

Alternatives to Imprisonment for the Juveniles: A Case Study of Pakistan

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Abstract:

This article sets out to explore alternatives to imprisonment in the context of human rights, and as an obligation of Pakistan under international law. Firstly it explores the contextual issues of juvenile imprisonment. It tackles the central issue of age of criminal responsibility and goes on to analyze international norms and practice, including principally the CRC Committee recommendations and prescriptions of relevant child right bodies, in identifying the variety of dispositions available to imprisonment for the juvenile offenders. Secondly, the case of Pakistan is examined in the light of established international standards as well emerging norms of handling juvenile offenders. As a signatory what are Pakistan's obligations and how far Pakistan is fulfilling its obligations and how relevant and effective are the CRC's recommendations? Such questions will be critically examined. This paper attempts a holistic view of the subject from the perspective of international law as well as counter poses it against the exigencies of the local situation before offering considered conclusions on the direction the emerging debate of alternative imprisonment may take in the world context as well at a local level in Pakistan.

Keywords:

Criminal Justice System, Juvenile Justice System, Juvenile Delinquency, Diversion, Probation, Juvenile Courts, Age of Criminal Responsibility, Borstal Institution, Imprisonment, Alternative dispositions.

Introduction

Children, by nature, are vulnerable to human rights abuses. It is arguable that the locus of International Human Rights Law is the individual in the shape of an adult rights - conscious person. Children do not necessarily fall into the category of aware individuals and hence the need of specially designed laws and more importantly specially designed machineries to implement the laws. The judiciary plays a crucial role in giving shape and direction to all laws that affect children. But, more than anything, it plays a critical role in addressing the rights of the deviant or delinquent child. The rest of the criminal justice system is also very important to the ultimate enjoyment of basic rights and opportunities. There is an increasing realization that rehabilitation not retribution is the preferred rights based approach to correct the delinquent child. The best interests standard¹ underscored by the United Nations in its Declaration on the Rights of the Child² recognizing the need to provide *every* (emphasis mine) child with the opportunities and facilities "to enable him to develop physically, mentally, morally, spiritually and socially in a healthy

and normal manner”.³ It need not be overemphasized that the declaration mentions every child and does not make any exceptions prejudicing the law against the deviant child. To that effect the non-discrimination clause of the Declaration states that:

'the child shall enjoy all the rights set forth in this Declaration. Every child without any exception whatsoever shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether himself or his family'.⁴

These standards of non-discrimination are echoed by other international instruments and are applicable in the context of children's rights.⁵

In 1989, the Convention on the Rights of the Child (hereinafter CRC)⁶ stated in Article 3 that:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*'⁷ (emphasis added). The mention of both welfare institutions and administrative and legal institutions in the same statement is symptomatic of the felt need of treating children differently even when they are 'offender' in the eye of law. Young people committing the highly publicized serious crimes are only a tiny fraction of the children who come into conflict with the law in some way. Majority of the children get into trouble for minor offences, or may not be guilty at all. As indicated above, a large number of the detainees implicated are awaiting trial. And while they wait, they are subjected to the worst forms of abuse at the hands of inmates, guards and other prison authorities.⁸ For many of them, the criminalization process begins in prisons. It is a fact that prisons, meant for rehabilitation, are in reality training grounds for criminals. They serve mainly as retributive structures, reflecting the “punish the criminal approach” as well as the discriminative attitude of the society towards the delinquent. While it is arguable that the adult deviant may be subjected to retributive penalty, it is necessary to recognize the juvenile offender should not be undergoing a similar treatment. It is not clear however that the alternatives to imprisonment are necessarily categorically out of the purview of the criminal justice system or are non-institutionalized options of correction. The idea is to avoid incarceration of the juvenile through imprisonment.

International laws are implemented by and through sovereign nations. CRC is no exception. Article 4 outlines the obligations and duties of States Parties to the Convention. It states:

'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this Convention. In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation'.

Of course, it has to be recognized that local socio-economic and cultural differences have a bearing on both the acceptance and the implementation of law. In the case of many countries the child is not regarded as an autonomous individual who can enjoy his individual rights *qua* an individual. At best, his rights are seen as derived from the ones ascribed to the elders in the family. Pakistan like many other developing countries of Asia and Africa is socio-culturally geared to such a perception. Naturally, the rights of a juvenile who has also caused an infraction of law is an issue of marginal social consideration. As a consequence, the established law in Pakistan reflects this marginalization of the juvenile offender. In the case of Pakistan, the reality unfortunately is that the children who are deemed to have committed a legal violation have to spend months, even years of their precious childhood behind bars. A large number of children remain in jails as under-trials for long periods, perhaps, even longer than the time they would have spent in the prison if they had been sentenced.⁹ Ironically, some are not even found guilty at the end of the legal process and suffer amidst hardened criminals in jails for no fault of their own. The childhood and innocence of these children is lost for all times. In 2008, out of the total number¹⁰ of 1788 juvenile prisoners in Pakistan, 1653 were under trials and only 153 were finally convicted. These children are the victims of the system of juvenile justice, which fails to respond to their special needs. By no means it is suggested here that by providing alternative sanctions, children are any less guilty of an offence or that they should not in any case be held accountable for their acts of omission or commission. Rather, the point is that there has to be recognition of the fact that children have special needs and a right to special treatment under the law,¹¹ because of child's capacity for change. Children have not yet completed their growth and development and with appropriate education, training or psychological treatment, those involved in criminal acts may be helped to grow into law abiding citizens without the stigma of criminality attaching to them.

Exploring International Norms

A. *Question of the Age of Criminal Responsibility:*

‘The child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection’¹²

To start with we may look at the age of criminal responsibility to see how a particular criminal system is treating children coming in conflict with the law. In any criminal justice system the most crucial element is the *age of criminal responsibility* at which a child could be held responsible or obliged to take responsibility for his criminal actions.¹³ The importance of age of criminal responsibility can be gauged from the example that there is less obvious need for a child to be protected from making incriminating admissions when being interviewed about his or her responsibility for a certain action, if by virtue of age, that action cannot be defined as a criminal offence at all. An admission of guilt would not then constitute part of that child's criminal record. In any case if the age of criminal responsibility is set too high, then there is a risk that it may bring the law in disrepute and easy to flout; if set too low then it may cause the law to be savagely harsh. International instruments have recognized “the importance of adopting an appropriate age for criminal responsibility, without being particularly helpful about what this should be”.¹⁴ Thus the fixing of a minimum age limit is a decisive factor when determining those children in trouble with the law who can be subjected to and sentenced in criminal proceedings.

