Judging in a Therapeutic Way: TJ Audit of Juvenile, Probation and Criminal Procedure Law in Pakistan with Reference to Therapeutic Design and Therapeutic Application of Law

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Abstract In Professor Wexler's "bottle-liquid" metaphor, the legal landscapes or legal structures are "bottles," and the roles, behaviors, practices and techniques used by legal actors (judges, lawyers, therapists) are "liquid". Within this framework responsive judging requires judges to use Therapeutic Jurisprudence (TJ) practices to promote procedural fairness and better outcomes. However, enabling judicial responsiveness may also require legislative changes consistent with therapeutic design. This Chapter describes changes made in Pakistan, where the *Juvenile Justice System Ordinance 2000*, the *Control of Narcotics Substance Act 1997* the *Criminal Procedure Code 1898* and probation law contain therapeutic provisions. These laws, thus, are therapeutic in design—*the bottles*. However, the practice in trial courts and the decisions of constitutional courts suggest that there exists no mechanism and training regime for judges, prosecutors and lawyers to provide them with guidance into the humane side of law, i.e., TJ application—*the liquid*. This paper will provide a TJ "audit" of these Pakistani laws in accordance with the Therapeutic Design of Law (TDL) and Therapeutic Application of Law (TAL). It gives examples of judicial education concerning TJ in the form of joint lectures of the author and Professor Dr. David B. Wexler (who was available through Skype) at the Punjab Judicial Academy. The paper also discusses TJ literature produced in Pakistan, including reference to some court opinions, in relation to mainstreaming therapeutic jurisprudence practice.

Paper presented at the Law and Society Association (LSA) Meeting, Isabel Maria Sheraton Hotel, Mexico City, Mexico, 22 June 2017.

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T. Sourdin and A. Zariski (eds.), *The Responsive Judge*, Ius Gentium: Comparative Perspectives on Law and Justice 67, https://doi.org/10.1007/978-981-13-1023-2_9

1 Introduction

Therapeutic Jurisprudence (TJ) (Wexler 2000) aims to find the healing capacity of the law (Flies-Away and Garrow 2013). In juvenile law, "healing capacity of law" is generated through a special way of applying the law where the well-being and rehabilitation of the juvenile is the required outcome (Munir Muhammad Amir 2007). It is indeed interdisciplinary (Chesser 2016). This is to ensure that juveniles do not become victims of concurrence and recidivism (King and Auty 2005)—a phenomenon of great concern for a state, social scientists, judges, lawyers and law enforcement agencies. Professor James Gillian,[1] highlighted that in the United States, "[t]wo-thirds of prisoners reoffend within three years of leaving prison, often with a more serious and violent offense" (Gillian 2012). This shows the failure of the system of punishment and imprisonment, at least in one of its dynamics—deterrence.[2] The situation in Pakistan is the same where "life conditions in prisons is (sic) closely related with recidivism rate and criminal behaviour" (Akbar and Bhutta 2017). The Federal Shariat Court (FSC), a constitutional court of Pakistan, has also observed that the "prevailing prison system, does not envision rectification, reform, reformation, or rehabilitation of the convict and advised the managers of prison systems to adopt an objective attitude and bring a change in the prison discipline as well as in the outlook" (Muhammad Aslam Khaki v State 2009). However, prison becomes the abode of a convict only when no alternative sentence is deemed appropriate for his or her well-being or rehabilitation, or alternatively, when legal actors (judges, lawyers, police, probation officers, guardian etc.) are either unaware of a structure to facilitate rehabilitation, or they are indifferent in their roles, behaviour or practices to considering a therapeutic way of doing things. The latter may either be due to bias, prejudice,[3] or merely because of a lack of training in the use of the TJ tools. Hence, we can say that sometimes law is therapeutic in design but is not applied in a therapeutic way and vice versa (Syed Walayat Shah v Qaisar Mahmood 2015).

The role of the judge as going beyond simply providing justice according to law is emphasised in this chapter. Judging in context, essentially responsive judging, is finding its roots in recent cases of constitutional import. The Supreme Court of Pakistan has very recently held that if the confession of a child must be recorded, "it was appropriate and desirable that the accused should have been provided counselling/consultation facility of natural guardian or any close blood relative of mature age, having no clash of interest with him". These observations were made with respect to the non-therapeutic role of the magistrate in terms that "…the recording

[1] Professor Gillian is a clinical Professor of psychiatry and an Adjunct Professor of law at New York University. He is the author of, among other books, "Preventing Violence" and "Why Some Politicians Are More Dangerous Than Others".

[2] At this moment, we are not entering into the debate with respect to the death penalty and its impact on crime reduction. Our focus mainly will remain on other less harmful crimes.

