Special Protection Mechanisms during Arrests of Juvenile Offenders in Pakistan

PAPER

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This paper focuses on the procedures which apply following the arrest of a juvenile suspect and the provision of special protection mechanisms extended to him/her. The paper seeks to explore the implementation of provisions regarding the arrest of a juvenile under the Juvenile Justice System Act (JJSA) 2018. The process of the juvenile justice system is set in motion with the arrest of the child by the Police. It is important that the special protection mechanisms are extended to the child from the very beginning to achieve the ultimate outcome of reintegrating the child in the society.

Introduction

The Juvenile Justice System Act (JJSA) 2018 applies the criminal law in Pakistan to offenders who are under the age of 18 years. Children under the age of ten are exempt from criminal culpability in Pakistan. Additionally, children between the ages of 10 to 14 years have limited criminal culpability, depending on their maturity and understanding of the consequences of their conduct.

It has been estimated that 39% of Pakistan’s population is under the age of 18 years. About 22.6 million children between the ages of 5 and 16 are out-of-school at the primary, middle and secondary levels in Pakistan. Literature suggests that children out-of-school are at an increased risk of engaging in delinquent and criminal behavior.

This makes it imperative that interventions and policies applicable to the juvenile justice system in Pakistan keep the best interests of the child at their center. The juvenile justice system should

1 Juvenile Justice System Act, 2018 (‘JJSA’), s 2(a)
2 Pakistan Penal Code 1860 (‘PPC’), s 82, s 83
3 Ibid, s 83
be rehabilitative and restorative as opposed to being largely retributive in nature to champion the rights of the child effectively.

The first point of contact for a juvenile who is being suspected or accused of committing an offence begins with their arrest by the police. It is of utmost importance that during this time, special protection mechanisms are utilised in order to protect the juvenile. Due to the sensitivity of their age, juveniles should be treated in a rehabilitative manner to reintegrate them back into the society. Therefore, the procedure regarding the arrest and detention apply differently to juvenile delinquents as opposed to adult delinquents.

The arrest of a juvenile

While arresting a suspect, the investigating officers should first ascertain their age. Section 8(1) of the JJSA 2018 stipulates the method for the determination of the age of the suspect where the arrested person either physically appears or claims to be a juvenile. In Saleem Kahn v. The State, the Supreme Court of Pakistan held that it is the statutory duty of the Police to determine the juvenility of the suspect. The police shall determine the age of the suspect on the basis of his birth certificate, educational certificate or any other pertinent document. In the absence of such documents, the age of the suspect may be determined on the basis of a medical examination report by a competent medical officer. The Court also held that the court of general jurisdiction enjoys the power to determine the age of the accused, where the police have failed to discharge their duty of determining the age of the juvenile accused.

At the time of arrest, the juvenile must not be kept at the police station. As per Article 5(1) of the JJSA 2018, the arrested juvenile must be kept in an Observation Home. Furthermore, the officer-in-charge of the police station is required to inform the guardian of the juvenile of their arrest and

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6 Saleem Kahn v The State (Criminal Petition) No.251-L of 2020 (SC)
7 Ibid, para 9
the time, date and name of the Juvenile Court before which the juvenile will be produced.\textsuperscript{8} Upon arrest of the juvenile, a probation officer must be informed of the arrest of the juvenile to enable him/her to obtain any information that might be useful for the juvenile court,\textsuperscript{9} such as a report on the juvenile's character, educational, social and moral background.\textsuperscript{10}

The JJSA 2018 provides that the juvenile shall be informed of his/her legal rights within 24 hours of being taken into custody.\textsuperscript{11} Furthermore, Article 5(2) stipulates that a juvenile may not be arrested for offences mentioned under Chapter VIII of the Pakistan Penal Code 1860. These offences include the commission of a breach of peace or disturbing the public tranquility.

