk of offending behaviour among vulnerable children can be prevented or reduced through fulfilling their basic needs and tackling problems such as drug use. Recognising that the formal penal system may have very negative consequences for those caught up in it, the emphasis was on ensuring that such children get a better start in life so that their chances of ending up in the system later is minimised. Interventions sought by respondents into and through family, school and community settings at the earliest signs of delinquent behaviour were also in the hope that fewer children get ensnared in the system.

All the preventive and early interventions proposed have the potential to positively shape juvenile justice. But it is also possible to discern a worrisome aspect to the strong risk factor thesis that underpins them. A crucial takeaway from the risk factor literature is that risk factors associated

with criminal behaviour are not necessarily 'causes'. Yet, several respondents conceptualised risk factors to be straightforward causes of criminality, rather than a complex set of conditions which increase the level of risk of offending when clustered together in the child's life. In my opinion, the causal relationship assumed between socioeconomic disadvantages and crime in making the case for interventionism presents a significant danger in the Indian context. The danger lies in the tendency among some respondents to view lawbreaking, not as a common—though troubling—feature of the social order, but as an abnormal form of behaviour associated with certain types of children. In this regard, it is significant that the arguments of such respondents, consciously or unconsciously, tended to centre on children from most deprived backgrounds. There seems to be a risk here of criminalisation of children of the 'underclass' who are victims of poverty, social exclusion and neglect. Therefore, I think the interventions recommended by respondents which reflect the traditional welfarist thinking about juvenile offending may ironically produce labelling, stigmatising and net-widening effects even if they might have been meant well.

Another key theme that has emerged in the chapter is about the use of RJ in meeting the reform needs. RJ or the principles associated with it were seen to have a broad and varied application potential. Respondents supported its application as a conflict prevention/resolution mechanism in social settings as well as its deployment at different stages of the child's progression through the juvenile justice system and beyond. Within the system, its use was desired along with diversion (at pre-arrest and pre-trial stages), along with minimal diversion (at the sentencing stage) and also without diversion (along with institutionalisation). It was deemed similar to non-custodial sanctions like community service and probation, but also found compatible with a captive environment. All these naturally meant that there was a lack of agreement on what RJ actually involves at various points spanning both social and criminal contexts in relation to children. There is a parallel here with what is known about RJ from the literature: it can mean 'different things to different people' (Roach 2006 p. 168).

Though their desire for RJ did not culminate into a unified vision, the respondents shared a few important points in common about a restorative justice-oriented approach to interventions with children in conflict with the law. The first was the nearly exclusive focus on the child's needs, interests and rights. Few respondents had much to say about either the victims of crime, or about the community from which the offender (and possibly the victim) was drawn. The main

consideration behind the reform ideas involving RJ was how to utilise it to advance the cause of the child. This may not be in congruence with the centrality of the victim's needs or the involvement of the community in much of the RJ literature. However, it seems to be consistent with the emphasis placed by many respondents on treating the child largely as someone who have not had a safe and 'normal' childhood and is therefore themself more 'a victim of circumstance' than an offender. Therein also lurks the danger of slipping into paternalistic and punitive responses.

Although the focus of my thesis is on exploring the prospect of RJ in dealing with children in conflict with the law, the reform agenda discussed in this chapter included a lot outside that. The reason for this was plain. It did not seem possible to get a realistic sense of the extent to which a restorative intervention at any stage after the commission of an offence might be seen as useful unless the full extent of the reform needs and their context was explored. The chapter puts things in perspective and provides a sense of scope. It is evident from the reform agenda considered in its entirety that changes sought are holistic, emancipatory and transformative even though not radical. While RJ is valued and given a significant place in it, there is more to reform in juvenile justice than the need felt to apply RJ at one or more points. In the background of these findings, I will now examine the potential means to introducing restorative juvenile justice in the next chapter.

Chapter 7

The Road to Restorative Juvenile Justice

In order to explore the prospect of RJ as a way to deal with juvenile crimes in India, it is essential to consider whether means exist through which it might be feasible to introduce practices informed by the principles of RJ into the juvenile justice system. This chapter sets out to do that. It critically examines ideas and interventions identified by the interviewees to have the potential to facilitate the introduction of processes and outcomes linked with RJ. As I have discussed in Chapter 3, the core elements of RJ include, but are not restricted to, the following: a process that allows the opportunity to those most involved in the case, namely, the victim, the offender and their families/communities, to meet and discuss the offence in a more informal setting; the parties playing a part in deciding how the offence is responded to; and possibilities of reparation to the victim and rehabilitation/reintegration of the offender.

When talking about possible means to RJ, the respondents brought up a wide range of issues. Yet, in the main their views coalesced around four instruments and provisions. These are the Integrated Child Protection Scheme (ICPS), the individual care plan, counselling, and community service. The ICPS is a system-wide programme, while the other three are specific interventions targetting the child. At the same time, there are substantial interconnections between them. The choice of the mechanisms, as I shall discuss, is also indicative of particular meanings and priorities attached to RJ when approaching it in Indian juvenile justice.

I start the chapter with the ICPS for the reason that its fundamental and broad scope undergirds to some extent the interventions dealt with in the following sections. I discuss its salient features relevant to this study before moving on to examining the potential it has in the eyes of respondents to improve the prospect of RJ. That potential is analysed against evidence about the actual workings of the scheme. I then consider whether the individual care plan lends itself to incorporating restorative elements in light of how it is currently being implemented. The care plan is the newest of the interventions discussed, but it now often contains counselling to which I turn in the next section. I address the legal significance of counselling, its multiple conceptions, and its

putative restorative potential together with the evidence on practice. Next, I explore respondents' perceptions about whether it might be possible to use community service for the purposes of RJ. In closing, I draw out the main points of the chapter.

Integrated Child Protection Scheme (ICPS): A Step Towards Reform

The government is considered to have taken a key step towards addressing the gap between promises under the law and the actual practice in juvenile justice when it launched a comprehensive centrally sponsored 'Integrated Child Protection Scheme' (ICPS) in 2009 (Chopra 2015). Child protection under the scheme is an all-encompassing concept and means 'protecting children from or against any perceived or real danger or risk to their life, their personhood and childhood' (MWCD n.d.(b) p. 8). Among children, the scheme recognises those who are in difficult circumstances including children in conflict with the law as particularly vulnerable and in need of special attention (MWCD (n.d.(b)). Therefore, the scheme is central to any discussion on reform in juvenile justice.

With regard to protecting children in conflict with the law, four features of the scheme are particularly notable: (i) it adopts a comprehensive understanding of the child's right to protection; (ii) it establishes new service delivery and monitoring structures; (iii) it makes funds available to the state governments for implementing the existing provisions in the statute—the ideal assumption being that all those provisions are child protection measures; and (iv) it enables the government's partnership with civil society organisations. A number of respondents found these important both in regard to reform in general and the prospect of introducing restorative practices (Exp1; Ngo11). In this section, I will limit my discussion to the first three main features. The fourth will be covered in the next chapter.

Main features of the scheme

One of the overarching principles of the scheme resonates with the holistic approach to reform in juvenile justice which we have seen many respondents espouse in the previous chapter. This is the scheme's recognition that children's right to protection has both preventive and protective elements (MWCD n.d.(a)). From a preventive perspective it seeks to reduce children's vulnerability to any kind of harm by ensuring that they do not fall out of the social safety net. This study's focus being on children in conflict with the law, I will not go into the scheme's preventive

element which has provisions for children in need of care and protection. Suffice it to say that this element is a big part of the reason respondents consider the scheme to be important. The scheme's protective element consists of the following provisions for the child's rehabilitation and reintegration in post-harm situations.

The ICPS provides for the creation of a District Child Protection Unit (DCPU) in each district and a State Child Protection Society (SCPS) at the state level as the fundamental units for implementation of the scheme. The DCPU and the SCPS have been elevated to being statutory bodies that each state government is obligated to establish under the 2015 Act.[34] While the SCPS has the role of overseeing the implementation of child protection measures and monitoring the functioning of all the DCPUs in the state, the DCPU is 'the focal point' for providing and coordinating a wide range of child protection services at the district level. The Juvenile Justice (Care and Protection of Children) Model Rules 2016 assigns as many as 27 functions to the DCPU which include arranging counselling and community service for children, and supervising the functioning of childcare institutions.

To carry out this enormous responsibility, the DCPU has 13 functionaries including a District Child Protection Officer (DCPO), a counsellor, social workers, outreach workers, protection officers and community volunteers (MWCD (n.d.(c)). Though the DCPO heads the DCPU, the administrative control and supervision over it is vested in the District Magistrate, the senior most official of the district administration.

Finally, the scheme is often regarded as 'the vehicle for implementing the juvenile justice law' in the country (Ali 2016 p. 375). It is, at the very least, the vehicle for providing financial support to the states for implementation of the law. A respondent who worked with the Ministry (Ngo5) claimed that funds for the establishment of statutory bodies like the Boards and homes envisaged under the law became available in most cases after the ICPS came into effect. This is confirmed by the number of new Boards set up after 2009 (Ali 2016). In addition, another respondent (Ngo7) said that funding under the scheme has helped create new structures (mentioned above) at the state and district levels to strengthen the implementation of the juvenile justice law.

[34] Section 106 of the 2015 Act.

The scheme and its potential for facilitating restorative justice

A majority of respondents approved of the ICPS for its perceived potential to answer the need for reform in juvenile justice mainly by putting into practice the ideals already existing in the law or seen as implicitly present, RJ being one of them. Several respondents across different groups tended to think that the scheme's adequate implementation can provide 'the wherewithal to make RJ a possibility' (Ngo1). In this regard, both the services the scheme intends to deliver and the institutions it seeks to put in place for that were viewed as amenable to being used in restorative practices.

For several respondents the provision under the scheme for an individual care plan for every child in difficult circumstances—a reinforcement of the provision already in the statute—whereby counselling and other support services are to be made available held promise as a foundation on which restorative practices can be built (Exp1; Ngo9). I will discuss the individual care plan and counselling in the following two sections of this chapter.

Among the institutional structures, the DCPU was deemed to have a potential role in improving the prospect of RJ. Respondents saw opportunities in the presence of community volunteers as part of the DCPU. A judge (Jud8) felt that in order to facilitate RJ it is important that somebody not identified with the juvenile justice system gets in touch with the victim, informs them about the option of a restorative process and prepares them for it if they are willing to participate. The respondent's view was that community volunteers or an NGO is needed to perform this task on behalf of the system. Various studies have indeed emphasised the importance of preparation in restorative processes as the key to ensuring victim participation based on a free and informed choice (Crawford and Newburn 2003; Hoyle 2012; Hoyle and Rosenblatt 2016).

Community volunteers were also looked upon as suited for taking on the role of facilitators: "If community volunteers go through adequate and intensive training, we can have a cadre of professionalised community members. This can be via media between the ideal of community-led RJ and the practical need of having trained facilitators" (Ngo11). Having lay members of the community facilitate restorative processes represents an important normative ideal for RJ advocates (Dzur and Olson 2004). This goes back to Christie's (1977) call for reducing dependence on criminal justice professionals and empowering the community to resume control over the

resolution of its own conflicts. Also, Braithwaite (1989) proposed that reintegration of the offender back into the community is best achieved when members of the community are actively involved in the process. At the same time, there is a concern whether ordinary lay people will be able to facilitate restorative processes with the same level of efficiency as professionals can (Walgrave 2012). The respondent (Ngo11) sought to grapple with this tricky problem by mooting the idea of a hybrid cadre of persons who are both lay and professional. However, research suggests that young people in some cases do not distinguish between professionals and community representatives (Crawford and Newburn 2003). In addition, the experience of the youth offender panel in England and Wales indicates that the community panel members who act as facilitators have gradually turned into quasi-professionals (Rosenblatt 2014).

Another contribution the DCPU was considered to be in a position to make is to address barriers to the parties taking part in RJ. For instance, it was argued that the DCPU might be able to bring RJ literally closer to the parties, and thereby, make it easier for them to participate:

> You need the DCPU to be working well. We see in many cases victims get FIRs (First Information Report) registered and after that they can't be bothered to come. Most likely the victim and the child would be from the same district. If the DCPU is working properly in that district, a meeting could be facilitated closer to their homes. Why should they come all the way to the JJB for it? (Jud8)

In addition to the DCPU which is part of the service delivery structure, some respondents drew attention to the elaborate monitoring mechanism under the scheme particularly the one envisaged at the district level and below. To monitor the implementation of the scheme against a set of performance indicators, the scheme provides for one monitoring committee each at the district, block and village levels (MWCD n.d.(c)). However, the respondents who referred to these committees seemed to value them not so much for the monitoring role they are supposed to perform, but for the potential of their use to provide services often requiring coordination between multiple agencies. Their suitability for this kind of work was considered to lie in their multi-stakeholder composition.

When asked about the kind of institution that might facilitate restorative practices involving meetings between victims and offenders in the Indian context, one respondent (Ngo4) said, "Like the YOT, we have examples of multidisciplinary groups...DCPC (District Child Protection Committee) is the most appropriate example. But DCPCs are mostly defunct." The DCPC is the

district level monitoring committee that includes members from various government departments like health, education, labour, housing, judiciary, police and railways as well as members of local bodies and voluntary organisations (MWCD n.d.(c)). Another respondent (Ngo5) found the village level child protection committee better placed, in theory, to reach out to the community and address its child protection needs. In short, the argument of these respondents was that just as in England and Wales there are multi-agency bodies in the form of YOTs for the delivery of youth services including RJ, in India too there are provisions for agencies that draw on lateral linkages between various stakeholders and which can potentially take on a comparable role.

Thus, the respondents were of the opinion that there are 'a lot of good things' in the scheme which can be used to forge a restorative approach. They highlighted the scheme's institutional structures, service provisions and its avowed promotion of individualised interventions in which the community and civil society organisations are seen as active participants. The question now is how the scheme has worked in practice.

Implementation of the Integrated Child Protection Scheme

Respondents raised serious concerns about the state of implementation of the scheme. These related mainly to inadequate funding, low priority given to its implementation, the lack of a truly empowered and efficient child protection workforce and multiple monitoring and reporting requirements. It is worth looking at these in a little more detail.

The perception among respondents was that the scheme has not addressed the anomaly of meagre resources for child protection in the face of enormous needs. It was claimed that the budgetary allocation for juvenile justice is either at a standstill or not keeping pace with the growing requirements (Med3; Exp5). This is confirmed by an analysis that shows that child protection has continued to remain the most neglected of all the areas of financial allocation for children (HAQ n.d.(b)). It is also argued that within the very small budget for child protection the system has remained largely focused on curative interventions through institutional care for children who have experienced harm (Menezes 2019). The assessment seems to be that preventive interventions in the community and in support of families have not taken off despite the widespread use of the language of prevention (Menezes 2019).

Poor investment in child protection, recognised as a reflection of its low priority at the policy level in the government, was also seen as setting the tone for its low priority at the implementation level. A lawyer observed that "The ICPS neither caters to any politically significant group, nor is it financially lucrative. The result is that bureaucrats don't take much interest in it" (Exp5). This point was echoed by a child rights expert who recounted an episode from their personal experience:

> The DCPC…is headed by the DM (District Magistrate). 90 per cent of the DMs are not aware of the DCPC. In 2018, one of the DMs said in a meeting with the Secretary of the Ministry of Women and Child Development that '*the ICPS NGO*' didn't exist in their district! The DM's understanding was that the ICPS was a scheme whose implementation was a matter of availability and choice. (Exp4)

The respondent also expressed apprehension about further weakening of the ICPS as it has recently been turned into a sub-scheme under another scheme.[35] Though the government has described the move as 'rationalisation and restructuring' of child centric schemes, there is a concern that the move has 'once again given scope for dilution of the commitments to child protection' (HAQ n.d.(a) p. 13).

As it is, the lack of adequate financial resources is seen to have quite predictably led to a situation where the institutional structures under the scheme have either been set up very tardily or not at all. Pointing to the nascent stage of the scheme even after a decade of its launch, a judge remarked that "A DCPU in each district of Delhi was set up only last year or the year before that. Till then we had only four DCPUs for the whole of Delhi" (Jud8). A District Child Protection Officer (Bur3) confirmed that a DCPU in all eleven districts of Delhi was established only in November 2017. On the other hand, the District Child Protection Committee does not exist in any of the districts even to this day (Bur2; Bur3). The block and village level monitoring committees are likewise described as non-existent or non-functional (Ngo5).

Alongside the poor status of institutional structures is the lack of an adequate and professional workforce. Several respondents reported that a dearth of key functionaries such as probation officers, counsellors, social workers and staff in institutions has constrained the scheme's working (Jud8; Ngo4). Officers concerned with the scheme admitted that its

[35] The Ministry's decision in this regard taken in 2017 is available at https://icds-wcd.nic.in/icdsimg/ContinuationICDS30112018.pdf.

implementation is nearly completely reliant on contractual employees (Bur2; Bur3). All appointments in the DCPU are contractual for a period of one year which can be further extended (Bur3). Respondents argued that a contractual workforce hinders functioning as in the absence of security of tenure it is difficult to motivate the employees and hold them accountable (Ngo2). On top of this, it was said that they are 'underpaid, not paid on time, or they go without salaries for months' (Ngo9)—presumably indicative of the (lack of) esteem in which the employees are held. An officer dealing with juvenile justice in the Delhi government forthrightly explained the difficulty in securing adequate human resources due to low salary levels:

> We recruited people at very low salaries. An outreach worker was given 8000 rupees per month[36] which was much below the minimum wages…The government was going to be in violation of its own rules on the payment of minimum wages! We fought against it…it was agreed to bring those on the staff of the ICPS who were below the minimum wages to the minimum wages level. What about others? The government introduced the ICPS in 2009-10. Since then remuneration of the staff has not been increased...You expect a DCPO to be working for 33,000 rupees a month?[37] What calibre of people will you get?...Good people who are selected leave. Out of a staff of 110-111, all contractual, which we are supposed to have, there were 40 vacancies last week. (Bur2)

A major repercussion of the low-paid and short-term nature of the jobs is that the ICPS workforce is looked upon as having little authority and capability to carry out its numerous responsibilities. A high-ranking bureaucrat (Bur6) acknowledged that 'nobody listens to the DCPU' because of its lack of authority in the hierarchical structure of the district administration. For instance, the superintendent of an institution being a 'Class I gazetted officer' may regard the District Child Protection Officer, a contractual employee, too lowly in status to be reporting to:

> The DCPO is one of the most important functionaries, but they have been reduced to an insignificant position. They are contractual employees with no infrastructural facilities to perform their role. They can't even think of speaking on equal terms with the home in-charge or members of the JJB, let alone taking up any violation of the provisions of the JJ Act. (Hom1, superintendent)

[36] Equivalent to about 80 pounds.

[37] Equivalent to about 330 pounds.

Taking all these matters into account, respondents were of the view that the DCPU has not fulfilled the objectives with which it was created. An officer even observed that "The DCPU's contribution to rehabilitation is almost zero" (Bur2).

Thus, the evidence in this study suggests that the scheme is in dire straits. There has been a fear for some time now that the scheme may die 'a slow death' on account of various problems facing the implementation of its mandate (HAQ 2011 p. 298; Supreme Court Committee on Juvenile Justice 2018). In this context, the findings of this study might be taken as adding to the evidence on a persistent issue. The interesting thing here is that although respondents told it like it is about how the scheme has been hamstrung in its working, when it came to talking about the prospect of reform and RJ, they still referred to the scheme.

The explanation for this apparent paradox is simple. There was an agreement among the respondents that the scheme represents an important step towards ensuring that the state fulfils its commitments under the juvenile justice law. The scheme was believed to be well-intentioned, well-designed and have a lot of potential, including possibilities of being utilised in support of restorative practices. Its failures were treated as essentially the problem of its underfunded/unfunded mandate and poor implementation. Nevertheless, the respondents argued that it is largely due to the scheme that there is now at least some semblance of child protection in the country. These assessments, which seem to be mostly justified, allowed the respondents to be cautiously optimistic that its effective implementation can create conditions for the introduction of RJ.

Now from the scheme that has an overarching presence in the system, I turn to three specific interventions identified by respondents within the current legal framework as potential pathways to introducing restorative practices. These are the individual care plan, counselling and community service.

Individual Care Plan

The law passed in 2015 introduced the individual care plan as a new tool in juvenile justice. It provides that a dispositional order passed by the Board must include an individual care plan (ICP) for the child in conflict with the law. The care plan is described in the Model Rules 2016 as a comprehensive plan to take care of the developmental needs of the child and is supposed to serve

as the basis of the process of rehabilitation and social integration. It is to be prepared by a probation officer or a child welfare officer in consultation with the child while taking their circumstances, case history and specific needs into account. The Model Rules require the care plan be reviewed periodically. So, the care plan is expected to be a dynamic tool to enable a deeper understanding and response to the child and their needs (Supreme Court Committee on Juvenile Justice 2018).

The potential of the individual care plan

The overall view of respondents about the ICP was that it is a highly significant and positive development in juvenile justice. Several respondents stressed the importance of the plan for the child's rehabilitation and reintegration. Within this conception, some of them saw an opportunity for incorporating restorative practices into the plan. A child rights activist said, "Every child who comes into the system should have a care plan that helps them understand the consequences of their action as well as find their own remedies to their own problems" (Ngo2). Though the care plan does not specifically include any activity that focuses on the child's responsibility in the aftermath of the crime, it does refer to the need to 'nurture him into a responsible citizen'. The theme of responsibility was emphasised by another child rights expert who saw the ICP as something on which RJ may 'piggyback':

> I feel that in the JJ Act where RJ fits in is the individual care plan…I prefer this pathway to having RJ as part of group counselling because group counselling is usually not ordered in heinous offences. Having RJ as part of the individual care plan makes it broader. But it has to be voluntary in nature, for example, voluntary participation in a victim offender dialogue as part of the individual care plan. The objective of the individual care plan is social mainstreaming. You cannot mainstream anybody unless they take responsibility for what they have done and take steps to make things right. (Ngo9)

Because the ICP is mandatory in respect of all offences regardless of their gravity, it was the respondent's preferred medium for exploring the use of victim-offender interaction. The expectation was that RJ would thus be available for grave crimes too that may otherwise be treated as out of bounds. There was also another reason for the respondent's preference which seemed to be born out of both legal and practical considerations. Under the current law, as the Board's enquiry cannot be dispensed with (except where the offence is petty or the allegation appears to be unfounded), the respondent was of the view that the possibility for a restorative process does not arise until after the enquiry, which is the sentencing stage. To the respondent, a restorative

process proposed at that stage as a component of the ICP seemed least likely to face opposition from any quarters:

> I don't see why anybody should have issues with it if all the legal processes have been followed and then a RJ process is being done as a post-enquiry reintegration measure as part of the individual care plan. I don't see what resistance there can be to it if both parties are willing. It is not affecting the ongoing enquiry in any way.

The idea of integrating an RJ programme into the individual care plan has been written about in a recent book chapter (Raha 2020). The author argues that the possibility of participation in a restorative process should 'ideally' exist as a diversion from judicial proceedings (Raha 2020 p. 292). In its absence, the ICP is proposed as a specific avenue that could be tapped for the purposes of RJ. I do not think this opportunity should be thought of as necessarily less than ideal only because it comes at the post-enquiry stage. A restorative process, as part of the ICP, seems to have the potential to be a diversion from custodial punishment. The question really is whether it constitutes the whole sentence or is done as a side activity, as an adjunct to the sentence. Equally important is what is done in the name of RJ.

