

Criminal Justice for Juveniles: International and National Law*

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Abstract:

Pakistan stands committed to international obligations under the Convention on the Rights of the Child (CRC), and has thus its first comprehensive juvenile law as the Juvenile Justice System Ordinance 2000. Though many issues have been addressed by the JJSO, 2000 in light of the requirements of the CRC, yet there exist some legal, technical and practical difficulties in implementation of the said law. Legal and academic debate is needed to identify such discrepancies and suggest ways and means for the removal of such hindrances in dispensation of juvenile justice and for securing the rights of children in conflict with law. This paper examines some of these academic and practical hassles associated with interpretation and implementation of the existing laws.

Keywords:

Juvenile Justice System Order 2000, CRC, Guardianship, Age of Criminality, Bail, Juvenile Court

Introduction

The present articulation is aimed at an objective appraisal of the Juvenile Justice System Ordinance, 2000, which in its preamble contains the following recital, which expounds the objective of the Ordinance as:

Whereas, it is expedient to provide for

- i. Protection of children involved in criminal litigation;
- ii. Their rehabilitation in society;
- iii. Reorganization of Juvenile Courts and matters connected therewith and incidental thereto;

To the above-quoted recital delineating the purport of the legislature, Justice Wahid Bux Brohi of the Karachi High Court in case of *Afsar Zamin v. The State* held that the Ordinance is a special legislation to protect 'Human Rights' of children. The ratio decidendi is reproduced here:

*'...Ordinance in a way safeguards the human rights of a section of society who deserve reasonable concession because of their tender age and, therefore, it is to be construed liberally in order to achieve the said objective.'*¹

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As to the above stated objectives, one may feel inclined to express that the Juvenile Justice System Ordinance, 2000 does not cater to them. The reason being is that Juvenile Justice System Ordinance, 2000 quintessentially addresses issues dealing with procedure of trial and interim custody during litigation of criminal nature and not with the protection, 'rehabilitation' and 'reorganization' of juvenile criminal justice. That's as may be, here the international and national law on the subject as embodied in different instruments is elucidated with brief comments.

International Law

The Convention on the Rights of the Child 1990

The Juvenile Justice System Ordinance, 2000 has basically its roots in the famous CRC, (the Convention on the Rights of the Child 1990. It defines a 'child' and its language gives the expression as if the basic criterion in order to determine a 'child' is that he is one who has not attained age of majority according to the law applicable to him (i.e. his national law). However, in absence of a national law specifying the age of majority, the CRC says that a 'child' is a human being below eighteen years of age.²

Likewise, Articles 37 and 40 of CRC provide important guidelines for the following issues:

- i. Prohibition of Torture of a child;
- ii. Prohibition of inhumane or degrading treatment or punishment of a child;
- iii. Prohibition of capital punishment;
- iv. Prohibition of life imprisonment without possibility of release;
- v. Right to life of a child;
- vi. Right to liberty of a child;
- vii. Treatment of child in accordance with law;
- viii. Arrest, Detention or imprisonment of a child should be resorted to as a measure of last resort;
- ix. Humane and respectful treatment of a child;
- x. Separate internment of children from adults;
- xi. Access to justice against depravity of liberty of a child and the determination of this depravity to be done by a competent, independent and impartial authority;
- xii. Ensuring prompt decision of the determination or adjudication of depravity of liberty;³

- xiii. Retroactive (Retrospective) effect of a penal law;
- xiv. Minimum guarantees provided to a 'child' in a proceeding before a Court; these are enlisted as:
 - Presumption of innocence;
 - Right to information in trial;
 - Right to legal aid;
 - Right to fair and impartial adjudication/trial;
 - Right against incriminating evidence's procurement;
 - Right to revision⁴ and appeal;
 - Right to privacy at all stages of the proceedings;
- xv. Enactment of a national law to effect presumption as to establish minimum age below which absolute immunity from criminal liability is introduced;
- xvi. Providing of alternative and non-judicial remedies; and
- xvii. Ensuring dispositions like counseling, probation; foster care; education and educational training programmes etc.

National Law

Juvenile Justice System Ordinance 2000

Most apposite form of elaborating the law propounded in the Juvenile Justice System Ordinance, 2000 (hereafter referred to as the Ordinance) appears to be a discussions of its characteristics. Thereby, following issues are discussed in line with the scheme of the Ordinance.

1. Age of a Juvenile

The issue of age of an accused⁵ assumes significance at two stages generally which are:

- a. At the time of deciding whether a particular person is subject to special law i.e. the Ordinance;
- b. At the time of deciding the quantum of punishment of the accused if the accused juvenile is found guilty. Moreover, in the ante-referred case of Afsar Zamin, the learned Judge of the Karachi High Court held that that the determination of age of an accused is a prerequisite condition. He held:

'... Had the point of age been determined in accordance with law as a prerequisite condition, a statutory right would have accrued in favour of accused for release on bail, as even the charge against him had not been framed...'

