



# Juvenile Justice System Act, 2018: A Practical Overview of Legal Assistance, Determination of Age and Disposal Through Diversion

PAPER

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## Introduction

“There can be no keener revelation of a society’s soul than the way in which it treats its children” (Nelson Mandela).

The Juvenile Justice System Act (JJSA) 2018, was an effort by the legislature to treat the juvenile offenders in a better way in a conventional criminal justice system, and efforts were also made for their reintegration in the society, but this law like many other laws was drafted and passed but not implemented properly. This article will critically evaluate the provisions relating to legal assistance, determination of age and disposal of cases through diversion.

## Legal Assistance

The JJSA was enacted to provide an expedient criminal justice system for children and their reintegration into society.<sup>1</sup> In Pakistan, criminal proceedings are commenced by registering a First Information Report (FIR)<sup>2</sup> and the police, in ordinary circumstances, are the first responders in a criminal case. JJSA also lays down some duties on the police when the case is registered against the child (a person who “has not attained the age of eighteen years”)<sup>3</sup>.

Investigation in case of the juvenile shall be conducted by an officer, not below the rank of a Sub-Inspector under the supervision of the Superintendent of the Police or SDPO.<sup>4</sup> This provision of the law was laid down to make sure that the misuse of the police powers is not done in juvenile cases, but in practice, this safeguard is being ignored, and police reports merely mention that the investigation was conducted under the supervision of the SP or SDPO.<sup>5</sup>

The right to liberty is a fundamental right guaranteed by Article 9 of the Constitution of Pakistan. The UN Convention on the Rights of Child (CRC) also emphasizes that no child shall be deprived of his liberty arbitrarily or unlawfully,<sup>6</sup> however, when a person is deprived of liberty through due process of the law, the CRC emphasises that legal assistance should be given to the child. The relevant rule of CRC is reproduced here:

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<sup>1</sup> Juvenile Justice System Act, 2018 (‘JJSA’) preamble

<sup>2</sup> The Code of Criminal Procedure, 1898, s 154

<sup>3</sup> JJSA, s 2(b)

<sup>4</sup> JJSA, s 7(1)

<sup>5</sup> Interview with Police Officers and Public Prosecutors

<sup>6</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, (‘UNCRC’), Article 37(B)

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 legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

In Pakistan, the right to legal assistance has been provided to the juveniles and victims under the section 3 of the JJSA, as per the provisions of CRC, the constitutional and international norms. The legal assistance right was also available to juveniles and victims under section 3 of the repealed Juvenile Justice System Ordinance, 2000 (JJSO), however, the standing for the legal practitioner was enhanced from five to seven years.

This right to legal assistance at the earliest stage is meant to protect the juvenile's valuable rights. However, interviews with prosecutors from three different districts (Narowal, Lahore and Nankana Sahib) stated that they have not seen this safeguard being implemented since they have not seen any mention of legal assistance being provided to juveniles in police files at the stage of remand or even at the scrutiny stage of the police report under section 173 of Code of Criminal Procedure, 1898 (CrPC). These safeguards can be implemented if a proper awareness campaign is lodged, and training of police officers is conducted.

## Determination of Age

Determination of age is the core issue for the effectiveness of the provision of the JJSA as it will be the age which shall determine whether a person is treated under the jurisdiction of the JJSA or not. Under section 7 of the JJSO, the court was responsible for determining the age of the juvenile accused when he/she is brought before it. It was held by the Supreme Court that such determination should be made at the earliest possible stage. The process of the inquiry was not laid down in the JJSO, court can do that suo-motu and cannot wait till it is claimed. In JJSO, the word 'shall' was used in section 7 so the court cannot dispense with the inquiry (ossification test) for the determination of the age<sup>7</sup> except in extraordinary circumstances.<sup>8</sup> In an inquiry for the determination of the age, and alongside the ossification test, the court can also require

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<sup>7</sup> Muhamad Zakir v The State (2004 SCMR 121)

<sup>8</sup> Muhammad Akram v Muhammad Haleem (2004 SCMR 218)

documentary evidence, such as medical certificates, for the determination of the age.<sup>9</sup> Section 7 of the JJSO, 2000 reads as follows:

If a question arises as to whether a person before it is a child for the purposes of this Ordinance, the juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child.

The determination of age is done under section 8 of the JJSA, and its scope was expanded as compared to the previous JJSO where it was done by the court when it is claimed or appears to the court. Under the JJSA, the investigating officer can make an inquiry for the determination of an accused's age when it is claimed or it appears to him that the accused is juvenile. Section 8 reads as the following:

(1) Where a person alleged to have committed all offence physically appears or claims to be a Juvenile for the purpose of this Act, the officer in charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, educational certificate or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.

(2) When an accused person who physically appears to be a Juvenile for the purpose of this Act is brought before a Court under section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.

Under the JJSA, an inquiry regarding the age should be done at the earliest stage, in contrast to the previous law, where it was done by the court at a later stage usually at the stage of scrutiny of challan or trial of the accused. Under the JJSA, more significance is attached to the documentary evidence. The investigating officer can gather birth certificates, educational documents, and other relevant documents for the determination of age. In the absence of documentary proof, the investigating officer can require determination of the age on the basis of a medical report from the medical officer.