[3] When legal actors presume that the law may be abused by the accused. It is general opinion in Pakistan that the softness in juvenile laws provides an opportunity for using children to commit crimes (Author's informal discussions with a number of judges, lawyers, probation officers, and police).

Magistrate did not provide him [the child defendant] sufficient time for reflection to recompose himself" (*Hashim Qasim v State,* 2017 SCMR 986). With respect to social context judging in rape cases, the Supreme Court has guided all legal actors in the following terms (*Salman Akram Raja v Government of the Punjab*, 2013 SCMR 203):

- every police station that receives rape complaints should involve reputable civil society organizations for the purpose of legal aid and counselling;
- a list of such organizations might be provided by bodies such as the National Commission on the Status of Women;
- on the receipt of information regarding the commission of rape, the Investigating Officer/Station House Officer (S.H.O.) should inform such organizations at the earliest possible time;
- the administration of DNA tests and preservation of DNA evidence should be made mandatory in rape cases;
- as soon as the victim was composed, her statement should be recorded under S. 164 of the Code of Criminal Procedure (Cr.P.C.), preferably by a female Magistrate;
- trials for rape should be conducted in camera and after regular court hours;
- during a rape trial, screens or other arrangements should be made so that the victims and vulnerable witnesses did not have to face the accused persons; and
- evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly juvenile victims, did not have to be present in court.

In the same vein, an earlier decision shows that exemption from the death penalty for children convicted of offences carrying capital punishment prior to the enforcement of the *Juvenile Justice System Ordinance* was only granted by the Supreme Court in the course of interpreting a Presidential Order based on the constitutional principle of equal treatment (*Nazir v State,* PLD 2007 SC 202). According to the Presidential Order the death sentence of some children was converted to that of life imprisonment. Likewise, giving importance to peace and harmony in the community, the Lahore High Court has observed that the "[c]ompromise between parties was relevant as it would imprint beneficial effects in relations between the parties and promote peace, tranquillity and harmony" (*Faiz Rasool v Province of Punjab*, 2017 YLR 134). Accordingly, the death penalty was converted into that of life imprisonment.

The court has also expanded the meaning of compensation which has to be awarded to a person who has suffered mental anguish or psychological damage due to a crime. In this way, a "minor baby girl born in result of crime [of rape] committed by the appellant" is declared as "'a person' suffering mental anguish and psychological damage for her whole life, thus, she is entitled for the compensation provided under the law." (*Nadeem Masood v State,* 2015 PCrLJ 1633). In the ways described above, Pakistan's judges and courts are now more relevant to society by practicing responsive judging in context.

2 Therapeutic Design and Application of Law (TDL and TAL)

The liquid/bottle metaphor identified by Professor Wexler is useful in understanding the interconnection between the therapeutic design of a law and its therapeutic or responsive application by legal actors. He writes:

> To examine the law and its administration, we are using a metaphor of "[liquid] and bottles", looking at the law itself—the legal landscape or legal structure—as "bottles," and at the roles, behaviors, practices and techniques used by legal actors (judges, lawyers, therapists) as "liquid" …." (Wexler 2015).

Thus, there may be a law that may be classified as therapeutic in its design, e.g., a law dealing with juveniles (bottle) has provisions for rehabilitation and restoring the well-being of juveniles. Although the law seeks rehabilitation of a juvenile as a first option for the courts, the trend of court decisions may reflect the attitude of legal actors who are indifferent towards the concept of rehabilitation (liquid). TJ techniques suggest that instead of the court imposing a rehab plan (Wexler 1993), it is advisable to ask the juvenile to propose his or her own conditions of future behaviour so that compliance is optimal, and relapse is minimal (Wexler 2015). By training and discussion, legal actors may be sensitized to TJ by interdisciplinary studies establishing that a juvenile, if treated differently and humanely, may become a responsible citizen again. In this way, the old bottle (law, rules) will carry new liquid (roles, practices and techniques of legal actors).

To determine if a penal law is therapeutic in design (TDL), the criteria to be applied is whether it takes into account the rehabilitation and well-being of the accused. It should also be determined if the punishment is immutable, and what objective circumstances/factors may be taken into consideration when imposing a sentence especially where the court must use its discretion in reaching a decision.

To determine if a law is being administered in a therapeutic way (TAL), the criteria focusses on the roles and attitudes of legal actors in relation to their support to enable the accused to enter into a process for his or her own rehab and well-being planned in an integrated way. A team decision making approach by legal actors will be a plus point as well. The supervisory role of the judge and other legal actors should also be considered at the execution stage of a convicted person's behavioural contract. Another factor to be considered is whether the convict was provided an opportunity to give his or her input if a sentence is necessarily passed after conviction.[4]

[4] In Pakistan, it is generally presumed that the criminal courts are bound to pass sentence immediately after recording conviction of an accused at trial. There is no concept of post-conviction sentence hearings.