The ICP was considered flexible enough by some respondents to accommodate restorative interventions like a face-to-face meeting between the child and the victim. A lawyer (Exp5) attributed this flexibility to the lack of detail in the law on exactly what the care plan is to contain and how it is to be made. The Model Rules do say that the ICP should address a range of different needs of the child and that inputs from the child, their family and the counsellor should be solicited in making it. However, the respondent felt that they still leave a large area undefined: "The Model Rules are cryptic. They are profound in what they leave rather than what they cover" (Exp5). This was seen as providing the space for RJ in the care plan. Drawing on essentially the same logic, another respondent argued that there is nothing to prevent features similar to those of the referral order in England and Wales from being built into the ICP. In this sort of pick 'n' mix approach, the allusion was to features such as a face-to-face meeting between the parties, agreement of a programme of activities with the child, and convergence between different agencies like the police, health, education and social welfare to make the agreement workable.

Notwithstanding the foregoing possibilities, respondents painted a bleak picture when it came to how the ICP has worked in practice.

Implementation of the individual care plan

Evidence in this study suggests that the ICP for the most part has not served its intended purpose. Before the question arises of implementing the plan, it was argued that the challenge lies with regard to practitioners fully grasping or accepting its importance and being able to formulate it properly:

> First, it has been difficult to make the system realise why an ICP is necessary. But then also we have not yet understood how to make an ICP. Making an ICP requires well trained officers who have time. In our institutions, the staff is inadequate even to run the basic management. If you have only one welfare officer per shift for 80 children, when will they make the ICP? For various reasons like lack of education, qualification, skill, and adequate staff strength, it has been very difficult to get the ICP running. So, a sophisticated tool like the ICP remains a formality. The JJB also takes it as a formality. It may randomly make references to the ICP…In theory, it (the ICP) is very similar to the referral order. In practice, it is mere paper compliance. It makes no difference to the child's life. (Exp5, lawyer)

The problems referred to here may often be intertwined, and together result in the practical evisceration of the ICP. Yet, it is important not to treat them as an undifferentiated mass. For practitioners being wilfully indifferent to the care plan is not the same as them being too overburdened or ill-equipped to use it meaningfully. The former and arguably more intractable of the problems is certainly in evidence as hinted at by the respondent above, and as asserted by other respondents who said that the care plan has not yet been 'taken seriously'. This problem might point to deeper underlying issues concerning how children and their offending behaviour are perceived and what types of responses are thought to be effective. The fact remains that along with the infrastructural deficiencies, the lack of a genuine commitment to the ICP is seen as contributing to the utter disregard for the substance of the provisions dealing with it.

When asked about the contribution the ICP has made in practice, one respondent wryly observed that there was 'a lot of excitement and enthusiasm about it': "Everyone, from the JJB to the Supreme Court, talks about the individual care plan" (Ngo4). A judge claimed that in Delhi there was at least awareness among practitioners about the ICP, whereas in several other parts of the country 'people in the juvenile justice system don't even know that there is an ICP' (Jud8). Nevertheless, it was pointed out that the ICP was prepared and utilised in a perfunctory manner:

> The individual care plan has been a f-l-o-p, flop. An individual care plan must be a dynamic document. It must evolve based on the child's interests, family's input, and inputs of the staff in the institutions. Instead, it is just one shoddy piece of paper, a standard form which they keep using over and over. (Ngo4)

Buttressing this point, an official revealed that in their experience the different sections of the ICP form pertaining to different stages of the child's course through the juvenile justice system are often filled in one go, defeating the very purpose of what is meant to be a dynamic tool (Bur5).

There was an argument that perhaps the format of the ICP given in the Model Rules is too long and complicated and that this acts as a barrier for a lot of welfare and probation officers who have to fill it in (Ngo2). On the other hand, a few respondents questioned the value of a well-prepared care plan in the absence of resources to carry it out. Said an experienced superintendent, "A plan that cannot be followed is meaningless" (Hom4). It was argued that instead of blindly following the letter of the law, the focus should be on developing a care plan that is realistic given the very limited availability of resources (PM4). The argument even extended to something like this: since there is only so much that can actually be done, it could as well be done without framing a formal plan if the Board and other agencies were sincerely committed to the child's rehabilitation and reintegration (Jud8).

Moving beyond the question of practitioners' commitment to these ideals, one respondent expressed concern about the direction of travel in the juvenile justice system, and wondered whether the ICP fits within that wider context:

> The current law is definitely regressive compared with the trend we were witnessing a decade ago. It has gone back to focusing on the offence rather than the offender. Yet, for a change it insists on an individual care plan much more than the previous law did. So, I also find it to be a very confused law. It is caught between the criminal justice approach and the RJ approach. (Ngo2)

It appears that RJ has been portrayed here as the opposite of an approach based on deterrence and punishment. I have argued before (in Chapter 3) that such an interpretation is problematic. But leaving that aside, the respondent's comment tells us something useful about the care plan which I would like to summarise along with the insight from some of the other comments seen earlier. It is this. The ICP is a key intervention and is acknowledged for its potential for fostering restorative practices. Yet, so far it seems to have in general served a rhetorical function rather than delivered

a real change. To fully understand the problem of implementation, regard must be had to systemic and contextual factors that influence its working.

One intervention that may be used as part of the child's care plan, but more prominently as a dispositional order on its own, is counselling.

Counselling

Counselling as a measure to deal with the child was provided for the first time in the Indian juvenile justice law in 2000. The new law passed in 2015 and the subsequent Model Rules have further elaborated upon it. Counselling, along with other non-custodial sentences, has been accorded considerable importance in the law which is apparent from this: the Board can, in theory, order counselling in and of itself as the final determination of all offences committed by children, except in cases of heinous offences committed by children in the age group of 16-18 years in certain circumstances. It can also direct counselling in combination with another non-custodial measure or place the child in a home and direct that counselling be done there. Various counselling modalities provided in the law include individual counselling, group counselling, behaviour modification therapy, milieu-based interventions and individual therapy. These appear to have been largely drawn from the behavioural, social learning and cognitive strands within psychology (McGuire 2004) and mark the advent of the therapeutic language in the juvenile justice law especially since 2015.

A majority of respondents strongly recommended the use of counselling as a type of rehabilitative activity to deal with children in conflict with the law. Several also argued that counselling is a potential means of initiating a restorative process. In both instances, the respondents took counselling to mean different things harbouring an amalgam of underlying motivations.

Diverse conceptions of counselling: From punishment to healing

In one of the conceptions, counselling appeared to be a consequence that was felt needed to be imposed on the child and which they were deemed to deserve to endure due to their offending behaviour. In other words, counselling was a euphemism for punishment. When I wanted to know from a woman child welfare police officer who was talking about the problem of children

reoffending as to what the response should be, she rather disappointedly said that "being children they cannot be punished too severely. More counselling seems to be the only way out" (Off4). By 'more counselling' the respondent meant an enhanced period of stay in the institution where what mainly takes place in her presumption is counselling of the child.

A few respondents saw counselling, in consonance with the legal provisions, as a medicalised intervention to address the child's 'imbalanced and inappropriate temperamental traits' (Hom3, counsellor). In their view, it should be administered by trained professionals and mental health experts—a situation laden with a major power differential. Some magistrates and social members in the Board also expressed a preference for counsellors to be clinical psychologists. A qualified counsellor and psychologist in an institution (Hom3) explained that their work involves face-to-face interaction with the child and observation of their behaviour to find out the supposed causes of their deviance, and then the use of behavioural therapies such as modeling therapy, cognitive behaviour therapy, motivation enhancement therapy 'to help children change themselves'. The onus seems to be ultimately put on the child to change by participating actively in counselling offered or imposed in what has been judged by the counsellor to be their 'best interest'. And the child's participation is expected to be more of compliance: "These children want to have their way. But they have to learn to abide by certain rules" (Hom3). While counselling here is proposed to be a measure for doing good for the child, it also seems to have paternalistic, patronising and penal connotations.

Some respondents in this study questioned the treatment model of counselling and contended that counselling should not be regarded as synonymous with psychotherapies delivered by professionals. While counselling may address psychological needs, it was also considered to have a more general and seemingly less ambitious focus than that of changing attitudes or even the whole person through therapies:

> Counselling is not necessarily a mental health intervention. Even people who are considered to be mentally on a very balanced plane may need counselling from time to time on certain issues. The child may need counselling with respect to coping up with peers, approaching the family and society, and perceiving things in their proper perspectives…The child has to be helped in a facilitative mode. Right. No sermons. Make the child comfortable. Don't make the child feel as if they have done something. (Exp7, child development expert)

The contention being made here is a reasonable one: psychotherapy ought not to exclusively lay claim to the term counselling defining away alternative approaches/strategies. Departing from a narrow conception, the respondent attached importance to counselling as interpersonal talking aimed at providing a supportive and non-judgmental environment in which the child may develop a better understanding of what is good for them.

One NGO worker felt that 'the child (within the system) needs to be accepted and treated like a normal child' (Ngo11). It was claimed that counselling by practitioners in the juvenile justice system—like probation officers, legal aid counsels and social workers, who come into contact with the child as a matter of routine—can prove to be quite useful in this regard. The focus of such counselling was recommended to be on providing an empathetic 'talking and listening service' for the child who is often considered to be in a stressful situation (Brown 2010). As the same NGO worker said, "For me counselling is about healing their trauma. The first thing is to get them to talk. A lot of them have reasons for why they are there. Nobody has ever bothered to listen to them" (Ngo11).

Broader and restorative interpretations of counselling

In order that counselling has a greater potential to be beneficial for the child, some respondents made the case for counselling to be informal, take place in community settings and involve a wider set of people than just the child. Reconceptualising counselling in this way to make it more inclusive and accessible was also seen as creating an opportunity for restorative practices.

Respondents gave much weight to using counselling to reintegrate the child with their family and community. One of the basic ideas underpinning it was that the child's deviance is often wrongly perceived as an individual phenomenon which, in turn, leads to the neglect of family and other environmental factors. Therefore, it was considered important to explore the possibility of counselling the child's parents and others, as required, with a view to ensuring that any negative influence they might have on the child can be minimised. Some respondents also talked about the need to address the problems of exclusion and stigmatisation of the child through counselling (Ngo11). It was said that often 'parents disown the child because of the offence. The school does not take them back. Their friends are not friends anymore' (Exp1). At the same time, the child is believed to be either unwilling or unable to voice their feelings in the face of 'the entrenched

hierarchy' in the family and community (Med4). In the respondents' opinion, in such circumstances instead of targetting the child alone, counselling ought to involve the other individuals around them in order to mitigate their social dislocation and improve the chances of their reintegration. One social work member argued that the presence of well-meaning community members during counselling is particularly important for "the child to accept that they have indeed been given a second chance and allowed to go back into the community" (SM2).

Some respondents saw counselling not only as a method to reintegrate the child with their family and community, but also as an opportunity to connect the child with the victim and initiate a restorative justice process. In a child development expert's conception, counselling can encompass RJ:

> Community around the child should be involved (in counselling). If the victim is part of that community, they should be part of counselling too. RJ can happen as part of counselling in a more sensitive manner, rather than in a mechanical way of bringing the parties together. It will be part of a healing process where the child having realised their mistake wants to apologise to the victim. (Exp7)

By the 'mechanical way' of doing RJ, the respondent implied a scenario where only the offender and the victim are brought together by the facilitator, presumably without adequate preparation, leaving out their families, circles of care and those who are primary victims (directly harmed) and secondary victims (indirectly harmed). There seems to be a preference here for the family group conference model over other models associated with RJ. The respondent's impression also was that counselling afforded a better opportunity for assessing whether the child will benefit from having a face-to-face interaction with the victim. For the decisive criteria for the participation of the victim remained, in addition to their willingness, whether it was deemed to be in the child's interest: "We can have it only in cases where it will help the child" (Exp7). Prioritisation of the child's needs over those of the victim's, as I have highlighted in the previous chapter, has been a theme repeated by majority of the respondents whom I found to be in favour of some form of RJ in juvenile justice.

Underlining this conditional approval of the face-to-face interaction between the child and the victim, the same child development expert cited above argued that it is to be scrupulously avoided in situations where:

> Bringing the victim in contact with the child will reinforce the negative experience of the latter. This is precisely what we are trying to prevent. You cannot control the victim. You don't have control over the words they might use. The victim will say whatever they feel like. The child gets psychologically affected by those words. The victim might have catharsis, but what about the child? We don't want anyone who has got anything negative to say to the child.

At first glance there does not seem to be anything terribly problematic about the argument against the victim's participation based on the purported concern for the child. RJ advocates themselves insist on ensuring that everything is safe and well prepared before the offender and the victim are brought together, and, indeed, in cases where such an encounter is not deemed to be the best way forward, options for indirect communication between the two are explored. However, on reflection, the respondent's line of argument seems to raise questions about the potential of counselling to serve as a platform for a 'fully restorative' practice where all the stakeholders are actively involved (McCold and Wachtel 2002).

First, though interests of the offender and the victim may compete and conflict with each other, an a priori notion that there is a zero-sum relationship between them undermines one of the central arguments in favour of using a restorative approach. That argument is that it is capable of striking an appropriate balance between the interests of victims, offenders and ordinary members of the community so long as it is carefully managed (Dignan 2005). Second, the contention that the victim's participation is welcome only under controlled (as opposed to safe) circumstances when it has been made sure that they will conduct themself in a manner that has the facilitator's prior approval, is likely to make for the very 'mechanical way' that is not desired. In a 'natural way' it should be acceptable for the victim to express their feelings towards the offender. In fact, one of the principal attractions of face-to-face restorative justice lies precisely in the possibility that its interaction ritual might transform a situation of anger and anxiety into one marked by displays of empathy and understanding between the victim and the offender (Rossner 2013). Also, going by the theory of reintegrative shaming proposed by Braithwaite (1989; see Chapter 3), feelings of shame and guilt generated in the child when adequately counterbalanced by support and reassurance for them may, perhaps, be beneficial for their reintegration.

A minority of the respondents who accorded a central role to the victim in their understanding of RJ did not favour making the claim that counselling represents an application of RJ. Nonetheless, they saw it as something that can contribute to the child's rehabilitation: "Though

counselling is not a form of RJ, it can be looked at as another way of helping the child understand what the impact of their action is…I do think it can be a beneficial process for the child, a part of their rehabilitation and social reintegration" (Ngo3). It is mainly the perceived lack of consideration for the victim's needs in the counselling process why this respondent regarded counselling as rehabilitative rather than restorative. On the other hand, a judge suggested that counselling could be used as a 'partially restorative' intervention: "There is a very thin line between RJ and counselling. Counselling could be used more as a restorative process for the child and their family if the victim does not participate" (Jud8).

I conclude this section with an assessment of the (full or partial) restorative potential identified in counselling by combining the evidence I collected about its actual working with insights from the extant literature.

Assessing the restorative potential of counselling

The discussion so far indicates that how counselling is understood has an impact on whether, or to what extent, it is recognised to have a potential to enable restorative practices. If counselling is interpreted as psychotherapy rooted in a solely psychosocial explanation of criminality and which aims at radical, far-reaching behavioural modification in response seems to have little in common with the principles RJ embraces. On the other hand, in comparison, counselling in family and community settings which is claimed to be sensitive to a range of social and contextual issues influencing offending behaviour and which is intended to have a reintegrative effect may seem to be already a not-too-distant cousin of RJ. An affinity between notions of counselling and RJ has been noted in the critical literature on RJ too.

Knox (2001) interprets counselling as one of the main methods of implementing reintegrative shaming. The relationship between counselling and RJ was perhaps most explicitly explored for the first time by criminologist Kelly Richards (2005) in her genealogical account of RJ. She suggests that the widespread cultural acceptance of counselling and therapy in the last quarter of the 20th century has acted as 'one condition of emergence' of RJ (Richards p. 387). Specifically, she argues that a number of restorative justice programmes draw on ideas derived from the 'therapeutic' discourses concerning the importance of talking about one's problems, expressing one's emotions, and 'being heard'. The author does not appear to consider this to be

problematic per se. What she questions is a tendency among RJ advocates to deploy the rhetoric that participation in such processes lead to spectacular results such as 'healing', 'closure' and 'reconciliation'. Raising an equally pertinent issue, Tom Daems observes that "… "therapeutisation" of restorative justice seems to be highly incompatible with some of its core values, such as active participation and reciprocal communication" (2010 p. 506). These incisive analyses only underline the need to closely examine the claims made about the restorative potential of counselling in this study.

From the responses of my respondents about the actual practice of psychotherapy/counselling in juvenile justice, I gathered, first and foremost, that counselling is almost exclusively institution-based. A lawyer in fact said that "The order of counselling (by the Board) remains unimplemented if the child is not in an institution" (Exp5). The inference from this is that counselling, in cases where it happens, becomes an add-on to pre-trial/under-trial custodial detention or a custodial sentence. Even in cases involving low-level offences where counselling is ordered as a non-custodial sentence in its own right, it likely follows, as I tried to explain in Chapter 6, at least some period of pre-trial/under-trial institutionalisation of the child. So, if counselling is intended to be a rehabilitative measure, its working still seems to be deeply enmeshed with the punitive element of juvenile justice, not far apart from the possibility that it may itself be used as punishment (experienced as such by the child) or as a justification for punishment (Daems 2010).

Further, respondents provided details of the setting—the time, place and circumstances—in which counselling is carried out. A respondent found the manner in which it all begins, at the pre-trial stage itself, to be a bit pointless to start with:

> "Counselling every week once. Report to be filed", when the Board orders counselling in this way in the presence of a counsellor, prosecutor and others, neither the child nor their family can make anything of what has happened. The legal aid counsel representing the child does not have enough time to explain the whys and wherefores of the procedure to them. (Exp5)

The respondent observed that since there is little interaction with the child to achieve an initial buy-in from them, they adopt an uncooperative attitude towards counselling before it has even begun. Additionally, it was felt that the indeterminate duration of pre-trial/under-trial detention makes it difficult to produce a well-planned intervention. One respondent who had served as a

superintendent said: “A major issue is that when you do not know the length of the child’s stay, how and what kind of intervention can you plan? As a result, I will choose to do whatever comes to my mind” (Hom1). In the same context, the respondent highlighted the issue of what they described as the ‘trauma’ the child experiences during detention. Once in the institution, the child’s thoughts are said to constantly oscillate between hope and fear: the hope that they might be released (on bail) at the next hearing, and the fear that it might not happen. The former superintendent added, “With this ongoing trauma the child is not in the frame of mind to accept what even a very good counsellor attempts to do for their benefit.”

Some respondents expressed concerns about an insufficient number of counsellors and unsatisfactory quality of counselling. These are linked to the observations, which we have earlier seen, that there is a lack of budget under the ICPS for hiring an adequate number of staff including counsellors, and that the salary offered is too low to attract well trained psychologists. In addition, a child rights expert stated that ‘a single standardised mandatory course’ to qualify as counsellors does not exist (Exp9); as a result, individuals with often dubious qualifications claim expertise and may get the job of counsellors.

The majority of respondents thought that counselling is mostly one-off, ritualistic and poor in quality. A government official who worked on juvenile justice issues told me in all candour that counselling is generally administered and expected to be swallowed up as if it were an oral vaccine: “Counsellors usually give one-time counselling which is not of any help…counselling is not a polio drop that can be given once to eliminate the problem. But here counselling is taken to be a polio drop” (Bur2). Counsellors are said to adopt a superficial approach in which the notion of counselling primarily consists of the number of children ‘counselled’ and reports thereof sent to the Board.

One defence lawyer drew attention, in particular, to the moral and legal hazards that seem to afflict the way counsellors are required to share their reports with the Board, and how those reports then get used by the Board. Referring to the moral hazard, the respondent said:

> Many counsellors have felt very uneasy about submitting their reports to the JJB. They are willing to say whether any counselling has been done, and if yes, on what date. Beyond that, revealing everything that the child says during counselling is a breach of confidentiality. But they are ordered to submit their reports. They are told that if they don’t give reports, other counsellors will be engaged. (Exp5)

This suggests that a counsellor serves at the pleasure of the magistrate and is put in a position where they may have to compromise with basic moral values of their profession. There is also evidence that the Board's full access to counselling reports and the counsellor's own answerability to the Board tends to make the counsellor see counselling through the prism of the Board's expectations. One of the counsellors said that "We feel obligated to get information that will aid the judicial process" (Exp8). The implication is that the counsellor assumes the role of an information seeker, deploys various disclosure techniques and wants to share the child's disclosures with the Board. In other words, counselling may turn out to be a kind of investigation. And from what another counsellor revealed, this investigation seems to be biased against the child. The counsellor told me that in several cases where they noticed symptoms of a conduct disorder in the child, they refrained from reporting that diagnosis. The reason was to ensure that the child's lawyer could not claim during enquiry that the child committed an offence due to such a disorder and, therefore, was not culpable.

It appears that counselling and counselling reports which might be suffering from the aforesaid lacunae, far from being discredited, could furnish grounds for legal decisions having serious ramifications for the child:

> Counselling is supposed to be a service that shouldn't in any way impact the legal process. In practice, a lot of decision-making is based on it...The JJB goes through counselling reports. The JJB forms its own view of the child. It denies bail to the child on the basis of the reports. Reference is made that the child has admitted their guilt. (Exp5, defence lawyer)

The narratives about the alleged violations of norms involving counselling problematise the notion of a neutral, technical counsellor/psychologist when located within a justice delivery system in control of the judiciary. This appears to be consistent with insights available in the literature on the engagement of psychology in the penal sphere (Pearson 1975; Brown 2002). Brown (2002) argues that the instrumental use of therapy with offenders draws psychologists into the domain of the political where axiomatic assumptions about how therapy is done are rendered untenable. In that specific context, he justifiably emphasises the need for much greater scrutiny of whether there is capitulation of psychology to the demands of control and punishment. There does seem to be some evidence of that in this study as we saw above.

The defence lawyer, whom I quoted on the practice of counselling, was deeply skeptical of the idea that it could be adapted for RJ on account of what they called their 'experience after experience' of having seen counselling used in coercive ways against the child. Their fear was that only cosmetic changes will be made in counselling in the name of practising RJ, and that this could lead to RJ becoming 'one more tool in the hands of authorities' which can be used against the child (Exp5). Significantly, some scholars who have studied institutionalisation of RJ in criminal justice systems in different countries have raised an almost identical concern about moves towards co-optation of RJ practices, which is that the state may abuse and distort the rationales of RJ (Aertsen, Daems and Robert 2006). Perhaps equally valid as this point is the risk that any such coopted practice which does nothing but conform to the punitive rationale of the criminal justice system will misrepresent RJ (Blad 2006). The evidence on the working of counselling indicates that it bears little resemblance to participatory, deliberative and less coercive processes understood as expressions of RJ. Therefore, the skepticism of the respondent does not seem to be out of place.

