



Determination of Age and Maturity under the Juvenile Justice System of Pakistan

POLICY BRIEF

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Author

Wasif Hassan

Editor

Zainab Mustafa

Design

Ayesha Mushtaq

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Under national and international law, juveniles should be treated differently from adult criminals. As per the Juvenile Justice System Act (JJSA), 2018, a child is defined under section 2(b) as a person who has not attained the age of eighteen years. Section 2(h) defines a juvenile as a child who may be dealt with for an offense in a manner that is different from an adult. The Juvenile Justice System Act 2018 is a step towards realizing the child rights goal in Pakistan.

However, the Act has not amended the minimum age of criminal responsibility set by sections 82 and 83 of the Pakistan Penal Code 1860 (PPC). Thus, these sections remain applicable with regard to determining the age of the accused under section 8 of JJSA, 2018. Section 82 states, 'Nothing is an offence, which is done by a child under seven years of age.'¹ Section 83 is associated with a discretion provided to the court in determining whether a juvenile above seven years and below twelve years had the level of maturity to understand the nature and consequences of their conduct.² This paper aims to highlight and analyze the law on the determination of age and maturity under section 83, arguing that the use of section 83 is dubious and needs to be replaced by a higher minimum age of criminal responsibility.

Determination of age

Under section 82, any child below the age of seven cannot be held criminally responsible for an offence punishable under the PPC. It means that the absolute lower minimum age of criminal responsibility is seven years. Children are vulnerable individuals and therefore should be afforded protection by the juvenile justice system.³ The essential factor in determining whether the case of an accused falls under the ambit of juvenile justice is the determination of the age of the accused at the time of the commission of the offense. Section 8(1) of JJSA, 2018 provides that where a person physically appears or claims to be a juvenile, the officer-in-charge of the police station or the investigation officer shall hold an inquiry to determine the age based on the birth certificate, educational certificates or any other pertinent documents.⁴ In the absence of such documents, age can be determined by a medical report of a medical officer. Before a court authorises the detention of the accused beyond 24 hours under section 167 of the Criminal Procedure (CrPC)

¹ Pakistan Penal Code, 1860 ('PPC'), s 82

² Ibid, s 83

³ Hasnaat Malik 'Article 35 Provides 'State Should Protect Child' The Express Tribune (30 June 2022) <<https://tribune.com.pk/story/2363999/article-35-provides-state-should-protect-child>>.

⁴ Juvenile Justice System Act, 2018 ('JJSA'), s 8(1)

1898, the court has to record its finding regarding the accused's age, including the report submitted by the police or medical examination report by a medical officer.⁵

If the police officer in charge or investigation officer does not conduct an inquiry into the determination of the age, it is the statutory duty of the court to investigate and determine the age of the accused. In the case of *Muhammad Umar v The State*,⁶ the petitioner was arrested for murder and his initial bail application was dismissed. The Court had to consider whether the accused could be granted bail during the pendency of his trial. The Court eventually declared that it was the statutory duty of the police and subsequently the Court to determine the age of the accused, and since there was no delay on part of the accused, he was granted post-arrest bail under section 6(5) of the JJSA.

In the case of *Mirwise v Mohib-Ur-Rehman, Si/Sho Police Station Saddar, Loralai, and another*,⁷ the petitioner asked the High Court to set aside the order of the trial court, and for the constitution of a medical board. He also asked for school and college records to be verified through the office concerned as there was a contradiction between the school leaving certificate and NADRA records regarding the respondent's age. It was held that the 'report of NADRA alone is not an independent source of information about the age of the petitioner, because, this document followed the information volunteered by the person himself or someone connected with him. Such document, therefore, cannot be conclusive proof of the concerned person's date of birth.'⁸ The Court further held that it is the statutory duty of the trial court to hold an inquiry into the issue of determination of age. For this purpose, the court should take into consideration the documents produced by the parties and record statements of witnesses where necessary, and 'requisition medical report, which means clinical and radiological examination of the accused or what is called his ossification test.'⁹ The petition was accepted, and the case was remanded to the trial court with the direction to conduct an inquiry into the determination of the age of the accused. As per section 8(1) of the JJSA, it is incumbent upon the trial court to set up an inquiry whenever there is contradictory evidence regarding the age of the accused and therefore, they could not choose one of the two produced evidences.