The International Covenant on Civil and Political Rights (hereinafter ICCPR)¹⁵ was the first International Human Rights Convention to impose an express obligation on states parties to provide for a special procedure for the juvenile persons in the administration of justice that was different from the procedure for adults. In particular, Article 14(4) of the ICCPR provides that “*in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation*”.

In the ICCPR the term 'juvenile persons' in Article 14(4) is not defined, therefore, in the estimation of Nowak, the term 'juvenile person' is principally used in connection with criminal law, he states that, “*it undoubtedly describes those years in a persons life beginning with the age of criminal responsibility and ending with majority age*” Although the determination of these two age limits is left to the discretion of states parties, they are obliged to establish specific age limits.¹⁶ The *UN Human Rights Committee (hereinafter HRC)* has observed that the age at which the child attains the majority in civil matters and assumes criminal responsibility should not be set unreasonably low and that in any case a state party cannot absolve itself

from its obligations under the covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.¹⁷ In its *General Comment* on Article 10 of the ICCPR the *HRC* stated that:

Article 10 does not indicate any limits of juvenile age, while this is to be determined by each state party in the light of relevant social, cultural and other conditions, the committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice.¹⁸

Besides this under Article 6(5) the ICCPR prohibits death penalty for crimes committed under the age of 18, which is another indicator of the age of criminal responsibility.

Interestingly, if we look at the Article 24 of ICCPR, it recognizes the right of every child, without any discrimination to receive from his family, society and the state, the protection required by his or her status as a 'minor'. The Covenant does not define 'minor', nor does it define the age at which majority is attained. But as per Article 40(3) (a) of the Convention on the Rights of the Child, requires state parties to set, “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”¹⁹, although it does not specify what that age should be?

In the words of Geraldine Van Beuren, the Beijing rules, “apply to anyone under the age of eighteen. They therefore have the advantage of applying to all individuals under eighteen years of age who are deprived of their liberty, without any reference to national definitions of childhood and without being dependent upon the jurisdiction of special proceedings”.²⁰

It is rightly contended that Article 1 of the CRC should not be interpreted as allowing states parties to establish ages that are incompatible with the provisions, aims and objectives of the CRC, including the *principle of the best interest of the child* embodied in its Article 3.²¹

B. Alternatives to Imprisonment in the International Instruments:

It is a recognized principle of international law that “juveniles should only be deprived of their liberty as a last resort and for the shortest possible period of time” (see *Convention of the Rights of the Child*, Article 37(b) and Rules 13 and 19 of the *Beijing Rules*). The sub paragraphs (b) to (d) of Article 37 of the CRC relates to deprivation of liberty. Article 37 (b) prohibits unlawful or arbitrary deprivation of liberty. Furthermore, it imposes the obligation on states parties to use the arrest, detention or imprisonment of a child only as a measure of last resort and for the shortest appropriate period of time. The first sentence of article 37 (b) provides that “No child shall be deprived of his or her liberty unlawfully or arbitrarily”.

Furthermore the first part of its second sentence provides that “the arrest, detention or imprisonment of the child shall be in conformity with the law...” According to the CRC’s *travaux préparatoires*, these provisions are based on article 9(1) of the ICCPR, which provides that:

“Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention; no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

In its General Comment on Article 9 of the ICCPR, the UN Human Rights Committee (hereinafter HRC) states that the provision of article 9 (1) apply with respect to all deprivations of liberty whether in criminal cases or other cases. Similarly, in its general guidelines for periodic reports of the CRC indicates that, in its opinion, the deprivation of liberty referred to in the first sentence of article 37(b) means any form of detention or imprisonment, as well as any other form of placement in the public or private custodial setting, from which the child is not permitted to leave at will by order of any judicial, administrative or any other public authority.²² The committee refers in this regard to the definition of “deprivation of liberty” contained in rule 11(b) of the 1990 UN Rules for the Protection of the Juveniles Deprived of their Liberty²³ (hereinafter JDL). Furthermore, in the section on Article 1, the CRC requests the state parties to provide information in their reports on the minimum legal age defined by their national legislation for deprivation of liberty, including arrest, detention and imprisonment, in the areas of, *inter-alia*, administration of juvenile justice, asylum seeking and placement of children in welfare and health institutions.

The second sentence of the article 37(b) further provides that, “*The arrest, detention or imprisonment of a child only as a measure of last resort and for the shortest appropriate period of time*”.²⁴ In the commentary on rule 13 of the Beijing Rules, it is stated that the danger to juveniles of “*the criminal contamination*” while in detention pending trial must not be underestimated. Therefore, it is important to stress not only the basic principle that *pretrial detention should be used only as a measure of last resort and for a shortest possible period of time*, but also that minors should not be held in a facility where they are exposed to the negative influences of adult detainees, and the need for alternative measures. The Rules 17 of the Beijing Rules concerns guiding principles in adjudication and disposition, and encourages *the use of alternatives to institutionalization* to the maximum extent possible.²⁵ The approach in rule 17 is closely in consonance with the internationally accepted principles.²⁶ In the commentary it is also noted that rule 17.1(b) of the Beijing Rules implies that strictly punitive approaches are not appropriate. In juvenile cases the

possible merits of just desert and retributive sanctions, “should always be outweighed by the interest of safeguarding the well-being and the future of the young persons.”²⁷

The provisions of article 40(4) of CRC follow the approach taken in rule 17 of the Beijing Rules. The Article²⁸ 40(4) provisions indicate its aim to ensure making use of *variety of dispositions*. The CRC *travaux preparatoires* reveals that these examples are directly taken from rule 18 of the Beijing Rules.

According to the rule 18, some of the important reactions and sanctions that have been practiced and proven successful so far in dealing with juvenile offenders in different legal systems are enumerated in rule²⁹ 18.1 of the Beijing Rules. They have in common, above all a reliance on and an appeal to the community for the effective implementation of alternative dispositions.³⁰ International instruments stress the importance of diverting young offenders out of the courts, whenever possible, without resorting to formal trial.³¹ In the Commentary on rule 11 of the Beijing Rules it is noted that diversion involving removal from criminal justice proceedings and often redirection to community support services, is commonly practiced in a formal and informal basis in many legal systems. The purpose of such practice is to hinder the negative effects for the juvenile offender of subsequent criminal proceedings .e.g. the stigma of conviction and sentence. It is further observed that, especially in cases where the offence is of non serious nature and where the family, the school or other informal social control institutions have already reacted, diversion at the outset without referral to alternate social services may be the optimal response.³² Research indicates that those children who enter the criminal justice system are unlikely to emerge reformed characters, particularly if they receive institutional care or custody. The UN Standard Minimum Rules for Non- Custodial Measures³³ (The Tokyo Rules) is also relevant to provision of article 40 of the CRC. The rules do not refer specifically to juveniles, but state that they should be applied without discrimination based on age. They provide minimum safeguards for persons subject to alternatives to imprisonment. The growing trend towards alternative measures internationally can be judged from the Model Treaty on the Transfer of Supervision of Offenders Who Have Been Conditionally Sentenced or Conditionally Released.³⁴ This provides us with the contextual framework on how to deal with children in conflict with law and what possible measures should be taken for their rehabilitation and hinder the relapse/recidivism among them through alternative dispositions to imprisonment as is evidenced by the fact that incarceration/imprisonment in any institutional setting, does not help to reform the offender, rather it has negative effects and those coming out have offended most.