Given the difficulties with institution-based counselling by professional counsellors, the idea of community-based counselling by community members as a means to introducing restorative practices, as some respondents earlier advocated, may appear comparatively more sustainable. However, a few other respondents did not find this community alternative reassuring. A child rights activist was wary that in the absence of careful planning and preparation by a trained counsellor, it might turn out to be a case of 'anything is counselling, and anyone is a counsellor' (Ngo4). Another respondent saw in it, from the perspective of the child's rights, the potential to be the opposite of what it is promised to be:

> Facilitators can come from the community, but we don't want the Khap Panchayat—branding, labelling, being judgemental, and doing everything which is against the principles of RJ. It will have serious repercussions for children coming from a certain background. Caste and religious prejudices are so entrenched that I don't see the process really being a just process. (Ngo2)

The spectre being raised here is of community-based counselling turning into the Khap Panchayat. A word of explanation about this is in order. In rural north India the Khap Panchayat, also called Caste Panchayat, is a traditional council. It is usually distinguished from the Village Panchayat (council) on account of its extra-judicial nature and domination by a single caste within a particular area of operation (Chowdhry 2004). Though the Khap Panchayat is historically said to have been

an informal system of dispute resolution, in recent times it has acquired particular notoriety in the public discourse for sanctioning acts of violence, including honour killings, against individuals who do not conform to customary norms (Thapar-Björkert 2014). So much so that it may now be regarded to have become a byword for egregious violation of human rights of individuals by powerful elements within communities ridden with caste hierarchy and patriarchy. The reference to the Khap Panchayat by the respondent stems from this connotation. There is surely more to community participation than the extreme and repulsive case the Khap Panchayat represents (I will come back to it in the next chapter). That said, the concern that community participation in counselling can arguably open the door to the very kind of community practices and prejudices that may jeopardise RJ needs to be acknowledged.

Moreover, community-based counselling may itself, without spectacularly descending into a sort of Khap Panchayat, possess elements that could be a hindrance to RJ. An important example could be power imbalances between participants emanating from their divergent socio-economic backgrounds, to which the previous respondent alluded, and which is recognised to be of particular concern in RJ practices. Willis's (2018) research indicates that offenders from less advantaged communities are believed to be at risk of being harmed in RJ processes as they may struggle to articulate themselves and, thus, may feel deprived of an opportunity for meaningful self-expression. The risk applies especially to juvenile offenders who, as Richards (2005) reminds us, are likely to belong to the most marginal and least articulate sections of the population. These issues resonate strongly with the Indian context not only because inequalities of caste, class, gender and religion run deep in society, but also because the juvenile justice cohort is largely made up of the most disadvantaged and dispossessed. In view of the specific circumstances, possible implications of community-based counselling need to carefully thought through. With that, I turn to the fourth and last intervention under examination in this chapter.

Community Service

Scholars argue that community service can be designed to achieve the basic objectives of RJ especially within juvenile justice (Walgrave 2004; Bazemore and Maloney 1994). On this view, the offender can be ordered by the court to complete a period of community service work, and thereby make amends and improve their prospects for reacceptance into the community. It is

considered important that community service is provided to the 'community' affected by the offence, and is proportionate and at least symbolically relevant to the harm caused (Wright 1996).

Community service was introduced in Indian juvenile justice in 2000 as one of the dispositions available to the Board. It stands on an equal footing with all the other dispositions, and the Board has the same discretion in making use of it as we have earlier seen in the case of counselling. Community service is defined in the Model Rules 2016 as "service rendered by children in conflict with law who are above the age of fourteen years and includes activities like maintaining a park, serving the elderly, helping at a local hospital or nursing home, serving disabled children, serving as traffic volunteers etc." A few things stand out here. First, the illustrative examples of activities suggest that the rationale is for the child to engage in visible, positive work and 'give something back' to civic life in general. A second related point is that the definition does not stipulate that activities be linked either to the victim (individual or community) or to the offence committed. Third, the age cut-off seems intended to protect younger children from manual work that some activities might entail.

Community service and restorative justice: perceptions, potential and practice

The majority of respondents were of the view that community service, in principle, is a very meaningful measure. Most of the magistrates and social members of the Boards claimed that it is frequently ordered in petty and serious offences (not heinous offences), particularly in cases where the child pleads guilty. It was also indicated that community service is exclusively used as a non-custodial measure. Unlike counselling, it is not found amenable to being combined with the child's institutionalisation. Though there is nothing in the provision itself to prevent a child staying in an institution from being sent outside to do community service, an officer in the Department dealing with juvenile justice suggested that no superintendent would like to take such a risk: "There is a sword hanging over your head. Suppose somebody escapes. It is the superintendent who will be hauled up. So, the child should not run away is the main focus" (Bur2, previously a superintendent). This perhaps partly explains why community service seems to be used only in cases involving low level offences in which it might be deemed to be a sufficient response by itself. The activities most often said to be assigned to the child under community service was helping out at a hospital, serving disabled children at a school for the blind, planting trees, volunteering at a library and assisting the Board or the traffic police.

Respondents perceived community service variously as a measure aimed at deterrence, rehabilitation and restorative justice. The deterrent position, a minority one, was evident in a social member's rationale for using community service:

> In the case of first-time offenders involved in petty cases most of the times we just advise and admonish the child…In some cases where we feel that the child should learn a lesson, we ask them to do community service at a school for the blind, a cancer hospital, or help out at the JJB if they are educated. (SM3)

Community service was considered sufficiently deterrent with regard to certain children in that it was a way of making them realise the wrongness of their action. The example here also reveals that community service served as an alternative to 'advice and admonition', another non-custodial dispositional order.

That said, it was in the name of rehabilitation that the use of community service was justified by most of the respondents. When asked how the Board seeks to achieve the objective of rehabilitation, one of the main interventions a magistrate spoke about was community service:

> As part of community service, we tell the children to go to the school and hostel for the blind…There they have to clean utensils, chop vegetables, serve food and assist the blind children in their daily chores. Despite their handicap, the blind children want to do something…want to pursue their education. The interaction with the blind children brings a sense of realisation among the juvenile offenders that they ought not to follow the path of crime. This is a kind of therapeutic rehabilitation. (PM2)

Though there is no sense here that the different tasks performed by the child are either voluntary or according to what they might prefer, those are supposed to 'reeducate' the offender by enabling self-introspection and building empathy. The approach seems to be limited by fundamentally the same thinking that characterises all judicial interventions directed at the child's rehabilitation. That limitation, in the words of Walgrave, is "the need for cooperation from the 'rehabilitated' juvenile (which is often hidden behind the illusions of 'coercive assistance' and 'educative penal interventions')" (1994 p. 72).

Yet, significantly, community service emerged second only to counselling as far as the importance respondents attached to it for its potential to be facilitative of RJ practices was concerned. A child rights activist (Ngo4) held the view that community service can enable the offender to repair the harm that was done due to their offence while restoring a sense of dignity to

both the offender and the victim. However, this respondent along with several others felt that despite the provision of community service in the law, the practice regarding it is 'really weak' both in terms of nature and quality.

For an expert on juvenile justice, the problem to some extent lay in judges often going on ordering community service without considering whether it will help the offender realise the consequences of their offence in a constructive manner:

> A link between the community service an offender is asked to do and the harm they have done is important. At a training programme in northeast India, I came across one judge who said that he had asked the child to do three months of some kind of community service. For three months, the child was not going to go to school. From 10 to 5 for three months, the judge was disrupting the child's education. Once the judges realise it, they try to do better. I think that is where we are at this point of time. (Exp1)

Similarly, another respondent argued that because community service is usually not planned and mentored properly, the child is unable to understand and experience it as community service; rather they think of it as punishment. A social member expressed concern about community service work, whether it be in a hospital, library or park, turning out to be nothing but cleaning and having a negative impact on the child:

> By way of community service, we ask the child to do service in a hospital. I am not very happy about sending a healthy child to a hospital due to the risk of them catching an infection. Moreover, what service can a 14-year-old child do there? They can't be working in a lab! They are asked only to do cleaning there. We also send children to a library for community service. The child is often a school drop-out. What are they going to learn? Again, unless we provide gardening skills to the child, gardening as community service is also not useful. Mostly, community service ends up as cleaning work for the child. It is a frustrating rather than a positive experience for the child. (SM4)

This seems to be a common problem with community service which is not restricted to India. There is evidence, for example, that the community service order in England and Wales tended to drift into work which was 'almost exclusively manual, menial and arduous' (cited in Caddick 1994 p. 450).

Furthermore, as a journalist who reported on social issues pointed out, it is important to recognise that in the Indian context there seems to be a danger of this problem assuming a particularly stigmatising and repressive caste dimension:

> Community service will manifest in the form of a lot of cleaning work and there is no way of seeing cleaning except within the caste paradigm. Cleaning, whether it is manual scavenging or any other kind, is a deeply casteist practice. I only see this being manipulated, distorted and abused really to further marginalise people already from marginalised communities. (Med5)

This apprehension about community service may come into sharper focus if it is looked at in the light of the kind of children most likely to receive the sentence. Many children who enter the juvenile justice system are thought to be from socially and economically deprived backgrounds in which individuals often experience different forms of discrimination and exploitation for reasons of their birth into certain castes (Gopani 2018). One of the most visible and ubiquitous of degrading practices associated with the system of castes is that those from the lowest castes, Dalits, are traditionally assigned the tasks of manual scavenging, picking up garbage, sweeping, cleaning, etc. (Subrahmaniam 2017). Against this backdrop, the possibility of community service reproducing indignities and oppression for children from the lowest strata of the society cannot be ruled out.

However, none of this is to discount the idea that community service has the potential to enable restorative practices. The challenge clearly lies in approaching community service with critical thinking and sensitivity to context so that it is consistent with the child's dignity and rights, and, importantly, is experienced by them as a humane and constructive intervention. While the dominant narrative about current practices under community service does not suggest that that is the case, it seems that with greater awareness and training among the practitioners, as one respondent (Exp1) observed, the prospects for restorative use of community service can improve.

Now in the final section, I have some observations on the main takeaways from this chapter.

What Do We Learn?

Here, I have analysed the means/points of entry that could, in the respondents' view, potentially be used to introduce restorative practices concerning children in conflict with the law. All the four instruments and provisions proposed by them in this regard, namely, the Integrated Child Protection Scheme (ICPS), the individual care plan, counselling and community service, lie under the roof of existing legal and institutional structures in juvenile justice. Since the current law does

not have an enabling provision for diversion at pre-trial or trial stages, by necessity, the possible pathways to RJ that get considered belong to the sentencing and post-sentencing stages.

This finding in itself may be interpreted as having a crucial bearing on the prospect of RJ. On the one hand, the apparent lack of interest among respondents in ideating entirely new mechanisms is possibly reflective of a path-dependent approach to envisaging practices and values that may be recognised as manifestations of RJ. Their cognitive understandings seemed to have followed the path defined by legal and institutional legacies (Pierson 2004). On the other hand, this does not appear to be the result of a lack of desire for radical reforms. There does exist, for example, a desire for RJ by way of a pre-trial diversion, as evidenced in the previous chapter.

The contradiction between restrictive means and expansive desires is probably explained by the following two connected points. Firstly, there was a widespread perception across interviewees that the current political and penal environment is not receptive to the idea of making big policy changes in the direction of RJ. Therefore, their preference for pre-existing ways and means seems to have been also shaped by a sense of realism about what might reasonably be hoped and what some real choices are. Secondly, it is also pertinent to note that the mechanisms invoked by the respondents have all become effectively available only post-2009. Indeed, RJ as a term has become better known among stakeholders as recently as three-four years ago, largely due to the efforts of civil society organisations, as I discuss in the next chapter. In this context, the respondents genuinely seemed to think that RJ is a realistic possibility within the existing legal framework, something that probably could not have been said, say, 10-12 years ago. Thus, the underlying conditions both enable and constrain the range of tools that come into focus.

Respondents offered a variety of opinions on how the ICPS, the individual care plan, counselling and community service might be repurposed for facilitating restorative practices. As with the selection of these means, the elements of/styles of/objectives of RJ practices that were envisioned through them are closely related to the context in which such practices might develop. A key fact to be kept in mind is that the potential avenues in question to enable RJ are either geared towards child protection (in the case of the ICPS) or provided in the law as specific tools for offender rehabilitation. It is a testimony to the salience of rehabilitation not only in the official ideology, but also in the world views of key actors I interviewed. The influence of this policy

paradigm is noticeable in their arguments in which reintegration/restoration of the child seems to be central, of the community reasonably so, and of the victim rather less so.

Though the focus on offender issues may be understandable in the context of India's juvenile justice, it does raise a question about the extent to which interventions oriented towards rehabilitation qualify as RJ. Bazemore and Sandra O'Brien (2002) proposed the idea of 'restorative rehabilitation' in which rehabilitation is subordinated to restorative principles. In contrast, my respondents seemed to suggest that a more appropriate theoretical fit in the Indian context may be what one might call 'rehabilitative restoration' in which the child-related ends of rehabilitation and reintegration get promoted over victim-related needs and interests such as reparation and punishment of the offender. This proposed variant might also be understood as 'embedded restorative justice' as it is located firmly within the dominant paradigm of rehabilitation. Whatever the terminology, if it does not involve victim participation, it should be thought of, in McCold's (2000) typology, as an approach that can at best be 'mostly restorative', not 'fully restorative'.

Ultimately, the prospect of institutionalising RJ through the four means under consideration needs to be confronted with evidence about their current workings. The evidence discussed in this chapter shows that their operations are rife with contentious issues. From the perspectives of the majority of respondents, it appears that the said provisions, in general, are not being used in ways which could be described as either rehabilitative or restorative. Some argued that the ICPS is 'almost defunct', and that the individual care plan amounts to little more than 'rhetoric'. A lot of this was attributed to the problems of implementation due to lack of funding, trained and empowered workforce, and low priority given to juvenile justice.

Most of the current practice of counselling/psychotherapy described by respondents indicates that it is deeply embedded in the logics of control and punishment. The underlying implication seems to be that counselling largely produces a (punitive) result that is wanted of it in practice. (It should again make one wary of thinking solely in terms of a dichotomy between 'good law' and 'bad implementation'.) Taking social, cultural and political contexts into account, respondents also pointed out the challenges in the use of counselling in community settings. In particular, it was apprehended that the child might be adversely affected by such a process because of their marginalised position in terms of caste and class among others. Similarly, community

service was considered to be fraught with the risk of undermining the child's rights and exacerbating deep-seated inequality and disadvantage.

It may still be argued that if there is a sense of reality about the potential of the different pathways to RJ, there is also a sense of possibility. This chapter has demonstrated that such potential or the possibility of its realisation should not be portrayed/accepted in an unproblematic, self-evident and decontextualised way. Rather, they must be weighed against concerns grounded in a whole host of contextual factors. It is also within that backdrop the potential means to RJ have emerged. As Aertsen, Daems and Robert astutely remark, "Ideas on RJ depend, always, at the very least to some extent, on the social setting (the history, politics, culture of a particular place in a particular time)" (2006 p. 285). With all this in mind, I turn in the next chapter to consider some specific actors and issues that can help or hinder the prospect of RJ.

Chapter 8

Facilitators and Barriers to Restorative Juvenile Justice

The aim of this chapter is to examine actors and issues which were identified by respondents as the key potential facilitators and barriers to the prospects for RJ in Indian juvenile justice. Before I introduce them, a caveat is worth mentioning. Respondents referred to a plurality of actors whose roles they deemed to be vital to promoting the use of ideas such as meetings between victims and offenders, community involvement in justice processes, and reintegrative and reparative responses in the forms of counselling, community service and probation—ideas they related closely with RJ. These actors included the police, magistrates, counsellors, social workers, probation officers, NGOs, the media and politicians. Similarly, respondents raised a multiplicity of issues as constituting impediments to institutionalising RJ. Among such issues were lack of resources, lack of capable and efficient workforce, the absence of an explicit legislative mandate, the pressure of a heavy caseload, the perceived emergence of punitiveness, and skepticism about RJ.

Important as all these actors and issues are, it is not feasible to provide an analysis of each of them in the space of a single chapter. A reasonable choice under the circumstances seems to be to address those facilitators and barriers that figured most prominently in the interview data. Accordingly, the focus of this chapter will be on the roles of civil society organisations and the judiciary as two potential enablers, and on the issues of punitiveness and skepticism about RJ as two potential hindrances.

Beginning with a short outline of civil society in the recent Indian context and its place in the juvenile justice system, the first section of this chapter analyses the contribution NGOs may potentially make in improving the outlook for RJ. In the second section, I briefly discuss the importance of the judiciary as an institution of governance reflecting particularly on its activism in juvenile justice. This is followed by a critical evaluation of the role that respondents perceived the judiciary might play in fostering a restorative approach. The chapter then shifts its attention to interrogating the two probable impediments to RJ. So, the third section looks at punitiveness in juvenile justice, its enduring persistence in practice and its societal underpinnings. This

examination enables me to carry out a more realistic appraisal of the impact of an ostensibly harsher penal regime on the prospect of RJ. The fourth section considers the main reasons for skepticism about RJ among some respondents. The final section summarises the core narrative in the chapter and suggests that there is room for mild hope alongside grounds for caution.

Civil Society Organisations and the Prospect of Restorative Justice

India boasts a thriving civil society, a term that generally refers to non-governmental organisations (NGOs) or civil society organisations as they are also called. According to recent data, there are a staggering 3.1 million NGOs in India (Anand 2015). Their work spans a wide spectrum of activities including human rights and various aspects of development. Over 70 per cent of the current organisations are said to have come into existence only post-1990s when the economy was liberalised leading to increased funding opportunities (DTE 2011; Sen 1999). It is also argued that the period has witnessed a shift from a statist model of governance to a neoliberal paradigm that is accommodative of civil society and market as partners in policymaking and delivery of services (Mathur 2013).

Although critics have interpreted the shift as the state's strategy to evade responsibility and promote privatisation (Mathur 2013), it seemed to have enabled civil society to come out of the margins. For many advocates of civil society, its partnership with the government entered a high point during the Congress-led United Progressive Alliance government that lasted from 2004 to 2014 (Goswami and Tandon 2013). Over this period, civil society is seen to have played a critical and formal role in shaping rights-based laws and policies aimed at empowering disadvantaged groups (Nilsen 2018; Singh 2014). The government-civil society partnership under the Integrated Child Protection Scheme (ICPS) which I have discussed in the previous chapter belongs to the same phase.

Scholars have pointed out that even as civil society seemingly enjoyed 'dizzying heights of influence' (Behar 2019 p. 396) in that period, the state had used its capacity to cut off sources of funding for NGOs, especially foreign funding, in order to tame groups suspected of acting against its interests (Kilby 2011; Mohan 2017). Since the change of government in 2014, scrutiny of and action against such NGOs is considered to have increased (Doane 2016). As a result, civil

society actors feel that the space for them has been shrinking or has become contingent (Behar 2019).

Civil society and the juvenile justice system

The existing literature lacks any systematic study of civil society's role in juvenile justice, much less of its potential role in developing an RJ approach. To be brief here, I will note that an explicit recognition of civil society as a stakeholder in juvenile justice came for the first time in the 2000 Act. Evolving from the role of contributing to welfare, social work and rehabilitation activities in the period prior to that, civil society organisations from the early 2000s appeared to be beginning to exert greater influence (Raghavan and Mishra 2017). Kumari (2017) argues that they played a key role in highlighting the problems faced in the implementation of the 2000 Act through public interest litigation (on which more in the next section), which led to amendments in the law in 2006. NGOs consider the introduction of the ICPS in 2009 to be an outcome of their 'successful advocacy' for better child protection over a prolonged period (Thukral and Shastri 2010 p. 66). It was again in large part in response to their continued focus on the need to improve the implementation of the law, as pointed out in Chapter 5, that in 2011 the Ministry initiated consultations to introduce further amendments in the law. In 2014, a number of civil society organisations came together in their opposition to the proposal of the Ministry that children in the age group of 16–18 years involved in heinous crimes be tried under the adult criminal system (Ashok 2014). Despite their opposition, the proposal became part of the new law in 2015. This represented the limits of their advocacy in the changed political situation. However, it did not have any apparent effect on the role civil society had already been playing in terms of service delivery under the legal framework.

Civil society organisations offer a wide range of services that have a direct bearing on the day-to-day functioning of the juvenile justice system. These primarily include providing counselling and vocational skills training to children, assisting the Board in preparing the social investigation report and the individual care plan, and conducting training and capacity building programmes for different stakeholders working with children. NGOs may even run residential homes for children in conflict with the law, but this is perhaps either least preferred by them, or not so amenable to being undertaken by them; there are possibly only a few such homes in the country (including one in Delhi) which are managed by NGOs. On the other hand, the majority of

the 17 counsellors working with the Boards and institutions in Delhi are affiliated with NGOs (Hom3). Though both NGO-run home and counsellors are paid for by the government, they represent instances of criminal justice functions being contracted out to private hands. In addition to delivery of services, some NGOs seek to have a say in the governance of the juvenile justice system. They claim to monitor implementation of child protection measures with a view to holding the state accountable for its obligations in this regard (HAQ 2021). Policymaking and advocacy related work constitutes another key area of activity for NGOs (Butterflies 2019). In most cases, they have a common interest in child rights and protection issues.

"RJ can come through NGOs"

I asked respondents about those actors in Indian juvenile justice whose role might be important with regard to the prospect of introducing practices they associated with restorative justice, such as victim-offender meetings and counselling of the child aimed at their reintegration into the family and community. Several including politicians, bureaucrats, judges, media persons and police officers emphasised the role of NGOs.

Some respondents attributed the potential of NGOs to improve the prospect of RJ to the fact that they have already been deeply engaged with the system as 'service providers', particularly of counselling, so much so that it is now considered to be their preserve. A recent study on counselling in the juvenile justice system conducted by an NGO also notes that there is an assumption that counsellors will come from NGOs (HAQ 2020). It is precisely the ease with which NGOs tend to blend in and work within the system which seemed to make them valuable in the eyes of the respondents, especially the magistrates inclined towards using counselling. With counselling being seen by some respondents as having the potential to be moulded into a process for reintegration—and, therefore, having a linkage with the idea of RJ—it appears only natural that they had NGOs in the forefront of their minds when it came to considering the prospect of RJ.

A factor that more directly accounts for the eminent role some respondents assigned to NGOs is the perception that they are a prime mover in the emergence of nascent discussions on and engagement with the idea of RJ in juvenile justice. Pointing out that interest in RJ among stakeholders in India has a very recent origin, an NGO professional observed that "It is something that has come to us as a concept in India just 3-4 years back. Prof. Ved Kumari was the first one

who in collaboration with the UNICEF did the initial conversation with us" (Ngo4). Professor Kumari was a professor of law at the University of Delhi and is known as a leading expert on juvenile justice in India. She explained to me that her own interest in RJ was kindled as a matter of coincidence:

> In 2016 or maybe a bit earlier, I had gone to Argentina for a conference and one of the sessions was on restorative justice. There I came to know that in Australia restorative justice was being practised even in very serious offences like murder and rape…Later I visited the website of International Institute of Restorative Practices. They have a three-day programme on teaching people about restorative practices in serious offences. Terry O'Connell[38] is the name of the police officer who started it forty years ago there and I have been very influenced by that whole programme.

A respondent who worked as a child protection specialist at the New Delhi office of the UNICEF (Exp9) told me that not long after attending the session on RJ, Professor Kumari requested them if the UNICEF could facilitate an initial orientation programme exposing people who might be interested to the concept of RJ and how it can be used. The respondent went on to elaborate that, in response to the request,

> As UNICEF the first objective we set ourselves was, can we create a platform for people to come together and discuss? ...I managed to reach out to Terry (O'Connell) who is based in Australia. Terry and his institute, International Institute of Restorative Practices, which is based in the US, were very supportive and agreed to come to India on our invitation…. So, we had Terry and Jean (Schmitz) of Peru who was also associated with the Institute. In Delhi and Bangalore, we were able to organise these really intense sessions with a few child rights groups, lawyers, and others on understanding and unpacking what RJ meant from the perspective Terry and Jean had, but also to then discuss its viability in India, and what is it that we can do as a group. We were also very lucky that were able to have an orientation session, for just a couple of hours, for some Supreme Court and High Court judges as well.