⁵ Ibid, s 8(2)

⁶ *Muhammad Umar v The State* (PLD 2021 Lahore 586)

⁷ *Mirwise v Mohib-Ur-Rehman, Si/Sho Police Station Saddar, Loralai and another* (2021 PCr.LJ 1032)

⁸ Ibid, para 8

⁹ Ibid, para 12

In the case of *Saleem Khan v The State*,¹⁰ an FIR was registered initially under section 394 PPC and later under section 302 PPC after the death of the brother of the complainant, who was shot in the left leg. The petitioner moved an application to seek declaration of his juvenility. According to his B-Form, he was born on 01.01.2001. He also moved an application for an ossification test. After considering the birth certificate, medical report, and ossification test, the petitioner was declared a juvenile by the trial court on 27.11.2019. The Court held that the determination of the age of the accused, who appears to be or claims to be a juvenile is initially the responsibility of the police. In the absence of inquiry by the police, the trial court or the court of general jurisdiction has the power to determine the age of the accused. The determination of age by the court is also a statutory obligation; hence, the time spent in obtaining the said finding or declaration by the court cannot possibly be termed as a delay caused in the trial by the accused to deprive him of his right to bail on the ground of statutory delay.

Determination of maturity

Section 82 and Section 83 of PPC allow the defence of *doli incapax*, which is a Latin phrase that refers to the presumption 'in law that a child is incapable of forming the criminal intent to commit an offence.'¹¹ However, in the case of section 83, the presumption can be rebutted by ascertaining the maturity of the accused. Children aged 10 to 14 can be held criminally responsible if the presumption can be rebutted and section 83 of PPC. Once the age of the accused has been determined and falls within the range of 10 to 14 years under section 83 of PPC, the accused can only be held responsible if they have attained sufficient maturity or understanding to judge the nature and consequences of their conduct on the occasion of committing the offense.

The *doli incapax* rule has a colonial origin as it was a part of English law from the 14th century till 1998.¹² To rebut this presumption, the prosecution had to 'bring proof that the child, in addition to the *mens rea*, had acted with mischievous discretion; or in other words, that the child appreciated at the time of committing the act that he or she was doing something seriously wrong, as opposed

¹⁰ *Saleem Khan v The State* (PLD 2020 SC 356)

¹¹ 'Doli Incapax - ICLR' (ICLR, 2022) <<https://www.iclr.co.uk/knowledge/glossary/doli-incapax/>>.

¹² Section 34 of the UK Crime and Disorder Act 1998 abolished the presumption of *doli incapax*.

to something merely naughty or mischievous.¹³ It was not necessary to have a psychiatric evaluation. The circumstances of the case were sufficient to draw an inference about the child's state of mind.¹⁴ To ascertain the maturity of the accused, the statement made by the child during the police investigation was preferable in that it refers to the appreciation of the act by the child.¹⁵ The child's age and the heinousness of the offence, the mode of committing and participating in the act, the conduct before or after the commission of the offence, and the child's personal background are other factors indicating mischievous discretion.¹⁶ The UK abolished the presumption of a child's incapacity by Section 34 of the Crime and Disorder Act 1998.¹⁷

The case law in Pakistan does not explicitly deal in detail with the question of ascertaining the maturity of the accused above the age of seven years and less than twelve years. The case law does not provide an objective standard for ascertaining the maturity of the accused. However, there are three considerations in ascertaining maturity under section 83: firstly, the plea of immaturity needs to be specifically raised and proved. The court will presume that the accused has attained sufficient maturity; the prosecution may not feel obliged to produce evidence on the question of maturity.¹⁸ The question of maturity has to be dealt, in the first instance, by the police.¹⁹ The case of *Farooq Ahmed v The State*²⁰ dates back to 2005, when the Juvenile Justice System Ordinance 2000 was in force. Regarding the determination of maturity of the accused, the court cited a previous authority where the West Pakistan High Court had provided an interpretation of section 83 of PPC. That court held that sufficient maturity of understanding is to be presumed in the case of a child above seven years of age and under twelve unless negative is proved on defence. It means that the burden of proof lies on the accused to prove that he has not attained sufficient maturity.

