"DOES A JUVENILE GET A BETTER LAW THIS TIME? A COMPARATIVE REVIEW OF THE NEW & OLD JUVENILE LAWS OF PAKISTAN"

A LEGISLATIVE REVIEW PUBLISHED IN LUMS LAW JOURNAL

VOLUME VI. (2019)

Published on 05 September 2019

Table of Contents

Articles

Multiplying Zeroes: (In)Validity of Promises in Marriage Contracts under Pakistani Case Law
Muhammad Munir **1**
g
Democratising Foreign Policy: Parliamentary Oversight of Treaty Ratification in Pakistan
Ahmad Ghouri **15**

UNHCR in Pakistan: Analyzing the Global Governance Regime – Repatriation of Afghan Refugees from Pakistan
Umar Rashid **31**

Liquidated Damages – Common Law versus Pakistan Law
Hassan Raza **50**

The Hidden Curriculum of Street Law
Mahum Shahzad Laun **60**

Presidential Pardoning Power, Judicial Review and 'New Face of Mercy': An Examination of Pardoning Power in Nigeria and India
Olusola Babatunde Adegbite **70**

Case Notes

Comment on the Lahore High Court Judgment in *Al-Baraka Bank (Pakistan) Limited v Province of Punjab through Secretary Food*
Zia Ullah Ranjah **95**

Sexual Harassment at Workplace: *Asif Saleem v. Chairman BOG University of Lahore*
Muhammad Usman Mumtaz **108**

Legislative Reviews

Did a Juvenile Get a Better Law this Time: A Comparative Review of the New & Old Juvenile Laws of Pakistan?
Kashif Iftikhar **115**

Combatting Terrorism: An Analysis of the Law on Information of Temporary Residences
Arslan Mahmood **121**

Book Reviews

Constituting Religion: Islam, Liberal Rights, and the Malaysian State
Raas Nabeel **131**

Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence: A Book Review
Sara Raza **136**

Does a Juvenile Get a Better Law This Time? A Comparative Review of the New & Old Juvenile Laws of Pakistan

Kashif Iftikhar*

Abstract

The criminal justice systems are designed for adults and do not adequately protect the rights specific to the juvenile offenders. For this purpose, separate juvenile justice systems are being developed in the world. Torture and abuse during police custody, lengthy and cumbersome process of trial, and death sentences to juvenile offenders are some of the core issues of a juvenile justice system. This legislative review examines whether Pakistan has been able to address these issues in her revised juvenile criminal justice system that was promulgated in 2018.

Key words: United Nation Convention On the Rights of Children(UNCRC), Juvenile Justice System Ordinance 2000, Juvenile justice System Act 2018, Juvenile Offender, Juvenile Court, Comparative legislative Review.

Introduction

Pakistan has recently promulgated its new juvenile justice system after repealing the old one. This was mainly due to two reasons: firstly, to bring the new law further in conformity with the principles of United Nations Convention on the Rights of Children; and secondly, due to the Lahore High Court's decision in *Farooq Ahmed v Federation of Pakistan*[1], striking down the earlier law with the suggestion for a new legislation that is more cognizant of the needs of the juveniles. The purpose of this legislative review is to analyse the distinct features of the new enactment as compared to the previous law on the subject and comprehend the potential challenges posed by it.

Historical Background

The United Nations Convention on the Rights of Children (UNCRC) adopted by the United Nations in 1989 can be regarded as the *Magna Carta* on the rights of children. It is the most rapidly and widely ratified human rights treaty in history – most of the 196 State Parties ratified the UNCRC in the early 1990s. Presently, all nations of the world are its signatories except the United States and Somalia. The UNCRC is an outstanding international legal document on the rights of children with the core principle of safeguarding the best interest of the child. It also demands from member states that particular developmental and survival needs be considered in all policies affecting children.

On the subject of Administration of Juvenile Justice,[2] the treaty provides guidelines for member states to treat children in conflict with the law in a manner that promotes their sense of dignity and worth. Moreover, having regard to a child's age, judicial proceedings and institutional placements shall be avoided wherever possible. The UNCRC emphasizes the member states for the establish exclusive juvenile justice systems:

* Civil judge-cum-judicial Magistrate currently posted at Tehsil Courts Cantt, Lahore.

[1] PLD 2005 Lahore 15.
[2] United Nations Convention on the Rights of Children 1989, Art 40.