C. *Committee on the Rights of the Child and Fulfilment of State Obligations:*

The Committee's Guidelines for periodic reports asks under Article 1 (definition of the child) for information on the minimum legal age defined in the legislation for criminal responsibility (Para 24). Despite this clear obligation, several States that have ratified the CRC, filed their implementation report, and appeared before the Committee on the CRC³⁵ without ever having set a bottom age.³⁶ An inappropriately low age for criminal responsibility shows that the State does not have a clear idea of what the criminal law can achieve with young children, and does not appreciate the harm that it can cause or for that matter the benefit of deliberately keeping these children out of the formal system of criminal justice. This is a major demarcation that completely shuts young children out of the judicial system. A too low an age of penal responsibility shows that the State has not re-examined its penal system with the aim of promoting the healthy development of children. Moreover the Committee has never specified the age, it should in fact be taking strong position on such issues and should be more definitive in approach and very clear in sending messages and what it want to be done.

The Committee on CRC while in its concluding observations to Nicaragua stating that the, "state party give particular attention to ... ensuring that deprivation of liberty is used only as a measure of last resort,... and to developing *alternative measures* to deprivation of liberty.....consider reviewing its penal policies concerning "property offences" committed by children, and establish alternative measures to address the needs of children involved in this type of offence."³⁷

The Committee showed concern about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system and that there is a tendency normally to refuse applications for bail for them. The Committee was particularly concerned at the enactment of new legislation which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.³⁸ Now, what do the Concluding Observations to Australia show? The Committee did not condemn the mandatory-incarceration laws as violations of articles 37 and 40. Instead, it handled the matter exclusively as an indigenous people's issue. The Committee did not relate this "concern" to any specific CRC article. In other words, the focus shifted from juvenile justice to indigenous people. The mandatory-incarceration laws in question are matters of international concern from both perspectives, and both need to be raised. But the attention in the recommendations went to only one of the issues. As a result, the recommendation to Australia missed an opportunity to drive home a fundamental point about juvenile justice, a point that applies to all States, and irrespective of any differential impact on any particular social group. And the recommendation failed to condemn the unjust sentencing laws in the strongest human rights terms: that they are *per se* violations of CRC articles 37 and 40.

The Observations on juvenile justice are not connected to the social context, with few exceptions. This lack of linkage may be one reason why *prevention* and *rehabilitation* are often not given attention in the recommendations, except indirectly through the references to various UN guidelines. For example, in the Observations during 1999 there are no specific recommendations on prevention with respect to Mexico, Mali, South Africa, and Peru (although reintegration is covered); and neither prevention nor rehabilitation is expressly mentioned for Sierra Leone and India. All of these Observations do refer to the Riyadh and Beijing guidelines and the Rules for the Protection of Juveniles, but this is no substitute for specific³⁹ recommendations from the Committee.

Unfortunately, there are far too many Concluding Observations that fall into this pattern of insufficient attention to juvenile justice. Moreover the recommendations are too “thin” in their content. For instance, a 1994 recommendation to France reads: “The Committee is also concerned that legislation and practice relating to arrest, detention, sentencing and imprisonment within the system of the administration of juvenile justice might not be fully consistent with the provisions and principles of the Convention, and in particular articles 37 and 40”. And a 1999 Concluding Observation to Mexico recommends the State to “effectively implement a juvenile justice system in accordance with the Convention and other related international standards”.

Recommendations that are vague like those just quoted are not very useful to government officials, or to NGOs working for young people. It is far more helpful when they are concrete, such as: “guarantee prompt access to justice for children in pre-trial detention”. (Mexico; some other recommendations to this State are equally specific.)

In evaluating the recommendations since the first review session in 1993, it is important to note that there have been significant improvements, particularly in the past couple of years. The recent Concluding Observations are, overall, more specific, more comprehensive, and more readable. Nevertheless, the juvenile justice recommendations still tend to lag behind those made in respect to other major areas.

The Committee has not hesitated to criticize overcrowding of detention facilities, bad conditions in these institutions, lengthy delays in trials, and other abuses, all of which will require significant outlays of money to correct. But the recommendations almost never speak directly about increasing the budget allocations for the administration of justice. In fact, it has done so only once, to the Russian Federation: “The Committee urges the State party ... to make the necessary resources available for the administration of such alternatives [to incarceration] and to restructure reform institutions ...” (second report). To be sure, on several occasions the Committee said that it was aware of a State's lack of financial

resources (e.g. Burkina Faso, Nicaragua, Sierra Leone, Chad), but it did not take the next step of making a recommendation on spending priorities.

The Case of Pakistan

A. *The treatment of children under the Pakistan Criminal Justice System:*

i. An Overview of the Laws and how are they implemented?

To understand the status of the juvenile offenders in the Criminal Justice System of Pakistan we need to have an overview of the Laws affecting children. The main body of the criminal offences is set out in the Pakistan Penal Code 1860; while criminal procedure is dealt with under the Code of Criminal Procedure, 1898. These laws extend to all parts of Pakistan with the exception of certain tribal areas and parts of Balochistan Province.⁴⁰ In Pakistan the minimum age for criminal responsibility is 7 years,⁴¹ but can be raised up to 12 years if the child has not attained sufficient maturity or understanding to judge the nature and the consequences of his act.⁴² But this ambiguity of the criterion of “sufficient maturity of understanding” and the arbitrary power that is given to the court to evaluate criminal responsibility of a child between 7 and 12 years, this age should rather be raised in order to better respond to the International standards,⁴³ otherwise children above the age of seven are, therefore, potentially eligible for the full range of penalties provided for in the code, including death and life imprisonment.

Besides this, *Hadood Ordinances* of 1979 (so called Islamic Laws) relate to offences relating to rape, adultery, use of alcohol and drugs, theft, robbery which are dispensed through special proceedings and prescribed punishments. They apply to all Pakistanis regardless of age, religion or geographical residence. Therefore, children accused of offences falling under the ambit of Hadood Ordinances do not receive any benefits of the special laws.