¹³ Thomas Crofts, 'Rebutting The Presumption of Doli Incapax' (1998) 62 *The Journal of Criminal Law* 185.

¹⁴ *Ibid*, 186.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ Since then, there has been a 560 percent increase in the custody of 10 to 14-year-olds;

Ray Arthur, 'Rethinking The Criminal Responsibility of Young People In England And Wales' (2012) 20 *European Journal of Crime Criminal Law and Criminal Justice*.

¹⁸ Khurshid Iqbal, 'Judging Juvenility: Determination of Age of Juvenile Offenders Under Pakistan's Juvenile Justice System' (2009) 1 *Pakistan Journal of Criminology* <<http://www.kpja.edu.pk/sites/default/files/digitallibrary/SSRN-id2305488.pdf>>.

¹⁹ *Ibid*

²⁰ *Farooq Ahmed v The State* (PLD 2005 Lahore 15)

In *Mst. Tahseen And 2 Others v National Accountability Bureau And 5 Others*,²¹ the petitioners were charged for corruption and corrupt practices under section 9 of National Accountability Ordinance, 1999. The petitioners were of very tender ages when the land was transferred to them. At the time of the request for conversion made by their father on their behalf, they were less than 10 and 12 years. The Court adopted the reasoning that as they were very young and did not have means of their own, the petitioners could not be held criminally responsible because of their age. The Court also held that despite what section 83 provides, the burden of proof, according to the judicial pronouncement, lays on the accused, who is above seven years of age and below twelve years, to prove that he had not attained sufficient maturity. However, in this case, the matter was compounded before the framing of the charge. Hence, the Court held that even if the accused had committed any offence, they were entitled to the benefit of an immature understanding.

In the case of *Muhammad Zahir v The State*,²² the appellant was charged in the FIR under sections 302/324/34, PPC. There was a dispute over property where two men died and one man was injured. The Court took the assistance of the Advocate General, who contended that the, 'basic thing to see is as to whether the culprit incapable of forming of possession necessary mens rea for an offence or whether he has attained maturity of understanding to judge the nature and the consequences of his conduct.' The Court then inquired whether any material is available on record regarding the establishment of understanding or maturity of the accused. The appellant failed to show any record or any effort from the prosecution in this regard. From a plain reading of the section, the court highlighted that, 'the offence committed by a child below 12 years of age, cannot be termed as an offence until there is a proof or observation regarding sufficient maturity of understanding.' It shows that in contrast to the *Mst. Tahseen* case, the burden of proof is laid on the prosecution to prove that the child has sufficient maturity.

In the case of *Shoaib Ahmad v The State*,²³ the accused confessed his guilt and disclosed that he and two of his companions murdered the deceased. The appellant used to commit sodomy with the deceased and feared that he might reveal this fact to his parents. The Court held that the maturity shown in the planning and executing their scheme of killing the deceased holds testimony to the fact that, 'neither they were suffering from lack of maturity while committing

²¹ *Mst. Tahseen and 2 Others v National Accountability Bureau and 5 Others* (2013 PCr.LJ 1137)

²² *Muhammad Zahir v The State* (2013 Y L R 1483)

²³ *Shoaib Ahmad v The State* 2019 P Cr. L J 57

the said brutality nor were unaware of the consequences, which might have resulted from the said act.'