States Parties shall seek to promote the establishment of laws, procedures, authorities, and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.[3]

Pakistan ratified the treaty on December 12, 1990. Despite adopting the treaty within one year of its inception, Pakistan took a decade to promulgate its first exclusive law dealing with children. During the emergency era, the first Juvenile Justice System Ordinance 2000 (JJSO) was enacted that remained in force until the promulgation of the Juvenile Justice System Act 2018 (JJSA) on May 24, 2018.

Distinct Features of JJSA and Its Comparison with JJSO

Suitable Definitions Inserted

Useful definitions have been introduced in the JJSA which were missing in the JJSO, including the definitions of terms such as 'Juvenile' and 'Juvenile Offender.' Under the Act, a 'Juvenile' is considered to be a child whose offence may be dealt with in a manner which is different from that of an adult. A 'Juvenile Offender' is a child who is alleged to have or who has been found to have committed an offence. Moreover, the spectrum of the institutions for the custody of juvenile offenders has also been widened in the new enactment through the expression 'Juvenile Rehabilitation Centre.' These now include the certified institutions, juvenile training institutions, borstal institutions, vocational centres, *dar-ul-amaan*, and women crises centres (established by the Government or othervoluntary organizations as certified by the Government). However, previously the expression borstal institution used in the JJSO only remarked and defined a place where a child offender may be detained, given education, and training for their moral and mental development. The term 'best interest of the child' was defined for the first time under the JJSA to conform the law with the UNCRC. The 'best interest of the child' has been regarded as the basis for any decision taken regarding the child to ensure fulfilment of his basic rights, needs, identity, and social wellbeing along with his/her physical, emotional, and psychological development. Similarly, the term **'**Medical Officer' has been inserted under the JJSA to meet the special circumstances where the report of the medical officer is needed to determine the age of a juvenile, or to ascertain his mental or physical condition whenever required.

Distinctive Investigation Procedure

Section 7 of the JJSA provides a distinct investigation procedure for a juvenile offender. Under this section, the investigation must be carried out by a police officer above or at the same rank as that of a sub-inspector, under the supervision of the superintendent of police or the SDPO. The investigating officer shall also be assisted by the probation officer or social welfare officer, as notified by the Government to prepare a social investigation report to be annexed with the report prepared under section 173 of Criminal Procedure Code, 1898 (CrPC). The JJSO was silent on these distinctions.

Detention in Observation Home

Under section 5 of the JJSA, the arrest of a juvenile offender requires specific mandatory steps to be followed by the officer in charge of the police station:

i) after the arrest, the juvenile offender shall be kept in an observation home;

[3] Ibid, Art. 40.3.

ii) the guardian and the concerned probation officer shall be informed as soon as possible, and

iii) the police-report prepared shall describe the steps to be taken to refer the matter to the Juvenile Justice Committee for disposal through diversion.

Section 2(p) of the JJSA defines 'observation home' as a place where a juvenile shall be kept temporarily after the arrest, on remand, or during any inquiry or investigation. Although the definition is not very specific about the place that may be called an 'observation home', the purpose of this 'home' is obvious: that child offenders should not be mixed with adult offenders at any stage, even for a small amount of time. In other words, a juvenile offender shall not be detained in an ordinary police station after his arrest but shall be kept in an observation home.

Introduction of Diversion Process

A novel concept of 'diversion', which was not discussed under the JSSO, has been introduced in the JJSA with great emphasis. Under section 2(d), the Act defines it as a mean for the juvenile offender to avoid undergoing the formal judicial proceedings and instead be diverted to an alternative process. This channel would be used to determine his responsibility and treatment on the basis of his social, cultural, economic, psychological, and educational background.

The concept of diversion emphasizes restorative justice whereas formal criminal justice systems are based on the idea of retribution, or punishment for an offence committed. Restorative justice underlines the importance of restoring the balance of a situation disturbed by crime or conflict and making good the harm caused to the individuals concerned. The formal criminal justice system has often proven to be deeply disturbing for children: once they are branded as criminals by going through the formal justice process, they are more likely to remain criminals. Children who are diverted away from the formal criminal justice system have a lower tendency to repeat the offence, and this is particularly the case with first-time offenders.[4]