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<sup>9</sup> Sultan Ahmed v Additional Sessions Judge Mianwali (PLD 2004 SC 758)

Apart from the investigating officer, the court can also determine the age of the accused when he/she is brought before the court under section 167 of the Cr.PC. The court will determine the age of the accused on the basis of the information available on the record, including the medical report and a report/finding submitted by the police. In contrast to the previous JJSO, the court must form its finding on the basis of available record rather than on the inquiry conducted by the court.

The practical aspect of this provision is very satisfactory as compared to the previous practice when conventionally, the police ignored or failed to determine the exact age of the juvenile and thus usually assigned them an age between 16-18 years based on their physical appearance rather than on the basis of medical evidence (ossification test) or any documentary proof.<sup>10</sup> During the interviews held with prosecutors, both the trial prosecutor and the prosecutor appointed with the magistrates confirmed that usually, the documentary proof regarding the age of the juvenile is attached with the remand paper now as per normal practice.<sup>11</sup> An investigating officer also revealed that they attempt to establish the exact age of the juvenile, so that the juvenile offender can benefit from procedural safeguards.<sup>12</sup>

## Diversion

As per Article 3 of the UNCRC, the best interest of the child is the primary consideration in any legislation pertaining to the rights of children.<sup>13</sup> The preamble of the JJSA also emphasises the social reintegration of juvenile offenders. Keeping these aspects in consideration, the JJSA introduced the concept of diversion under section 9. As per this section, diversion is a key component of restorative justice and can be decided before or during the preliminary investigation. More specifically, diversion is the process of steering 14–17-year-olds away from the criminal justice system, thereby avoiding exposure to the violence that exists in its institutions.<sup>14</sup> The concept as it is available in JJSA was not available in the previous law (the JJSO), only the concept of probation was available, and that option was available to juvenile offenders only after the conclusion of the trial. Although, some advantages were gained by the

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<sup>10</sup> Aqsa Ijaz, Attia Madni and Naureen Akhtar, 'Implementation of Juvenile Justice System Act, 2018, Prospects and Challenges for Pakistan' (2021) 3(1) *Review of Politics and Public Policy in Emerging Economies* 79

<sup>11</sup> Interviews held with Prosecutors

<sup>12</sup> Interview with Investigation Officer

<sup>13</sup> UNCRC, Article 3

<sup>14</sup> Catherine L. Ward, Amelia van der Merwe, Andrew Dawes (eds.), *Youth Violence: Sources and Solutions in South Africa* (University of Cape Town Press 2012)

juvenile offender but the purpose of saving the juvenile child from the agony and exposure to the conventional trial was not achieved under the previous law.

Under the JJSA, with the consent of the court, a case can be referred to the Juvenile Justice Committee (a committee constituted under section 10 of the JJSA). The disposal of the case through diversion can be exercised at different stages by different stakeholders of the state. For instance, during any stage of the investigation, it can be exercised by the police, and it can also be exercised by the prosecution or court, during the trial.

Conditions for the exercise of diversion are exercised in two ways: when the juvenile has committed a minor offence<sup>15</sup> (when the punishment of the offence is three years with or without fine),<sup>16</sup> and in case of major offence, the age of the juvenile is less than 16 years at the time of the commission of an offence.<sup>17</sup> However, the Act is silent about the heinous cases whether they can fall for the disposal through diversion, in any situation or for offenders of other age groups.

The practical aspect of the disposal through diversion is very grim as police and prosecution, both the actors of criminal justice system are denied the exercise of powers under section 9 of the JJSA. Police and prosecution are of the opinion that this is so because the notifications for the committees were not being issued, but in June 2021, a notification was issued by the Home Department for the constitution of Committees throughout the province<sup>18</sup> and determined that the place of work for these Committees will be the court premises.

During the interviews held with prosecutors and investigators, most of the participants were unaware of the constitution of Juvenile Justice Committees, therefore, the purpose of the Act cannot be achieved without proper awareness raising campaigns and capacity building of the criminal justice stakeholders.

## Conclusion

The JJSA is a commendable effort by the legislature to lay down the criminal laws and procedures governing juvenile offenders as per the contemporary international and human rights norms, but a law can only be fruitful if it is properly implemented. Out of the three dimensions

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<sup>15</sup> JJSA, s 9(5)(a)

<sup>16</sup> JJSA, s 2(o)

<sup>17</sup> JJSA, s 9(5)(b)

<sup>18</sup> "Govt Trying to Protect Rights of Children through Reforms: Dr Shireen Mazari" The News (Islamabad June 19, 2021)



discussed in this article, the law is properly or mostly followed in only one area (the determination of age), whereas in the other two areas, the law is not followed in letter and spirit. Hence, the juveniles are not being benefitted properly. If a proper training and awareness regime is not invoked, this law shall also meet with the same fate as many other laws in Pakistan. Empirical research depicts the true picture of implementation of the JJSA. Although it is a demanding task, it can be performed in selected districts of all provinces to gauge the practical aspects and pitfalls related to juvenile justice in Pakistan.