Section 83 of PPC leaves it to the court to ascertain whether the child has attained sufficient maturity, providing a large amount of discretion to the judges. It is also unclear whether the burden of proof falls on the accused or the prosecution. General Comment No. 10 of the Committee on the Rights of Child refers to state parties that use two ages of criminal responsibility. It provides that the assessment of 'maturity is left to the court/judge, often without the requirement of involving a psychological expert, and results in practice in the use of the lower minimum age in cases of serious crimes.'²⁴ The case of Pakistan is that the Juvenile Justice System Act, 2018 does not provide any insight in this regard. It means that under the Pakistan Penal Code, two minimum ages of criminal responsibility operate, which can cause confusion and has the potential for discriminatory practices.²⁵ Under the international standards, the system of two minimum ages has the potential for discrimination, and therefore, Pakistan needs to review its state of law.

The case law shows that the law on the application of section 83 PPC is uncertain. When the question of maturity of an accused arises under section 83, there is no provision for the constitution of a psychological board or any other objective way of ascertaining the level of understanding and maturity of the accused. Instead, the ascertainment of the fact of the maturity of the accused is left as an opinion of the court based on the material on record and the circumstances of the case. For example, in Mst. Tahseen case, the Court looked at the nature of the crime and whether the juvenile accused possessed the resources to commit the act to hold that the accused were absolved of the liability. Moreover, the burden of proof is laid on the accused according to the case law. In light of the case law, it seems that the standard to ascertain the law on establishing the maturity of the accused is dubious and puts further pressure on the accused by shifting the burden of proof. As another example, in Shoaib's case, the gruesome circumstances of the case and planning by the accused led the court to develop the opinion that he had sufficient maturity and understanding. It is left to the court to discern the child's maturity without recourse to any objective standard; thus, the determination of maturity by the court is a dubious measure.

²⁴ UN Committee on the Rights of the Child (CRC), 'General Comment No. 10 (2007): Children's Rights in Juvenile Justice' (25 April 2007), UN Doc CRC/C/GC/10 Paragraph 30

²⁵ Ibid

Recommendation and Conclusion

In light of the above discussion, it is recommended that Pakistan raise the minimum age of criminal responsibility to 15 years. It is also in conformity with Islamic Law. According to many jurists, at the age of 15, a child is presumed to have obtained puberty and can be held criminally responsible.²⁶ Once the minimum age of criminal responsibility is increased from seven to at least internationally accepted age of twelve years,²⁷ it would already reduce the burden of determining the age of the accused. It means that children who are near the lower limit of seven years and are currently not provided immunity under the law will fall under the ambit of the protection. General Comment No. 10 of the Committee on the Rights of Child also encourages the state parties to set a higher minimum age of criminal responsibility, such as 14 or 16 years.²⁸ Raising the minimum age of criminal responsibility will achieve two goals. Firstly, it will reduce the potential number of accused who would be faced with the legal system, and young children will be protected from the roughness of our legal system. Secondly, per the international requirement under the Convention on the Rights of the Child (CRC) to clearly demarcate a minimum age of criminal responsibility, it would remove the court's discretion in determining the maturity of the accused.

In conclusion, the juvenile justice system of Pakistan provides the mechanism of determination of age through section 8 of the Juvenile Justice System Act 2018. The issue of determination of maturity still remains as the JJSA is silent over the operation of section 83 of the PPC. The current state of the law is that the age of the accused has to be determined initially by the police. If the police officer in charge fails to do so, then it is the statutory obligation of the court to conduct an inquiry to determine the age of the accused. Regarding the application of section 83 and determination of maturity, the case law is already scant. However, the presumption of *doli incapax* is a part of Pakistani law that can be rebutted for children aged seven to twelve. It adds to the confusion surrounding the age of the accused, and the practice has the potential for discriminatory treatment. Thus, Pakistan should increase the minimum age of criminal responsibility to decrease the pool of accused whose age has to be determined. It would also remove the confusion

²⁶ Mudrasa Sabreen, 'The Age of Criminal Responsibility and its Effect on Dispensation of Justice' (2017) 7 Pakistan Law Review <<https://pakistanlawreview.com/wp-content/uploads/2019/10/8.pdf>>.

²⁷ *Ibid* (n 25), para 32

²⁸ *Ibid*.

regarding the implications of doli incapax and the burden on seven to twelve year old children to prove that they lack the maturity to understand the nature and consequences of the offence.