The JJSA 2018 also prohibits putting a juvenile in a fetter, handcuffs or extending corporal punishment to a juvenile who has been taken into custody.\textsuperscript{12} A juvenile should only be interrogated by a police officer who belongs to the rank of Sub-Inspector and under supervision of a Superintendent of Police or SDPO.\textsuperscript{13} A special provision is provided for female juveniles under the JJSA 2018. It provides that a female juvenile must not be apprehended or investigated by a male police officer under any circumstances.\textsuperscript{14}

The minimum time-period within which a juvenile who has been arrested without a warrant can be kept in custody is not mentioned in the JJSA 2018. However, the CrPC stipulates that the time-period should not exceed 24 hours, excluding the time necessary for the journey from the place of arrest to the Magistrate's Court.\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{8} JJSA, s 3(1)(a)
\item \textsuperscript{9} Ibid, s 5(1)(b).
\item \textsuperscript{10} Ibid, s 14 (1) (a).
\item \textsuperscript{11} JJSA, s 3(2).
\item \textsuperscript{12} Ibid, s16(2).
\item \textsuperscript{13} Ibid, s 7(1).
\item \textsuperscript{14} Ibid, s 17.
\item \textsuperscript{15} Code of Criminal Procedure, 1898, s 61
\end{itemize}
In some cities, the Juvenile Courts have been notified at the district level. For example, after consultation with the Sindh High Court, the Government of Sindh notified Juvenile Courts at the district level. Further, the Judicial Magistrates in districts East, West, South, Central and Malir in Karachi have also been conferred the power to hear cases arising under the JJSA 2018.  

There is a lack of case law regarding the arrest of a juvenile (and special protection mechanisms extended to him/her) under Article 5 of the JJSA 2018. Nevertheless, case law under the Juvenile Justice System Ordinance (JJSO) 2002 (which was replaced by the JJSA 2018) can provide some guidance. In Najeeb Ullah v. The State, a 16-year-old juvenile had been arrested for murder and was produced for recording his confession before the Magistrate after three days of his arrest. The Peshawar High Court (PHC) showed that the juvenile was not provided with counsel or an opportunity of consulting with his guardian. Furthermore, no extra care or caution appeared to have been taken by the Judicial Magistrate in the case while recording the confession of the juvenile. Moreover, the juvenile had only been given a short period of thirty minutes to consider the details of his confession. In view of this, the PHC held that a time span of thirty minutes was insufficient to allay the fears and apprehensions the juvenile might have been facing following the long period of police custody. The Court concluded that the confession of the juvenile could not be relied upon to maintain a conviction on a capital charge.

Therefore, the JJSA 2018 provides numerous special protection mechanisms to juvenile delinquents during and after their arrest. However, there is room for improvement, as outlined below in a comparative analysis with the United States of America (USA).

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16 JJSA, s 4  
17 Notification no. SOJI/9-2/2018 (Juvenile Courts) dated 1-04-2019 issued by the Home Secretary, Home Department, Government of Sindh  
18 Najeeb Ullah v. The State 2022 Y L R 838  
19 PPC, s 302  
20 Ibid (n 19)
Comparative analysis with the USA

There is an absence of several safety mechanisms in the JJSA 2018, when compared with the law prevailing in the USA. In the USA, the Attorney General has to be notified of a juvenile's arrest alongside the guardians of the juvenile. Furthermore, the juvenile has to be immediately taken before a magistrate. Where a Magistrate is not available, the juvenile cannot be detained for longer than a reasonable period of time. The U.S. District Court for the Southern District of New York has held that a 7-9 hour delay before an appearance in front of a Magistrate was unreasonable given the availability of a magistrate on that weekday morning. Statements made by the juvenile during the delay could not be adduced as evidence in subsequent proceedings. Further, the US Juvenile Justice and Delinquency Prevention Act (JJDPA), 1974 requires that there shall be sight and sound separation of adults and juveniles.

Although illegal border crossings account for 7% of charges in the Pakistan juvenile justice system, there is an absence of provisions related to providing safety mechanisms where the arrested juvenile is an alien or a refugee. In contrast, the United States Court of Appeals of Ninth Circuit held in United States v. Doe that where the juvenile is an illegal entrant into the USA and his parents reside abroad, the Federal Government must make reasonable efforts to notify the parents. These reasonable efforts may consist of either (a) actual notification or (b) sufficient inquiry or effort to make the reasonable determination that actual notification is not feasible, in which case the Government may opt for the alternative of notifying a foreign consulate in the USA.