In order to determine age, conceptually speaking two types of tests may be employed: one objective and the other subjective. In objective test, the determination of age is decided on the basis of any document proving age of the accused to be 18 years provided the document merits the presumption as to 'genuineness' of documents kept under the only law under Article 92 of the Qanun-e-Shahadat Order, 1984. On the other hand, the subjective test contemplates proving of age in absence of or in doubt of or in case of rebutting (of presumption under Article 92), on the basis of secondary evidence like medical opinion or 'hulia form' etc. The objective test, it may be submitted has its roots in definition of 'child' under section 2(b) of the Ordinance, while subjective test emanates from Section 7 of the Ordinance, which makes the determination of question of age, in absence of objective test, test of an inquiry which includes a medical report.

Having delineated the two tests, it is adumbrated that in Section 10(5) of the Ordinance, the legislation introduces a new 'age parameter', which is 15 years. This new age parameter poses novel and an altogether irrelevant issue which has no significance with respect to merits of the case save as in connection with bail.⁵ The fifteen years slab may result in extraordinary hardship for the child and the Court as two adverse things are bound to take place: First, the Court will have to determine the age of the child before passing him the benefit of the provision; secondly the aggregate time of the trial and the whole process of criminal justice would increase.

2. Guardianship

The Ordinance defines 'guardian' as a person who has actual care of the child and includes relatives of child who are willing to take his responsibilities. On the other hand, Guardians and Wards Act, 1890' enunciates in general, three kinds of guardians which are:

- a. Guardian of person;
- b. Guardian of property; and
- c. Guardian of both person and property.

To these three kinds, superior judiciary, through case-law, has introduced three more types, which are:

- a. Natural Guardians;
- b. De facto Guardians;
- c. De Jure Guardians;

The above three kinds are not mutually exclusive, which means that one person may enjoy more than one kind of guardianship (i.e. A, father of B, a minor may be natural, de facto, de jure and guardian of both person and property). However, the Court would be required under the Ordinance to 'determine' in case of disagreement or dissension of opinion of different contending guardians in order to commit child into custody of any one of them. To illustrate, say A, a minor of more than 7 years (and in custody of mother 'M') regarding whom a suit for custody of minor has been filed, causes a grievous hurt. F, his father may opt to apply for the fight to guardianship for the purposes of the Ordinance. In such a situation, Court would have to exercise one out of two options: either it will send the child into Probation Officer's custody or to 'M's custody but unnecessary hassle and inconvenience is bound to occur. In our considered opinion, instead of redefining the concept of 'guardian' it would have been much better if an allusion to 'The Guardians and Wards Act 1890's Section 4(2) would have been undertaken. Moreover, a proviso of either vesting Judge with discretion or with a mandatory provision of committing child to Probation Office's custody seems to be a better solution.

3. Juvenile Court Special Procedure

Special procedure coupled with the restriction on orders, which can be made by a Juvenile Court characterizes the Ordinance. A statutory time limit has been laid down for the disposing of the case by the Juvenile Court.⁶ Another section⁷ stipulates that notwithstanding the law relating joint trial envisaged in section 239 of The Criminal Procedure Code, 1898, a child shall not be tried with an adult. On the day fixed for evidence, no other case shall be taken up by the Juvenile Court is another provision, which it appears, is far from reality and the people who made recommendations, and have codified this law seem to have little or no knowledge about the practical knowledge of working of our Courts because ordinarily our Courts are overburdened with case. In any event, if a Court chooses to apply this principle of exclusive hearing, it would be done at the cost of other litigants. Furthermore, the principle of exclusive hearing of case of a juvenile conflicts with section 526(1)(d) of The Criminal Procedure Code, 1998. Section 526(1)(d) empowers a High Court to transfer a case on the basis of general convenience of the witnesses in a case. Exclusive hearing of a case of a juvenile implies double

summoning of the witnesses: once in the trial of a co-accused non-juvenile of a juvenile and second time in the trial of juvenile. Invariably the double set of evidence would culminate into conflicting judgments. However, it would be prudent to review the same in the light of practice prevailing in the Courts. Publishing proceedings and pictures regarding a case in which a child is involved has been made subject to specific authorization of the Juvenile Court. Finally, except members and officers, parties to the Court, police officers and guardian of a child, there is a prescription on presence of any other person at the time of trial of child in the Court.⁸