According to section 9 of the JJSA, all minor and major offences shall be compoundable for the purpose of diversion. However, in the case of major offences, the juvenile accused should not be more than sixteen years of age to get the benefit of the diversion as provided under this section. The process of diversion can be initiated at any stage (investigation, prosecution, or trial) with the consent of the accused juvenile or his guardian. The case can be resolved through the diversion process with the consent of aggrieved person by adopting different modes such as:

(a) restitution of movable property;

(b) reparation of the damage caused;

(c) written or oral apology;

(d) participation in community service;

(e) payments of fine and costs of the proceedings;

(f) placement in Juvenile Rehabilitation Centre; or

[4] Nikhil, Roy, Wong and Mabel (2006). *Juvenile Justice: Modern concepts of Working with Children in Conflict with the Law*. [online] Resource Centre. Available at: https://resourcecentre.savethechildren.net/node/6415/pdf/6415.pdf [Accessed 19 Jul. 2019].

(g) written and oral reprimand.

Sub-Categorization of an Offence

Unlike the JJSO, the term 'Offence' as defined in the JJSA is divided into three subcategories: minor offence, major offence, and heinous offence. All crimes under the Pakistan Penal Code, 1860 (PPC) or under any other law with the punishment of imprisonment up to three years will be regarded as minor offences, whereas the crimes made punishable by imprisonment between three to seven years will be treated as major offences. Heinous offences are those which are serious, gruesome, brutal, sensational in character, or shocking to public morality, and are punishable under the PPC or any other law with death, life imprisonment, or imprisonment of more than seven years.

Special Safeguard for Female Juvenile Offenders

Section 17 of the JJSA provides a special safeguard for the female juvenile offenders with regards to their arrest and interrogation. The provision states that no female shall in any circumstances be apprehended or investigated by a male officer, or released on probation under the supervision of a male officer. She can only be kept in a juvenile rehabilitation centre established or certified exclusively for female inmates. This distinction between male and female juvenile offenders did not exist under the JJSO. Previously female juvenile offenders were treated equally with adult female offenders and were kept at the same women police stations. The JJSA has acknowledged the fragility of female juvenile offenders and provided a separate place of detention for them.

Establishment of Separate Juvenile Courts

Another distinct feature of the Act was the establishment of one or more exclusive Juvenile Courts[5] in a session division, within three months from the commencement of the JJSA. This exclusive Court was required by the JJSA to decide juvenile cases within six months of taking cognizance; otherwise, the Juvenile Court would have to seek an extension from the concerned High Court by explaining the reasons for not being able to decide the case within the prescribed time limit. If no such extension has been sought by the Juvenile Court, the complainant or the juvenile may make an application to the High Court in this respect.

Establishment of Juvenile Justice Committee

The process of diversion was to be completed through the Juvenile Justice Committee as defined under 2(j) of the JJSA, and this Committee was to be formed three months from the commencement of the Act[6]. The Committee shall consist of the following members:

i) Judicial Magistrate Section 30, who shall also head the Committee;

ii) district public prosecutor;

iii) member of the local Bar having at least seven years standing at the Bar, appointed by the concerned Sessions Judge for a period of two years; and

iv) serving probation officer or social welfare officer not below the rank of an officer in BPS-17.

Penalty for the Printing without Permission

[5] Juvenile Justice System Act, 2018, Section 4.
[6] Ibid, Section 10.

Although there was a prohibition on printing any material related to the proceedings of juvenile courts (except judgments of the High Court and the Supreme Court), there was no penal provision available under the JJSO for violation of the same. Under section 13 of the JJSA, the offence has been made punishable on two accounts:

i) Violation of disclosing the identity of a juvenile without permission.[7]

ii) Violation of printing or publishing the proceedings of the Court without permission.[8]

Such orders may be made by the order of the in-charge of a police station or the police officer leading the investigation in good faith for the purposes of the investigation; or the authorization may be given by the juvenile or his next-to-kin in writing for such printing or publication. The authorization shall only be given to the chairman or the secretary of a recognized welfare institution.

No handcuffing, No prison, No death penalty

Section 16 of the JJSA expressly prohibits awarding death penalty to a person who was a juvenile at the time when the offence was committed. Similarly, no juvenile shall be committed to prison, ordered to labour, put to fetter, handcuffed, or given corporal punishment anytime during custody. Exceptions to the principle of no handcuffing are:

i) the juvenile is more than sixteen years of age;

ii) reasonable grounds existed for his escape from custody, and

ii) the juvenile was involved in a heinous offence or previously convicted to life imprisonment.