NGOs that took part in the training programme conducted in 2016 included HAQ, Counsel to Secure Justice, Leher and Enfold (Exp9). The website of the International Institute of Restorative Practices has a report about the programme titled "India begins journey to become restorative" (Wachtel 2016). I did not get the impression from the respondents who had attended the training that it amounted to the momentous change that the title proclaims. Nonetheless, they

[38] Terry O'Connell is credited with pioneering the police-led Wagga Wagga model that I referred to in previous chapters.

did underline the training as a significant development in that RJ became a subject of discussion among various stakeholders. The child protection specialist from the UNICEF (Exp9) who helped organise the training observed that it stimulated different thoughts among participants: while several participants were skeptical of the idea of RJ, there were some who showed willingness to try it out on a limited scale. The UNICEF was also seen to have acted as a catalyst for more individuals and organisations to start reflecting on the need to have a restorative approach (Exp9).

Respondents held the view that since the first orientation programme, interest in RJ had grown. They claimed that several other training programmes on RJ for key personnel in the juvenile justice system have been held in different states, mostly with the support of the UNICEF. In addition, building on the initial exposure to the idea of RJ, a few civil society organisations have sought to train their staff in the use of restorative methods by inviting international experts. Mention was especially made of training imparted on the circle process to a few NGOs in Delhi and Bengaluru by a US-based RJ advocate, Sujatha Baliga.

One material impact of these orientation and training programmes was seen by respondents in the development of small initiatives by a few NGOs to experiment with restorative processes. For example, I was told that Leher works within communities to help them use circles to address issues concerning child protection; Mumbai-based NGO Ashiyana and Bengaluru-based NGO Enfold hold circles with children in the observation home as a means to impart social and emotional learning to them. Among NGOs in Delhi, respondents pointed out that Counsel to Secure Justice has focused on the use of restorative processes. I turn now to discuss this aspect of the said NGO's work in order to have a better understanding of what such initiatives may signify.

'The talking circle'

The RJ programme officer at the NGO Counsel to Secure Justice (CSJ) told me that the core of their work on developing a restorative process for children in conflict with the law consists of the application of the 'talking circle' or simply 'circle'. From the term it may seem that this circle bears a resemblance to healing and sentencing circles discussed earlier. But though the practice draws on RJ circle process, it neither follows any specific model nor has a fixed model of its own.

Since 2018, the NGO, with the approval of the Board, has organised circles for children who are institutionalised prior to or during the enquiry/trial into their alleged offence. As per the

RJ programme officer, the circle is intended primarily to address the mental and emotional impact of institutionalisation on children and to help reintegrate them with their families. It begins in the observation home with two facilitators from the NGO involving a group of ten children in a set of mindfully engaging games. This is considered to create a safe space in which children connect with each other and talk about things that interest them. The session held once a week lasts for about two hours, and the aim is to repeat it at least twice with the same group of children. However, the respondent acknowledged that "the challenge of doing circles at the observation home is that we do not have a consistent group of children. That affects the group dynamics." This feels accurate because arrival and departure of children is a daily feature of such homes.

The respondent claimed that as these talking circles are iterated children begin to reflect on their specific needs and how they will prefer those to be addressed. In the NGO's experience, some children express the need to talk to their family about what they have done and rebuild their relationship. In such cases, the NGO contacts the child's family and has separate preparatory sessions with them as well as the child before bringing both sides together as a step towards reintegration. The reintegration process was also said to take the form of a circle where every participant has an opportunity to talk. But unlike the previous circle, this is held outside the home, either on the day the child is released or a little after. The respondent's contention was that such circles have been helpful in cases where the family had felt angry with the child perceiving them to be a source of stigma and shame.

The respondent said that in addition to the above two kinds of circles, their NGO has facilitated one victim-offender dialogue in a case where the child had committed theft of a motorcycle. In this instance too, the child was first said to have participated in circles at the home during which they expressed an interest in talking to the victim about their realisation of having acted wrongly. On being approached by the NGO, the victim consented to meet the child. After obtaining the Board's permission, a meeting between the two was facilitated by the NGO. In the meeting, the child admitted committing the offence and apologised for their action. The victim told the child about the impact the offence had on them. In the end, the victim accepted the child's

apology and asked them to attend school regularly and not to reoffend. As both parties agreed to this outcome, the Board acquitted the child of the offence.[39]

Admittedly, only a tiny proportion of the talking circles the NGO facilitates in the home lead to a potential reintegration process, and there has been only a solitary case of victim-offender dialogue. Consequently, the talking circle can by no means be regarded as an established practice. That it is literally embedded in the penal setting of an institution further affects its functioning. Yet, within such limitations and restrictions, it does seem to represent an attempt to at least ameliorate the impact of institutionalisation on the child.

There was a sense among NGO professionals and experts that the initiatives taken by NGOs so far have been inadequate and unsatisfactory. The absence of either a statutory provision or guidance on the application of restorative processes was believed to lay such exercises open to charges of arbitrariness and compromising the rights of the child and the victim (Ngo9). Some also felt that innovations being tried out by NGOs do not have a realistic chance of becoming mainstream without a concerted effort in that regard by the government. There is only so much, the argument went, one or two NGOs whose actions are dependent on the discretion and goodwill of the Board can apparently do (Ngo4). The respondents deemed statutory backing of the kind that exists in several countries including England and Wales desirable in the Indian context too for progress towards RJ.

At the same time, they maintained that it is too premature to contemplate or advocate such a legislative change. Rather, their objective for the present was to work towards being in a position to press the case for incorporating RJ in the law. To this end, they accorded high priority to developing and piloting a model that works within the current legal framework. In reply to a question on what steps NGOs could take to increase the prospect of RJ, a child rights activist said:

> I think we've got to go slowly and focus on building a robust principle-based pilot. We will make mistakes…We must monitor and document the impact of what we are doing. The idea is to generate evidence to show the level of victim satisfaction as well as accountability and rehabilitation of the child…Once we have enough of a body of evidence to show it works, we can lobby for bringing a change in the

[39] Theft under the law is a compoundable offence, that is, the owner of the stolen property may agree not to proceed with prosecution of the case.

> law…We cannot rush RJ. Concerted efforts have to be made to create awareness. It can't be top down. It has to come from bottom up. (Ngo9)

The preference here, quite judiciously in my opinion, is for a slow, incremental approach that is underpinned by empirical evidence. Notably and ambitiously, under this bottom-up scenario, a lot seems to depend on NGOs taking on the tasks of running pilot programmes, collecting and analysing data, and advocating for legislative change. Although many respondents regarded the role of NGOs as central to such potential endeavours, some also raised pertinent issues that can have repercussions for what NGOs might actually be able to do.

Challenges in the way of civil society organisations

There seemed to be an undercurrent of unease about civil society and NGOs assuming a much larger role than that which is mandated for them under the juvenile justice system. A child rights expert argued that just because the juvenile justice law considers NGOs to be an important stakeholder, there is an unfair and exaggerated perception at least in some quarters that 'it's an Act for NGOs' (Exp4). One lawyer pointed out, choosing their words carefully so as not to sound critical, that "In the adult criminal justice system NGOs are on the margins…The presence of NGOs is very strong in the juvenile justice system" (Exp5). Still, the lawyer did not hold back from questioning what they saw as NGOs taking advantage of the favourable conditions to 'push for RJ' in an aggressive manner: "They have straightaway jumped to practice (of RJ). How do you practise something which is not in the law?"

A police officer (Off8) and a probation officer (Po3) looked at NGOs somewhat disapprovingly for 'always lining up in support of the accused'. The probation officer alleged that "NGOs advise them (children) that there is nothing for them to worry about, and that the JJ Act will protect them." NGO interventions were regarded by these respondents as mostly intended to protect children from being punished even in grave offences and, therefore, not really in the interest of children who may reoffend if treated leniently.

Talking about the role of NGOs, a senior bureaucrat expressed their preference for NGOs that serve as a support structure for the juvenile justice system instead of relentlessly engaging in advocacy: "There are NGOs, and there are NGOs. Advocacy is the easiest part in which everybody is an expert. Some NGOs are only into advocacy. But real NGOs are those which are providing

services to juveniles" (Bur7). This may be interpreted as 'a strongly instrumentalist view of what NGOs are or should do', a trend that is said to be growing globally (Kilby (2011 p. 20). From the bureaucrat's perspective, NGOs that are seen as espousing radical reform ideas, as opposed to those that undertake a service delivery role and meet government needs, may not be deemed useful.

A respondent whose NGO often worked 'at the direction of' the Board acknowledged that "The system co-opting civil society organisations remains a risk" (Ngo11). There is a well-established recognition in the literature that co-option weakens the voices of civil society organisations (Mohanty 2002). In this understanding, paradoxically, the closer NGOs are to the state, the weaker their power to influence the state's policy. Contrary to the usual understanding though, some NGOs representatives seemed to think that proximity with the system may give them greater leverage. By working closely with the system, they expected to be in a better position to have their voices heard and nudge the policy and practice in a desirable direction. Supporting this practical consideration, one NGO activist said, "If the government doesn't listen to you, change will not happen. You can go on screaming for the next hundred years" (Ngo7).

Another consideration was simply the question of survival. With foreign funding said to have become increasingly scarce, a journalist claimed that NGOs are desperate for funding and are 'falling over each other to bag various government contracts' (Med5). Some respondents belonging to NGOs also admitted that NGOs are struggling to keep afloat. In this context, one NGO professional observed that they are expected to perform a much circumscribed role if they wish the government not to close the door on them: "We had reached a stage where NGOs could gain a foothold in the JJ system. We are back to a phase where only certain kinds of inputs are expected from NGOs. If you are not fitting into that, you are not needed" (Ngo2). This perceived atmosphere was said to have severely limited NGOs' chances of being heard, let alone influencing policy reform. In contrast, a few other respondents claimed that their NGOs have been able to carry on with most of their activities including advocacy as usual (Ngo6). So, the experience does not seem to be alike for every NGO; the relationship between the state and civil society appears to be complex.

Overall, civil society organisations working in the juvenile justice system are no longer believed to wield the kind of influence they did over a decade ago. However, the evidence in this study also shows that they have come to be accepted as an indispensable part of the system in some

ways. Whilst it is quite unlikely that they will be able to substantially boost the prospect of RJ on their own, some of them seem to have taken the lead in creating greater awareness about RJ, spreading relevant skills and working incrementally towards instituting certain restorative practices.

Much of this work depends on the support, if not the express approval, of the judiciary, which acts as the gatekeeper of the juvenile justice system. It is also the judiciary on which several respondents ultimately pinned their hopes to make RJ possible.

The Judiciary and the Prospect of Restorative Justice

No study has previously examined the role the judiciary may potentially have in introducing and encouraging the use of RJ in Indian juvenile justice. I think that it is critically important to fill this gap for an obvious reason. The existing literature indicates that the judiciary, and the Supreme Court in particular, has made an enormous contribution to the development and reform of the juvenile justice system. There is good reason to believe, and, as several respondents indeed stated, that the support of the judiciary is crucial to the prospect of RJ as well. Significantly, we have seen evidence in Chapter 6 that most of the respondents belonging to the judiciary favoured the idea of incorporating RJ in juvenile justice. A key aspect still to be considered in the study is the scope for the judiciary to support or spearhead the introduction of RJ in practice. But before moving on to discuss the empirical evidence on this aspect, I want to touch upon some literature that offers a helpful frame for analysing the judiciary's interventions in juvenile justice.

The Supreme Court began taking a proactive approach in juvenile justice matters in the late 1970s.[40] It repeatedly exhorted states to enact their Children Act—and, in cases where a state had the law, to implement it—so that children were not dealt with in the same manner as adult offenders. Much of the literature is understandably appreciative of the Court for showing a protective attitude towards children (Kumari 2004; Razdan 1991). But it seems to overlook the need to situate this development in the broader social and political background in which it occurred. Consequently, the impression created is that the Court started playing a leading role in the field of juvenile justice in exercise of its legal authority alone. This raises the legitimate

[40] The Supreme Court's (1977) judgment in *Hiralal Mallick v. State of Bihar* delivered by Justice V.R. Krishna Iyer has come to be seen as marking the beginning of this era.

question of why then, why not earlier. One explanation is that some Supreme Court judges of that era, Justice V.R. Krishna Iyer in particular, championed the cause of children who were poor and oppressed. This tells an important part of the story, but we can come to a fuller understanding by considering that the activist approach of the Supreme Court was not disconnected from the social and political milieu of the time.

Leading legal scholars have convincingly argued that the Supreme Court possesses a dual identity (Khosla and Padmanabhan 2017). The authors describe the Court as both a legal institution and, vitally, 'a public institution that is required to engage with, respond to, and negotiate the political pressures and social expectations that surround it' (Khosla and Padmanabhan 2017 p. 104). Baxi (1993) emphasises the need to consider the Indian judiciary as an organ of state power which positions and repositions itself in interaction with the political executive—one that also controls the legislature in a parliamentary democracy. I think that to grasp this power dimension of the judiciary is just as necessary in juvenile justice as it is in any other domain. To do so is not to underplay or underappreciate the humanistic considerations with which the judiciary has acted. Rather, it is to recognise that juvenile justice does not somehow transcend the question of power. In fact, judicial power as it is constituted and reconstituted provides an important lens for analysing the potential for the Court to pave the way for RJ.

For the purposes of this study, it will suffice to note that the Supreme Court considerably expanded its powers in the late 1970s through to the 1990s against the backdrop of often weak and fragmented elected political institutions (Khosla and Padmanabhan 2017). Embarking on a path of extraordinary activism, the Court reinvented itself as an institution that was committed to correcting governance failures and human rights abuses (Mate 2015). A chief legal mechanism instrumental in this regard was the Court's innovation of public interest litigation (PIL). Described as 'a revolution in judicial procedure' (Bhuwania 2017 p. 2), PIL enables a citizen or civil society organisation, without being personally aggrieved, to petition the Supreme Court or a High Court for redressing a wide array of public grievances. Over the past four decades, the judiciary, largely by invoking its PIL jurisdiction, has laid down policies on a range of issues, taken over supervision of executive agencies in some instances, and created 'new ad hoc mechanisms for implementation of policies and executive orders' issued by it (Ayyar 2009 p. 199).

Judicial activism has been a subject of debate in India and there are divergent views on it. Some commentators have lauded the judiciary for filling the perceived vacuum in governance, holding the representative institutions accountable and focusing on the needs of marginalised and disadvantaged sections of the population (Singh 2010). Critics, on the other hand, say that by usurping executive and legislative functions, it has weakened democratic norms producing counterproductive results (Divan 2016). Despite such criticisms of how the judiciary has used its enhanced power, there has been considerable reliance on it as an institution of governance. With a majority government in power at the centre since 2014, commentators have argued that the Supreme Court's activist-reformist role has become much less prominent (see Sebastian 2019; Bhuwania 2020).

Judicial activism in juvenile justice

Juvenile justice is one of the key areas where the impact of judicial activism through PIL has been strongly felt. Beginning in the 1980s with the *Sheela Barse* case, several PIL cases have been brought to the Supreme Court. Through PIL judgments on a variety of issues including the need for legislation beneficial for the child, the question of constitutionality of the law and non-implementation of statutory provisions, the Supreme Court has fundamentally shaped the course of juvenile justice over the last decades.

In recent years, the Supreme Court and the High Courts have become more deeply involved in the governance of the system by establishing new institutions called the Supreme Court Committee on Juvenile Justice and the State level Juvenile Justice Committees of the High Courts—a development that originated in 2006, as discussed in Chapter 2. Consisting of one or more sitting judges of the respective Courts, the Juvenile Justice Committee is described as 'a policymaking body with supervisory and monitoring functions' (Mediation Centre n.d.). It has a sweeping mandate and every aspect of the implementation of the statute falls within its purview. The uniquely powerful position the Committee occupies in juvenile justice can hardly be overemphasised: it is the creation of a judicial body acting on the administrative side, and has a role that combines both executive and policymaking functions.

Several respondents identified the judiciary as the driving force behind reforms so far undertaken in juvenile justice. Some believed that it is the only institution that has the intent,

capability and commitment to initiate further reforms. As the superintendent of an institution who had a long career behind them observed:

> I have seen this home 29 years ago. Its condition was miserable then. A lot of work has taken place since. …If this home is in such a good condition today it is because of the intervention of the High Court and the Supreme Court. They want to improve things. Whenever the higher judiciary has been approached through PIL, or it has come to know about any issues, it has ensured the implementation of the JJ Act. …The judiciary controls the JJ system. If it wants to strictly implement the JJ Act, there is no reason why it won't happen. (Hom1)

An important point the respondent approvingly refers to here is that apart from intervening on being petitioned, the Courts also take action *suo motu*, that is, by their own initiative. In various matters relating to children in the juvenile justice system, the Courts have initiated cases themselves based on newspaper articles and media reports. Such cases, usually called *suo motu* PIL, form a notable feature of the judicial concern for children.

Taking the judicial route to restorative justice

For a few respondents, the precedent of the Supreme Court ushering in reforms through PIL held promise as a potential route to introducing RJ. When I asked a juvenile justice expert-cum-activist for their reason for sounding optimistic about the prospect of RJ despite having themself argued that juvenile justice has taken a step backwards with the enactment of the new law in 2015, they explained:

> At some stage, the judiciary might intervene. We do not believe at this point of time that the legislature is going to be of much help to us. The only hope is that some case will come in the Court where we can put all that evidence (documented 'success stories' of restorative methods applied by civil society organisations) out and then pray (to the Court) that such restorative methods be used. In the past too, a uniform system juvenile justice came because of the Supreme Court's decision in the *Sheela Barse* case in 1986. It was not going in that direction. (Exp1)

A fundamental element of this and similar views held by other respondents is the prior emphasis on investing efforts in developing practices that demonstrate the usefulness of a RJ approach. It is on the strength of such persuasive evidence that these respondents envisaged the possibility of approaching the Court for passing favourable directions. Put another way, they harboured no illusions that the judiciary acting on its own can push through RJ. In their assessment, the PIL route to RJ depends on following the same manual that we have earlier noted NGO professionals

refer to while talking about the prospect of a statutory provision to implement RJ: slowly building a convincing case for RJ. Regarding this endeavour too, respondents reckoned the judiciary's role to be crucial particularly on account of its authority stemming from the Juvenile Justice Committee.

Respondents were of the view that the Juvenile Justice Committee of the High Court has been effective in bringing about much-needed coordination between various agencies involved in implementation of the law. A police officer argued that the Committee is a 'very good forum for escalating issues' that often remain unaddressed because the authorities concerned would just shirk their responsibility (Off7). The respondent, speaking from first-hand experience of having attended meetings of the Committee, claimed that that evasive, lackadaisical approach is no longer an option when the judiciary holds the authorities accountable: "It meets regularly and asks different departments about implementation issues. It looks into pendency (of cases in the Board) and reasons for pendency" (Off7). The description here clearly fits the role of a supervisory and monitoring body. The focus of the Committee at the Supreme Court was said to be more on 'encouraging state governments and NGOs to frame guidelines and SOPs (standard operating procedures)' on various matters related to implementation of the law (Jud9).

Considering the highly influential position of the Juvenile Justice Committees, a magistrate in the Board opined that RJ would have 'greater acceptability' among Boards if they were asked by the Juvenile Justice Committee of the High Court to consider applying restorative processes wherever feasible (PM2). It was argued that in the absence of a legal provision enabling a restorative practice involving a meeting between the child and the victim, magistrates may feel inhibited in utilising it even in cases where an NGO equipped with the skills to conduct such a process is willing to assist the Board (PM2). A second factor acknowledged by the same respondent as constraining the possibilities of RJ practices is the so-called 'criminal justice mindset' of magistrates, by which is meant an inclination to punish the offender (PM2). The respondent claimed that these constraints—one legal, the other concerning judicial behaviour—can be overcome to some extent if the use of RJ is encouraged by the Juvenile Justice Committee. Another respondent, underlining the importance of the Committee to the prospect of RJ, suggested that "Any pilot project on RJ can be facilitated through the Juvenile Justice Committee" (Off7).

The special emphasis placed by these respondents on the potential for judicial intervention in favour of RJ may seem justified in theory. However, this needs to be tempered by the fact that not all respondents considered the higher judiciary's role in juvenile justice to be an unqualified good. A few respondents were in fact quite forthcoming in voicing their concerns and criticisms about the judiciary even as they accepted that it has 'intervened effectively and, at times, very positively' (Ngo1). It is important to take these views into account in analysing the belief that the judiciary can create significant momentum towards RJ.

Critical views on the judiciary

The head of an NGO, explaining their disagreement with the adulatory characterisation of the judiciary's interventions which they found to be commonplace, said:

> In my opinion, as a result of the overbearing influence of the courts, including the High court, local courts and definitely the Principal Magistrate of the Board as a representative of the judiciary, the criminal justice system has taken over the juvenile justice system. I have a serious grouse with it. The juvenile justice system has not been able to stand on its own feet. (Ngo1)

Likewise, a lawyer argued that the idea of 'insulating' juvenile justice from adult criminal justice, which was, in their view, beginning to take shape with the enactment of the 2000 Act, 'died away when the higher judiciary from 2006 onwards took it upon itself to address the issue of implementation of the law' (Exp5). To substantiate this point, the respondent claimed that disposal of pending cases, a performance indicator typical of the criminal justice system, has become the overriding motivation in the juvenile justice system too.

One principal magistrate of the Board (PM7) confirmed that performance appraisal of all judicial officers subordinate to the High Court of Delhi, including magistrates of the Boards, is based on statistical criteria. An officer earns particular 'units' for performing different tasks involved in processing and disposing of cases. Every officer must collect a certain number of units for their performance to be rated highly in quarterly assessments. The respondent argued that this system acts as a disincentive for a magistrate who wants to adopt a restorative approach that might require a significant amount of time.

In sync with the views of the NGO head and the lawyer above, a bureaucrat in the Department concerned with juvenile justice (Bur2) resented the pervasive nature of judicial

activism, even 'interference', as they saw it, over the last 10–15 years. The respondent alleged that the Juvenile Justice Committee of the High Court through its secretariat routinely goes into individual cases and issues, thereby undermining institutional mechanisms at the lower levels that are capable of addressing them. Sharing their perspective on the situation, the bureaucrat said:

> The Supreme Court Juvenile Justice Committee holds annual conferences in four regions of India (north, south, east and west) where all the Juvenile Justice Committees of High Courts give their presentations on particular subject-matters or highlight good practices in their respective jurisdictions. There is pressure on the five judges of the Juvenile Justice Committee of each High Court to give nice presentations. …Now you see to what extent have things escalated! What should primarily have been a matter to be pursued by the police, the Boards and our department has been taken over by a nationwide forum.

The respondent also claimed that judicial overreach has not stopped at the levels of the Supreme Court and the High Court: "It has percolated down, so much so that a *'Tis Hazari ka magistrate'* (a magistrate of Tis Hazari courts)[41] summons the Secretary (of the Department) to appear personally. They impose a penalty of Rs 10,000 if Secretary doesn't go and is represented by some other officer." The respondent was critical of the perceived overbearing, muscular approach of the judiciary—issuing summons, passing orders and expecting compliance—which leaves little room for engagement and discussion with social work professionals, some with years of experience.