The Criminal Procedure Code provides for the confinement of any person under the age of fifteen, sentenced to imprisonment, in any reformatory established by the Provincial Government as a fit place for confinement.⁴⁴ This provision relates to the Reformatory School Acts, 1897(A Federal Legislation) that has also never been used and is dormant for all practical purposes, as no such reformatories exist in any of the four Provinces. The provision is also not applicable in areas where the Sindh Children Act 1955,⁴⁵ is in force. This Act was the only federal law on the subject of juvenile justice until the enactment of the Juvenile Justice System Ordinance, 2000. Till to date, no reformatory school has been established in Pakistan, and the law has not even been notified for it to come into force in the whole of the Country. Then we have provincial laws. i.e. in the Punjab and Sindh provinces Borstal Schools Act 1955, cover convicts below the age of 21 years.

Furthermore, then there is Sindh Children Act 1955,⁴⁶ and *Punjab Youthful Offenders Ordinance*, 1983.⁴⁷ Besides this Pakistan has probation and parole system laid out in the Probation of Offenders Ordinance 1960, which is most underutilized.

My main contention is that since the provision of alternative sanctions presents another, perhaps more feasible, solution to the detrimental effects of sentencing children.⁴⁸ Both the Convention on the Child and Beijing Rules address a variety of dispositions to divert children from the juvenile justice system⁴⁹ among such alternatives probation, restitution, community service, and victim compensation, thereby sparing children the stigma of conviction and punishment. Cases most appropriate for diversion might include minor offenses or ones incurring only financial liability. Nevertheless even in the case of minor offences, magistrates and courts fail to employ alternatives to incarceration.⁵⁰ According to one estimate, the use of probation and parole alone could reduce the amount spent on prisons from 800,000,000 to 70,000,000 rupees annually.⁵¹ Utilizing probation and parole, therefore, could eliminate severe overcrowding and simultaneously free needed resources to improve prison conditions. Wretched and depressing conditions persist in Pakistani prisons, cramped with pretrial as well as convicted children and adults. While sufficient resources may not exist to correct an insufficient infrastructure in the near future, possible interim and incremental steps do exist now.⁵²

B. Latest Developments in the Law and State Obligations of Pakistan:

Article 4 of the CRC codifies State obligations by stating, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in this Convention”. Similarly, Article 2 states that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind” ... Thus, Pakistan as a signatory is bound to undertake positive obligations to ensure the enjoyment of all guaranteed rights by children. Even in the context of resource constraints it must meet 'due diligence' standards. On the face of it, in recent years Pakistan seems to have initiated some steps, at least on paper. In order to harmonize national law and policy and to ensure conformity of legislative and other measures with the provisions of the CRC, the most significant change came on July 1, 2000, when the Government of General Pervez Musharraf promulgated the Juvenile Justice System Ordinance 2000 (hereinafter JJSO 2000),⁵³ the first ever federal legislation on the subject. The Ordinance, fixed the age of a child at 18 years⁵⁴ for the first time and abolished the death penalty for children, and envisaged establishment of Juvenile Courts and release of juvenile offenders on probation. Thus, this law linked the police, probation, and judiciary and prison staff with one another. Prior to the introduction of the JJSO 2000, several laws were prevalent in Pakistan that pertained to the rights and welfare of children. The difficulty has been

that there was no law that had uniform applicability across the four provinces of Pakistan. The law which governed children in the Province of Sindh was (and still has applicability) the Sindh Children Act 1955; in the Province of Punjab, the Punjab Children Ordinance 1983 and the Punjab Youthful Offenders Ordinance 1983 provided a legal framework. Sadly, no laws existed in the Province of NWFP and Balochistan. One of the highlights of the JJSO 2000 is that it was made applicable to the whole of Pakistan. However, the promulgation of this law did not bring to an end the ordeal faced by children who come into conflict with the law.⁵⁵

All four provinces as well as the Islamabad Capital Territory (ICT) Administration had notified rules (hereinafter JJR) for implementation of JJSO by 2002. The AJK has promulgated the Juvenile Justice System Act 2003. The JJSO has been extended to FATA, PATA and Northern Areas through notification. The Provincial Governments have further established Juvenile Courts by vesting powers to the Courts of Sessions Judges at the District level and in some districts to First Class Magistrates.⁵⁶

When going through the four stages of criminal procedure the arrest of the child is the most important stage and it is from where the child could be saved from experiencing the hardships of imprisonment and other problems. This stage is also important as the police register the age of the child in the First Information Report (FIR) which is important for further trial of the case and qualifying a child to the benefits of the JJSO 2000. According to the JJSO all juveniles which the court cannot release on bail because of various reasons: "*should be placed under the custody of a Probation Officer or suitable person or institution dealing with the welfare of the children if parent or guardian of the child is not present, but shall not under any circumstances be kept in a police station or jail in such cases*".⁵⁷ To the contrary the juvenile delinquents as a general practice are either kept in police stations or sent to jail, as there is no remand home on ground in NWFP and Balochistan province, which is in fact clear violation of the JJSO 2000 and its JJR and CRC. The child coming in conflict with law will take ages to prove that at the time of the commission of the offence he was a juvenile, as majority of the child delinquents are illiterate and cannot prove their age with a school certificate. Moreover, the police or the courts have seldom resort to medical checkups to ascertain the age⁵⁸ of the delinquent child. But the problem is that police are not aware of the JJSO and they continue to treat children like adults and hardened criminals. Police and probation departments have no coordination with each other and staff members of a police station, including DSP (Deputy Superintendent of Police) and SHO (Station House Officer .i.e. In- charge of police station) level officers, have little or no knowledge of the role of the Probation Department.

Authority to release children on bail is not practiced by the police in particular and by the courts in general. Majority of children who come into conflict with the law are sent to prison and spend more time there as under trial prisoners than the term of imprisonment in case of conviction.⁵⁹ Under Section 10 and 11 of the JJSO Probation officer has the most important role to play in diverting the first time child offender away from institutional treatment. Here too the police have a very important role to play in saving the future of a first time offender by using the concept of diversion⁶⁰ as provided under the newly established *Police Musalihat* Committees and diverting him from entering the criminal justice system.