On fulfilment of these preconditions, a juvenile may be handcuffed or put to solitary confinement in a rehabilitation centre or observation home for a period not exceeding twenty-four hours.

Overriding Effect on Other Laws

The provisions of the JJSO were not in derogation of any other law during the time it was in force but were in addition to other laws. Due to this, a confusion was seen with regards to the jurisdiction while trying the cases of juveniles who were allegedly involved in offences punishable under special laws like anti-terrorism and narcotics laws. However, Section 23 of the JJSA addresses this ambiguity and states that the provisions of this Act shall have an overriding effect notwithstanding anything contained in any other law.

Challenges and Shortcomings of the JJSA

Infrastructural Deficiencies

While the JJSA defines 'observation home' - a place where a juvenile can be kept temporarily after arrest or during physical remand – it also leaves certain obvious questions

[7] "Whoever prints or publishes the name or any matter which may make known identity of a juvenile shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine." Juvenile Justice System Act, Section 13(1).

[8] "Whoever prints or publishes any matter in relation to any proceedings before a juvenile court with respect a juvenile without the previous permission of juvenile court shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine." Juvenile Justice System Act, Section 13(3).

unanswered. These include issues such as who will provide and manage this observation home? Whether it would it be an independent place or a designated place within a police station concerned? What sort of paraphernalia will be attached to this place? Since the inception of the JJSA, no observation home has been established in any province: juvenile offenders are arrested and detained in the same lock-up where all kinds of adult offenders are held. Similarly, the Government is yet to notify juvenile rehabilitation centres.

Discriminatory Nature

Similar to the JJSO, there is a likelihood that some provisions of the JJSA may also be challenged in the higher courts due to their discriminatory nature. For instance, Section 6(3) of the JJSA treats all the minor and major non-bailable offences which the juvenile offender allegedly committed as bailable irrespective of his age. Moreover, a plain interpretation of Section 6(4) suggests that a court of competent jurisdiction *shall* grant bail to a juvenile who is less than sixteen years of age a matter of right. This right will stand even if the juvenile has allegedly committed a heinous offence or the crime in question is punishable with capital punishment (such as murder, etc.). A court of competent jurisdiction may refuse bail to a juvenile offender more than sixteen years of age if he has allegedly committed an offence of heinous nature. With regards to divergent socio-cultural norms of the society, there is strong apprehension of the misuse of this extraordinary relief. Similarly, the prohibition of death penalty, bars on imprisonment, restraint on handcuffing, and the creation of a special diversion process for the disposal of juvenile cases are some of the instances which may pose a challenge to the very existence of the Act.

Delay in Setting Up of Essential Institutions and Devising Rules.

One of the unique features of the JJSA is the order to establish special institutions within the criminal justice system like Juvenile Justice Committees and exclusive juvenile courts. So far, no such committee has been formed by the Provincial Governments. Recently, however, a letter of the Directorate General of District Judiciary High Court Lahore was written to the Secretary Government of the Punjab Home Department for the establishment of the Juvenile Justice Committee.[9] No separate juvenile court has been established anywhere in Pakistan except in Lahore. Likewise, the rules of business to carry out the functions under the JJSA are also yet to be framed.

Aspect of Social Reintegration Not Fully Addressed

The preamble of the JJSA establishes its purpose as to provide a criminal justice system exclusively for juveniles along with a mechanism for their social reintegration. As per Article 40.4 of the UNCRC, appropriate educational and vocational programs must be provided to juvenile offenders to provide them with opportunities to become productive citizens. But similar to the JJSO, this new Act is silent about the measures and mechanisms which can be adopted to reintegrate the juvenile convicts released from jail or returning from rehabilitation centres into the society as contributing members. Section 19 of the JJSA, however, removes the disqualifications attached to a conviction of juvenile under the concerned law, subject to the provisions of the Constitution. This measure can help ward off the social stigma attached to juvenile convicts.

Conclusion

The promulgation of the new and revised criminal justice system in Pakistan for juvenile offenders is a significant step for protecting the rights of children. The Honourable Chief

[9] No: 12174/DDJ/MNT/JJC dated 21-06-2019.

Justice of Pakistan, Mr. Justice Asif Saeed Khan, recently assured the formation of special courts for juveniles while addressing judicial officers of Model Criminal Trial Courts. However, nearly everything depends upon the full implementation of the JJSA, otherwise, the whole exercise will prove futile.