3 TDL and TAL Analysis of the *Pakistan Penal Code*

This study examines three laws, viz., the *Juvenile Justice System Ordinance 2000*; the *Code of Criminal Procedure 1898* and the *Probation of Offenders Ordinance 1960* with respect to TDL and TAL. The first is a special criminal procedure law for the trial of juveniles/children in conflict with the law; the second is a general criminal procedural law, and the last is the probation law that empowers courts to consider imposing alternative sentences of probation in appropriate cases. However, it would be best to start with the *Pakistan Penal Code 1860* (hereinafter PPC), a general penal law,[5] that prescribes acts and/or omissions (sections 33 and 36) as offences punishable in the form of prescribed or discretionary sentences.

The PPC provides punishments for the offences it defines (section 2 and Chapter III). The preamble to PPC is indifferent towards any rehabilitation theory of punishment in simply stating: "Whereas it is expedient to provide a general Penal Code for Pakistan". The sentences which a court can impose on an accused on conviction range from simple imprisonment to the death penalty,[6] according to the nature of the offence.[7] There are certain Islamic punishments prescribed as well for qisas[8] and diyat[9] offences. Chapter III of PPC provides an interesting structure of punishments in which the role of the courts is to consider, subjectively, why a specific sentence must be imposed. Section 60 of PPC provides discretion to a trial court to impose a sentence of imprisonment either rigorous (with labour) or simple (mere confinement):

> 60. *Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple*: In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Through TJ lenses (Munir Muhammad Amir 2008), there is much of therapeutic jurisprudence in such a provision leaving aside the question that the sentence still focuses on incarceration or is custodial in nature.[10] For example, in a sodomy case where the offender himself was a child/juvenile, the appellate court converted his sentence of rigorous imprisonment to that of simple imprisonment (*Qayyum Ullah v*

[5]There are many special criminal laws with specific offences defined therein along with their punishments. However, we will not go into detail of those laws for brevity and time constraints.

[6]There are very few offences having capital punishment.

[7]Other punishments include rigorous imprisonment, fine, life imprisonment, arsh, daman, ta'zir, and forfeiture of property: See section 53 PPC.

[8]"qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim, or by causing his death if he has committed qatl-i-amd, in exercise of the right of the victim or a wali: See section 299(k) of PPC.

[9]Compensation payable to legal heirs of victim: See section 323 PPC.

[10]We have to note that the TJ literature does not support custodial rehab programs for different reasons and its anti-therapeutic impact on the psychology of a convict.

State 2016, YLR 178). Likewise, in another case where a former legislator was tried for contesting an election using fake educational certificates, the High Court in appeal reduced his sentence to simple imprisonment (*Abdul Qayyum v State* 2013, MLD 1750). Further, there is no ground to impose rigorous imprisonment if the offender commits the offence for the first time and has no other criminal record. In a murder case, the appellate court converted the sentence of a child offender to that of simple imprisonment for 14 years by reason of his being a minor, i.e., less than 18 years of age. It should also be mentioned that the punishments prescribed for offences in PPC are mostly variable, i.e., either rigorous or simple. Very few offences have only rigorous imprisonment as the only option for sentencing by the court. However, the research at Pakistanlawsite (2018)[11] shows that there are very few cases where the appellate courts have converted the sentences of rigorous imprisonment to that of simple imprisonment. The author could not locate a case where this provision is applied to impose the lesser of the two options.

In the same vein, most offences have an alternative punishment of a fine only, i.e., a non-custodial sentence. However, it is rare to find a conviction recorded where a mere fine is imposed as a sentence. Courts are rigorously applying imprisonment as a first option of their sentencing behaviour. In this connection it should be mentioned that the Lahore High Court, in *Ali Muhammad v State* (PLD 2009 Lahore 317) elaborated on the sentencing policy for harms punishable under Qisas and Diyat law. It was held that the first option for the courts is to pass a non-custodial sentence. Imprisonment can only be inflicted if certain pre-conditions are met.[12]

It thus appears that the courts are still without good guidance on whether to impose rigorous imprisonment only at first instance. These dynamics of the sentencing regime should be considered in relation to the therapeutic or detrimental impact on those convicts for whom rigorous imprisonment may be physically and mentally harmful.[13] Thus, law in this perspective is seen to be 'unfriendly' to TJ but on a deeper analysis, some therapeutic impact can be created for the convicts. This law may be therapeutic in design, but the above analysis shows that it is not being applied in a therapeutic way. Here the role, behaviour and practices of legal actors are causes of the non-application of TJ.