Under the JJSO 2000, children cannot be sent to ordinary prisons rather they must be sent to a Borstal Institution⁶¹ for rehabilitation. There are only two Borstal Institutes, both in Punjab Province (Both are administered by the Punjab Prisons Department), one Youthful Offenders Industrial School and one Remand Home for juvenile offenders, in Karachi, Sindh Province, in the country. Since the number of Borstal Institutions is limited in the country, juvenile inmates are kept in separate sections of the prisons called "Juvenile Section". Interestingly, the existing Borstal institutions are governed under the Jail manual and not under the *Borstal Act* with virtually no rehabilitation taking place which in fact falsifies the claim of Pakistan Government.⁶² In view of the prevailing situation, rehabilitation is taken out from the very outset by keeping these institutions under the prisons Department who know little about rehabilitation and where one cannot make a difference between the criminals and the keeper (Jail Staff)?

i. A legal reality check- Respect, Protect, Fulfill?

Children held for petty crimes, which are eligible for bail or for probation are sent to jail. A weak probation system and lack of exclusive Juvenile Courts are partly responsible for this violation. Some of the judges of the lower courts are not aware of the JJSO and the probation system. Trend in the courts is more towards the punitive approach than to look for non custodial means. Though death sentence has been abolished under the JJSO 2000 for all those under the age of 18 years at the time of committing the crime, but there are cases where the fate of the children still remains undecided because of the determination of age.⁶³

ii. Remedies?

Although probation is not the due right of any accused rather it is court's leniency towards the accused and first offenders. Almost 60 percent⁶⁴ of these prisoners are eligible for probation. They are asked they would be released if they confess before the court. But this alternative to incarceration is very sparingly used for the reasons that not many legal practitioners are aware about this measure or are reluctant to use it. There are only 70 Probation Officers⁶⁵ in Pakistan and only two

Female Probation Officers. While defending the lesser number of probationers⁶⁶ and parolees, officials of probation and proclamation department in all four provinces were of the view that more human and financial resources should be provided to the probation department and awareness should be created about the probation and parole system not only among general masses but also among, judiciary and police. There is a need to improve the working relationship among judicial professionals, particularly judges and probation officers. High Courts may give instructions to the lower courts to utilize the system of probation.⁶⁷

iii. Possible Avenues for Redress

- Specific judicial laws and procedures for minors, extendable to whole of Pakistan, including the Tribal Areas both Federally and Provincially Administered, without any discrimination of sex, race etc.
- Special provisions for the female offenders, as they have no separate detention centres for them, so they have to be kept out from the institutions in any case.
- Initiate a debate on alternatives to prison for children by e.g., publishing a report, inviting someone from another country to lecture, factual news releases, publicizing stories of good experience of children given an alternative sentence rather than prison.
- An awareness raising campaign should be launched targeting judges of juvenile courts, probation officers, police prison authorities, management of special institutions (e.g. borstal institutions and certified schools) and the relevant civil society actors. Children at risk also need training and orientation on the applicable laws and standards in the field of juvenile justice.
- There should be appropriate monitoring and evaluation systems to support juvenile rehabilitation institutions and the withdrawal of children from jails on priority basis, with a special focus on the protection of vulnerable street living/working children and other groups of children that most frequently come into conflict with law. These children should be provided with educational/vocational skills development programmes.
- Ensure that children are detained in separate facilities from adults at all stages of the judicial process.
- The implementation process needs greater profile at the national level, clarifying the significance of the Ordinance and renewing the nation's obligation to the children. The wide range of actors involved in the juvenile justice system: police, judges, lawyers, prosecutors, probation officers and jail officials all need focused training and capacity building in order to realize their commitments.

- Prevention: emphasis on preventive policies facilitating the successful socialisation and integration, with a high priority on the family and children in risk.
- Analyze the current legislative situation and ensure that it is understood by the important players, e.g. new legislation may not be needed.
- Early Intervention: emphasis on community-based services, specific programmes, non-institutional treatment, coordination, and interdisciplinary effort.
- More stress on reducing pre-trial detention.
- Set up a working group (on the pattern of Juvenile Justice Working Group in NWFP) ensuring that all agencies with an interest are represented. Draw up some proposals to introduce alternatives or new methods of supervising alternatives and ensure wide discussion.
- Pakistan should give consideration, wherever appropriate, to dealing with a juvenile offender without resorting to a formal trial, provided that human rights and legal safeguards are fully respected. Alternative methods include referral to community or other services (Police Musalihat Committees and reformatory justice for diverting children out of the criminal justice system).
- Application of the principle of “*doli incapax*”, so that the age of criminal responsibility could be raised in accordance with internationally acceptable standards, which further help in blocking the young offenders from entering the criminal justice rigmarole.
- Ensure that arresting officers follow the correct procedure in determining the age⁶⁸ of the child arrested, and that they have prompt access to adequate external verification sources if necessary.
- Courts must ensure that sentencing is proportionate to the crime and takes into consideration the age and best interests of the child.
- Listening to children would be a valuable exercise when developing schemes to prevent crime.
- Run some pilot schemes⁶⁹ and evaluate the process and the outcomes very carefully.

Once a major debate is generated and alternatives have been broadly accepted there is the potential to look at other areas of necessary reform, e.g., more diversion and crime prevention. However, on balance it has to be said that the record of Pakistan in this area continues to be a matter of concern. The obligations of the State to *respect, protect and fulfill* have not in any way been met by the passing of a few

laws like the new ordinance. Even the basic steps to *respect* the obligations undertaken are not seriously implemented. For example while Probation is an established system, many in the criminal justice system, including judges are not fully aware of the presence of Probation officers in the local area. This violates the provisions in CRC- Article 42 of the CRC states that "States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike"⁷⁰ and Article 44 provides that "States Parties shall make their reports widely available to the public in their own countries."⁷¹ This sums up the lack of policy commitment and also the absence of civil society commitment to juvenile justice matters. Ultimately, the State has failed to honour its international obligations. When Pakistan submitted its second periodic report to the Committee on the Rights of the Child made the following observations and recommendations, comments:

" welcomes the promulgation of the Juvenile Justice System Ordinance (JJSO, 2000), but is concerned at the poor implementation of this Ordinance and that many of the authorities in charge of its implementation, particularly within provincial governments and tribal areas, are unaware of its existence. The Committee is also deeply concerned at the high number of children in prisons, who are detained in poor conditions, often together with adult offenders and thus vulnerable to abuse and ill-treatment. The very low minimum age of criminal responsibility (7 years) is also of concern to the Committee. Further, the Committee is deeply concerned about the reports of juvenile offenders sentenced to death and executed, which have also occurred after the promulgation of the Juvenile Justice System Ordinance"

The observations were clear but not authoritative and nothing much on why Pakistan submitted its report after four years delay, such an approach sends wrong signals, that's why the Committee has to assert and play proactive role to make the states fulfill their obligations under the international law. However, the Committee slightly upped the ante in its concluding observations and recommendations on Pakistan's 3rd & 4th periodic report in 2008:

"...The Committee welcomes the promulgation of the Juvenile Justice System Ordinance (2000), but is concerned at its poor implementation and that many of the authorities in charge of its implementation, particularly within provincial governments and tribal areas, are unaware of its existence. The Committee is also deeply concerned at the high number of children in prisons who are detained in poor conditions, often together with adult offenders and thus vulnerable to abuse and ill-treatment..."

