



Death Row's Children

Pakistan's Unlawful Executions
of Juvenile Offenders

FEBRUARY 2017



The report is dedicated to the memory of **Aftab Bahadur** and all juveniles wrongfully executed on Pakistan's death row. You will not be forgotten and the fight for your justice will continue.

Table of Contents

EXECUTIVE SUMMARY	05
INTRODUCTION: A BROKEN CRIMINAL JUSTICE SYSTEM RESUMES EXECUTIONS	09
A PROHIBITION ON EXECUTIONS OF JUVENILE OFFENDERS UNDER INTERNATIONAL LAW	12
I Pakistan faces criticism from the United Nations	12
B JUVENILE JUSTICE SYSTEM IN PAKISTAN: A FLAWED LEGAL ORDER	16
I Juvenile Justice System Ordinance 2000: Overview	16
II Lack of Implementation of Juvenile Safeguards	16
C THE JUVENILE JUSTICE LEGAL FRAMEWORK IS NOT GIVEN RETROSPECTIVE FORCE	19
D JUDGING JUVENILITY: DETERMINATION OF AGE UNDER PAKISTAN'S JUVENILE JUSTICE SYSTEM	21
I Failure to Register Births leads to Reliance on Arbitrary Visual Age Assessments	21
II Adjudication of juvenility claims falls short of international law standards	25
a Lack of age determination protocols leads to conflicting judgments on the evidentiary value of different types of evidence	25
b Juvenility pleas are only entertained at the "correct" stage of proceedings	27
c Courts rely upon unreliable medical testing in age determination proceedings	29
E SAFEGUARDS FOR JUVENILES ARE NOT APPLIED TO TERRORISM TRIALS	31
CONCLUSION AND RECOMMENDATIONS	35

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Justice Project Pakistan (JPP)

Justice Project Pakistan (JPP) is a non-profit, human rights law firm based in Pakistan that provides pro-bono legal advice, representation and investigative services to the most vulnerable prisoners facing the harshest punishments.

JPP's clients include prisoners on death row, survivors of police torture, mentally ill and physically disabled prisoners and victims of the "war on terror."

JPP conducts strategic litigation to challenge unjust laws and to create progressive legal precedents. JPP's litigation aims to improve the rights of the mentally ill, restrict the application of the death penalty, bring Freedom of Information to Pakistan, and enforce the fundamental rights of prisoners. It also organizes conferences and trainings in its areas of expertise for judges and lawyers to build capacity within the legal community.

EXECUTIVE SUMMARY

Like 160 countries in the world, Pakistan has enacted legislation prohibiting the sentencing and imposition of the death penalty against juvenile offenders - persons who commit crimes before turning eighteen years of age. However, despite this prohibition, hundreds of suspected juvenile offenders have been sentenced to death. On 16 December 2014, the Government of Pakistan lifted a six-year de facto moratorium on the death penalty. Since then, at least 6 juvenile offenders have been executed despite credible evidence showing them to be underage at the time of the alleged crime.

This report documents the many ways that Pakistan's juvenile justice system fails its juvenile offenders and results in the Government of Pakistan's unlawful and arbitrary implementation of the death penalty against juvenile offenders. The violations highlighted in this report compel the conclusion that even though the Government of Pakistan has consistently maintained that no executions of juvenile offenders have taken place, the lack of implementation of protective safeguards and protocols particularly whilst conducting age determination investigations means that juvenile offenders continue to be executed.