Two other important provisions of PPC should also be considered. Section 82 provides that nothing is an offence which is committed by a child under 10 years of age. Section 83 deals specifically with children between 10–14 years of age. It says:

> 83. *Act of a child above ten and under fourteen of immature understanding:* Nothing is an offence which is done by a child above ten years of age and under fourteen, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

[11] This is commercial website of Pakistani case law reported in Pakistan Legal Decisions and other journals issued by M/S PLD Publishers.

[12] This judgment is under challenge before the Hon'ble Supreme Court of Pakistan which has yet to expound the law on this point.

[13] For example, women, children, the infirm and the elderly. So far, there are no sentencing guidelines provided by the legislature in this respect.

For children under 10 years of age, there is no criminal responsibility. However, to make this provision operational, it is imperative that either age is not at dispute, or if disputed, the question needs to be resolved at the earliest stage (Munir Muhammad Amir 2007). This issue is taken up again below when section 7 of the *Juvenile Justice System Ordinance 2000* is discussed.

TJ literature suggests that it has its origins in mental health cases—where medical jurisprudence entered legal jurisprudence. Section 84 of PPC says that a person of unsound mind cannot be held criminally liable. The Balochistan High Court, in *Abdul Ghaffar v State* (PLD 2017 Balochistan 46) held that the burden of proof of insanity lay on the accused, and under section 84 of PPC, the crucial point of time at which unsoundness of mind should be established is at the time when the act, constituting the offence, was committed. In this case, the medical report submitted by the Standing Board had revealed that the accused was suffering from "Bipolar disorder" and the court held that with this illness the petitioner could not be considered a person of unsound mind (*Abdul Ghaffar v State* 2017). Likewise, in the case of *Safia Bano v Home Department* (PLD 2017 SC 18), the Supreme Court of Pakistan rejected the plea of a wife of a convict that his paranoid schizophrenia entitled him to a halt of his execution. These opinions reinforce the assertion that knowledge of mental health science is of crucial importance in applying penal law. However, the international literature on mental health is critical of judicial systems with the allegation that "the judicial system does not give as much weight to a diagnosis of mental illness as it should when determining the proper sentence upon conviction" (Padowitz 2015).

Thus, the design of these provisions may be somewhat therapeutic (old bottle); however, their application is non-therapeutic at the moment (no new liquid).

Another provision of the PPC concerns the right of self-defence against persons being a child or under mental disability or unsoundness of mind. Section 98 PPC provides that if any of these persons do an act or omission which would otherwise be an offence, although they are a child or insane, they may be harmed at the hands of a prospective victim within their right of self-defence. The juvenile or person of unsound mind may even be killed. This area is of great concern for the development of law, judicial precedent and TJ.

Another important provision is section 306 PPC which states that the punishment of qisas cannot be inflicted on a minor or insane person. Thus, for these, the law is therapeutically designed. However, the question of determination of age at the relevant time may become a crucial point of controversy if this issue is not taken seriously by legal actors and guardians of the minor or the insane. In recent cases, the Supreme Court of Pakistan has held that the defence of juvenility, if not taken at the earliest possible opportunity, cannot be of any help to the convict to escape the death penalty in a murder case. In *Muhammad Aslam v State* (PLD 2009 SC 777), the Court observed that where an accused claims minority, such a plea must be taken by him at the earliest available opportunity and he should not be allowed to throw surprises at the prosecution at the end of the trial or at the appellate or revisional stages, thereby depriving the prosecution of opportunities to rebut such claims in a proper manner. The same was recently reaffirmed when the Court held: Any belated attempt made by the accused [alleged juvenile] in such regard before the Supreme

Court may not be met with approval or acceptance (*Muhammad Raheel v State,* PLD 2017 SC 145). Thus, if the legal actors are not friendly to TJ practices as reflected in section 306 there is a chance that a child may suffer the death penalty through no fault of their own.

4 TDL and TAL Analysis of the *Juvenile Justice System Ordinance* 2000 and the *Probation of Offenders Ordinance* 1960

Pakistan enacted its formal *Juvenile Justice System Ordinance* (hereinafter JJSO) in the year 2000. Its preamble reads:

> Whereas it is expedient to prove for protection of children involved in criminal litigation, their rehabilitation in society, re-organization of Juvenile Courts and matters connected therewith and incidental thereto.

This law focuses on the rehabilitation of children who come in contact with the criminal law and courts. It has brought a fundamental shift to the juvenile justice system of Pakistan. Thus, it has been held by the Sindh High Court in *Ghulam Rasool v State (*PLD 2010 Sindh 384) that:

- *Juvenile Justice System Ordinance 2000* was a special law and would take precedence over the general law;
- The Ordinance did not give any discretion to a Trial Court to ignore its mandatory provisions;
- The purpose of the Ordinance is to provide protection to children in criminal litigation and their rehabilitation in society.

