

A Critical Review of Juvenile Justice Law in Pakistan*

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Abstract:

The promulgation of JJSO, 2000 was appreciated and welcomed almost by all stakeholders and human rights activists and organizations. Despite a warm applause, the said law suffered many a legal difficulty during its implementation and interpretation. The last seven years experience demand a fresh review and re-interpretation of certain provisions. This paper is an attempt to critically evaluate the implementation and interpretation of the said law from a strictly legal perspective.

Keywords:

JJSO, 2000, CRC, Criminal Responsibility, Juvenile Court, Probation, Investigation Diversion, Juvenile Offender

Origin and Need of Juvenile Justice System a Historical Perspective

The Convention on the Rights of the Child (CRC) is the fundamental treatise formally laying down the resolve of the international community concerning protection of child rights. Establishment of a separate criminal justice system for juvenile offenders is one of the key features of the Convention which envisages such treatment to a child in conflict with law (CICL) which should primarily attempt his/her reintegration into society and enable him/her to play a constructive and positive role.

The Convention chalks out broader, yet fundamentally important, principles and areas of focus in the area of juvenile justice system, which include custodial arrangement separate from adult prisoners, providing him/her with legal assistance, prioritized disposal of their cases and reformatory, rather than punitive measures upon conviction. The Convention puts a clog on the award of capital punishment, life imprisonment, physical torture and cruel treatment to a child.

It was under this international commitment that Pakistan promulgated the Juvenile Justice System Ordinance, 2000 (JJSO) in order to provide a legal basis to the juvenile justice system. For the separate trial of juvenile cases, the Ordinance provides for the establishment of juvenile courts having exclusive jurisdiction to try cases in which a child is accused of commission of an offence (S.4 of JJSO 2000); it prohibits joint trial of a child with an adult (S.5); special protective procedure is laid

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down for proceedings of juvenile cases (S.6); it prohibits publication of proceedings of juvenile cases (S.8); it provides special procedure of arrest and bail of a child giving him/her extra protection and safety (S.10); upon conviction, the court is empowered to release a child on probation (S.11); award of death penalty, handcuffing, corporal imprisonment and labour in borstal institution is barred (S.12).

Though JJSO provides for the basic skeleton of a juvenile justice system, it is yet to be developed into a comprehensive legal instrument encompassing all relevant aspects and firmly establishing a procedural mechanism in this direction. Therefore, it needs to be reviewed, modified, improved and reconciled with the international standards and other existing laws respecting juvenile offenders.

In this space JJSO shall be analyzed with a view to explore (a) whether the existing provisions of JJSO 2000 are in consonance with the international standards laid down in CRC and other related international documents; and (b) whether it is correctly legislated to achieve the desired objectives of the Convention and (c) what practical, procedural and administrative impediments are there in its implementation and making it functional. Some of the issues are analyzed and discussed:

Minimum Age of Criminal Responsibility

Article 1 of the Convention on the Rights of the Child (CRC) provides that for the purpose of present Convention, a child means every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier. This clause is aimed at prescribing the maximum age of a human being where he is to be considered a child generally for the purposes of the Convention and for enjoying special protections provided therein.

JJSO 2000 has blindly followed this definition of a child and incorporated it in its S. 2(b) which reads: "Child" means a person who at the time of commission of an offence has not attained the age of eighteen years".

This definition is too simplistic and replicating. The definition of a child in perspective of age i.e. below 18 years in the CRC, is broader and general, which is not at all relevant and befitting in the context of criminal liability. Also while defining the age of a child, JJSO completely ignored Article 40(3)(a) of the Convention wherein it is provided that state parties shall seek the establishment of minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

The issue of minimum age of criminal responsibility has already been incorporated in Pakistan Penal Code. However, the definition of child and issue of criminal responsibility must also be covered by JJSO. In this regard it is recommended that JJSO must lay down that a juvenile offender is a child (i) who is not below the age of 12 years; or (ii) who is below 12 years of age but above 7 years and has attained sufficient maturity and discernment to understand the consequence of his act and understand the difference between right and wrong. A child of 7 years of age or below shall be presumed to be incapable of committing any offence.

Legal Assistance to a Child in Conflict with Law (CICL)

Section 3 of JJSO provides that every child who is accused of an offence or is **a victim of an offence** shall have the right to legal assistance at the expense of the state. It further provides that a legal practitioner appointed by the state for legal assistance to a child, shall have at least five years standing at the Bar.

At the first place this provision is defective so far as it brings into its fold **a child victim of an offence**. JJSO is a law which revolves round a juvenile offender or a child in conflict with law. Entire scheme of this legislation is not for the protection of such victims. For them other child protection laws shall be worked out.

