

Brief insight on Indigenous Children and Youths detention in selected region of Asia

Jiten Yumnam, Forum for indigenous Perspectives & Action/
Asia Pacific Indigenous Youth Network (www.apiyn.org)

Indigenous Children & Youths and Detention: Issues & Challenges: High incarceration of indigenous children and youths and ill treatments has long been a challenge among indigenous nations in many parts of Asia. Indigenous Youths who stand up for their fundamental rights, for defense of their land and resources and protection of their culture and educational rights are subjected to arbitrary arrest, detention, torture and killings. Children and youths are also targeted on charges of supporting indigenous resistance groups in conflict prone areas and tortured forcing to confess to charges leveled against them. No country in South Asia has explicit restrictions on the use of physical force in the arrest of children and youths and the provisions of UN Convention on the Rights of the Child to ensure arrest of children and youths as a measure of last resort are ignored in south Asian countries.

Indigenous children and youths are subjected to degrading treatments and infringement on their rights in the name of national security. Youths are often held in police custody arbitrarily for long periods. Law enforcing officials often don't follow proper procedures, either due to a lack of familiarity with the law or a deliberate abuse of their power. Not all police stations have facilities to separate children from adults, and children and youths are detained in overcrowded police lock-ups. No country in South Asia requires the presence of a parent or legal representative with the child during police questioning.

Indigenous children and youths are held in pre-trial detention for months or even years, contrary to article 37 (b) CRC. No country in the South Asia has an explicit requirement that pre-trial detention be used as a measure of last resort. Indigenous children and youths arrested for substance abuse are incarcerated with inadequate medical facilities. In Nepal, indigenous youths quite recently are detained for supporting indigenous insurgent groups in army barracks, police stations and held incommunicado without subjecting to any legal process. In armed conflict situations such as in North East India and Nepal, with anti-terrorist legislations in place and disregard by state agencies for the rule of law, the already weak protections for child detainees are further eroded. In Nepal, children are being held in detention under the 2004 Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO), which allows for preventive detention for up to one year. The National Security Act, 1980 also detained indigenous youths for similar period in India.

Indigenous children and youths after arbitrary arrest are also subjected to violation of right to life, subjecting them to enforced disappearances and extra judicial executions and facilitated by conditions of emergency situations in India's North East after the state responded militarily to the political demands of indigenous peoples, with enactment of Armed Forces (Special Powers) Act, 1958 (**AFSPA**), National Security Act, 1980, Unlawful Activities and Prevention Act, 1967 which derogates non derogable fundamental rights.

States in South Asian region have no nation-wide program to divert cases proceedings away from the formal court system towards community support to avoid the negative effects of being implicated as against UN CRC provisions. (CRC, Art 40). Once formal proceedings is initiated against a child, there is no scope for diversion from the system, and all cases proceed to a determination of whether he or she is guilty or innocent and a disposition order from the court.

Indigenous children and youths are subjected to adult terms of detention if they commit serious offences if they are 16 years or older for serious offence in India. Options in sentencing like community service, counseling are underutilized due to insistence on institutional rehabilitation and a limited

commitment to set up necessary infrastructure. Lack of protection during detention puts them at serious risk of torture and ill-treatment from authorities and adult inmates.

On rehabilitation of children & youths in South Asia, they are placed in institutions other than prisons, emphasizing on secure containment by restricting their movement. The preference is for large-scale institutions, which impose a strict regime. Most lack adequate facilities for education, vocational training, counseling and reintegration. Due to prolonged periods of institutionalization and limited community contact, many children lack basic living skills and support for reintegration into community.

Policy on Juvenile Justice and Implementation challenges: Several states in South Asia initiate legal reforms for integration of international advances for juvenile justice. The jurisdiction of Juvenile Justice Acts is in conflict with national Security Legislation which confers special powers and impunity to the law enforcing official, such as Code of Criminal Procedure, AFSPA, 1958, NSA 1980 etc.

Even as the Juvenile Justice (Care and Protection of Children) Act, 2000 came to force in 2001 in India, many States are yet to implement its provisions. Though Child Welfare Committees and Juvenile Justice Boards (JJBs) have been constituted in all nine districts of Manipur in India's North East way back in 2007, provisions of the Act are unimplemented, such as non appointment of Metropolitan Magistrates or a Judicial Magistrate of the first class, no set up of special Juvenile Police Units, juvenile fund and child protection unit etc. Assam faces fund shortage to run juvenile courts. The Observation Home at Lichubari is the only home of Assam covering ten districts. As CWC and JJB remains incapacitated, targeting indigenous youths to arbitrary arrest, torture, executions has increased.