PAKISTAN, JUVENILE JUSTICE AND INTERNATIONAL LAW

A THE EXECUTION OF JUVENILES IS PROHIBITED UNDER INTERNATIONAL LAW

The international community realizes that children are inherently different from adults and thus merit special considerations throughout the legal process, particularly during sentencing. Capital punishment fails to take into account the child's limited culpability and disallows opportunities for rehabilitation or redemption. Thus, the execution of offenders under the age of 18 years is squarely prohibited in international law by a number of multilateral treaties, such as the United Nations Convention on The Rights of the Child (CRC)², which Pakistan ratified in 1990, and the International Covenant on Civil and Political Rights (ICCPR), ratified by Pakistan in 2008.³

B PAKISTAN COMES UNDER INTERNATIONAL CRITICISM FOR EXECUTION OF POTENTIAL JUVENILE OFFENDERS

Pakistan's failure to protect juvenile offenders from the death penalty since the resumption of executions has drawn sharp criticisms from international actors. In May 2016, Pakistan's fulfilment of its obligations under the CRC was reviewed by the UN Committee on the Rights of the Child. In its Concluding Observations the committee noted that it *"is seriously alarmed by reports of the execution of several individuals for offences committed while they were under the age of 18 years, or where the age of the individual was contested following the lifting of the moratorium on*

¹Justice Project Pakistan & Reprieve, *Juvenile on Death Row*, (March 2015), http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/PAK/INT_CRC_NGO_PAK_21444_E.pdf

²UNCRC, Article 37 (A) states that "neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age"

³ICCPR Article 6(4) states that "sentences of death shall not be imposed for crimes committed by the persons below 18 years of age".

the death penalty in December 2014, despite numerous calls from the international community and the United Nations in this regard". However, despite facing continued censure from the international diplomatic community, the Government of Pakistan continues to sentence and execute juvenile offenders in violation of international legal standards.

THE JUVENILE JUSTICE SYSTEM IN PAKISTAN

The Juvenile Justice System Ordinance, 2000 (JJSO) is the primary law underlying the conduct of juvenile justice in Pakistan. The legislation delineates separate and strengthened safeguards for juveniles below the age of 18 involved in criminal litigation with an aim to rehabilitate and reintegrate them back into society. The most significant safeguard that the JJSO provides juveniles is its Section 12 which "[prohibits] the sentencing of juvenile offenders to death, or labour during their imprisonment".

A THE PROBLEMS OF IMPLEMENTING JJSO

However, since its enactment the JJSO has been marred by a lack of implementation and political will and successive governments have failed to fulfil its provisions. As a result, juvenile offenders are meted out the same treatment as hardened criminals.

A major problem in hampering the course of juvenile justice is the dismal lack of birth registrations in Pakistan. As a result, when juveniles are arrested they lack any documentation proving their age, thus children are kept in prison with adults until a plea of juvenility is raised at the trial stage. This issue is exacerbated by either the lack of awareness among the police about their duty under the JJSO to conduct age determination or the deliberate registration of juveniles as adults by the police in order to avoid the safeguards afforded to underage suspects in the JJSO.

Other failures in implementing the JJSO include: a) failure to provide children with competent legal assistance when they come in contact with the law, b) failure to establish separate courts for juveniles that protect their privacy and are attuned to their special needs, c) failure to establish separate and specialized detention centres for juveniles, and d) failure to set up a functional probationary and rehabilitative department.

B LACK OF RETROSPECTIVE FORCE

On a bare reading of the JJSO, a significant proportion of the population of juvenile prisoners fall outside the ambit of the protections accorded by the law- including protection from the death penalty as they were convicted and sentenced before its implementation. However, on 13 December 2001, the President of Pakistan, exercising his powers under Article 45 of the Constitution, issued a Notification that granted special remission to all the juveniles on death row, whose sentence had been confirmed by a High Court before 17 December 2013, and their punishment was commuted to life imprisonment. In 2004, the Lahore High Court confirmed the Presidential Order. It ruled that a juvenile under sentence of death, whose case had been decided before the promulgation of the JJSO is still entitled to the protection of the JJSO.

Despite these protections, many suspected juveniles sentenced to death prior to the Notification continue to be denied an inquiry into their claim of juvenility by provincial home departments and the courts. Courts frequently deny requests for age determination for juveniles sentenced prior to the enactment of the JJSO on the grounds that on account of all appeals having been exhausted the question of the age cannot be reopened or even worse, that a plea of juvenility may only be raised during the investigation or trial. Therefore, the accused persons are often caught in an impossible situation – the JJSO was not in existence at the start of their proceedings and they can no longer rely upon it as it is too late.