Secondly, Article 40(2)(b) (ii) of CRC recognizes the guarantee to a child, alleged as or accused of having infringed the penal law, to have legal or other assistance in the preparation and presentation of his defense. It is in view of this right that the said provision of JJSO is formulated declaring that a child shall have a right to legal assistance at the expense of the state. But the declaration is sweeping, general, vague and theoretical. It is not at all provided as to which government agency shall provide legal assistance to what category of the child and how; who will appoint a legal practitioner for a child and at whose instance and how he will be paid. These are questions of practical importance. Without having an elaborate mechanism, Section 3 of JJSO would remain a shallow provision.

In order to really provide legal assistance to a child in conflict with law, a better practical legal arrangement must be shaped in the JJSO. The Juvenile Court must be empowered to maintain a panel of legal practitioners from the local Bar and to nominate a legal practitioner from the said panel to conduct the case of such child. He shall be entitled to such fee or remuneration as may be prescribed by the Provincial Government under the rules made under JJSO.

Juvenile Court's Exclusive Jurisdiction in Conflict with other Laws

Section 4 of JJSO 2000 provides for the establishment and jurisdiction of juvenile courts which have exclusive jurisdiction to try cases of the child accused of an offence. But this law seems to be in conflict with certain other laws specially

legislated for **certain category of offences** wherein special courts are established **having exclusive jurisdiction to try such offences**. Anti-terrorism Courts established under the Anti-terrorism Act, 1997 and Anti-Narcotic Courts established under the Control of Narcotic Substances Act, 1997 are a case in point.

The conflict of laws is evident: on the one hand an offence is triable by a special court under a special law exclusively and on the other side, a child committing that very offence would be cognizable by a juvenile court under JJSO having exclusive jurisdiction as to juvenile offenders.

In order to overcome this conflict Section 4(3) of JJSO may be given overriding effect and it may specifically be provided therein that in all cases where for the trial of an offence, a special court is established under a special enactment, the jurisdiction of the said court shall be barred if the accused of such offence is a child.

Joint Trial of a Child with an Adult

Section 5 of JJSO enjoins that a child accused of an offence shall not be tried together with an adult co-accused. This provision has got serious practical complications. Practically all criminal courts of Magistrates of 1st Class and all courts of Sessions are empowered to try juvenile cases as juvenile courts. But at the same time these criminal courts are trying offences and cases under other general and special laws. The real theme of JJSO for having a separate set of justice system and juvenile courts is no more in practice.

The recommendation in this respect is that Provincial Government and High Courts may issue administrative orders to entrust the cases of juvenile offenders to the Family Courts i.e. the courts presided over by a Civil Judge-cum-Judicial Magistrate and entrusted with cases of family nature including civil matters as to custody of child, his maintenance and guardianship etc. Such civil courts are also magisterial courts and are generally otherwise empowered to exercise jurisdiction of a juvenile court under JJSO. Hence at least at magisterial level this issue can be resolved if not at sessions' courts level.

Separate trials of a single case has another serious implication-two separate courts may come up with conflicting judgments and factual findings on identical issues of facts, one trying an adult and the other a juvenile offender in the same case. JJSO does not at all address this issue. In this respect it is proposed that in cases where a child is accused along with an adult, such cases may have a single trial by a juvenile court. JJSO may also provide that in such cases joint trial shall be conducted by a juvenile court. The adult accused shall be dealt with in accordance with the Code of Criminal Procedure and provisions of JJSO shall not be applied in his case. A juvenile court shall also ensure that all concessions are made available to the juvenile offender during the joint trial under the JJSO.

Publication of Juvenile Cases Proceedings

Section 8 of JJSO prohibits publication of proceeding of a juvenile court in any newspaper, journal or other publication disclosing the identity of the child without prior permission of the court. This provision does not cover telecasting such prohibited information on electronic media like television channels, documentaries, movies and internet. Suitable amendment may be introduced in this regard.

Probation

Section 9 of JJSO provides that a probation officer shall assist a juvenile court by making a report on the child's character, his educational, social and moral background, which may then be sent to the child or his guardian. This legal provision is vague and seems to be out of place and context. It is not clear when a juvenile court will ask the probation officer, and for what reasons, to report as to child's character. It is also not clear on what occasion or stage of a criminal case such report is to be prepared and for what use; whether it will serve as an evidence against the child during a criminal case, and if yes, then this purpose is quite unjust, as the juvenile court will have to focus on facts of the case and not on the general character, educational or moral background of the child.

The provision also does not reveal any reformatory objective. It is not provided that if at all a child is ill-reported by the probation officer, what next step the court would take beyond giving information to the child or his guardian.