There is no effective juvenile justice system in Nepal and the few juvenile detention facilities that do exist are overcrowded, resulting in many children being kept in adult jails. Even as provisions to set up juvenile benches in all districts since April 2000 exist, it is not functioning in many districts.

One major drawback in the implementation procedure is a constant lack of resources both financially and in terms of personnel. Countries in South Asia lacks infrastructure to administer juvenile justice properly. Art 6 mandates that *every child has the inherent right to life*. This principle has once again not been explicitly or implicitly invoked by the JJ Act 2000. There was no systematic collection of data, comparative experiences, experiential learnings that could inform the thinking on juvenile justice and consultation with indigenous peoples groups in the formulation of the Act.

Strategies successfully utilized by tribal governments and indigenous peoples' organizations to challenge disproportionate rates of incarceration of indigenous youth:

Immediate community responses to incidents of deprivation of liberty of indigenous children and youths and intervention with UN Human Rights mechanisms and campaign with human rights groups worldwide proved effective at times. Community mobilization and democratic responses, including seeking legal recourses for action against State forces operating with special powers, sometimes leading to limited legal remedies in incidence of youth arrest, torture and arbitrary detention. This approach, on several occasion led to release of indigenous youths detained and to question the process and trend how youths are deprived of their liberty and violations of other fundamental rights.

Direct engagement with law enforcing agencies, legal fraternity, social orgs and others responsible for protection of indigenous children and youths for respecting their rights produce some results, however limited it is, especially dealing with youths detained for substance abuse.

Research and advocacy by Indigenous peoples with groups working on youths for policy changes to integrate policy advancements for promotion of rights of indigenous children and youths internationally, such as preparing alternate reports to the UN Committee on the Rights of the Child.

Commemoration of International day against torture, promotion of the Rights of the Child, Need for Juvenile Justice etc raising awareness against torture and arbitrary arrest and detention.

Efforts to repeal emergency legislations in situations of armed conflict, such as the Armed Forces Special powers Act, 1958 in North East India that led to derogation of fundamental rights, which has been abusively used against indigenous youths is a big challenge but its moving slowly, at least and contributes in generating a debate on treatment of indigenous youths by the state.

To what extent can tribal government, indigenous peoples' organizations or authorities influence the treatment and rehabilitation of indigenous youth in State justice systems?

States in South Asia are slowly listening to efforts of civil society, especially those working on indigenous youths to integrate policy advances and best practices worldwide. However, there are limitations especially when in addressing rights of indigenous youths in armed conflict prone areas. With the increasing militarization of the government and its primary focus on countering insurgents, several States are according less priority to ongoing problems related to education, health, poverty etc. Despite the large numbers of children and youths affected by the armed conflict, there are very few support and rehabilitation services available for them and those existing are severely under-funded. There is a strong challenge in terms of recognition of indigenous peoples as peoples, over their rights over their land and resources, honoring and respecting inherent, inalienable, non derogable rights. Space for participation of Indigenous peoples in policy formulation processes is again highly limited.

Despite problems in implementation, the new Juvenile Justice (Care and Protection) of Children Act, 2000 and amendment in 2006 in India includes the condition for release of the child on bail regardless of surety for children in conflict with law and the need for social workers is part of the Juvenile Justice Board. A child cannot be sentenced to death or life imprisonment or committed to prison in non-payment of fine or furnishing of security. No child shall be tried with an adult.

How can tribal governments and indigenous peoples' organizations from different regions work together to address common concerns regarding the incarceration of indigenous youth?

Create mechanisms for continuous sharing and exploration of successful efforts for promotion of rights of indigenous youths including to stop disproportionate incarceration of youths and ill treatments in different regions. The mechanism involving indigenous peoples and human rights organizations, children and youth groups and concerned authorities involved in juvenile justice.

Explore and develop viable community based alternatives to detention appropriate to indigenous peoples' cultures after exploration of both good practices within indigenous peoples and other taken p by states. Establishing effective arrangements for the participation of indigenous parents and community members in decisions regarding the planning, delivery and evaluation of alternative justice system appropriate to indigenous peoples' cultures.

Coordinate and extend support to each other across regions in advocacy and campaigns for influencing the concerned states for policy changes towards respecting the rights of indigenous youths and to stop indigenous youth incarceration and intervene in factors contributing in such challenges.