Likewise, in an earlier case, *Zia Ahmad Awan v Govt of Sindh* (2002 PCrLJ 659), the Sindh High Court emphasised that responsibility lay with the Provincial Government to ensure that the provisions of the law were complied with by agencies and officials, as the issue involved in the petition was not only legal, but also had social and moral dimensions. The Court also emphasised that the government and legislature should bring about a unified juvenile law as there were other laws that also deal with the matter of juveniles.

The Courts are cognizant of the seriousness of the issue as when the Sindh High Court in *Afsar Zamin v State* (PLD 2002 Sindh 18) held that the JJSO needs to be interpreted liberally. It was observed:

- *Juvenile Justice System Ordinance 2000* is aimed at extending protection to children involved in criminal litigation and their rehabilitation in society;
- The Ordinance in a way safeguards the human rights of a section of society who deserve reasonable concession because of their tender age and, therefore, it is to be construed liberally to achieve the said object.

In a paper for the 3rd International Conference on Therapeutic Jurisprudence, Muhammad Ahmad Munir (2007) has remarked:

> This law introduces therapeutic jurisprudence in Pakistan. It is interesting and surprising to note that that the terms "well-being", "bond for good behavior" and "Court controlled probation" used in this law are key words for the TJ community and courts around the world wherever TJ is practiced.

The first element in the TJ design of this law is its preamble. Later, remarkably, except for its title which contains the word 'juvenile', nowhere in the text of the Ordinance has the word 'juvenile' been used. Instead, the law focuses on the word 'child'[14] whenever it refers to a person in conflict with the law who is under 18 years of age. In the definition clause the word 'child' is defined. This, in the author's view, has a healing impact in that a child is not referred to as a "juvenile" which can have the association of "juvenile delinquent" and so stigmatize the child. Literature on labelling theory also supports this assertion (Hora 2016). The law is thus consistent with TDL in this aspect. However, it remains to consider this Ordinance in relation to TAL on which there is little research.

Twenty judgments of the Supreme Court of Pakistan have been surveyed, spanning over a period between 2003 to 2017 (15 years).[15] Three terms are used by the apex court for children who come in conflict with the law. These are:

- "Accused"
- "Juvenile offender"
- "Juvenile"

The behaviour noted will not be much different for the other courts of the country with few exceptions. It is apparent from this record of litigation that the use of words that may stigmatize the child needs to be avoided not only in literature but also in other writing like news items, judgments, and publicly available records. The JJSO has used the phrase 'child accused of' in some places. Perhaps the legislature should consider the approach used in India which favours the term 'child in conflict with law' to avoid any stigma to the child. The TAL in relation to the Ordinance in this respect is a little foggy and the fog can be easily removed by producing more literature and awareness of the importance of terminology.

The JJSO, in its section 3, casts a duty upon the state to provide free legal assistance, if requested, to every child in conflict with law. There is little ambiguity in the legislative words which are "shall have the right of legal assistance at the expense of the State". However, the state may argue that the child had a right of free legal assistance, but he or she never used his or her right to it. Though hypothetical, that argument may have force in terms that it is not the 'duty' of the state, but only an obligation to act if the same is requested by the child. The Child Rights Convention

[14] See section 2(b) of JJSO where the term 'child' has been defined as "a person who at the time of commission of an offence has not attained the age of eighteen years".

[15] I used the Pakistanlawsite search engine and searched for the term 'juvenile justice' with the limitation that only cases of the Hon Supreme Court of Pakistan be searched. It brought 20 titles as such.

(CRC) in Article 40 places a duty on states to ensure that every child has legal assistance. However, Article 35 of the CRC only provides a right to the child, as is the case in our legislation. Thus, reading Articles 35 and 40 of the CRC, the national laws may cast a duty upon the state through prosecutors and/or courts to immediately provide free legal assistance to a child irrespective of the fact that he or she asserts his or her right in this regard.

Joint trial of children with adults is prohibited in JJSO. This provision is therapeutically oriented to prevent children from meeting and interacting with adults accused of offences. However, practically speaking, the environment in courts is not conducive to implementing this provision in letter and spirit. Courts are overburdened with case backlogs and thus violations of this provision are noted by appellate courts. In *Adnan Zafar v State* (2005 YLR 1281), the Lahore High Court observed:

- The Record had shown that the trial Court, instead of conducting a separate trial, had tried both the accused as well as his co-accused jointly and used carbon copies of the record;
- Such procedure adopted by the trial Court on the face of it, militated against mandatory provisions of *Juvenile Justice System Ordinance, 2000*.