The disregard for inputs from individuals with social work experience was considered to be the norm at the level of the Boards. In previous chapters, I have discussed the perception among respondents that social work members in the Board, counsellors and probation officers are marginalised. A superintendent put the blame for this on the lower judiciary saying that 'principal magistrates, accustomed to having their way in the criminal justice system, don't want to listen to social experts and psychologists' (Hom1). The respondent did not absolve the higher judiciary either: "It always preaches to small functionaries about complying with the provisions of the JJ Act. But when it comes to the judiciary itself, it knowingly and conveniently forgets about the need to enforce the law in the true sense."

Several respondents considered the so-called 'takeover' of juvenile justice by the criminal justice system, characterised by the establishment of 'judicial supremacy' and the consequent

[41] Tis Hazari is a locality in Delhi where some district courts are situated. The respondent used it as a metonym for the lower judiciary.

negation of the social work profession, as incompatible with adopting a restorative approach. With the coming of the waiver provision in the 2015 Act, this takeover was considered to have been further consolidated. For the respondents, the idea of restorative justice was linked with diverse elements such as avoidance of, or reduction of, punitive interventions, the use of non-custodial measures like counselling, community service and probation, and active involvement of those directly affected by the offence in the justice process. Also in their conception, the condition for these elements to be put into practice emerges when juvenile justice moves away from the dominant criminal justice paradigm. As one respondent said, "The juvenile justice system takes the first step away from the criminal justice system. Restorative justice is like a natural progression" (Ngo3). By taking juvenile justice firmly within the fold of the criminal justice system, the judiciary is considered to have actually harmed the prospect of RJ.

Such views casting doubt on the role of the judiciary were shared by respondents from different groups. At the same time, a significant section of respondents counted on the judiciary to facilitate the introduction of RJ. This apparent conundrum, however, need not be surprising for two reasons. First, there appears to be little ground for entertaining a belief in the higher judiciary producing a radical change in favour of RJ. The evidence is clear that even those respondents who recognised the need for judicial action did not have this expectation. In addition, I sought the view of the chairperson of the Juvenile Justice Committee of the High Court of Delhi (Jud6) on the potential role of the higher judiciary in adopting a restorative approach modelled on the referral order in England and Wales. Much as they expressed their inclination towards such an approach, they were categorical that it will require legislative change: "Restorative justice is the way forward. …But somebody will have to sell this idea to the lawmakers."

The second reason is related to the perception of the respondents that legislative change in this regard is unlikely in the immediate future. Moreover, despite criticisms of the judiciary, the majority opinion was that judicial activism has to some extent been an antidote to bureaucratic apathy towards juvenile justice, and it is here to stay. Further, the judiciary in a more concrete sense was viewed as consisting of individual judges some of whom had been deemed 'pretty good actually' in terms of giving adequate importance to social aspects of juvenile justice and working closely with social work professionals as a team (Exp1). It was in this context that respondents

were cautiously optimistic about the judiciary giving a forward thrust to potentially restorative practices.

When I asked the chairperson of the Juvenile Justice Committee of the High Court of Delhi about what they thought about the view that a model akin to the referral order can be practised in India within the current legislative framework, they candidly said:

> Can such a model be practised in India within the current legislative framework? Yes and no. The reason I say no is that it becomes judge-centric. Who is the judge administering the law at a given point in time? What is their worldview? What is their view on juveniles? There are judges who are wedded to the doctrine of deterrence. Some of us think otherwise. It can work with a judge who has the sensitivity to allow the child to get back into the society. (Jud6)

It is perhaps this contingent possibility which nourished the hope several respondents had in the judiciary.

The focus of the previous chapter and of this one thus far has been on what might have the potential, according to respondents, to advance the chances of introducing restorative juvenile justice. My interview analysis, along with laying out the promises of possible means and facilitators, has shown complexities and difficulties that lie in their path. In addition, two issues merit investigation in some depth because they emerged as key potential barriers to the adoption of restorative practices. These are an increasingly punitive approach perceived to have been taken towards offending by children in recent years and skepticism about the idea of RJ itself, which I discuss in the next two sections respectively.

The Problem of Punitiveness

Many respondents were of the opinion that Indian juvenile justice has gone in the direction of harsh punishments with the introduction of the waiver provision in 2015 following the Nirbhaya case. They also interpreted this 'punitive turn' or perceived rise in punitiveness to have created conditions that are unfavourable to RJ. Before proceeding further, there is a need to investigate the belief that punitiveness has surged compared with its level before the change in the law. I should mention here that despite the existence of quite a large criminological literature on the 'punitive turn' or 'punitiveness' across a number of jurisdictions, there is a lack of conceptual clarity around the term and the best ways in which to measure it (Hamilton 2014). That said, in essence, as

Matthews notes, "The term 'punitiveness' normally carries connotations of excess…It involves the intensification of pain delivery, either by extending the duration or the severity of punishment above the norm" (2005 p. 179). Its measurement often relies on imprisonment rates or other indices which act as proxies for pain severity (Hamilton 2014).

In the case of juvenile justice in India, data which could be used as reliable and comparable measures of punitiveness are largely unavailable. As such, it becomes important to pay greater attention to not only what is new, but also what is not, in terms of punitive sanctions. Having already described the legal change in the form of the waiver provision in Chapter 2, my focus here is on analysing punitiveness in practice. In doing so, some consideration of social factors that are inextricably tied to it is of particular relevance. The premise is that only after punitiveness has been examined closely that an assessment of its effect on the prospect of RJ can tenably be made. This is also necessitated by the fact that punitiveness in Indian juvenile justice has remained under-theorised.

Continuity in change

While not disputing that the waiver provision marks a shift towards punitiveness, a few respondents seemed to suggest that the change, however, may not be as epochal as it was visualised to be by other respondents. A senior human rights official (Bur8) argued that the absence of a waiver provision prior to 2015 was often in practice not a guarantee, regrettably, against prosecution and punishment of children as adults. As an illustration, the respondent spoke from personal knowledge of a case in which a child was caught for theft of a motorcycle. They said that though the school record showed the child to be under 18, the police and the school principal went to great lengths to try to establish otherwise so that the child did not get the protection of the juvenile justice law. In attempting to ensure that the child was sent to an adult jail, the respondent concluded, 'the police, the principal and the magistrate believed that they were doing a service to the society'.

Indeed, other respondents also drew attention to the problem—stated to be not so infrequent—of children being detained in police lockups and incarcerated in jails with adults. A child rights expert (Exp4) who had previously worked in the National Commission for Protection

of Child Rights (NCPCR) referred to a suo motu PIL case[42] initiated in 2012 by the High Court of Delhi based on a study by an NGO which had revealed confinement of a number of children in adult jails in the national capital. The respondent told me that on the Court's order a team of officials, of which they were part, visited Tihar and Rohini Jails to find out if there were children lodged in those jails:

> Over a period of three years, we identified about 3200 children who claimed that they were below 18 years; some children could be clearly distinguished by their appearance to be 14 to 16 years old. Out of such children, we could get documentary evidence of age in the case of 310 children, and they were released from the jails.

As an official at the Department dealing with juvenile justice (Bur2) said, determining the age of children is quite a challenge because they mostly belong to poor and uneducated families where birth registration is low. According to the official figures, only 40.7 per cent of children in the poorest section of the population have a birth certificate (IIPS and ICF 2017). In its absence, the police and the magistrates are considered to have a lot of discretion to pick and choose evidence proving age (Kumari 2009b). This discretion might be used, to draw an inference from the case cited above, to subject children to the 'hardship' of the adult criminal justice system irrespective of the waiver provision.[43]

The argument here is not that the waiver provision is merely symbolic or rhetorical. Far from it, respondents provided an illuminating account of the increased punitiveness it is presumed to have engendered; I will discuss this briefly later in the section. Rather, the insight to be gleaned is that punitiveness towards children, with or without the law sanctioning it, has been a perennial issue. (Just to remind ourselves, the *Sheela Barse* case in the 1980s was after all about hundreds of children imprisoned in the same way as adults.) Not surprisingly, one respondent reflecting on the waiver provision said, "We can't really pretend that it (the intention to punish children harshly) hasn't always been with us. But it all came to a head with the Nirbhaya case" (Ngo4).

So, crucial as it is to examine the new punitive measure, an exclusive or excessive focus on it may obscure the enduring continuity it represents at a more fundamental level, as also, critically, those societal factors that underpin and sustain it. Two such factors came up constantly

[42] *Court On Its Own Motion v. Department of Women and Child Development and Ors., WP (C) 8889/2011.*

[43] Ibid.

during this study. First is the way children and their offending behaviour is conceptualised, and second, which also implicates the first, is the role of the media.

Some respondents felt that a punitive approach goes hand in hand with problematic constructions of childhood which are peculiar to the Indian context. Before elaborating on this perceived association, I should add that some of the criminological literature places great emphasis on the idea that both 'child' and their 'crime' are social constructions (Muncie 2004). The basic assumption is that as creations of societies, these terms are to be understood contextually, rather than universally (Haines et al. 2020). A social constructionist perspective supports a link between our understandings of childhood and criminalisation of children. Consequently, it seems to offer a useful starting point for making sense of *continuity*—in our present case, the persistent theme of punitiveness—by looking at deeper-lying societal forces at work in juvenile justice. Furthermore, it also has the potential to deepen our understanding of *change* in the legal response in the wake of the Nirbhaya case.

In his comparative study of two cases of killings by children of children from the 1990s, in Britain and in Norway, respectively, David Green (2008) demonstrates that individual countries do not react to high-profile crimes, of reasonably similar nature, in an identical fashion. In fact, they may react in hugely different ways. Whereas the English response to the killing was harsh and involved new punitive measures, the Norwegian reaction remained restrained, and the case had no policy impact. The author lays out a carefully argued case that the dissimilar responses in these two countries are 'deeply rooted in cultural constructions of childhood and the moral culpability of children' (Green 2008 p. 10). Logically, one should consider the dominant cultural constructions of childhood deviance in India, and how these affect penal policy and practice.

Social constructions of childhood deviance

Respondents provided a glimpse into multiple social constructions of childhood deviance, some of which are diametrically opposed to others. A juvenile justice expert asserted that in 'Indian culture' children who commit offences are not described as 'evil'. Referring to religious scriptures to buttress this point, the respondent said that Krishna, a Hindu deity, in his childhood was 'a habitual thief and sexual harasser who used to hang around with a gang of children' (Exp1). So, the argument was that with a god himself depicted as a serial juvenile delinquent, so to speak,

negative representations of children who offend are alien to 'Indian culture'. The respondent further claimed that 'Indian culture' is imbued with the belief that children who commit offences are still to be treated as children. It is possible to engage with these views from more than one angle. Briefly put, to carve out an idealised, essentialist Indian attitude towards childhood deviance with the help of a mythological portrayal may have a didactic or rhetorical value, suggesting that repressive practices simply represent a corruption of the ingrained cultural norm. But it is clear that there are different, sometimes countervailing, images of childhood which are arguably no less Indian.

There was a sharp contrast between a deep-seated historic and cultural representation of childhood deviance (above) and a more real-world representation that emerged in the description of marginalised childhood given by a prominent leftwing politician (below). Commenting on what they saw as overly negative representations of children from marginalised backgrounds in the print and visual media in recent years and pernicious assumptions inherent in them, the respondent cited an example:

> I remember an advertisement from a few years ago with a picture of a small boy, obviously from a working class background, in which the caption was something like "Help him learn how to chop an onion before he learns how to chop a head".[44] God! Just think about the assumptions here. ...You are talking about child labour as being the correct thing for children of a certain class; otherwise, they have no option but to become violent offenders. It is almost as though the idea of childhood is not allowed for children of a certain class and castes. Only children of a certain class are children, and the others are basically either violent offenders or part of the labour force. (Pol6)

The illustration here draws attention to the distinction that seems to be made between some idealised notion of children (innocent) and more particular status-based representations (the dangerous classes). It also highlights the exaggerated and unfair association of poor children to crime. These issues provide a counterpoint to the normative claim about the Indian belief on childhood deviance which the earlier respondent offered. But then again, it might be that problematic portrayals of children are not so much at odds with the more idealised view. Rather, they may occur because of it. By failing to live up to the idealised image, it seems children become

[44] Incidentally, the advertisement was launched by the Delhi Police to raise funds for its programme of training street children in gainful employment. It was subsequently withdrawn following objections by social activists. See https://www.outlookindia.com/newswire/story/delhi-police-withdraws-controversial-ad-on-street-kids/805807.

susceptible to being perceived especially harshly. This parallels the argument made about the way in which female offenders are often portrayed markedly negatively for disturbing patriarchal notions of how a woman should behave, or what a woman is supposed to be (Chesney-Lind 1986).

The association assumed between marginalised childhood and criminal behaviour seems to coexist with the notion among the middle and upper-middle class of Indian society that their children are 'entirely different' from those on the other side of the social divide. This dichotomy in construction of childhood is palpable in a senior politician's observations as they argued for 'the reality of India's highly stratified social, economic and cultural structures' to be taken into account when considering matters concerning juvenile justice:

> Let's distinguish between children from what we may call privileged backgrounds, being socially and economically middle class and upwards, and children who are from the lower economic strata to poverty. Survival of a child born in poverty is already made difficult by problems with regard to access to food, clothing, shelter, education, and health. When conditions of life are so loaded against them from childhood, it is unfair to expect them to have higher values of ethics, morality, truth and reasoning. (Pol3)

Here sympathy for children living in a distressed state seems to be tinged with an assumption that they are more likely to commit crimes than those from well-to-do families. These perceptions about childhood and crime correspond with conclusions drawn in previous empirical research (Basu 2019). The author found that a distinction between privileged childhood ('ours') and marginal childhood ('theirs') is commonly made in Indian juvenile justice, and that there is a pervasive notion that social marginality and deviance are interlinked.

My study further reveals that the unequal construction of childhood and the perceived association of marginalised childhood with deviance seem to produce a desire for escalation of penal severity. Some respondents suggested that the question of whether juvenile justice is punitive is contingent on the background of the child. It was claimed that only children from privileged backgrounds find institutionalisation to be punitive and stigmatising. On this view, being placed in an institution is an 'improvement' for poor children because they are provided 'good food, a good counsellor and good medical facilities' there (Hom1). Moreover, a politician put it unabashedly, "Stigma is the least of their problems" (Pol3). The politician's interpretation of institutionalisation as producing two conflicting results is informative:

> For a child who comes from a background where survival is a daily challenge, the home (institution) is already restorative in a sense. A child from this background finds themself in the company of children from similar backgrounds in the home. For a child belonging to another segment of the society who is untouched by that sort of struggle, getting into a 'restorative' home is retributive. You make an error, and you are introduced into a dark world.

The dualistic pattern of thinking here with its apparent biases and prejudices appears conducive to crafting what Garland has termed 'a criminology of the self' and 'a criminology of the other' (1996 p. 446). Whereas the former is intended for offenders depicted to be 'just like us', the latter caters to those characterised as patently different from us whose crimes call for harsh penal treatment (Garland 1996 p. 461). Sure enough, the respondent and a few others shared the perception that institutionalisation within the juvenile justice system is no deterrent for certain children. This was given as a justification for adopting a more punitive approach in the case of those children who are repeat or serious offenders. A probation officer called such children '*bad juveniles*'. The implication, bizarrely, was that only '*good juveniles*' deserve to be institutionalised within the juvenile justice system! Trial and punishment of the others as adults under the waiver provision was seen as an effective, appropriate option.

But not all those who were supportive of a tougher approach found the waiver provision adequate. For instance, advocating a more extreme approach, one superintendent preferred that only children below 14 years be dealt with as per the juvenile justice law, and the rest be governed by the general criminal law (Hom1). On the other hand, a few respondents appeared to employ euphemistic language to advance an essentially punitive approach. To take an example, a former minister from an opposition party disapproved of the idea of sending children to adult jails, and instead suggested that they should go through 'a process of absorbing values and acquiring skills': "China has this re-education programme—though I'm not really very enthusiastic about it. But I think we need to instil values and change their behavioural pattern" (Pol4). China's 're-education' programme consisting of detention centres/camps has been widely criticised for alleged human rights abuses. Perhaps realising this mid-sentence, the respondent hastened to qualify their reference to it. But the choice of the reference nevertheless seems to convey a subliminal message about how they might want children from non-elite backgrounds to be treated.

The role of the media

Many respondents considered punitiveness towards children to be linked with media representations of children and crime. They blamed the media for being deliberately sensationalistic and willfully irresponsible in its coverage of crimes committed by children. Such media reportage is believed to have caused or contributed to the harshening of public and political attitudes towards offending by children in recent years. For several respondents, the Nirbhaya incident constituted a watershed in this regard. During the time national attention was focused on that tragic case, many of the media stories about it portrayed the accused juvenile as 'the most brutal' of all the six accused persons although there was no such evidence (Anwar 2015). One respondent said that the unrelenting media coverage of the case led to stereotyping of juvenile offenders involved in any sexual offence as 'dangerous rapists and killers' who should be punished like adults (Pol6).

A juvenile justice expert observed that disproportionate and biased media coverage whenever a child is involved in a serious crime has since become a 'trend' (Exp1). Another respondent argued, though ironically not without a bit of exaggeration it may seem, that "A juvenile offender today is targetted (by the media) much more than an adult offender" (Ngo1). To the extent this might be the case, it appears to be linked with the point I made about offending children in particular being singled out for violating culturally held beliefs regarding their ideal conduct. At the same time, some respondents quite reasonably thought that the brunt of the media-stoked hate and anger is borne by children from marginalised sections of society. This ties in with the perception, seen earlier, that the caricature of a juvenile offender is typically that of a marginalised child.

Opinion was divided among the media persons interviewed in this study about the extent to which the media influenced the change in the juvenile justice law which came after the Nirbhaya case. An English-language newspaper journalist who supported the change claimed that it was 'totally media-driven' (Med2). Taking credit, they added, "We in the media ensured that the incident pricks the conscience of the society at large." The others who were either opposed to the waiver provision or ambivalent about it preferred to see the media's role in a broader context:

> I think the media's role was certainly important. But none of these things happen in a vacuum. The media was also reflecting what society was feeling at that time.

> Politicians, activists and major protests…everybody's saying hang them. So, whether the media fostered it or just reported on it, but that reporting itself fostered a certain mood is a chicken and egg situation…. But I think it's a symbiotic thing and on any major contentious issue it will always be one feeding into the other. (Med5)

The view that the punitive stance taken by the media is influenced by public punitiveness and vice versa does seem to have a certain common-sense ring to it. Consistent with this mutually reinforcing relationship between the two, the toughening of the law was interpreted by some respondents to be in response to the pressure exerted on the government to act punitively by both the media and public. However, a two-way link between the media's influence and the demand for punitive action to which then policymakers merely defer still tends to simplify what is essentially a much more complex issue.

It fails to consider the possibility that the public may not actually be as punitive as they are made out to be—a point I will return to a little later. If this point is valid though, there is an argument to be made that the shift towards a harsher regime may have an element of what Bottoms has characterised as 'populist punitiveness' (1995 p. 40). The term conveys the notion that politicians are inclined to adopt a heavily penal approach assuming that it will be popular with the public. In addition, as suggested before, an in-depth understanding of the punitive mood and response requires taking into account constructions of childhood/deviance that pervade the socio-political system.

Therefore, I would argue that punitiveness in juvenile justice needs to be analysed in terms of the interplay between a set of factors that include, but may not be limited to, constructions (seemingly Janus-faced) of childhood and their offending behaviour, politics, public opinion and the media. To follow on from this, it will be superficial and even misleading to say that the Nirbhaya case and its aftermath explains punitiveness in juvenile justice. On the reverse, it might not be unreasonable to suggest—drawing on Green (2008)—that the system has long embraced a punitive approach, but such characteristics may have received reinforcement, and been added to, since the Nirbhaya case.

The 'new' punitiveness

The discussion in this section has so far stressed that punitiveness in juvenile justice has roots that go deeper than the waiver provision. That said, the perception of some respondents about the actual working of the provision was that the level of punitiveness has gone up substantially due to it. They alleged that children falling in the category which the provision targets are transferred to the adult criminal justice system by the Board more often than not on the basis of a perfunctory preliminary assessment. Significantly, the provision is also considered to have de facto prejudiced the child's right to bail. As a juvenile justice expert said:

> A couple of things are happening in a very mechanical manner. If someone in the 16–18 age group is accused of committing a heinous offence, the Board just transfers them to the adult system. The discretion which is there even if an offence is heinous, even if the child is 17 to still keep them in the juvenile justice system is not being exercised…The refusal of bail continues for heinous offences despite the fact that the transfer provision applies only to trial. The bail provision has not been affected for 16–18s. But the judges are saying it is a heinous offence, therefore, no bail. (Exp1)

The claim here about routine and ill-considered transfer of children for an adult trial is similar to the one made by Ganguly and Ali (2020) in a recent paper (see Chapter 2). On the issue of bail too, a respondent (Exp5, lawyer) cited a recent judgment of the High Court of Allahabad[45] to highlight the adverse, unintended impact upon children. In that case, the Court has taken the view that juveniles to whom the waiver provision applies no longer enjoy bail as a matter of right as that will be inconsistent with the purpose of bringing the new enactment.

Another respondent claimed that post-2015 the attitude of the Board on granting bail has hardened even in cases that do not attract the waiver provision, resulting in an increased use of institutionalisation. Though it is difficult to confirm this in the absence of data on pre-trial and under-trial institutionalisation, the respondent's explanation for the perceived change provides an important insight. They said that magistrates who already had a 'criminal justice mindset' now feel less inhibited 'morally' to depart from the principles associated with juvenile justice (Ngo2). It is almost as if there is a new permissiveness about punitiveness.

[45] This judgment was delivered in the case titled *Radhika (Juvenile) v. State of U.P.* on 5 August 2019. See https://indiankanoon.org/doc/79411056/.

For all the perceived newness and higher intensity of penal practices it brings out, the foregoing account also has a subtext that speaks, once again, to issues that I have earlier emphasised as central to understanding punitiveness in juvenile justice. One is that the letter of the law does not give the full measure of punitiveness in practice. As a corollary to this, making sense of punitiveness in practice requires reckoning with social forces that shape it as a normal and normative objective to pursue in the first place.

An Impediment, Yes, But…

A large section of respondents considered punitiveness and the perceived upswing in it in recent years to be detrimental to the prospect of RJ. This view can be broken down into the following two overlapping themes. First, in the words of one respondent, "People feel that harsh punishment is the only answer. There is a hankering for more punitive treatment of the juvenile among the victim, the media and the public" (Off2). The law was taken to be in sync with this mood. The second theme was that any approach that seeks to 'mitigate the harshness of punishment', already seen as inadequate by people in the case of the bulk of juvenile offenders, will not be acceptable to the public at large (Exp3). The concern was that RJ will be interpreted as letting juvenile offenders off and going soft on crime and will therefore be opposed.

It was quite reasonable on the part of the respondents to think that the pursuit of excessive or disproportionate punishments is a major impediment to the adoption of restorative practices (though what constitutes such punishments or, indeed, restorative practices, may be open to debate). But, equally reasonably, some qualifications along with a little discernment are in order here.

A small number of respondents did not subscribe to the notion that people in general overwhelmingly and uniformly favour harsh punishments for children. This is in addition to the fact, significant in itself, that a large majority of respondents themselves did not approve of the idea of punishing children by institutionalising them except in the case of grave offences. By way of explaining that the punitive shift does not enjoy a broad appeal and approval, a woman politician-cum-activist said, "All the change happened in the name of women's safety. But women's groups opposed it. Everybody who has an actual stake in this, who are working with juveniles, or working with victims of sexual crimes, would appeal strongly against this kind of

treatment (of children)" (Pol6). Another respondent asserted that the public preference for repressive punishment, in cases where it exists, is largely born out of ignorance about juvenile justice issues.