- “... The Committee recommends that the State party:*
- a. Ensure the full and effective implementation of juvenile justice standards, in particular articles 37, 40 and 39 of the Convention and other United Nations standards in the field of juvenile justice, including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and the Vienna Guidelines for Action on Children in the Criminal Justice System, and, in the light of the Committee's 1995 discussion day on the administration of juvenile justice (CRC/C/46);*
 - c. Consider deprivation of liberty only as a measure of last resort and for the shortest possible period of time;*
 - f. Ensure that children in detention are always separated from adults”*

A lot still need to be done for full implementation of the JJSO 2000, perhaps a country visit by the Committee on CRC would bring the desired change and realization in the government circles in this low priority area.

Conclusion

“Childhood is entitled to special care and assistance” CRC preamble.

International standards set out clear guiding principles relating to alternative dispositions to imprisonment. These are founded on the duty of the state to secure the best interests of each child and the corresponding duty to ensure that measures affecting children who have broken the law are proportional to the gravity of the offence and take into consideration the personal circumstances of the juvenile. Every child has the right to protection by their family, the state and society as required by their status as a minor. The best interests of the child must be a primary consideration in all actions concerning children, including those undertaken by courts of law, administrative or legislative bodies. In line with the rehabilitation into society as the standard of true correction of a deviant child, the juvenile justice system must emphasize the well-being of the juvenile and ensure that any reaction to juvenile offenders is always in proportion to the circumstances of both the offender and the offence as per Rules 5 and 17(1) of The Beijing Rules.

Pakistan should recognize the right of every child accused of a criminal offence to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, taking into account the child's age and the desirability of promoting the child's reintegration and assumption of a constructive role in society. Juvenile justice systems should uphold the rights and safety and promote the physical and

mental well being of juveniles and take into account the desirability of rehabilitating the young person. Policies should involve consideration of the fact that "*youthful behavior or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood*", as rightly asserted in Article 5(e) of The Riyadh Guidelines.

Most international standards encourage - but do not require - states to establish separate or specialized procedures and institutions for handling cases in which children are accused of or found responsible for having committed criminal offences. The American Convention, however, requires states to establish specialized tribunals for handling cases of juveniles accused of crimes.⁷² Coming specifically to the case of Pakistan, as a party to the Convention on the Rights of the Child (CRC) Pakistan should be confronted for non-implementation of the relevant laws on the subject. The issue in Pakistan is not non-existence or lack of requisite laws on the subject but the implementation of these provisions. Pakistan ratified the CRC on November 12, 1990, and upon signature Pakistan made the following reservation: "*provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values,*" but withdrew it in 1997. When a country ratifies the Convention, it assumes a legal obligation to implement the rights recognized in the treaty. The Beijing Rules recognized the necessity to factor in local conditions by stating that child criminal justice should be "*be conceived as an integral part of the national development process of each country.*"⁷³ But this cannot be a valid excuse to keep improvement of child justice system as lowest priority in terms of resources and policy commitment. It is the imperative of international law today to treat the children themselves as '*full and equal partners*'⁷⁴ and to involve progressive civil society institutions. The State must play its role in promoting, protecting and fulfilling the rights of children without any bias against delinquents. In other words international norms expect state not to hide behind the 'delinquency' excuse to deprive children of their basic rights. Pakistan cannot be an exception. In Pakistan it is time now to step away from "a general tendency to inflate and overreact to the delinquency "problem"⁷⁵ and truly work for the best interests of the child as envisaged in the CRC.

End Notes

¹Preamble of the United Nations Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989), “by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”

²Declaration on the Rights of the Child, 1959

³Ibid, Principle 2

⁴See Principle 1, U.N. Declaration of the Rights of the Child

⁵Standard non discrimination provisions, extendable to children, appear in the other major conventions. See, e.g., Article 2(1) of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, (entered into force Jan. 3, 1976).

⁶United Nations Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989).

⁷Art. 3, *ibid*

⁸UN Doc E/CN.4/1998/35 (1998) on the “Question of the human rights of all persons subjected to any form of detention or imprisonment”, which stated that, “The risks and the consequences of arrest and detention pending trial appear to be underestimated. Juveniles can be exposed to authorities' violence, which is still tolerated in certain countries and to hardened criminals attention which could transform the juvenile's stay into a life-long nightmare”. See also generally the reports of Human Rights Watch, *Prison Bound, The Denial of Juvenile Justice*, 1999 <http://www.hrw.org/en/reports/1999/11/01/prison-bound> and Amnesty International, *Denial of basic Rights of the Child Prisoners, 2003 Pakistan: Denial of Basic Rights for Child Prisoners*. (2003). Retrieved 09 03, 2009, from Amnesty International USA: <http://www.amnestyusa.org/document.php> (Imprisonment of juveniles-male and female in jails and conditions they live in.)

⁹See *Supra* note 8 (Human Rights Watch Report, “Prison Bound(1999).

¹⁰Data as provided in CRC/C/PAK/Q/3-4/Add.1:2009. Written Replies by the Government of Pakistan to the List of Issues (CRC/C/pak/q/3-4) Prepared by the Committee on the Rights of the Child in Connection with the Consideration of the third and fourth Periodic Reports of Pakistan (CRC/C/PAK/3-4 (2009), Website : <http://tb.ohchr.org/default.aspx?country=pk>.

¹¹Jahangir, Asma & Mark Doucet, “*Children of a lesser God*”: Child prisoners of Pakistan (1993), p.44.

¹²Declaration on the Rights of the Child, 1959 and the CRC 1989, both put it so.

¹³Fortin, Jane, *Children's rights and the Developing law*, (1998), at p.439, Butterworths, London, at p.439.

¹⁴Ibid

¹⁵International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, (entered into force Mar. 23, 1976)

¹⁶Nowak, M, *UN Covenant on Civil and Political Rights: ICCPR Commentary*, 1993, p.265, (*Kehl am Rhein: Engel*),

¹⁷HR Committee, General Comment 17. (1989)

¹⁸HR Committee, General Comment 21 (1992)

¹⁹Article 40(3) (a) of the UN Convention on the Rights of the Child. See also for background of Article 40(3) (a), UN Doc. E/CN/4/1989/48. para 534, and

²⁰Van Bueren, Geraldine, *International Perspectives on Adolescents Competence and Culpability: A Curious Case of Isolationism: America and International Child Criminal Justice*, (1999) Bridgeport Law Review/Quinnipiac Law Review.