In an earlier case, *Liaquat v State* (2001 YLR 3278), the Sindh High Court also declared joint trial of a child with an adult to be an illegal procedure and direction was made for re-trial.

This stream of case law suggests that the legislative intent is not followed in practice. The law, which is consistent with TDL, is actually having anti-therapeutic impacts on children because legal actors seem indifferent to the physical and psychological impact on children who come in contact with accused adults during trial and imprisonment. Training and sensitization of legal actors is necessary to ensure the therapeutic application of this law.

A well written law cannot be as beneficial for a child if a key question is not resolved at the earliest possible point: the question of age of a person for the purposes of JJSO (Munir Muhammad Amir 2007). This is a matter of great debate in judicial decisions in Pakistan because of the availability of fake birth certificates. In *Faisal Aleem v State*, PLD 2010 SC 1080, the apex Court did not accept a birth certificate on the grounds that the date of birth of the accused was just few months different to his brother and this does not seem possible. There is also malpractice by birth registration officers. In *Muhammad Nasir v State*, 2007 MLD 148, the Lahore High Court observed: the intention of the Legislature was very clear that determination of the age of an accused person based on a School Leaving certificate or birth certificate was not safe, hence, a report from the Medical Board was to be obtained for determination of age. Another weak area is the issuance of school certificates with manipulated dates of birth in school records. The JJSO in its section 7 has thus focused on two elements: documentary and medical evidence. In *Muhammad Aslam v State*, the Supreme Court has provided detailed guidelines for trial courts on how to resolve the controversy of age of the accused. In this case it was observed by

the Court that medical evidence must also be considered along with documentary evidence, but keeping in view the principles of the *Qanun-i-Shahadat Order 1984*.[16]

The Lahore High Court in *Mohammad Ilyas v State* (2017 YLR 71) observed carefully that "the issue about the age of an accused at trial, which can result in punishment of death, is of vital significance." Thus, the whole therapeutic design of the law may be of no use for a child if his or her age could not be determined at the earliest stage if age is in controversy. "This is only possible if we apply the JJSO with an 'ethic of care'" (Munir Muhammad Amir 2007).

The Supreme Court of Pakistan has settled the controversy as to who may initiate the query about the age of the person alleged to be a child. In *Sultan Ahmad's case* (PLD 2004 SC 758), it was held:

- The Court is not to wait until someone raises the question of age;
- It is the obligation of the court to suspend all proceedings until the question is resolved;
- The Court must hold an inquiry to determine the child's age.

Recently, the Supreme Court, in *Muhammad Aslam v State* (PLD 2009 SC 777) has provided a distinct procedure to be followed by the courts to determine the age of the person alleged to be a child to make the process simple and clearer. If legal actors take the proper steps well within time the therapeutic application of laws may be ensured.

With respect to arrest and bail, the JJSO seems to be consistent with TDL. This is because it focuses on two important therapeutic values:

- Avoiding incarceration where appropriate (non-custodial process) (Murrell 2017);
- Ensuring the presence of a guardian (Hora et al. 1999).

In a case of unnatural lust, the plea of the child was accepted for a grant of bail because of his age below 18 years (*Zaher v State*, 2007 SCMR 1178). There are some heinous cases where bail was granted to children who have committed crimes, but after the lapse of some reasonable time in custody, e.g., after five months of arrest in 2012 MLD 1965, after 18 months of arrest in 2017 MLD 399, and after 3 and a half years of arrest in 2014 YLR 422. It is a prime duty of courts to apply the exceptions in the law of bail for juveniles when the offences committed by them are serious, heinous, gruesome or brutal.[17] For non-serious offences, the law provides that bail must be granted as a first option even in non-bailable offences if a child is below 15 years of age. Case law referred to above dictates that the trial courts are still reluctant to grant bail at the earliest stage and thus these matters have to go to the High Courts or Supreme Court of Pakistan. There is a lack of empirical analysis of the culture of decisions on bail by trial courts to provide an informed view of the behaviour of courts in this area. The National Judicial (Policy Making) Committee, however, when considering the aspect of non-grant of bail by trial courts to deserving accused

[16]This is a present law of evidence in Pakistan.

[17]Section 10 of JJSO has special exceptions to refuse bail to children on these grounds.

persons, has issued policy guidelines for the courts to grant bail in appropriate cases. It has further emphasised that cases of juveniles must be disposed of within given timelines (Law and Justice Commission of Pakistan 2009). There is no consistent therapeutic application of the JJSO in this aspect as well.