Besides, the contention that there is a popular majority of support for more punishment is not backed up by any substantive evidence. There is little published research on public opinion in India regarding the response to offending by children. That said, a lesson from countries in respect of which public opinion polls and surveys showing punitive public attitudes to youth crime do exist extensively may be relevant here. A number of scholars caution against taking such quantitative evidence as a straightforward reflection of the public's punitive stance (Jones 2010). It is not necessary for me here to dive into the wealth of research in this area except to highlight that an important theme in the literature is that public opinion is much more complex, contradictory and malleable than is generally supposed (Roberts et al. 2003; Hutton 2005). Pertinently, research demonstrates that when better informed the public tend to be less punitive (Hough and Roberts 1998).

To say all this is not to suggest that punitiveness in the Indian context is any less real. The point rather is that it should be possible to recognise that there are public demands for harsher sentencing in violent offences without imagining the existence of an undifferentiated and unchanging 'punitive majority' (Jones 2010 p. 345). It should similarly be possible to analyse punitive consequences of the waiver provision for children without asserting either that punitiveness is novel or that all juvenile justice interventions are inevitably moving in the punitive direction. For what has been found to be accurate about the description of public views on punishment for children also appears to hold for juvenile justice. That is to say, juvenile justice in practice often reflects ambiguities and tensions arising out of diverse sentencing goals. We have earlier seen that respondents in this study emphasised the goals of diversion, rehabilitation, punishment and restorative justice where these were not necessarily separate from one another.

More specifically, some respondents who advocated counselling, face-to-face meetings between the parties and community service as part of a restorative justice approach did not term it as non-punitive or soft, but rather as 'less punitive in relative terms' (Exp3). Those activities were correctly thought to involve 'some kind of experience of pain' for the child (Exp3), which is similar to Daly's (2000) position that punishment is part of RJ (see Chapter 3). Still, considering the likely

public demand for a more punitive approach in a small proportion of offences that are grave, the respondents proposed not submitting such offences to restorative processes, or at least not until after RJ has gained sufficient traction. No less importantly, following the same logic of proportionality, they were of the view that punitiveness need not impede the adoption of RJ in the rest of the cases.

From a practical point of view, their rationale does seem to make sense. It is the case after all that the use of restorative justice is often limited to relatively minor, first-time offences in countries where it has been adopted, including England and Wales (Cunneen 2010). There is research evidence to suggest that public support for restorative alternatives to punitive sentencing options declines as the seriousness of the offence increases (Roberts and Stalans 2004). A recent study (CSJ and NLU 2018) conducted by an NGO in and around Delhi on exploring the use of restorative justice processes in child sexual abuse cases also found evidence consistent with this theme. The study notes that in focus group discussions and interviews within communities, women were open to the idea of meeting and talking to the offender as part of a restorative process provided that the offence in question was not rape or murder. Once again, this underlines both one of the possibilities and one of the limits of RJ.

In sum, it is necessary to qualify the assertion that punitiveness imperils the prospect of RJ. A critical examination of punitiveness and a realist engagement with RJ reveals the potential for the two to very much coexist in juvenile justice in India, as indeed they do in countries where RJ is a component of the criminal justice policy for children.

Not all respondents, however, appreciated the prospect of RJ being introduced in juvenile justice. In the following section, I discuss views that were skeptical of RJ.

Skepticism over Restorative Justice

In another contrasting view to the notion that RJ and punitiveness are mutually exclusive, a small section of respondents objected to certain elements associated with RJ for the perceived risk of exposing children to more harm and pain than they currently face. The objection came out clearly in response to my query about their assessment of the referral order. Two core features of the referral order that they had reservations against were: (i) the condition that the young offender must plead guilty to an offence to be eligible for the referral order, and (ii) the provision that the

young offender attend a face-to-face meeting with community volunteers and the victim (where appropriate) in the panel.

Pleading guilty

Some respondents argued that the requirement of the guilty plea is coercive and liable to cause injustice to the child. They considered it unfair for the child to be put in that position especially in view of the possibility that the police might have falsely implicated the child or used fabricated evidence against them. As a journalist said, "We do have people accused of crime they didn't commit. It creates a diabolical situation for someone who is accused. You will just plead guilty to the offence because the system has screwed you over and you want to avoid going through a trial. I see that open to misuse" (Med5). The current statutory scheme, which lays down the principle of presumption of innocence of the child (until proven guilty after an enquiry) and prevents a guilty plea of the child to be made or accepted, was considered to have important procedural safeguards against alleged abuses of power by the police.

However, a defence lawyer claimed that, in practice, the Board usually does not extend these safeguards to the child, who, as a result, comes under pressure to plead guilty. The respondent's concern was that the provision of RJ following a guilty plea may legitimise the practice of putting pressure on the child to act in a manner desired by 'the system':

> Asking children to plead guilty is almost a routine practice in the Board. The reason is that it helps the Board in achieving fast disposal, even same day disposal of cases. If you accept your guilt, the case will be closed today itself. This is what the Board says to the child. It is used by the system to the great disadvantage of the child…. My anxiety is whether RJ will be used by the system to compel the child to take responsibility on the pretext that there will be lenient treatment and the case will be closed very soon. (Exp5)

Another respondent said that under the present system, children who have not been able to secure bail for reasons such as that they 'do not have the money to afford a private lawyer, or are not in a position to provide bail sureties' often plead guilty to improve their chances of being released from the home quickly (Off2). It was argued that RJ may incentivise such non-voluntary guilty pleas by children who are already in a precarious situation.

The risk that the prerequisite of a guilty plea could have perverse effects on the child and their rights should be troubling for anyone who holds that RJ has the potential for bringing

progressive change in juvenile justice. This is particularly so because the danger is that instead of seeking consent and cooperation of the child—regarded as centrally important in restorative processes—RJ may proceed from coercion or actually be transformed into a tool of coercion (Ashworth 2002). Though the possibility of an undesirable impact of the referral order on the child's plea might exist in England and Wales too (Wonnacott 1999), there is little evidence of significant violations of their rights (Crawford and Newburn 2003; HMIP 2016). In comparison, the nature and scale of the potentially damaging consequences in the Indian context seems to be of greater concern.

It was not that respondents who desired RJ were not cognisant of this issue. Their common emphasis was on RJ to be 'a voluntary process in the true sense' for the offender and the victim (Ngo3). Asserting that a guilty plea forced out of the child will 'vitiate' a restorative process, an NGO professional underlined the need for 'protocols and safeguards' to prevent the abuse of the process and protect the child's legal rights (Ngo11). At the same time, respondents felt, understandably so, that it is not appropriate that a restorative meeting between the child and the victim take place unless the child has first pleaded guilty or at least expressed some acceptance of the harm done to the victim. One respondent said, "If you bring them (the parties) into a room where the child is not taking responsibility, you are endangering the victim and further victimising the victim" (Ngo9).

In view of the need felt for the child to plead guilty, I think it is important to recognise, as a few respondents did, that RJ is 'not completely voluntary' from the offender's point of view. Crawford and Newburn suggest that 'the loss of voluntariness was the price paid' to ensure that the referral order did not end up being peripheral to the youth justice system (2003 p. 239). It may be only reasonable to expect RJ in the Indian context, too, to call for some trade-off between voluntariness and coercion, the child's interests and the victim's satisfaction. So, while RJ has the potential to be beneficial to the child, it may be much less straightforward and much more problematic than it was hoped to be by many respondents.

Community and victim participation

As in the case of the child pleading guilty, some respondents found the focus on community and victim participation in RJ to be potentially inimical to the child's interests. A central plank of this

line of thought was the perception that the community and the victim are interested in seeking revenge and retribution for the offence, and that RJ will amount to providing them the opportunity for it. In Chapter 7, I have discussed the concern voiced by a child rights activist that counselling in a community setting could expose the child to individuals and groups that might want to impose harsh punitive measures on them. Such concerns were shared by a few other respondents too with regard to the direct involvement of both community members and the victim in a restorative justice process.

Victim participation was opposed by one defence lawyer (Exp5) on the grounds that the needs of the child, and not those of the victim, ought to be the focus of juvenile justice. Their opposition to RJ more or less took the form of a syllogism: juvenile justice ought not to be victim-centric; RJ is victim-centric; therefore, RJ is not suited to juvenile justice. It was contended that in the process of addressing the victim's needs RJ will strip an already vulnerable child of their basic legal rights and make them more vulnerable. The defence lawyer said, "The moment RJ comes I will be pushed out. The child will not have even me. They will have a *gol chakkar* (a circle). They will be made to say all kinds of things."

This resistance to RJ comes largely from a perspective in which the adversarial system is seen as the only reliable protection the child has against punitiveness of the public on one hand, and excesses of informal justice on the other. However, it was the failures, perceived or real, in the actual operation of the current (adversarial) juvenile justice system that were the main reason for the majority of respondents to feel the need for a less punitive approach. They were in favour of adopting a restorative justice approach precisely because they interpreted it to be non-punitive or less punitive as well as potentially beneficial to the child's rehabilitation and social reintegration. Again, it might be found acceptable for RJ to be skewed towards offenders where they are children, as opposed to when being applied to more serious cases and to adult offenders (Daly 2002b).

Several respondents were of the view that a restorative process involving the offending child and those affected by the offence (the victim and the community) can enable the child to take responsibility for their offending behaviour. This was considered to be an important component of their rehabilitation and reintegration. One NGO professional claimed that the child facing up to their wrongful act, realising the impact it has had on others, and even experiencing guilt ('being

sorry') in the process can be a surer way to achieve the declared objectives of juvenile justice than the option of institutionalisation (Ngo8). Another respondent conceived punishment too in terms of the child 'taking responsibility', being 'held accountable' in a social setting:

> Punishment should not be putting the child in an environment where they are actually even more vulnerable and even less likely after that to be able to make amends and move on. Punishment then should be something of a social nature. I don't know how it helps to put them in an environment where they will experience stigma and isolation. (Pol6)

There were a small proportion of respondents who preferred to have RJ primarily because they considered it to be more victim-focused than any other form of criminal justice. RJ was seen as a much-needed reform in the juvenile justice system which has 'no place for victims' (Ngo8). However, it was stressed that giving a voice to the victim was not antithetical to the child's interests. The argument was that 'not all victims see punishment of the offender as justice for themselves' especially in minor crimes (Exp6). One respondent said, "This kind of coming together, counselling and apologies go a long way in healing and providing a sense of closure of some kind for the victim" (Med5). Further, a magistrate in the Board argued that communication between the victim and the offender may itself in some cases curtail 'the urge for retribution': "Feelings of retribution and vengeance simmer down to an extent when victims get to meet the persons who have harmed them, particularly when some time has passed since the incident" (PM2). However, it was recognised that special care has to be taken in bringing an adult victim together with the child because of the inherent power imbalance: "This is a problem that needs to be addressed. But it doesn't mean that there is no benefit to the child possible out of an RJ process" (Ngo3).

In a similar vein, a few respondents opined that the community taking part in restorative criminal proceedings need not necessarily have adverse consequences for the child. Although there was no consensus on who might represent the community, one common aspect shared by the respondents was their sense of optimism that it may be possible to mobilise progressive voices having roots in the local community. They spoke of retired government officers, retired judges, trained volunteers, social workers and NGO workers as possible community participants.

One NGO activist said that "India does have a strong culture of community", which often tends to be overshadowed by social ills found in the same culture (Ngo11). It was argued that

parallel to cases of community members inflicting injustices on the weak or those seen as the 'other', there are examples of local communities acting as agencies of dispute resolution: "There have been Panchayats (village councils) that have sat together and solved community problems. We cannot overlook positive outcomes of community processes that might have happened in so many different ways which we don't know about because we do not document the things that we do." As to risks of community members transgressing legally acceptable boundaries, a politician felt that those could be managed by providing adequate safeguards: "It would be better if the nature of punishment that they could give was actually spelt out and restricted so that they could only choose on a certain basis and stick to the bare minimum" (Pol6). I think these points have merit precisely because while invoking the ideal of community they do not appear to neglect the reality that, as Crawford puts it, 'communities are often marked (and sustained) by social exclusion, forms of coercion, and the differential distribution of power relation' (2000 p. 291).

Certainly, there are potential benefits to the child and the victim which are distinctive to restorative processes. But it is not just this. There are legitimate and serious concerns too around the issues of consent and participation of the victim and the wider community. And the fact that measures *could be* taken to address such concerns, it is worth insisting, is no guarantee that either they *will* be taken if RJ is operationalised, or they *will be* sufficient to avoid unintended consequences. It seems only right therefore that the normative appeal of RJ is confronted with the empirical reality (Crawford 2000).

Concluding Remarks

In this chapter, I have analysed the roles civil society and the judiciary may realistically be expected to have in enhancing the prospect of RJ in Indian juvenile justice. In addition, I have attempted to evaluate the hindrance that may be caused by the perceived ascendance of punitiveness and doubts that RJ could be appropriated for the existing or more pronounced penal practices. Both tasks have entailed a critical engagement with the diverse and often contradictory views held by a wide range of respondents. This has also prompted broader reflections on social and political issues powerfully interwoven with the main themes. On the whole, the picture that emerges from the chapter is mixed and complex.

On the favourable side, the findings show that civil society organisations have a considerable presence in the juvenile justice system. They have taken initiatives in recent years to make RJ more familiar to various stakeholders and to explore ways to use counselling and the circle method for reintegration purposes. It is also an encouraging sign that they perceive a substantial section of the magistracy to be receptive to their endeavours. However, the ability of NGOs to influence the juvenile justice policy, limited as it was to begin with, has become more constrained by their own reckoning in the new political environment that emerged in 2014.

Given the unique power and potential of the Supreme Court and the High Courts to lead, guide and direct policy and practice in juvenile justice, their role seems central to the prospects for RJ-based reform. It is therefore significant that the majority of serving and retired judges of the higher judiciary whom I interviewed endorsed the idea of introducing restorative practices in juvenile justice. Yet, few NGO respondents or other practitioners expected the judiciary to make a radical departure from the existing law. Their hope instead was that progressive magistrates and judges might exercise judicial discretion to increasingly facilitate the use of current provisions to underpin RJ-inspired methods in practice. The respondents felt that this will help in arriving at an empirical understanding of the usefulness of RJ, thereby providing a fillip to the idea of having an explicit provision for it in the law. Their preference was for, to use Roach's words, 'measurable bottom-up actualisation of restorative justice' in contrast with 'top-down political and legal mobilisation and institutionalisation of restorative justice' (2006 p. 167). The approach and expectations seem to be both pragmatic and bounded by political realism.

On the less favourable side, there was a strongly held view that with the waiver provision juvenile justice has moved too far in the opposite direction, towards increased punishment, to leave much space for hope about RJ. My analysis suggests that the waiver provision may have hardened the penal attitude towards a particular group of children or led to somewhat of an escalating effect on the use of punishment more broadly. But this should not occlude the fact that harsh treatment of children has been an endemic feature of juvenile justice. I have argued that punitiveness cannot be fully understood without examining various social, cultural and political milieus in which juvenile justice is embedded. An important insight revealed in the chapter is that punitive attitudes are influenced by social constructions of childhood deviance. For instance, a few respondents considered a harsh approach appropriate for only those children who are deemed to require a higher

level of deterrence because, coming from marginalised backgrounds, they are assumed to be accustomed to a hard way of life. Such a differentiated approach to punishment also has the potential to accommodate RJ in the case of children who are not involved in serious offences and, more controversially, who may not be seen as 'the other'. This provides a reason for skepticism that RJ is good for juvenile justice when its application might actually reinforce the division between the 'haves' and the 'have-nots' (Harris 1998 p. 66).

There is also some opposition to the idea of RJ on the grounds that features usually linked with it, namely, the guilty plea and involvement of the victim and community, could turn out to be coercive, disempowering and oppressive for children, especially those from disadvantaged backgrounds. One may argue that adequate protection for them can help mitigate this risk. The point still remains though that if deployed without vigilance and circumspection, RJ carries dangers—as ever, the dangers of unintended consequences. It seems important here to recognise the paradox that free and voluntary participation of all parties about which some respondents justifiably raised concerns, or anticipated difficulties, lies at the heart of proceedings carried out under the banner of RJ. In other words, what is perhaps problematic about RJ is also what is most interesting and potentially useful about it. The key, in my opinion, is to confront the ideals of RJ with the practical difficulties and challenges involved in applying them and, certainly, to avoid confounding the ideals themselves or their rhetorical use with their actualisation.

Chapter 9

Conclusions

This study has attempted to address a specific problematic that stood out about juvenile justice in India. RJ is of growing importance in many jurisdictions around the world. In recent decades, there has been a proliferation of practices that adopt the 'restorative' label especially in relation to juvenile crimes (O'Mahony and Doak 2017; Miers 2001). Despite the trend towards using restorative approaches, there was little development in India in this regard. Empirical research on whether it might be desirable and feasible to introduce such an approach to interventions with offending children, including possibly learning from developments elsewhere, was conspicuously lacking. As a policy-oriented empirical inquiry, my research is the first to contribute to filling this crucial gap in the extant literature. It does so on the basis of in-depth interviews with an array of policymakers, practitioners, opinionmakers and experts strongly positioned to make sense of and influence juvenile justice policy and practice. This renders its findings all the more pertinent to informed discussion and decision-making around juvenile justice reform in India.

The findings that have emerged in answer to the three research questions crystallise into four original and substantive contributions. First, the study illuminates the nature and operations of juvenile justice / the juvenile justice system in India and gives a fresh perspective from which it might be understood. Second, it outlines reforms regarded by respondents as vital in order to achieve a humane system of juvenile justice and explores to what extent they perceived restorative practices as a desirable component of such reforms. I focus on the meanings attached to RJ and the means identified to implement it in the Indian context along with their critical appraisal. Third, the study produces an analytical account of attitudes respondents expressed towards the idea of learning from RJ-based referral orders used in youth justice in England and Wales. Fourth, it brings to the fore some important factors that create opportunities and constraints for restorative practices in juvenile justice.

In this concluding chapter, I draw together the findings spread across the thesis along the four core themes just enumerated, in that order, and consider their implications. At the end, by

combining insights gained from rigorous empirical analysis, I will propose some conclusions about the prospect of using restorative practices in the case of offences committed by children. I must start though from the beginning, with a discussion of how the findings complicate the nature and workings of juvenile justice.

Deconstructing Juvenile Justice

As Chapter 2 describes, a country-wide legal framework in India and, indeed, something approaching a 'system' to deal with juvenile offending separately from adult offending is a fairly recent construct. It can be dated to 1986 when a new law was introduced, though its history is traced deep back to the colonial period. The relatively short time span (less than four decades) of the arrangement's existence seems to have given little cause for circumspection or scrutiny while applying the terms 'juvenile justice' and 'the juvenile justice system' to it as a matter of course. Not that this is a problem in itself. Both are convenient, short-hand labels, not to mention that their routine official use may itself serve as part of the process of instituting a regime and governing through it. But the fact of the matter is that the terms mask a great deal of complexity about the response to juvenile crimes and how it might be adequately conceptualised. In what follows, I want to argue that this study has yielded a range of insights into the perennial tension between welfare and justice which is one of the least told and the least understood aspects of Indian juvenile justice.

Beyond 'gap studies': acknowledging the 'p-word' in juvenile justice

There is a common and uncritical acceptance in the literature that juvenile justice, in sharp contrast with criminal justice, is welfare-orientated in its aims and purposes (Kethineni 2017). At the same time, some scholars do not seem to find welfarism particularly appealing. They claim that, since 2000 when a new law was introduced, the child is not supposed be treated as an object in need of welfare and safety, but rather as a subject of rights (Kumari 2004; Bajpai 2018). No matter whether commentators highlight 'welfare', 'rights' or both, they tend to view objectives set out in the law as of paramount importance in providing an account of juvenile justice. The objectives include consideration of the use of child-friendly procedures, non-stigmatising terminologies and rehabilitative and reintegrative interventions.

Having reached an essentially normative—and largely appreciative—understanding of juvenile justice which is rooted in the official/legal narrative, much of the literature then goes on

to examine to what extent the legal standards are complied with in practice (see Kethineni and Braithwaite 2013, for example). The compliance literature notes gaps between law-in-the-books and law-in-action, ranging from 'challenges in implementation' (Kumari 2015) to 'blatant disregard' (Kethineni and Braithwaite 2013 p. 322) for provisions of the law. From this, there emerges a 'good law, bad practice' dichotomy which permeates the academic discourse on juvenile justice. Within that binary thinking, punishment is a dirty word (the 'p-word'). It is represented as antithetical to good law and consigned to the hinterland of bad practice.

Although the gap or dichotomy thesis—advanced mostly on the basis of legal research from a linear, positivistic rationality—is influential, it is, as this study has uncovered, rather limited and thin. For a start, beyond authoritatively identifying the gap with the help of official reports and published materials, it tends to pay less attention to fleshing out particular forms that the observed gap takes in the everyday operation of the system, factors that seem to have maintained and reproduced the gap over the years, and how they might be interpreted from a deeper sociopolitical angle. Further, considering that a falling off between law and its implementation happens to be a familiar theme in sociolegal research, it often fails to specify what, precisely, is so distinctive and important about the gap, and its implications for the nature of juvenile justice. There is also a tendency among scholars to portray the juvenile justice law (excluding the waiver provision) in terms of a logical, consensual progression marked by continual improvement. As a result, the tension arising out competing perspectives, alternative rationalities and, indeed, contradictions which exist in juvenile justice is either largely missed or overlooked.

Against this backdrop, the evidence gathered in this study sheds new light on the actual functioning of the juvenile justice system and confronts deeper underlying issues behind it. I have focused on how the police, the Board and institutions treat children in several fundamental areas at the heart of juvenile justice.

(i) Socio-legal insights into the police's treatment of children

Most respondents across different groups claimed that the police in general do not deal with children in conflict with the law in a manner that is substantially different from how they deal with adult offenders. When unpacked, this perception was built on specific examples they cited of

police treatment of children reflecting varying degrees of harshness and wrongdoing. In addition, they offered insightful reflections on factors that might be connected with the problem.

First, one compelling thought to emerge was that much of the problem flows from a particular ideology behind police functioning and wider societal influences on it. It was suggested that police officers in India think that they have the right to inflict punishment upon persons they see as wrongdoers, and that they generally do so in a variety of ways. The opinion of respondents was that this unlawful overreach and abuse of power remains undiminished when the police work with children. If anything, as a few women respondents implied, under the patriarchal conditions pervasive in Indian society, police officers probably feel more entitled to discipline and control women and children. Ill treatment and punishment of children by the police may then be interpreted as having to do with the seemingly intractable problem of police violence and misconduct in India's criminal justice (Subramanian n.d.; Common Cause & CSDS 2019).