²¹Rachel Hodgkin and Peter Newell, *Implementation Handbook for the CRC* (1997), p.414

²²See UN Doc. CRC/C/58, p40, at note 1 (1996)

²³1990 UN rules for the protection of the juveniles deprived of their liberty were adopted by General Assembly resolution 45/113 of 14th December 1990..

²⁴This provision is based on the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (Hereinafter Beijing Rules), in particular rules 13, 17 & 19 thereof and UN Rules for the protection of the JDL, in particular its rules 1, 2, and 17. See also Article 10(2)(b) of ICCPR.

²⁵Compare it with Article 40(4) of CRC.

²⁶Article 40 of CRC.

²⁷Ibid

²⁸Compare it with rule 17.1 of the Beijing Rules.

²⁹A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

- a. Care, guidance and supervision orders;
- b. Probation;
- c. Community service orders;
- d. Financial penalties, compensation and restitution;
- e. Intermediate treatment and other treatment orders;
- f. Orders to participate in group counseling and similar activities;
- g. Orders concerning foster care, living communities or other educational settings; and
- h. Other relevant orders.

³⁰Beijing Rules, Part Four-non institutional treatment.

³¹See Article 40(3) (b) of the CRC and the Beijing Rules, rules 11.1-11.4, together with the commentary.

³²Detrick, Sharon, "*A Commentary on the United Nations Convention on the Rights of the Child*" (1999), p 702, Martinus Nijhoff

³³Standard Minimum Rules for Non-Custodial Measures [The Tokyo Rules] (UN), 1990

³⁴Adopted by General Assembly resolution 45/119 of 14 December 1990.

³⁵Astonishingly low ages that a number of countries have set, and which the Committee has found to be violations of the treaty: 7 years (Australia, Bangladesh, Cyprus, Ghana, India, Myanmar, Nigeria, Syria, Yemen), 8 years (Sri Lanka), 10 years (Fiji, Sierra Leone, United Kingdom), and 11 years (Barbados). In addition, the Committee has expressed disapproval of the ages set by 21 other States by recommending that they review their criminal responsibility laws for CRC compliance. (Belize, Chile, China, Guatemala, Hong Kong, Ireland, Jamaica, Jordan, Lebanon, Mexico, Morocco, Nepal, New Zealand, *Pakistan*, Philippines, Poland, Slovenia, Sudan, Thailand, Trinidad & Tobago, Zimbabwe).

³⁶Guatemala, Micronesia, Panama, and Senegal.

³⁷Concluding Observations of the Committee on the Rights of the Child: Nicaragua 24/08/99. CRC/C/15/Add.108, at para 43.

³⁸Concluding Observations of the Committee on the Rights of the Child: Australia 10/10/97. CRC/C/15/Add.79

³⁹In fact, there is a danger that the habitual citation to these UN documents becomes a crutch; citing these documents may substitute for the making of concrete recommendations.

⁴⁰Federally Administered Tribal Areas, Provincially Administered Tribal Areas and parts of Balochistan are governed by special criminal legislation (Collective responsibility under which the question of age does not arise at all).

⁴¹Section 82 of the *Pakistan Penal Code, 1860*.

⁴²*Ibid*, Section 83.

⁴³Article 4.1 of the Beijing Rules states that “in those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”. The commentary that goes with this article clarifies that the minimum age of criminal responsibility differs widely owing to history and culture, but if the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.

⁴⁴Section 399 of the Criminal Procedure Code, 1898

⁴⁵Section 6 of the Sindh Children Act 1955

⁴⁶Sindh Children Act, 1955: The Act applies to children in difficult circumstances who are below the age of sixteen, with specific provisions for children in conflict with the law. It authorizes the establishment of juvenile courts. Where such courts are not established, the law provides for powers to be expressly conferred on existing courts with exclusive jurisdiction to deal with children under this Act.

⁴⁷Alternatives to placement provided by the Ordinance include discharge after admonition, release on probation of good conduct for a period not more than three years, or punishment of fine payable by the parent or guardian of the child.

⁴⁸See Jahangir & Doucet, See *Supra* note 11(asserting law could afford child offenders much greater protections). Jahangir & Doucet recommend that courts neither sentence nor imprison children at all. See at 44 (recognizing such ideas as too premature for Pakistan).

⁴⁹*Ibid.* at 44 (asserting alternatives to sentencing do not make children any less accountable for their offenses).

⁵⁰Geiger, Andrea, *Juvenile Justice in Pakistan*, 23 *Suffolk Transnat'l L. Rev.* 713(2000)

⁵¹Arshad Mahmood, SPARC, *Discourse*, issue No. 14 December 2003, page 8, 9 & 10. by

⁵²Geiger,Andrea,*Supra*50

⁵³The JJSO focuses on the child in the criminal justice process. It defines the child in line with international standards as a person below 18 years of age(2); provides for

the establishment of special juvenile courts exclusively to try juveniles under special procedures suitable for children; regulates the arrest of children by police as well as bail and probation; provides for the appointments of special panels of lawyers to assist children free of charge in court; and prohibits the death penalty and the use of fetters and handcuffs for children. Interestingly, JJSO states unequivocally in its first section that it "*extends to the whole of Pakistan*", it was initially only applied in the four provinces, Sindh, Punjab, Balochistan and the North West Frontier Province (NWFP), but this Ordinance is not extendable to Federally Administered Tribal Areas, Provincially Administered Tribal Areas and parts of Balochistan, Under Article 247 of the Constitution, a separate notification has to be issued by the President and the Governor of the province for extending a law to the Federally-Administered Tribal Areas (FATA) and PATA, respectively. also see "Progress Report on the implementation of the Convention on the Rights of the Child", Government of Pakistan, 2000, p. 103.

⁵⁴But the age of the Criminal responsibility has not been raised as yet from 7 years, a child is allowed to work at 14, but he can open an account in the bank at the age of 18.,but off course can now vote at the age of 18 (latest development).Boys are not free to marry until they are 18 and majority is attained under the Majority Act of 1876 , at 18.How can it be that they are denied rights and privileges which adults are free to enjoy, presumably because they are not mature and yet at the same time they are often treated as fully grown adults for the purposes of criminal sanctions? The Correct approach would be to recognize that a young boy and girl under the age of 18 is a child, and then bring the penal laws in conformity with that fact.