4. Bail under the Ordinance

For bailable offences a new concept is imparted. The Court, by virtue of this novel idea, shall take all possible steps that under any circumstances a child shall not be kept in a police station or jail.⁹ The custody of child, in the meanwhile, may under the Ordinance, be given to a Probation Officer (appointed under Probation of Offenders Ordinance, 1960) or to a suitable person or institution dealing with the welfare of the children or to the guardian of the child. In the same vein, for a child under the age of fifteen, who has been arraigned for an offence punishable with imprisonment of less than ten years, a non-bailable offence is to be deemed bailable.¹⁰ To further expedite a trial of juvenile and to improve upon rights of children, the Ordinance lays down statutory periods beyond which the juvenile would be entitled to concession of bail. These statutory periods are: (a) in case of an offence punishable with death, a continuous period of detention for one year; (b) in case of an offence punishable for imprisonment for life, a continuous period of detention for six month; (c) in case of an offence not punishable with death or for imprisonment for life, a continuous period of detention for four months.¹¹ Two points, however, are necessary to be kept in view. First, the above mentioned statutory periods are to be found in existence with the fact that the trial of a child is not concluded in this period. Secondly, a Juvenile Court may refuse extending the benefit of statutory periods aforementioned if the Court finds reasonable grounds for doing so.

In order to further fortify and to ensure corporal freedom of children, the law lays down that law of preventive detention and of demanding sureties for keeping peace and good behaviour (as is enacted in Chapter VIII of Criminal Procedure Code, 1898) cannot be pressed into service against child or youthful offenders.¹² The Juvenile Court is empowered to pass three types of orders in order to specifically make arrangement for release of a child offender. These three orders are that the Court may (a) release a child on probation on execution of a bond by his guardians and a child offender to Borstal Institution; (b) send a child offender to Borstal Institution; or (c) finally, reduce period of imprisonment or probation if Court considers its continuance unnecessary.

5. Orders That Shall Not Be Passed by Juvenile Courts

The Juvenile Court is not empowered, save as in exceptional cases, to order any corporal punishment at any time while a child is in custody or to put him in fetters or to handcuff him. Likewise, a Juvenile Court cannot award a capital punishment to a child. While former has its roots in principle of humane treatment to be meted out to a child offender, the latter is in line with Article 37 (a) of the convention on the Rights of the Child, 1989.¹³

Conclusion

The propensity of making reality the conceptions of Human Rights' proponents is good but needs careful observation of ground realities prevailing in our judicial system. Unfortunately, besides governance of the country by Ordinance, the military governments have developed a knack of treating District and Sessions Judge in the same manner as the colonists used to put in service office of Deputy Commissioner. Instead of establishing new Courts for dispensation of justice, the already over-burdened Courts are further put to test by new assignments. In this backdrop, the difficulties multiply when the provisions of exclusive fixing of a case of juvenile for evidence is incorporated as practically the provisions remain inapplicable and hence contribute in belittling the judiciary and further to deteriorate the concept of the rule of law.

End Notes

1. PLD 2002 Karachi 18
2. It is interesting to note that the definition of a child under Article 1 of CRC has given rise to various questions. In order to appreciate those questions, it is recommended to first look on the wording of the Article, which is reproduced thus:

“Article-1. For the purpose of present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.”

The questions, which cropped up of the definition may be formulated as: 'What about a person who is exactly 18 years of age (as the article specifies that a child is one who is below eighteen); secondly, as the language of Article suggests that the basic yardstick to determine age is the national law of individual, which, if absent, the 18 years age cap provided by the convention will come into play but what will happen if national law of a country enacts the age of majority above eighteen years in contrast to the CRC. In respect of former, it may be stated that the benefit of the Convention should be extended to the accused; while the

latter may be catered to in two ways: first, those who favour international law might be of the view that the national law shall prevail, on the other hand, the ones who uphold the doctrine of supremacy of national law over the international law might be of the view that the national law shall prevail. The above two propositions, in authors' view, need contemplation by the people engaged in the drafting of the Convention. It is importantly so for the obvious reason that many countries have incorporated the Convention into their national laws and there the Convention may be referred to for the purposes of interpretation as 'extrinsic evidence'.

3. The tabulation is provided by the authors; Article 37 of CRC reads:
'States parties shall insure that:
 - a. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age.
 - b. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as measure of last resort and for the shortest appropriate period of time.
 - c. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of human person, and in a manner, which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
 - d. Every child deprived of his or her, liberty shall have the right to prompt access to legal and other appropriate assistance, as well as, the right to challenge the deprivation of his or her liberty before a Court of other competent, independent and impartial authority, and to a prompt decision on any such action.'
4. Although Article 40 of CRC has used the word review the word revision is used intentionally to avoid confusion because in common law the concept of review is akin to civil law as against use of the concept of revision in criminal litigation.
5. Under section 10(5), a child offender accused of an offence punishable with ten years' imprisonment may be deemed to have committed a bailable offence.

6. (Four months time limit) Section 4 (6)
7. Section 5 (1)
8. Section 6 (3)
9. Section
10. Section 10 (5)
11. Section 10 (7)
12. Section 10 (5)
13. Section 12

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