The legal mechanics should always be purposeful, practicable and institutionalized. The said legal provision as to reporting of the child's character may be utilized in cases where a child is reported to be violent and is likely to commit breach of peace or is about to commit a crime or is developing into a criminal. As a pre-emptive and preventive security measure, the court may direct a probation officer to report as to a child and if it appears that such situation exist, the court may take security measures, emulating those as provided in section 107 CrPC, including taking bonds from the guardian of the child for his proper care and good behaviour.

It is therefore, proposed that suitable amendments may be introduced in JJSO providing that where upon a complaint, police report or upon its own information, a juvenile court is satisfied that a child is having bad character, or is likely to cause a breach of peace or disturb public tranquility or commit a crime, the juvenile court may summon the child or his guardian and direct the probation officer to submit a report as to child's character, his general activities and social and moral background. In case where after taking into consideration the circumstances of the case, the report of the probation officer and other evidence recorded and after hearing parties of the proceeding, the juvenile court may (a) direct the guardian of the child to

submit a bail bond for the good character of the child and for his maintaining peace, (b) send the child to a borstal institution or reformatory school established under the law for such period as the court deems proper or (c) make an order of probation under Section 10 of JJSO.

Investigation and Interrogation in Juvenile Cases

No specific provision of the JJSO deals with the pre-trial stage of a criminal case where investigation and interrogation by police is made. Though arrest and detention of a child accused of an offence are dealt with under Section 10, yet this subject need an elaborate and exhaustive treatment.

Violations of the rights of children, their physical abuse and torture by law enforcing agencies in cases where children are accused of an offence are important issues of a juvenile justice system. In detention they are exposed to physical torture, sexual abuse and inhuman treatment. From the protection of these violations, JJSO is completely silent to our astonishment. Drastic amendments need to be made in this respect. It is proposed that JJSO may provide that no child shall be subjected to physical torture, mal-treatment, violence, abuse, mental distress and inhuman and disrespectful treatment, during his detention with the police. In case a juvenile court is of the view that such provisions are violated in any way and the child is subjected to torture or was not produced before the court forthwith despite having sufficient time to do so and with malafide intention to prolong his detention, person committing such act shall be punished with imprisonment which may not extend to 3 years. A juvenile court shall send the case of such person to the Court of Sessions alongwith a complaint recording reasons for such proceeding. The Court of Sessions shall proceed with the trial of the case under the CrPC. It may also be provided that a child while in police custody shall be kept in special remand homes established by the Provincial Government.

Diversion and Re-Integration

Conducting a criminal trial and finally sentencing a child may have adverse effects on his/her personality and it may have deep scars of stigmatization on his mind. The Convention on the Rights of Child requires states parties to take measures before trial for dealing with juvenile offenders without resorting to judicial proceedings. (Article 40 (3) (b) of CRC). Before commencement of a formal trial, the juvenile court must resort to other means of disposal of the case and corrective methods. These measures include restitution and reconciliation with the victim of offence, warning and counseling of the child, supervision and surety by a guardian or community of the child's future conduct and taking from him commitment to attend school etc. These measures of diversion, prevention and mediation will not let

The child enter into the formal justice system and it will help him change his behavior and reintegrate into the society. These methodologies of diversion are to be applied in less serious and minor offences, which make up a majority of cases in which children are involved. Such methods would be inappropriate for cases of murder, extreme violence, rape and major drug trafficking. JJSO must cater for these significant issues of pre-trial diversion methodologies.

Release on Probation and Rehabilitation

JJSO provides and empowers a juvenile court to release a child, upon conviction, on probation placing him under a guardian or such other suitable person or sending him to a borstal institution where child offenders may be detained and given education and training for their mental, moral and psychological development.

Section 11 of the Ordinance as to release on probation is defective in many respects. There are two approaches: one, if the court decides to release him on probation, various options should be available to the court; two, if it decides that he/she may be detained then a separate section may spell out various detaining options.

Detention and Reformation

As said earlier that Section 11 of JJSO in no way comprehensively treats the issue of detention of the convict child in reformatory prisons in cases where the court does not release him on probation or give him in supervisory custody. The law must elaborately give explicit options to a court which may award imprisonment to a child in such places where his reformation and rehabilitation is taken care of.

Presently, the Reformatory School Act, 1897, the Borstal Institution Act, 1926 and some other provincial laws do cover the establishment of these rehabilitative institutionalized prisons. However JJSO must separately and elaborately deal with this issue. It may also be provided in this law that the Provincial Government shall establish such institutions where facilities of education, health, rehabilitation and counseling are available for developing a convict child's vocational abilities, moral character and personality.