Capacitation of indigenous peoples organizations, community, media, health centres, legal fraternity, agencies for children and women, Human rights Institutions, law enforcers, teachers, IP orgs, Rehabilitation centres etc on human rights, specific rights of children and youths.

Addressing the reasons, root causes through research and documentation as to why indigenous children and youths come in conflict with the law – which are often related to issues of loss of land and livelihood sources, displacement, armed conflict, poverty and lack of adequate care and protection systems - and the sources of violence in police custody and during deprivation of liberty. Connections between culture, drug and alcohol use, conflict, impact of conflict, separation from family, violence, poverty, spiritual needs, housing, health, race and gender discrimination etc must be identified.

The right to self-determination is central for Indigenous peoples in the context of criminal justice issues. All peoples have the right to self-determination and it is necessary for Indigenous people to overcome their previous and continuing institutionalized disadvantage and domination.

Clarify in the Rules of Engagement for the security forces that children and other civilians are never to be targeted and ensure that all security forces personnel are aware of this. Expedite ratification and implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its two Optional Protocols. Prosecuting security forces personnel responsible for violations against children in the civil courts in procedures that meet international standards of fairness. All administrative institutions, civil authorities, law enforcing officials involved in the administration of juvenile diversion should be trained on human rights needs of indigenous children and youths.

Take steps to resolve political conflicts in armed conflict prone indigenous peoples areas with due recognition of indigenous peoples rights can be a basis for ending patterns of arbitrary detention, torture and extra judicial executions targeting children and youths.

Media sensitization - Media can help focusing issues of juvenile injustice to the community for necessary interventions timely – research, advocacy, rehabilitation, policy changes etc.

What State initiatives, if any, have proven to be promising with regard to indigenous children, youth and communities? What lessons can be learned from experiences with such programs, and how can indigenous peoples best ensure that promising programs are further developed and expanded?

In India, legal reform is underway in most countries of the region; a number of pilot projects have been developed to encourage diversion, alternatives to deprivation of liberty and restorative justice; and the specialization of professionals is under way. The **Juvenile Justice (Care and Protection) of Children Act, 2000** and amendment in 2006 attempts to incorporate several provisions of UN Convention on the Rights of the Child and Riyadh Guidelines on Juvenile Justice in Practice. Countries such as India and Nepal have established, or are in the process of establishing, specialized juvenile police units.

Open Prison, Ankara Reformatory, Turkey is based on the philosophy of integration rather than isolation, and more than half the children leave prison every day, unaccompanied, to attend local schools or work in the local businesses. There is nothing to stop the children escaping; there are no perimeter fences or guards. Yet very few run away as the conditions and opportunities in the open prison are much better to those in closed prisons (where they are sent if recaptured).

Semi Open Rehabilitation of Juveniles in Afghanistan: The non-residential Juvenile Rehabilitation Centre (JRC) in Kabul opened in 2003, an open centre provides daytime education and vocational training for children in conflict with the law as a means of pre-trial supervision and as an alternative sentencing option. Children might return to their families at night, but spend the day at the centre where they receive supervision and support services.

South Africa One Stop Child Justice Centre is an innovative multi-disciplinary team approach to juvenile justice all under one roof. The "One-Stop" model is a juvenile justice centre with specialized police, court and probation officers (social workers) all in the same location. The model has helped improve coordination between the agencies, ensure that juveniles are kept separate and apart from adult offenders, and has allowed for more appropriate and timely resolution of juvenile cases.

In Lao People's Democratic Republic (Lao PDR), villages have long had Village Mediation Units to resolve adult civil and some criminal disputes in promoting Diversion and restorative justice where the community representatives mediates in cases of children in conflict with law.

Australia's Aboriginal Juvenile Court: In 2004, the state of Victoria created a new Children's Koori Court. With this new initiative, the government is attempting to create a less formal, more culturally relevant justice experience for young aboriginal offenders, their families and the community.

Role of UN Permanent Forum on Indigenous Issues and the UN to address disproportionate rates of incarceration of indigenous youths and harsh treatment of those in detention:

Request that UNICEF, as the nodal agency of children, to prepare **country-specific situation analyses** of situation of indigenous youths incarceration and to provide information, disaggregating data on indigenous children and youth detention, foster care and adoption. UNICEF with governments had taken up initiatives for strengthening of diversion law practice and procedures; scaling and diversification of pilot program of alternatives to deprivation of liberty; budgeting for juvenile justice reform etc. However, UNICEF needs to work more with indigenous peoples, primarily youths, to assess realities constantly, like non implementation of child friendly legislations. UNICEF can also provide expertise to train officials from law enforcing agencies, legal and health practitioners etc.