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21 The US federal law regarding Juvenile Justice System is stipulated in the Juvenile Justice and Delinquency Prevention Act (JJDPA) 1974. The JJDPA was amended by the Juvenile Justice Reform Act (JJRA) of 2018 was signed into law December 2018
22 18 US Code § 5031
23 18 USCA § 5033 (West 1985)
24 Ibid
27 United States v Doe 862 F. 2d 776, 780 (9th Cir. 1988).
The Court held that the burden of showing compliance with this statutory requirement is on the Government.

Non-implementation of JJSA 2018 and Policy Recommendations

Pakistan is not aligned with internationally acceptable standards for the minimum age of criminal culpability. It is recommended that immediate legislative action is taken to raise the age to fourteen years, in line with the UN Committee on the Rights of the Child’s General Comment No.24 on children’s rights in the child justice system. Pakistan should also amend the JJSA 2018 to insert provisions related to providing safety mechanisms where the arrested juvenile is an alien or a refugee in Pakistan.

Pakistan has a low level of birth registration. Only 34% of children in Pakistan are registered at birth. Where there is no proof of age and it cannot be established that the child is below or above the minimum age of criminal culpability, the child should be given the benefit of the doubt and should not be held criminally culpable in minor and non-heinous offences.

In October 2019, it was revealed that only four probation officers were appointed against a sanctioned strength of 57 officers. The Reclamation and Probation Department must appoint new officers, so that the JJSA’s provision regarding calling the probation officers upon request of a juvenile (outlined above) are implemented.

In March 2021, a seventh grade student died after committing suicide in police custody in Peshawar. The deceased juvenile was arrested by the police after a complaint from some

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28 UN Committee on the Rights of the Child (UNCRC), ‘General Comment No. 24 on children’s rights in the child justice system’ (18 September 2019) UN Doc CRC/C/GC/24, 6
30 Ibid (n 29)
31 Ibid (n 27)
shopkeepers who alleged that the juvenile used angry words and pointed a weapon at them. In a video message recorded on the premises of the police station, the father of the juvenile alleged that his son died due to police torture. The Chief Minister of Khyber Pakhtunkhwa had directed the Inspector General of Police (IGP) to conduct an impartial investigation into the incident and submit a report to him. Nevertheless, no such report has been revealed to the public as of yet. There should be accountability of police officers who fail to act in accordance with the JJSA 2018. The Deputy Inspector General of Police (DIG) should be notified when a juvenile is arrested.

Further, observation homes have not been established. Due to this, children are often detained in the same lock-up as adults while in police custody. Research has indicated that keeping juveniles with adults puts the juveniles at the risk of sexual and physical violence, increased trauma, suicide and a possible risk of re-offending due to the contacts they make with adult detainees. Therefore, observation homes should be urgently established. Until they are established, all efforts must be made to ensure that juvenile delinquents are not in the sound and sight of adult detainees.

Taking inspiration from the USA, the Provincial Advocate General should be notified upon the arrest of a juvenile offender. The arrest of a juvenile is a serious matter warranting the extension of special protection mechanisms in order to ensure the implementation of the JJSA 2018. A coordination mechanism between the police, prosecution, and juvenile courts for diversion referrals should also be established. A Legal Empowerment Desk such as the one piloted by the Legal Aid Society (LAS) at the New Town police station in Karachi should be established across the police stations where a high number of juvenile cases are reported, with the objective of providing legal advice, referral services, and legal awareness for cases of juveniles.

34 Ibid (n 29).
There is a paucity of data on crimes committed by juveniles and their reintegration in society, which creates a gap in the proper implementation of the law. A system for gathering data on the number of juveniles whose cases were resolved through diversions should be maintained by the Provincial Governments.

A sufficient number of CCTV cameras should be installed at all police stations to monitor the treatment extended to juveniles by Police officers and to curb custodial torture. This can function as both a quality control and accountability mechanism. Gender-sensitisation and capacity building of all stakeholders who enter into contact with juvenile delinquents should be conducted.

The implementation of the JJSA is defective five years on from its promulgation into law. In order to effectively implement the JJSA 2018 and to improve the treatment of the juveniles in the juvenile justice system and to reintegrate them back in the society, the above-mentioned policy recommendations should be adopted by Pakistan. It is often said in human rights discourse that a society can be judged by how it treats its marginalised and most vulnerable members. The application of criminal law to children is an example of this type of test. It is a test that Pakistan is currently failing.