In relation to the presence of the guardian or parent of a child after his or her arrest and appearance before courts the law is therapeutic in providing an opportunity for a team decision making process. However, the practice in courts and by the police is not good enough and this provision of law is mostly neglected. In a case where the confessional statement of the child was recorded by the magistrate in the absence of any guardian or other protector the Supreme Court of Pakistan observed:

> Being a juvenile (minor), it was appropriate and desirable that the accused should have been provided counselling/consultation facility of natural guardian or any close blood relative of mature age, having no clash of interest with him (*Hashim Qasim v State,* 2017 SCMR 986).

This provision of the JJSO has embedded the concept of 'team decision making' (Munir Muhammad Amir 2006) about a child. At different procedural steps, the team may consist of different persons. For example, as per section 10(1)(a) & (b), at the time of first appearance before a magistrate the presence of guardian and probation officer is made mandatory by the law itself. However, the magistrate is not constrained by law from involving other specialists like psychologists, psychiatrists, medical officers, school teachers, employers or any other suitable persons. The probation officer, being a member of the statutory team, is also empowered to consult any relevant person for writing his special report about the child to be submitted in court under section 9 of JJSO.[18]

A report by the probation officer is a mandatory requirement of law according to section 9(1) of JJSO:

> The Probation Officer shall assist the Juvenile Court by making a report on the child's character, educational, social and moral background.

The impact this report may have remains unclear. Courts must be sensitized to the importance of the report produced by the probation officer so that the law is administered in a better and informed way. A law with TDL features is not being applied (TAL) by legal actors to bring about its full potential.

[18]It is interesting to note that no law has yet developed about the report of a probation officer which he or she is bound to prepare and submit before a juvenile court (I have made this assertion on the basis of searching case law on section 9 of JJSO by using Pakistanlawsite. No case is reported there).

4.1 Probation

Section 11 of the JJSO is an impressive legislative intervention to provide a therapeutic track for dealing with a child before the Court. Although the probation law[19] was present since 1960, JJSO has now provided that a juvenile court, as a first option, must use its discretion, after convicting a child before it, to send him or her on probation (non-custodial sentence) for his or her well-being and good behaviour. This is also mandated in the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) (UNGA 1990). This is indeed an instance of TDL, as a brief study of the scheme of this law will show.

In section 11 of JJSO, the word 'may' has been used to provide juvenile courts a discretion to consider two options after convicting a child before it: either to send the child on probation or to order custodial care in a borstal institution. The first option is to send the child on probation, therefore if the court decides to use second option it is imperative for the court to justify its skipping of the probation option. The Supreme Court of Pakistan has observed: "The word 'may' involves a choice and the word 'shall' involves an order…. Such would be the customary usage of the terms when they appear in a statute…. Even an enabling word like 'may' would become mandatory, when the object was to effectuate a legal right." (*Muhammad Sadiq v University of Sindh* 1996). How the discretion is to be used by an authority is further explained by the Court in another case:

- Discretion must not be exercised to curtail the purpose of law and offend the statute, rather the discretion must be exercised to advance the cause of justice in a just, fair and reasonable manner;
- Failure to exercise discretionary power under the statute without any legal justification amounts to refusal to use such power in an arbitrary and capricious manner (*Abu Bakar Siddique v Collector of Customs*, Lahore, 2006).

Thus, in a narcotics substance case, the Lahore High Court has remarked that the "[c]ourt in narcotic case, if deemed it proper, could send accused on probation" (*Anti Narcotics Force v State* 2016). Giving preference to non-custodial sentences brings a therapeutic impact and meets the objectives of the law as well. Here, there is both TDL and TAL in action.

4.2 Court Controlled Probation

An interesting departure from the ordinary course of legal action was also made by the JJSO which introduced the concept of a court-controlled probation system. This approach is clearly in line with the literature on therapeutic jurisprudence. Professor Arie Freiberg (2017) from the University of Melbourne, has aptly remarked:

[19]The Probation of Offenders Ordinance, 1960.

> Problem-solving courts rely upon the active use of judicial authority to solve problems and to change the behaviour of litigants. Instead of passing off cases – to other judges, to probation departments, to community-based treatment programs – judges at problem-solving courts stay involved with each case throughout the post-adjudication process….

This is now the regime under JJSO in relation to probation. The judges of juvenile courts need to use this authority in a manner such that the purpose of the law is served the most. The court has even been granted a discretion to reduce the period of sentence if it is satisfied that further probation is not necessary (Munir Muhammad Amir 2005).

As a corollary to this discussion, it is also important to note that the *Code of Criminal Procedure 1898* has also given a role to trial court judges when the government must consider the release of a convict on the basis of good conduct in prison. Section 401(2) of CrPC provides:

> …may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

Thus, as early as 1898, a role for judges concerning the question of release of prisoners for good conduct was part of the law. When and how many times it has been used is not traceable due to a lack of empirical studies on this provision of law.