Secondly, some of the police officers interviewed in this study demonstrated a striking preoccupation with the need to control juvenile crimes. They viewed a particular category of children as dangerous and sophisticated criminals who pose a threat to peace, order and security. When asked about the kind of juvenile crimes they have handled, one police officer claimed:

> I have seen that 95 per cent of crimes like dacoity, robbery, theft and snatching are committed by budding criminals who are under 18. They are all professional criminals. They have become so qualified in criminal matters that they know all about legal processes. Even our newly recruited police officers don't know that much. (Off8)

Although the officer's assessment is not backed up by any concrete evidence, its policing implications cannot be ignored. Criminological research has shown that by taking on 'an impossible responsibility for controlling crime' as a means to 'reproducing order' (Ericson 1982 p. 4), the police create conditions rife with the potential for socially damaging consequences. They are inevitably selective in the exercise of their law enforcement powers because, if nothing else, institutional resources are limited (Bowling et al. 2019). It is therefore essential to a crime control model that the police have a suspect population in target, like the quote above illustrates. Consistent with prior research on Indian childhoods (Basu 2019; Balagopalan 2011), this study finds that it is overwhelmingly the poorest and most marginalised children who get defined as the 'dangerous others' (Garland 2001) in the society and are criminalised. One probation officer called

such children *bad juveniles*—mostly children who live in slum areas, abuse drugs and who might have previously been in trouble with the law. They were distinguished from *good juveniles* who have offended but are seen to belong to so-called 'good families'—a term implying well-to-do families. A few police officers and other respondents found the current legal provisions to be lenient in the case of children they deemed dangerous. They favoured trial and punishment of such children as adults even where the waiver provision is not attracted. All this might in some way recall the differentiated approach to delinquents during the colonial period (see Chapter 2).

Finally, a few respondents incisively noted that some police procedures deviate from the juvenile justice law, but nevertheless seem to have acquired the status of informal norms and practical working rules for the police. To take one example, the police register a First Information Report (FIR) to initiate a criminal investigation against a child even though the offence in question is neither a heinous offence nor has been committed by the child in association with an adult. This is followed by other infractions of the juvenile justice law by the police in matters of arrest and bail. Instructively, respondents cited two 'low visibility' reasons (Goldstein 1960) as informing decisions of the police not to invoke their power to grant bail to children, and both may be understood to be part of occupational norms in everyday policing. One, in the opinion of a lawyer (Exp5), is the police's inclination to regard bail as essentially a judicial decision to make. The second reason, a senior police officer observed, is the disinclination of the police to take responsibility in case the child having received bail from the police does not present themself before the Board as required. Police operational practices of these kinds may not necessarily be intended to punish the child. But they flourish, perhaps as elements of the police occupational culture, which is rightly emphasised by policing scholars as central to understanding police actions (Reiner 1992; Chan 1996).

(ii) Socio-legal insights into the Board's workings

In comparison with the police, the functioning of the Board was viewed in a favourable light by many respondents. The principal magistrates and some of the social work members stressed that, in contrast with the court, the Board conducts its enquiry in an informal, child-sensitive environment free from the cut and thrust of adversarial trial. They highlighted that all decisions/orders regarding the child are taken through a collegial decision-making process in which two social work members of the Board along with the magistrate have an equal say; the

majority opinion prevails in the absence of consensus. In addition, it was claimed that sentencing orders, except in a small minority of cases, consist of non-custodial measures such as counselling, probation and community service with the aim of rehabilitating and reintegrating as opposed to punishing children.

However, those respondents who might not have been biased towards giving the impression that 'everything is fine, and everything is working', as one journalist (Med5) put it, presented a more realistic picture of the Board. The discussion in Chapter 5 shows that several such respondents asserted that in substance it is very similar to a court. One key explanation, which in my opinion also helps in making sense of other specific findings on the issue, is that the expectation of equal partnership between the magistrate and social work members is nowhere near a reality.

The respondents suggested that the Board works 'under the absolute control of the judiciary' (Bur7). It was argued that the principal magistrate, representing the judiciary, enjoys the unwritten power to choose whether to take the views of social work members into consideration. The perception was that in most instances the magistrate chooses not to do so and expects social work members 'to just sign the order (they have) dictated' (Exp5). If that is the case, Rothman's (1980) influential thesis about failures of criminal justice reforms may be useful in understanding the magistrate's behaviour. He demonstrates that administrators of criminal and juvenile justice perpetuate practices of convenience over matters of conscience when implementing reform measures. So, from the magistrate's point of view, the reasoning might be something along the lines of: 'why bother about taking opinions of social work members on board when it is possible to manage without doing so'.

Further, research on partnership working between professionals from different domains reflects that a disparity in their status poses a major challenge to forming a collaborative relationship (Cheminais 2009). This seems to apply in the case of the judicial and non-judicial members of the Board rather acutely. My respondents had a strong impression that social work professionals like probation officers and welfare officers operate only on the margins and have little clout. In a review paper, Raghavan and Mishra have gone to the extent of saying that state-provided social work services in criminal justice are so weak as to be 'mere tokenism' (2017 p. 30). I would not go that far. Yet, in my view it may be naïve to think that the membership of social

workers in the Board brings about a change in the skewed power relationship such that they are able to assert a distinct or competing philosophy in their inter-professional work with the magistrate.

The structural imbalance affecting the Board's work, however, should not be taken to mean that social work members are passive actors with no agency. The evidence in this study indicates that their engagement with the magistrate exhibits varied patterns. One child rights activist (Ngo9) observed that some social work members who are well-qualified and experienced manage to negotiate space with the magistrate and make a meaningful contribution towards addressing the needs of the child. But critically, this was considered to depend on the extent to which the magistrate appreciates 'the spirit of the JJ Act' and sees 'the value in working as a team'. A juvenile justice expert (Exp5) opined that in some cases social work members defer to the magistrate with a view to enjoying a cozy relationship with them. From the social work member's point of view, the reasoning might be something along the lines of: "why go looking for confrontation when there are advantages in avoiding it, such as being treated with respect and dignity within the Board and being able to 'flaunt' the official position outside it" (Agrawal 2019). As a result, what seems to ensue is an 'enactment' of partnership working by social work members. In still some other cases, as one NGO official described, they may share a common belief with the magistrate that 'children need to be taught a lesson' by means of institutionalisation (Ngo3).

At the same time, the majority view in this study was that the locus of decision-making in the Board resides firmly in the magistrate. Their domination in turn was seen as a main factor accounting for the distortion of the Board into a court-like body, and its attendant problems. From the findings reported in Chapter 5, it emerges that day-to-day proceedings of the Board are conducted along adversarial lines. Public prosecutors and defence lawyers regularly involved in the process of adjudication ('enquiry') by the Board informed me that there is not much difference between an enquiry and a court trial in practice, particularly in cases where the Board deals with grave offences. Many respondents were of the view that the legal and technical nature of proceedings prevent the child's participation in them. They underlined considerable delay in disposal of cases as another fallout resulting from the trial mode in which the enquiry is carried out. It was further stated that the adverse impact of the protracted period on the child is only exacerbated by the fact that they often endure it while undergoing remand detention.

Unfortunately, institutionalisation of children by the Board at pre-trial and under-trial stages has received little attention in the existing literature. My study suggests that it is a commonplace practice along with custodial sentences, thereby strengthening the argument that the Board seems to mirror the court.

(iii) Socio-legal insights into the institutional treatment of children

Many interview respondents stressed the importance of avoiding custodial detention of children considering it to be harsh and harmful for them. In their perception, it is essential to the difference between juvenile and adult criminal justice that the child is placed in an institution only a measure of last resort. Yet, they maintained that the juvenile justice system fails a large number of children precisely in that regard.

It appears that the principle of institutionalisation as a last resort is often forsaken at the first opportunity when the police, having apprehended the child and refused to release them on bail, produce them before the Board. Respondents felt that in many cases the Board uses its wide discretionary power (see Chapter 2) to deny bail to the child and send them to an institution pending an enquiry. The distinct disadvantage the child seems to have vis-à-vis an adult in the matter of bail was articulated well by a defence lawyer:

> The judge has to give bail to an adult accused of a bailable offence. In juvenile justice even if the offence is bailable, the Board may refuse to grant bail to the child saying that they need care. This is one instance where the juvenile accused is a very weak and vulnerable accused. They do not enjoy all the protection extended under the Cr.P.C. to adults. (Exp5)

Though the use of custody by the Board at pre-enquiry and under-enquiry stages is said to be extensive, no data is available to ascertain its exact scale and proportions. When asked to estimate what the duration of such detention normally might be, the same respondent quoted above stated that it may range from ‘one day to three years’ depending on the gravity of the offence. A principal magistrate indirectly confirmed the lengthy period of pre-conviction institutionalisation by pointing out that a procedural practice is followed by the Board to provide ‘relief’ to children under detention. Under the said practice, the period for which the child has been kept in custody during the pendency of the investigation and enquiry is set off against the term of detention the Board

imposes on them upon conviction. But there is still more to pre-conviction detention than meets the eye.

Unlike remand detention, custodial sentences for children are reflected in the official crime data. In Chapter 2, my analysis of the data for 2018 shows that custodial sentences constituted a quarter of the total dispositional orders passed by all the Boards in the country in that year. The rest of the orders (three quarters) did not involve custodial sentences from which any period of detention already undergone by the child could be deducted as per the magistrate's description. The consequence, then, is that pre-conviction detention of a child who does not subsequently receive a custodial sentence is neither recorded in the official data nor questioned in studies. It remains what I term the 'dark figure of detention'. Because it is hidden and unexamined, the possibility that remand detention is more commonly used than custodial sentences cannot be ruled out.

Whether institutionalisation is resorted to pre-enquiry or post-conviction, a standard argument of Board members in this study to justify it was that the decision serves 'the best interest of the child'. However, most respondents did not buy into it. A lawyer made the point that "'The best interest of the child' is a most abused phrase. All illegal things that cannot otherwise be done are justified in the name of the best interest of the child" (Exp5). While 'illegal' may be too strong a word and not really intended, it is possible to say that there are competing rationales and motivations at play behind custodial detention of the child, which in the end repudiate the principle of welfare.

Respondents identified the so-called 'criminal justice mindset' or the penal focus of magistrates as one of the main drivers of the high level of institutionalisation in juvenile justice. Being used to delivering sentences against adult offenders, magistrates were seen, rather stereotypically I think, as predisposed to the idea that a child who has committed an offence deserves punishment in proportion to the seriousness of the offence. This agrees with the diagnosis found in the literature that magistrates/judges are instinctively reluctant to opt for non-custodial interventions where the crime committed by the child is considered serious (Kumari 2015). There was also a view among respondents that the magistrate's inclination to use custody freely at pre-enquiry stage is correlated with apparently practical, but superficial, considerations of conducting an enquiry. These may include awaiting investigation reports from the police and the probation

officer to decide on the issue of bail and denying bail to ensure the child's appearance during future proceedings. The narrative here again seems to be in conformity with the insight that Rothman (1980) phrased so eloquently: when conscience and convenience meet, convenience wins.

Yet, the penal/correctional approach of magistrates or, for that matter, of social work members and other key actors who influence decision-making, has a wider social context. And the study highlights the importance of not losing sight of this context. The disproportionately high representation of poor and marginalised children in institutions is but symptomatic of a broader dynamic at work whereby deviance is socially constructed (Becker 1963). Words and expressions such as 'poverty', 'criminal areas', 'slums', 'bad environment', 'adverse family circumstances', 'uneducated parents', 'drug addicts' and 'school dropouts' frequently cropped up when some magistrates and others described the problem of juvenile crimes in this study. In their conception, children who commit crimes are 'entirely different' from those who have a safe and secure childhood. This came across in some formulations as what Basu calls the 'pathologisation of marginal children'—marginality and precarity becomes associated with deviance (2019 p. 73). And it easily led to the belief among some respondents that to put offending children in custody is actually to do them good. The paternalistic and interventionist approach is reflected in what one magistrate had to say: "We (the Board) should attempt to pluck them (children) out of the environment in which they have committed a crime and then, later, put them back in the society" (PM2). As per this rationale, institutionalisation serves as the primary delivery mechanism for education, training and other services children need, but are otherwise not able to access, so that their likelihood of reoffending is reduced. To put it simply, punishment is justified as a purposeful act aimed at welfare.

The trouble with this, the majority of respondents claimed, is not only that institutions fail to work as might have been intended, but also that they have harmful and long-lasting effects. The common perception was that "The homes function very much like prisons" (Ngo4, NGO activist). That is, their function is largely punitive. A social work member provided a telling illustration of the quotidian interactions in childcare institutions which is far removed from the official legal discourse where even the word 'juvenile' is excised as demeaning:

> In the homes children are identified by the staff as "*murder wala case*" ("the murder case"), "*rape wala bachcha*" (the boy who committed rape"), etc. The repeated use

> of these stigmatising labels is then internalised by children. They begin to think that that is who they are. (SM3)

Highlighting another damaging aspect of the institutional life, several practitioners said that children learn more about criminal behaviour from each other in an environment where they are generally left to their own devices except when they create trouble. To drive home this point, a district child protection officer observed, "A child who spends even one day in a home takes away the experience of ten years." In other words, the impact may be far-reaching and indelible. Due to all these potential iatrogenic consequences, the general perception of respondents was that 'damaged children' go into institutions and come out far worse. In some cases, they reoffend and go back in.

The research findings on the police, the Board and institutions reviewed in this section bring a new perspective to the understanding of juvenile justice in India. By exploring the specificities of core practices, their politics and internal logic, and their socio-cultural underpinnings, I have been able to deconstruct 'juvenile justice', and this has revealed the tensions, contradictions and paradoxes embedded in it. The analysis demonstrates that the workings of juvenile justice are far too complex to be circumscribed into the law/practice divide—the bread and butter of (legal) research on Indian juvenile justice. To characterise the various subtle and unsubtle ways in which punishment courses through the system merely as gaps in implementation is to present a misleading picture. I would argue that the main problem with such a portrayal is precisely that it regards law and practice as two discrete domains—the 'pure' world of law and the 'impure' world of practice. It ends up depoliticising law, on the one hand, and for want of a better word, desociologising practice on the other. The contingent, incrementalist and non-linear journey of juvenile justice law-making from the past to the present (discussed in Chapters 2 and 5) shows that politics cannot be separated from the law. The state response to deviance is fundamentally political. Similarly, the range and complex nature of practices in juvenile justice cannot be grasped without paying close attention to the underlying socio-cultural forces. Implementation of any policy or law is not carried out in a mechanical, 'according to the book', fashion (Long 2001; Lipsky 1980). Actors who implement the juvenile justice law, as much as they might improve, alter or reverse it in that process, are embedded in social and cultural contexts.

This study also challenges the hegemonic thesis advanced by legal scholars that 'juvenile justice (in India) has long ceased to be part of the criminal justice system and has become a completely independent justice system for children' (Kumari 2004 p. 202; Kumari 2015). The rich empirical insights into the workings of the three primary components of juvenile justice reveal that, on the contrary, there is a great deal of convergence between the two systems. And, importantly, it is not necessary to bring up the obvious example of the waiver provision to sustain this claim.

In the next section, I outline reforms that respondents thought needed to be implemented considering their assessment of the present state of juvenile justice.

The Vision of Reform and Restorative Justice's Place Therein

At the outset, an important point to note is that just as the conventional emphasis on what the law mandates and the preoccupation with the law/practice dichotomy is insufficient to understand *the-system-as-it-is*, it is also of limited value in explaining respondents' vision of *the-system-as-it-ought-to-be*. Across all my respondents, there was something approaching a consensus that reform of juvenile justice is necessary, even if there was not a consensus as to the required form it should take. They put forward an agenda for reform which is wide-ranging in its content, reach and ambition. Though interpreted in different ways, RJ emerged as an essential element among things the majority would like to see happen in juvenile justice. The idea of RJ provoked strong, and in a few instances pragmatic, contestation too on the part of a small minority. All in all, the diversity in the empirical evidence about reform, observable in Chapters 6 and 8, destabilises the well-entrenched notion in the literature that reform in Indian juvenile justice is straightforwardly an issue of implementation of the law (albeit as it stood before the introduction of the waiver provision) (Kumari 2015).

Social prevention of juvenile offending, early intervention and restorative justice as a preventive mechanism

When I asked the interviewees about what kind of improvements are required in the juvenile justice system, many of them focused first and foremost on things outside the system. The logic behind it was simple and sensible. Given the damaging effects of system contact on children, the respondents' view was that efforts ought to be concentrated on ensuring as few children enter the

system as possible. Towards this end, they called for a comprehensive approach to what may be termed *social* as opposed to *situational* prevention of juvenile offending (Rosenbaum, Lurigio and Davis 1998). Such prevention was seen to involve taking steps way outside the formal system of punishment—in the family, community, school and wider social circles. It meant making provisions to address basic social, educational and economic needs of children from deprived backgrounds and tackling problems such as drug use, dropping out of school and violence in the family which respondents identified as underlying factors behind juvenile crimes. The preference for a preventive approach among respondents at once highlights two enduring features in criminological literature. First, it is an acknowledgement of the limits of the criminal justice system which advocates of RJ, in particular, have emphasised (Richards 2014). Second, it is a nod to the 'risk factor' research tradition (presumably without the awareness in most cases that such an academic literature exists) which focuses on a wide range of risk factors that are believed to predispose children to offending (Tolan 2002).

Some respondents in this study who referred to socioeconomic disadvantages of children assumed a strong causal link between such contextual/structural factors and juvenile crimes. However, within the 'risk factor' literature, a more nuanced position has been recognised: risk factors matter more when they are significant in number and operate alongside each other, but still, whether they have a causal effect on crime is difficult to establish (Newburn 2016). In most cases, I found that the 'root cause'-oriented thinking reflected respondents' empathy for offending children in the sense that they were seen as 'victims of circumstance'—not in itself a guarantee of humane treatment. But in some cases, that line of thinking evolved into tropes connoting prejudice against them. For example, a trope prevailed that children from disadvantaged backgrounds drop out of school, do drugs and commit crimes. The juvenile justice system was viewed as primarily catering to such children. Thus, the 'root cause' assumption feeds into the construction of a binary image of childhood—deviant children versus 'normal' children (Basu 2019)—like the one I mentioned earlier. And, as the chapter will underline later, this normative and ontological belief has implications for reform since it evokes a fear *for* children, but also a fear *of* children.

While the preventive approach discussed above entails providing basic, universal services to a broad population of at-risk children, several respondents argued for adopting a less structural, more targeted intervention in the case of children who have already demonstrated a low level of

offending. The opinion was that such intervention should be both early and minimal and, importantly, again, should not involve exposing the child to the juvenile justice system. In this regard, a couple of respondents presumed that the alleged omission by the police to intervene for minor offences at an early stage of the child's offending behaviour contributes to their progression on that path. However, the presumption is not necessarily justified. A notable insight from criminological studies is that children are likely to grow out of crime so that a lot of them will never go on to become 'life-course-persistent' offenders (Rutherford 1992; Moffitt 1993). The natural process of learning or maturing is known to be undermined by contact with the criminal justice system (McAra and McVie 2007). In addition, one respondent in this study made a well-reasoned case against early intervention by juvenile justice agencies on the ground that it has the potential to draw an even greater number of children into the formal system—a process described as 'net-widening' (Cohen 1985).

Yet, so long as early response does not involve action from functionaries like the police, some respondents found real merit in it. In their view, restorative practices in particular can be useful in at-risk community, family and school settings to start conversations around and raise awareness of common problems. A longtime child protection expert stressed that RJ offers 'a really good opportunity' for individuals concerned to participate in a collaborative discussion to redress issues such as peer violence and bullying in school so that the likelihood of children falling into the penal grip of the formal juvenile justice system is minimised.

From pre-arrest/pretrial to post-sentence: the potential uses of restorative justice with/without diversion

The majority of respondents expressed strong support for the use of principles and practices associated with restorative justice throughout the whole spectrum of the criminal process. My analysis of their narratives in Chapter 6 shows that they envisaged the application of RJ with diversion and with minimal diversion or no diversion at different stages: pre-arrest, pre-trial/enquiry, trial/enquiry, sentencing and post-sentence. Though, as clarified in that chapter, diversion and RJ are not the same thing, the two overlapped with each other in some of the specific reform scenarios proposed by respondents. This accords with common practice (UNICEF 2010). The 2015 Act lays down diversion as one of the 'general principles' to guide implementation of the law. It has provisions for alternatives to custodial detention—a weak or minimal form of

diversion, but not for diverting children in conflict with the law away from judicial proceedings—a maximal version of diversion (Newburn 2017). On the other hand, the legislation neither makes any reference to the term 'restorative justice', nor includes any interventions such as victim-offender mediation and family group conferencing.

Going beyond the current provisions of the law, some key informants and practitioners in this study indicated the need for either pre-arrest or pre-trial diversion into a restorative process in certain cases. There was a difference of opinion among them about which of the two stages might work best, the type of offence that should be eligible for such a diversionary process, and the role of the police in triggering or leading it. A few respondents were in favour of diversion at the earliest possible stage, which is usually when the police start looking into an offence allegedly committed by the child. In petty offences, these respondents preferred that the police divert the child away from arrest and the Board proceedings and counsel/caution them instead in a restorative way. RJ in this instance appears to have been interpreted as something akin to the police-initiated and police-led restorative conference model that emerged for the first time in Wagga Wagga, Australia. However, the majority of respondents including, interestingly, a few police officers themselves, showed lack of trust in the police to operate sensitively, impartially and reflexively as ought to be required in administering RJ.

In comparison, there was considerable support among my respondents for pre-enquiry diversion of the child into a restorative process at the hands of the Board. Several of them convincingly argued that for non-serious crimes like acts of physical assault occurring between children, it will be preferable if the Board enables the parties involved to work together to find a solution themselves, rather than subject the child to an adversarial enquiry and then pronounce a judgment. A female social work member of the Board proposed this kind of diversion also for status offences like elopement, and misconduct of a sexual nature. These are categorised as serious offences under the law, but the respondent quite prudently framed them as possibly arising out of a natural 'exploration of sex by adolescents' and 'consensual' in many cases, and therefore deserving of a non-adjudicatory response.

Notwithstanding the desire shown for a restorative intervention following pre-enquiry diversion, many respondents believed that its implementation especially in serious offences will require an enabling provision to be made in the law. As juvenile justice expert stated, "Unless the

statute is amended, the enquiry process cannot be bypassed" (Ngo9). A few respondents indeed favoured the proposed restorative process to be legislatively mandated. However, the majority of NGO professionals and child rights experts argued for building a momentum towards that end, instead of seeking an immediate change. This is a significant and nuanced point, and I will unpack it in the next section.

Notably, some respondents had a conviction that the idea of RJ is implicit in the current legislation. They explained it by contending that the objectives of rehabilitation and reintegration explicitly enshrined in the law cannot be realised in a true sense unless a restorative approach is adopted. One magistrate stated that a face-to-face restorative meeting comprising the child, victim and others affected by offence can be organised in the Board during the course of an enquiry if the parties are agreeable to finding a resolution of minor crimes. Claiming that this was part of the practice followed in their Board, the respondent said that in such meetings the child often apologised to the victim for the harm caused and the Board accordingly disposed of many cases. I have critically examined the claim about RJ in detail in Chapter 5 and come to the finding that meaningful participation and empowerment of stakeholders, a cornerstone of RJ, is largely lacking in the Board's practice. But the perspective under discussion is important insofar as it reflects that RJ, interpreted in a certain way, was perceived by the respondents to be in consonance with the law and desirable at the enquiry stage.

In articulating the need for a restorative approach to juvenile justice, some respondents emphasised the greater use of alternatives to custodial detention at the sentencing stage which are provided in the law. Their focus was on counselling, community service and probation. The first two of these were in particular regarded as having the potential to be restorative.