PFII and OHCHR to urge States for full ratification and implementation of all Human Rights treaties, particularly the Convention on the Rights of the Child, Convention Against Torture, International Convention on Civil and Political Rights, Convention on the Elimination of all forms of Discrimination against Women and to adhere to all advances on Juvenile justice internationally.

The UN Economic and Social Council to urge States to ensure greater protection and humane treatment of those indigenous children and youth while in prison and youth detention centres, and to provide them with socio-educational measures for their rehabilitation.

PFII to urge upon program, funds and agencies of the United Nations system allocate appropriate resources for any initiatives, primarily children and youth led to prevent their incarceration. The Forum urges the members of the advisory council for the Voluntary Fund for the Second International Decade of the World's Indigenous People to allocate funds to indigenous youth-initiated projects and activities.

PFII invites indigenous peoples' organizations to consider creative ways of educating and disseminating information on issue of youth detention foster care and adoption to indigenous peoples' organizations and communities, including through art, workshops, radio programs, posters, indigenous journalism and other culturally appropriate media

The Forum urges States and United Nations agencies and UN Youth unit to support the attendance and participation of indigenous children and youth at future sessions of the Permanent Forum.

The PFII urge Association of Southeast Asian Nations (ASEAN) and other regional human rights bodies to take initiatives to end incarceration and harsh treatments of children & youths.

Very little systematic data on incarceration rates of indigenous youth exist for most countries and regions. How can this gap be filled? What mechanisms can be used to share information on this issue among indigenous peoples' organizations and advocates concerned with this issue?

The Permanent Forum to urge upon States, UN Agencies, Indigenous peoples organizations and others concerned for submission of information data from indigenous peoples and State agencies on youth detention, state custody, adoption and foster care in its annual sessions.

UNICEF to take primary role to be more sensitive to indigenous children and youths issues in addressing issues of Juvenile Justice both in South Asia, South East Asia and the Pacific regions, in terms of research, campaign and advocacy in the region.

The UN OHCHR to take more initiatives to ensure that the UN expert under the UN Human Rights Council regularly highlights the trend of indigenous youths incarceration in Indigenous peoples areas. Indigenous peoples organizations to collaborate and take initiatives in collating existing information on the previous and ongoing trend of youth incarceration, all information existing with indigenous peoples and human rights organizations, human rights institutions, UN Agencies and with State agencies responsible for collating information on children and women.

Support indigenous peoples, human rights organizations and youth organizations to conduct systematic documentation and research within respective communities to explore the trend of youth incarceration and also to share information with other indigenous peoples, human rights and youths organizations.

Support indigenous youth initiatives to address and respond indigenous youth detention issues, such as fact findings, informal research, training workshops etc and to share information on the issue.

References:

Manipur, The Silencing of Youths, Amnesty International, Index Number: ASA 20/005/1998

'Operation Bluebird', A case study of torture and extrajudicial executions in Manipur, 1990, AI Index: ASA 20/17/90

Concluding observations of the CRC, India, 23/02/2000, at para. 63 and 26/02/2004, para. 68-9.

AI report, India: Official Sanction for Killings in Manipur, AI Index, ASA 20/014/1997, 1 April 1997

"India: Briefing on the Armed Forces (Special Powers) Act, 1958", AI Index: ASA 20/025/2005, 9 May 2005

Report of UN Special Rapporteur on Extrajudicial Execution to the UN Human Rights Council [A/HRC/4/20/Add.1](#).

Statement of CWIN Nepal on the Follow-up Report of Convention on the Rights of the Child Submitted by HM Government of Nepal, 1 February 2005, Geneva

Amnesty International's report Nepal: Killing with impunity (AI Index: ASA 31/001/2005).

Improving the Protection of Children in Conflict with the Law in South Asia: A regional parliamentary guide on juvenile justice: UNICEF

Concluding Observations of the CRC: Nepal, UN Doc. CRC/C/15/Add.260, 3 June 2005. para 81.

Quoted in report Watch list on Children and Armed Conflict, Caught in the Middle: Mounting Violations Against Children in Nepal's Armed Conflict, January 2005, p. 33.

Human Rights Watch, Ill Equipped: U.S. Prisons and Offenders with Mental Illness, (New York: Human Rights Watch, 2003), Chapter 12, <http://www.hrw.org/reports/2003/usa1003/>.

The repression of ethnic minority activists in Myanmar, The Amnesty International, February 2009, Index: ASA 16/001/2010