⁵⁵It is pertinent to note that the Lahore High Court struck down the JJSO in 2004.However, the Federal Government went to the Supreme Court against the decision of the Lahore High Court in 2005. In response to the Federal Government's petition, the Supreme Court restored the JJSO through a short order. It was decided by the Supreme Court that the case will be taken up later. The case came up for hearing on 19 May 2009. Since then there have been number of hearings on the issue. Though the Supreme Court has not yet decided the matter, it is strongly felt that it will restore the JJSO very soon. The last hearing of the case was on 23 July 2009 when it was adjourned.

⁵⁶No exclusive Juvenile Courts exist to date.

⁵⁷Section 10(3) of JJSO 2000. See also Rule 19 of the JJR states that "The juvenile shall not under any circumstances be kept in a police station or jail." See generally JJR 53, which talks of "No Stigmatization". Incarceration in a jail is in fact stigmatization.

⁵⁸Section 7 of JJSO 2000 that on "Determination of age... If a question arises as to whether a person before it is 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.”

⁵⁹See Generally Amnesty International Report 2003 at Supra note 8.

⁶⁰It is based on the understanding that formal responses to juveniles who come into conflict with law do not always protect the best interests of children or the community and that it can do more harm than good to certain juveniles. A juvenile may be diverted from the formal criminal justice system on admission of guilt, or if it is the first time offence, or the matter is a minor one. O'Connor, I., & Carmeron, M. (2002). *Juvenile Justice in Australia*.

⁶¹In its recommendation the Sub- Committee constituted in 2006 by the Provincial Human Rights Monitoring Committee (NWFP) stated that, “The article 40 of the Convention of the Rights of the Child talks of institutional care as a measure of last resort and for minimum period of time. It has at no point of drafting of the Convention equated institutional care with imprisonment. Moreover the inspiration that we got from British concept of Borstal institution too at no point made a mention that a juvenile offender can be sentenced to imprisonment in a prison. Instead he may be sentenced to detention in a young offenders institution. It was evident to the subcommittee during the course of the visits of the three Borstal institutions of Pakistan that the Borstal institution and the prison department cannot become natural partners in this process, because they are two differently administered institutions by two differently trained staff. From the very outset the rehabilitative factor is taken out, if a Borstal institution becomes a part of the prison department. The apparent apathy attached by the prison department is abundantly clear to all the members of the subcommittee and strongly recommend that separate staff specifically trained for dealing with juvenile offenders should administer all Borstal institutions.”

⁶²Pakistan stated in its report on the implementation of CRC CRC/C/PAK/Q/3-4/Add.1:2009 at supra note 10, that “Over 95 per cent of all the convicted juvenile prisoners are housed in exclusive Borstal Institutions and Youthful Offenders Industrial Schools. There are two Borstal Institutions in the Punjab province while there are two Youthful offenders Industrial Schools in Sindh for the rehabilitation of juvenile prisoners. The NWFP Government has set an Adolescent Training Centre at Central Jail Haripur for the juvenile prisoners. In addition to that, Sindh Government has set up a Remand Home for the under-trial juvenile offenders in Karachi. In all other places, juveniles are detained in juvenile cells within the District or Central Jails. Other male prisoners are not allowed entry into such juvenile cells. The NWFP Government has built a new Borstal Institution at Bannu which will be operational soon. The provincial government has allocated funds to that effect as well”. A Sub-Committee of the Provincial PHRMC (NWFP) in 2006

conducted the survey of above stated institutions and found them wanting in providing even the basic elements required for the rehabilitation of juveniles practiced world over i.e. formal education, skill development and most importantly psychotherapeutic treatment. I am not talking at all of the staff deputed to attend to these juveniles. Report placed on record for perusal. So in all earnest the institutions for the rehabilitation that we are boasting about are prisons rather than rehabilitative institutions.

⁶³Despite the slowness in implementation and the lack of awareness amongst members of the criminal justice system of the JJSO, some progress has no doubt been made, largely thanks to several child rights organizations in Pakistan which have formed the Juvenile Justice Network, lobbied for the full implementation of the JJSO and undertaken awareness training programs for staff of the criminal justice system. See also Supra Amnesty International Report, 2003.

⁶⁵See. Supra 51

⁶⁶Supra, at 51

⁶⁷Only 133 juvenile probationers released on probation “*The State of Children Rights in Pakistan 2008 SPARC*”.

⁶⁸According to 3rd and 4th periodic report on CRC submitted by Pakistan, “there is lack of awareness about the [probation] system and its significance. Police, prison officials and even in the ranks of lower judiciary there is lack of awareness concerning probation system.” There is no authentic system of birth registration in the whole country. The birth registration rate in the country is only 29.5% as provided in the 3rd & 4th periodic report by Pakistan to the Committee on CRC in 2008. In the absence of such a system it becomes very difficult to determine the exact age of a person accused of having infringed the penal law. This difficulty in age determination results in many mishaps to the child in conflict with law in the province.

⁶⁹A. Coleridge; G. Qadri; Save the Children Sweden: Pakistan Programme Publisher: Save the Children [Sweden], 2006.

Website: <http://sca.savethechildren.se/upload/scs/SCA/Publications/Towards%20Juvenile%20Justice.pdf>. This document has documented the project launched by Mr. Mashhood Ahmad Mirza Deputy Director of Regional Directorate of Human Rights, Ministry of Law, Justice & Human Rights together with Save the Children Sweden. The project's goal was to rehabilitate juvenile prisoners by providing them education, vocational training, recreation and psychological support. Training of prison staff and police officials in child rights and human rights is also undertaken to bring positive changes in their attitude towards children. This very project is cited as a success story by the Govt of Pakistan in its 3rd & 4th Periodical Reports to the UN Committee on CRC in 2008, See generally Paras on Juvenile Justice.

⁷⁰CRC, *supra* note 1, art. 42

⁷¹Ibid art 44

⁷²Article 5(5) of the American Convention. ,prohibiting death penalty to under 18.

⁷³United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 33, U.N. GAOR, 40th Sess., Supp. No. 53, at 207, U.N. Doc. A/40/53 (1985) ("The Beijing Rules").

⁷⁴United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 112, U.N. GAOR, 45th Sess., Supp. No. 49A, at 201, U.N. Doc. A/45/49 (1990) ("The Riyadh Guidelines").

⁷⁵A.D. Viccica, *The Promotion and Protection of Children's Rights Through the Development and Recognition of an International Notion of Juvenile Justice and Its Child-Centered Perspective in the United Nations*, 58 Nordic J. Int'l L. 73 (1989).

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