4.3 Death Penalty and Handcuffs

The JJSO bars trial courts from imposing the death penalty on children convicted of an offence having capital punishment. This provision is still a matter of controversy due to the concern that that this immunity may lead to a rise in the number of serious offences committed by persons below 18 years of age. However, so far, no empirical study is available to prove or disprove this assertion and more research is required to bring to bear empirical evidence and analysis.

With respect to the prohibition of handcuffs for children, magistrates are now much more conscious to keep an eye on police investigating officers for any such violation. Thus, some judicial officers have described their experience during training sessions at the Punjab Judicial Academy such that whenever they have found a child produced in court in handcuffs, they have made an order to remove them for the psychological benefit of the child. The author himself has made such orders in the past while a magistrate. That experience has shown that if a judge is aware of even a small therapeutic opportunity, its exploitation can have a positive impact not only on the accused, but also on other legal actors such as police so that they do not repeat the anti-therapeutic acts.

5 Legal and Judicial Education on TJ[20]

Professor Wexler from the University of Puerto Rico and the University of Arizona is a key exponent of therapeutic jurisprudence and its application. In 2005–06 the author started communicating with Professor Wexler through emails (Munir Muhammad Amir 2017) so as better to understand TJ concepts and their application to local laws in Pakistan, particularly to the JJSO. In wake of this connection, the author has written several articles and essays on TJ[21] and in this way, TJ literature in Pakistan began its journey. Thereafter, the author's father[22] and brother[23] have also developed a great interest in TJ and have written articles on this topic. The author's father has translated the baseline TJ article (TJ: An Overview) by Professor Wexler into the Urdu language (Mughal 2006).

It was an honour for the author when in 2015 Professor Wexler accepted a request to deliver presentations through Skype from Puerto Rico to Lahore at the Punjab Judicial Academy (PJA). These were joint presentations by Professor Wexler and the author (who was a senior instructor in the PJA at that time) on TJ and juvenile law. Almost 350 civil judges and judicial magistrates were trained on TJ in a series of lectures. The records of feedback at the PJA establish that the judicial officers found these lectures very informative and practical. Late last year, the Lahore High Court established child and gender-based violence courts in Lahore District. These courts must look at the humane side of law and should employ therapeutic jurisprudence principles while dealing with the cases where children and women are the victims or the defendants (accused).

6 Practicing TJ in Court

Over the last ten years or more, the author has been a TJ practitioner and has tried to apply TJ principles while on the bench as a magistrate. It has shown good results in several cases involving juveniles. In one of these cases, the child was charged with the offence of theft. Through a TJ dialogue and team decision making process, he was sent on probation for good conduct on his own behavioural terms agreed to by his father as guardian as well. The child completed his probation successfully and was released from probation even earlier than the initial period.

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[20] See Munir Muhammad Amir (2008).

[21] To read TJ literature in Pakistan, visit my SSRN page at http://ssrn.com/author=670902.

[22] Justice Dr. Munir Ahmad Mughal, a former judge of the Lahore High Court and a Member of the Council of Islamic Ideology. His research can be accessed online at http://ssrn.com/author=1697634. He can be contacted at justicemunir@gmail.com.

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Likewise, the author has also written in judicial orders about the use of language and its impact on litigants. Most important among these was a case relating to an intellectually challenged person. The pleadings and litigation used the word "lunatic" to describe said person. Taking guidance from the Lahore High Court Rules and Orders and TJ literature, the author held that the word 'lunatic' should not be used in a derogatory manner and against the fundamental right of human dignity (*Syed Walayat Shah v Qaisar Mahmood* 2015). A copy of the judgment was also sent to the Law and Justice Commission of Pakistan to consider legislative improvements where the word 'lunatic' occurs in different pieces of legislation.

7 Conclusion

This study has shown that the law relating to child offenders in Pakistan is fundamentally therapeutically designed. Many of its provisions are also being applied therapeutically but more legal and judicial education is required. Legal actors must be sensitized to TJ principles for administering the law in a responsive manner where welfare and well-being and rehabilitation in society are the prime objectives. There is much research, however, still required on the empirical side to analyse the TJ potential of JJSO and TAL with respect to the desired outcomes.

Acknowledgements The author wants to acknowledge guidance of Prof. Dr. David B Wexler and critical review by his Father Justice Dr. Munir Ahmad Mughal in writing this paper. For all the errors, omissions and assertions, the author is, however, solely responsible. The views reflected by the author do not reflect the official view of any of the institutions to which he represents. Thanks are also due to Professors Tania Sourdin (University of Newcastle, Australia) and Archie Zariski (University of Athabasca, Canada) for providing ample support in preparing and presenting at the LSA 2017 Conference through a generous financial grant by the National Science Foundation, USA.

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