As I discussed in Chapter 7, among different conceptions of counselling shared by respondents, one prominent and rather imaginative viewpoint was that counselling ought to include a broader group of people around the child in order to be helpful in their rehabilitation and reintegration. It signalled the desire of a few respondents, mainly child rights experts and NGO professionals, to move away from the problem-focused, treatment-oriented and medicalised notion of counselling which seems to have been privileged in the law. Their argument was that instead of being limited to a set of behavioural therapies counselling should be used by the counsellor as a mechanism to connect the child with their family members, others in their circle of care and

support and, where appropriate, the victim so as to collectively address issues surrounding the offence. It was felt that the reimagination of counselling and the role of the counsellor in this inclusive and socially meaningful way can not only help the child better reintegrate into their family and community, but also create an opportunity for a restorative process along with the victim. The face-to-face participative process envisioned here seems to have a resemblance with the family group conference-type of RJ.

Next only to counselling, some respondents recommended that community service be increasingly used as an alternative to custody and as a restorative intervention. A juvenile justice expert suggested, "Whenever any community service order is given under the JJ Act, it can be converted into a mechanism of RJ" (Exp3). By 'conversion', the respondent meant that any community service activity, in line with what advocates of RJ have said in the literature (Bazemore and Maloney 1994), should be so designed as to have a meaningful linkage with the offence committed. The magistrates in this study claimed that in many dispositional orders they direct the child to perform community service by way of making reparation for the harm done. They interpreted community service so rendered by the child in the form of planting trees or helping out at places such as a hospital, old-age home and school for the blind to be consistent with the philosophy of RJ.

Finally, some of my interviewees felt the requirement for RJ post-sentence within institutional settings and after release. Stressing that it is necessary for institutions to do more than just perform a custodial function, the respondents wanted them to become 'restorative' spaces by incorporating practices such as counselling and talking circles aimed at improving the child's social and emotional well-being. At the same time, mention was made of extending a restorative approach to the post-release phase to enable the child to reintegrate into the family and community.

Thus, RJ or a set of cognate norms and practices that my respondents identified with it emerges as a vital part of reforms the majority sought to the ways in which children are treated, both outside and within the juvenile justice system. Needless to say, the term 'restorative justice' takes on a polysemic character in the Indian context. This is not so much surprising—given a bit of a definitional problem with RJ noted in Chapter 3—as it is revealing. To schematise, it is possible to say that the various meanings attached to RJ in this study exist along two axes. One pertains to the stage at which a restorative intervention might occur: *before* juvenile justice enters

the picture, as a mechanism to address problems at the community, family and school levels, *within* juvenile justice, at different points from the beginning of the criminal process till the end, and *after* juvenile justice, where the child has completed their custodial sentence. The second axis is about the content of a restorative programme. It might consist of a face-to-face interaction of some sort with the child, as in a police caution, a family group conference, a counselling session and a referral order-like panel meeting; or it might not, as in the case of community service. Under a commonly used classification, the programme may be 'fully restorative', 'mostly restorative' or 'partly restorative' (McCold 2000) depending upon the extent of its 'restorativeness'.

Out of the extensive range of potential restorative measures, the majority preferred those which they thought feasible within the current legal framework. Therefore, much as some of them felt attracted to radical ideas of diversion of criminal cases into restorative processes, the general understanding eventually was that elements of RJ such as face-to-face encounters, community participation and reparative activities stand a better chance should they be integrated into the existing provisions on enquiry and sentencing. And if this proves difficult to attain, many settled for avoidance of custodial detention for the child as their idea of the least RJ requires—a seemingly 'good enough' approach to RJ.

In addition to counselling and community service, respondents identified the individual care plan and the Integrated Child Protection Scheme (ICPS) as the primary means to implement restorative practices (see Chapter 7). With regard to the individual care plan, their argument was that its objective of promoting the child's rehabilitation and social integration is flexible enough to allow a victim-offender meeting as part of it. On the other hand, the ICPS is seen as the financial backbone for the implementation of the juvenile justice law (Ali 2016). The perception of the respondents was that if the scheme functions well, the services and structures envisaged under it have the potential to be used innovatively to foster restorative practices. Whilst all these reform ideas and interventions were proposed as steps in the direction of a restorative approach in juvenile justice, their focus was on the offender. It might be thought that the victim and the community affected by crime are equally important participants in an RJ process. Yet, the advocates of RJ in my sample had a strong bias in favour of the child's welfare, understandably perhaps in the context of juvenile justice. This does not mean, conversely, that all those who were child-centred favoured

a restorative approach. A minority of respondents were either critical or skeptical of ideas about incorporating it into juvenile justice.

Critical and skeptical attitudes towards restorative justice

One of the main grounds on which respondents resisted RJ was its presumed lack of deterrent value especially in the case of dealing with serious offences. Their impression was that if the response to a crime under an RJ method is decided over a meeting where the offender and their family members have a say, the message going out from it will be that law breaking has little consequence, which, in turn, may encourage more law breaking in the society. Interestingly, though constituting an overall minority, these respondents belonged to different groups, not just magistrates and police officers, who, as seen earlier, were singled out for their punishment-oriented mindset, but also social work members, probation officers, politicians and journalists. This finding suggests that a commitment to 'just deserts' punishment for juvenile offenders might not necessarily be linked with specific professional backgrounds. As regards RJ, its critics in Western jurisdictions have long labelled it as 'soft on crime' (Knox 2001). That there is a similar feeling among a few within the context of juvenile justice in India only goes to show that the real or perceived limits of RJ, just as its putative advantages, have cross-jurisdictional resonance.

Some reservations expressed against RJ in this study come from the perspective that RJ may undermine the rights and interests of the child and, therefore, any move towards it may be for the worse. Voicing one such reservation, respondents argued that the willingness under a restorative method to accept a guilty plea from the child will nullify the presumption in law that they are innocent until proven otherwise upon an enquiry. The apprehension was that without that legal safeguard children in the Indian context will be particularly susceptible to pleading guilty even if they do not want to do so or, far worse, even if they have not committed a crime at all (see Chapter 8).

Equally pertinently, a question was raised about the justification for using restorative methods like a conference and a victim-offender meeting in response to minor crimes. It assumes added significance because the majority in this study considered RJ primarily suitable to tackle low-level offences. The skeptics pointed out that under the current law the Board already has the option of dealing lightly with such offences in the sense that it can complete an enquiry quickly

and let the child go after advising or admonishing them. So, there is no need, the reasoning went, to try to 'reform' this by introducing any restorative elements that will likely become an add-on, rather than an alternative, to the existing procedure. Once again, the argument here gives a good reason to pause and think carefully about what offences RJ might be suitable for, and in what ways. More so since offenders and others who attend restorative justice processes tend to view them as a difficult and demanding experience (Braithwaite 1999).

Lastly, respondents had doubts that counselling and community service can be adapted for the purpose of restorative practices (see Chapter 7). The skepticism stemmed from their perceptions of how the two generally work in the Indian context. It was reliably claimed that counselling, so far as it is provided, does not serve as a substitute for custodial detention, but rather nearly always as a supplement to pre-trial/under-trial custodial detention. This links back to the suspicion highlighted above and seems to bear out the observation that innovations in the criminal justice system often become add-ons to inherited practices, not replacements (Rothman 1980). Relatedly, there is evidence in this study to suggest that counsellors feel constrained to accommodate penal imperatives of juvenile justice in their practice, and their counselling reports may be used by the Board to reinforce punishment. Respondents also feared that any potential involvement of community members in counselling could further enhance the child's vulnerabilities.

Though current practices indicate that community service, unlike counselling, is not used in conjunction with custodial detention (perhaps because it does not lend itself to such blending), it still seems to work as an alternative, not to institutionalisation, but to 'advice and admonition'. There was a perception among respondents that community service is intended to be a rigorous lesson for the child and mostly requires them to undertake some form of cleaning activity. In the circumstances, it was considered more likely to carry the risk of demeaning marginalised children than to have the potential to be restorative.

The foregoing findings do not mean that reform ideas centred on RJ are mistaken. But I think that they do persuade me to be wary that any proposed change in the name of RJ need not necessarily be for the better. A questioning and pragmatic attitude seems necessary to guard against unintended consequences and perverse effects. There was indeed a sense of caution and pragmatism, crucially, along with openness, among the majority of respondents about whether

there is any lesson to learn from elements of restorative justice provided in the referral order in England and Wales.

Prospective Policy Transfer and the Referral Order

Respondents who were in support of RJ as a potential means of bringing reforms in juvenile justice found some parts of the referral order appealing and others less so. The features that elicited positive reactions included: (i) the referral order is laid down in a statute that prescribes conditions under which it is applicable; (ii) the child does not face a trial in the youth court and custodial detention under it; (iii) they are referred to a panel where two trained community volunteers facilitate panel meetings, (iv) they have an opportunity to participate in discussion around their offending, potentially along with the victim, and agree a contract of work with the panel, and (v) different agencies have a duty to partner under the youth offending team and deliver youth justice services. The broad agreement, in principle, over elements of the referral order deemed attractive was, however, accompanied by a divergence of opinion among the respondents about the extent to which and the way in which they could or should be incorporated into the Indian system.

Describing the referral order as 'a very good model', a few interviewees proposed that a diversionary path from prosecution leading the child to a restorative process should similarly be created under a specific provision of the law in the Indian context. One magistrate stated that "If RJ is set down in the statute book, it will be well-structured. The law will provide in clear terms the category of offences to which it can be applied. It will not be left to the will of an individual magistrate to implement it or not" (PM3). In addition to ensuring clarity and avoiding arbitrariness, another magistrate (PM2) claimed that legislation will help overcome whatever hesitation there might be among magistrates about using RJ. These are all fine arguments to make even though they seem to exaggerate what may be achievable by the writ of the law. Further, a bit of latitude and discretion in the application of RJ, whether built into the law (as is the case with the referral order) or otherwise, might be in sync with an individualised approach in responding to crime which is associated with RJ. In any case, the upshot of the position taken by the respondents referred to above was that without an enabling law it is not going to be possible to develop an intervention along the lines of the referral order.

However, the majority of the respondents felt that it was unrealistic to expect such a law anytime soon as it is not on the government's agenda. More strikingly, and in contrast, there was a common understanding that a big legislative change to that effect is not desirable at the current stage. This conclusion was grounded in a few different, although interwoven, points of consideration. It is useful to elaborate a little on two of the main points.

One was the perceived lack of capacity to implement a full-fledged scheme of RJ. A common refrain among the respondents was that the system routinely falls short of even the minimum standards of juvenile justice. Many pointed to the poor state of the Integrated Child Protection Scheme as epitomising serious capacity deficits (see Chapter 7). In such conditions, they saw little benefit in bringing in a full-blown restorative justice programme modelled on the referral order through the law. The worry, a legitimate one, was that it will either be badly implemented or not implemented at all. Looked at through the lens of policy learning, the present finding suggests a relationship between the appetite to engage in policy learning and what is conceptualised in public policy literature as 'policy capacity'. While policy capacity consists of different components (Wu, Ramesh and Howlett 2015), the one that is relevant here is the capacity of the government to implement a potential policy choice effectively. This study shows that in the context of weak policy capacity most respondents were disinclined towards ambitious policy learning. Their reasoning might be something along the lines of: "why fuss about the state-of-the-art in RJ when the basics of juvenile justice are not working properly?"

A second consideration against the legislative route to RJ which weighed with several respondents including NGO professionals, experts and politicians was that it is perhaps the 'wrong way' to go about introducing RJ. Their contention was that 'restorative justice' is still a relatively new concept in India and the need, first and foremost, is to 'get a better sense' of how it might be applied in the Indian context. It was suggested that policymaking efforts to that end should begin slowly from 'bottom up' and include developing contextually informed restorative practices, running pilot programmes, collecting and evaluating data on how those work, and building public support for RJ. As part of these endeavours, a senior politician said, "I would favour policy learning and adaptation. So, take a model, study it, adapt it, experiment with it, gather empirical data and concrete results. And not just in Delhi but in different parts of the country" (Pol3). The

respondent emphasised that the enactment of RJ, if necessary, should follow, not precede, the other stages.

Along with a reasonably healthy level of interest in policy learning, there was a near unanimity among the respondents against importing a restorative justice programme 'in its entirety' into the Indian context. A former minister observed, "A mistake that India has made over the last many years is that we have tried to implant all British institutions into our legal system which are not necessarily suited to the social conditions in our country" (Pol4). When it came to the referral order, the minister's response was that "We can use the thought behind it. That is all." Among other respondents, the support for learning from the referral order extended to incorporating some of its features into counselling, the individual care plan and the ICPS, but not to trying to implant it as a whole. These findings indicate that elite attitudes towards policy borrowing from England seem to have moved on from the exceptional enthusiasm prevalent in the past (see Chapter 1). The attitudes now appear to be much more nuanced and pragmatic with stress on what might fit the situation in India.

The respondents also showed a willingness to 'magpie' ideas and options from a wider pool of policies abroad. Other than England, the countries whose RJ policies found mention during the interviews included South Africa, Australia, New Zealand, Brazil, Canada and the USA. But the respondents insisted, rightly so, that while lessons and experiences on RJ may be amalgamated from a broad and diverse range of sources, such inputs must ultimately be forged into a model suited to India's 'social and cultural milieu'. Arguing for 'an Indian model of RJ', an NGO professional said:

> While the principles of RJ are good for us, we have to evolve our own ways of doing it. It may not look like this beautiful restorative circle with coffee and tea, and 'yes, please' and 'no, thank you'…What India needs to do is to create its own stories and narratives…And let's see what we want to call it. We may not want to call it restorative justice. (Ngo4)

The views discussed above seem to align with insights available from the policy transfer literature which caution against looking at 'transfer' as 'the importation of fully formed, off-the-shelf policies', or a process where policies do not mutate when moved from one jurisdiction to another (McCann and Ward 2013 p. 7).

The step-by-step, bottom-up approach to RJ policymaking advocated by the respondents sounds logical. It appears to be informed by important lessons learnt from the long history of reform efforts in India, as also influenced by the existence of a changed relationship between India and its colonial past. At the same time, it seems to be wisely alive to nuances of policy learning from abroad. But all this is not to say that it is easily done. An obvious limitation with it is that any initiatives or pilots will have to be designed within the existing legal framework. Such a difficulty, notably, did not arise in the case of the pilots for the referral order in England and Wales as they were carried out after a new law containing the order had been introduced. Another, and related, possible disadvantage of the approach is that it might not receive support from state agencies. Speaking about the need to 'build a restorative justice model in India which is suited to our milieu', the ex-minister cited earlier said, "It will require preparation. The state is not going to do the preparatory work. It is the task of social reformers and NGOs to actually bring issues to the table so that we have enough data to think about it and see the way forward" (Pol4). By this reasoning, non-state actors are expected to undertake a staggering amount of work, from devising a suitable model to pushing it on to the government's policymaking agenda. I review the findings on the role of NGOs in facilitating the introduction of RJ in the following section.

Potential Facilitators of and Barriers to Restorative Justice

In this study, respondents singled out civil society organisations and the judiciary as two main actors whose roles are of critical importance if restorative practices are to be implemented in juvenile justice. It is not exactly a surprise that the judiciary should have been seen as being in a position to bring change; as I have outlined in Chapter 8, the Supreme Court exercises considerable powers in policymaking. On the other hand, even though NGOs have grown remarkably in India since the 1990s, their ability to influence governmental decision-making in in general is considered to be marginal (Mathur 2013) or, lately, on the decline (Behar 2019). Yet, the respondents had good reasons to focus on the impact NGOs might be able to make on the specific matter under investigation.

A key factor that many respondents drew attention to was that NGOs have been actively involved in providing various rehabilitative and supportive services in the juvenile justice system. This explains, in part, their high visibility and recognition as a stakeholder in juvenile justice, which, in turn, perhaps distinguishes juvenile justice from other policy subsystems. The ICPS,

which has been in effect since 2009, mandates the government and NGOs to work as partners on issues of juvenile justice. The official 'partnership' of course does not imply that NGOs have an equal role in policy deliberations. But the respondents acknowledged that NGOs enjoy crucial access to the Board and the top tiers of power in juvenile justice. In this background, they saw a modest chance that NGOs could use their service delivery activities, including counselling, to nudge some of the current practices in the direction of RJ.

The above idea gains further plausibility from the findings that NGOs have taken keen interest in promoting the restorative approach in India. In fact, it emerged that it is non-state actors who have brought the term 'restorative justice' into greater circulation in juvenile justice in the past few years. A loose network of child rights activists, NGOs and juvenile justice experts, often in collaboration with UNICEF India, have organised training programmes where RJ advocates from overseas have introduced various stakeholders in India to their approaches. These non-state actors seem to constitute something akin to an 'epistemic community' (Stone 1999) with a shared desire to learn about RJ and explore its potential application in the Indian context. A notable aspect of such policy learning activities, in addition to their eclectic orientation noted in the previous section, is that they do not seem to have halted despite several NGO respondents' own downbeat assessment of the prospects for any major policy change towards RJ. This appears to be a sign of conviction in both RJ and prospective policy transfer.

There is evidence that NGOs have attempted to put their learnings into practice. In Delhi, trained facilitators from an NGO have held talking circles for children in an institution with the aim of addressing possible adverse effects of detention on them and, where appropriate, reintegrating them with their family. A representative of the same NGO also informed me about a case in which they were able to facilitate a mutually agreed meeting between the child and the victim (see Chapter 8). By the admission of NGO professionals themselves, these initiatives are still in a fledgling stage and happening at the margins of mainstream juvenile justice processes. Nevertheless, they underlined that such activities could not have got even that far had it not been for the support from some progressive magistrates in the Board. Looking ahead, NGOs along with several other respondents had the hope and expectation that the judiciary, particularly the Supreme Court and High Courts, will give an impetus to, if not lead, the effort to adopt restorative practices in juvenile justice.

The Supreme Court is no doubt extraordinarily powerful and is credited with a number of policy interventions, especially through the mechanism of public interest litigation, aimed at bringing reforms in juvenile justice. In addition, the respondents' perception was that through the Supreme Court Committee on Juvenile Justice and the State level Juvenile Justice Committees of the High Courts, it is the higher judiciary, more than the executive, that has maintained a hands-on approach to policymaking and policy implementation in this area. In light of the unique circumstances, it is significant that the Supreme Court has endorsed the idea of RJ in dealing with children in conflict with the law, as did most of the judges in my study.

Yet, the judicial support, in and of itself, may not be a sufficient condition for implementation of restorative practices. The empirical analysis shows that there are three substantial and meaningful points to consider in this regard. First, even those respondents who looked upon litigation or judicial activism as a route to RJ recognised that courts may be limited in their ability to intervene in the absence of evidence about specific ways in which it might be operationalised and its potential benefits in the Indian context. So, it was considered important to build the required evidence base in order to open a 'window of opportunity' (Kingdon 1995) for judicial intervention. Second, supposing that over a period of time the judiciary does become persuaded to ensure that restorative practices are mainstreamed by the Board, it is a moot question whether desired results will follow. A central finding of this study is that implementation of a potential restorative justice policy, be it in the form of legislation or judicial guidelines, will depend upon a range of factors including how practitioners interpret and apply it, the capacity for implementation, and the wider social and cultural context.

Finally, while acknowledging that the higher judiciary has led on juvenile justice issues with the best of intentions, a few respondents argued that it has inevitably resulted in concentration of power in the hands of the magistrate and marginalisation of the social work profession. Their case, based on arguably valid grounds, was that this 'judicialisation' of juvenile justice may hinder rather than help the emergence of RJ. However, paradoxical though it may sound, it is some of the magistrates, as noted earlier, who are said to have encouraged and enabled voluntary organisations and social workers interested in RJ to undertake their activities. Thus, while caveats apply, the judiciary and NGOs do seem to be potential facilitators of RJ.

In discussing the prospect of RJ, I must also take into account two issues that emerged in this study as key potential barriers to RJ among several others: (i) skepticism about the idea of RJ and (ii) a perceived rise in punitiveness towards children. In a previous section, I have already touched upon the main reservations respondents had against RJ which, interestingly, emanated from two contrasting standpoints. The first is that the approach is not sufficiently deterrent for the child where their offence is serious, and the second is that it may not be sufficiently protective of the child's rights and interests. In my view, the latter deserves greater attention because it is not so much a barrier as it is a cautionary tale. It exemplifies a lesson from the history of child-centred social policies that good intentions do not necessarily lead to good outcomes for the child (Gordon 2008). The caution seems particularly relevant in the case of RJ as too often advocates in their fervour to promote what they are convinced is a 'better', 'more constructive' and 'more just' approach suspend critical reflection about it (Pratt 2006).

Likewise, some critical thinking could be applied to the claim by pro-RJ respondents in this study that juvenile justice in India has taken a strongly punitive turn with the introduction of the waiver provision in 2015, and hence conditions have become unfavourable to RJ. Certainly, the waiver provision signals a hardening of policy against a particular group of children. However, my investigation shows that punitiveness in actual operations has been an enduring feature of the system. Harsh penal treatment of children has neither come about with the waiver provision, nor does it seem to be restricted to it. Pervasive, deeply rooted penal practices and attitudes, therefore, need to be understood in light of numerous social, cultural and economic factors that generate or influence them, including, crucially, social constructions of childhood and deviance. For instance, a few respondents in this study portrayed certain juvenile offenders from marginalised backgrounds as dangerous and deserving of treatment as severe as that of adults even if the waiver provision does not apply to them. Given these circumstances, it seems like the question to ask is not whether punitiveness is an impediment to RJ—if RJ in most countries, including England and Wales, can exist within a system suffused with a punitive rationality, so it can in some form in India too. Rather, the enthusiasm for RJ within a penal climate raises questions about whether it might hide or preserve existing problems behind a mask of benevolence. There is also a concern about whether its application could exacerbate difficulties for specific subgroups of children who might become even more susceptible to being brought into the system due to the risk of net-widening.

The Prospect of Restorative Justice: Concluding Thoughts

Reflecting on the prospect of RJ, one child rights activist aptly said, "Let's not think of RJ as the end-all of work needed in juvenile justice. Children need so much more. RJ in itself is not going to be enough. It is one of the tools we can use." An in-depth understanding of actual juvenile justice practices in India surely leads to the sobering conclusion that reforms that are necessary are too comprehensive to be realised by RJ alone, even if it is applied at all possible stages of the criminal process. Obviously, then, a restorative intervention at the sentencing stage is, by itself, too little to make a big difference in the larger scheme of things. But its promise to reduce exclusionary and punitive treatment of the child is not trivial. In fact, it is worth all the effort it might take. There is hope in the findings that key policymakers and practitioners support the use of RJ and that they seem receptive to learning how it can be implemented. Initiatives taken in recent years by civil society organisations to explore ways to use counselling and the circle method for reintegration purposes further anchor this hope in concrete practice. But any optimism about the prospect of RJ should be tempered by a realisation that so long as core practices in juvenile justice continue in a business-as-usual fashion, the effects of such occasional restorative initiatives will be superficial.

The rigorous analysis in this study of current operations of the system, the potential and pitfalls of a restorative approach, and the outlook for progressive change through it, hopefully, provides a deeper understanding of where juvenile justice is now and where it ought to go. It is absurd to imagine that RJ, or any other form of criminal justice for that matter, might be able to address longstanding and structural issues of social injustice, deprivation and marginalisation that underlie many of the problems facing juvenile justice. Nevertheless, the core values and goals of RJ, such as healing rather than hurting, making amends, forgiveness, responsibility and apology need to be part of the way forward in dealing with children. RJ processes centred around dialogue and empowering the voices of offender, victim and community representatives have distinct merits and limitations. While their instrumental claims are often oversold, their practical difficulties tend to be overlooked or underestimated. Yet, so long as the latent potential of RJ to do harm can be guarded against, it is well worth exploring its possibilities. And, as the study shows, harnessing some of the current practices for this purpose might be a good place to begin.

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