C JUDGING JUVENILITY: FLAWED DETERMINATION OF AGE

Pakistan has one of the lowest rates of birth registration in the world. There are nearly 10 million children below the age of 5 years that are currently unregistered with the figure growing by nearly 3 million every year. Pakistan's failure to fulfil the right to birth registration for its children means that the criminal justice system is marred by a high risk of wrongful arrests, detention and executions of child offenders.

Under Section 10 of the JJSO it is the responsibility of the arresting officer to determine whether the person who has been arrested is a child or an adult. However, the law posits no mandatory requirement for the police to investigate the age of the accused at the time of the arrest. Since recording the age of the accused remains the discretion of the police, they also often deliberately overlook it in order to retain custody of the accused and to deny them the protections accorded to them under the JJSO. When the police do write the age, they do it on the basis of a cursory visual assessment and in practice this means that the age of a juvenile is recorded as much higher than what it is in reality.

These visual assessments of the police are given the presumption of correctness by trial and appellate courts, and the burden of proof is placed on the suspect. Thus juveniles, especially those lacking in valid documents, find it virtually impossible to challenge the arbitrary assessments. An absence of comprehensive guidance on how and when to determine age of an accused person has marred a significant number of trials of juvenile offenders with confusion. Section 7 of the JJSO is the sole provision under Pakistani law dealing with determination of age inquiries, but it does not lay out any procedures or standardized protocols that need to be followed. Domestic jurisprudence is conflicted on evidentiary value of conflicting records, and an empirical analysis of judgments under Section 7 demonstrates that there is no apparent consistency of age determination procedure adopted by the courts; in practice they are free to choose any evidence that favours the verdict of their choice.

Moreover, the unwillingness of the superior judiciary to entertain inquiries into age during the appellate stages of a case or even after the appeals have been concluded has certainly led to the execution of a number of juveniles.

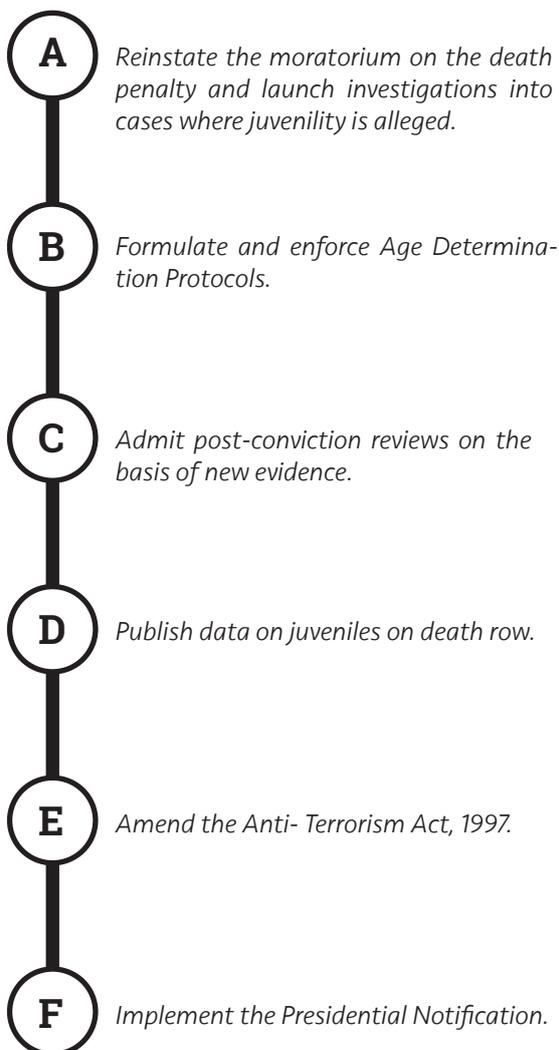
D SAFEGUARDS FOR JUVENILES ARE NOT APPLIED TO TERRORISM TRIALS

According to Section 14 of the JJSO, the law does not repeal other laws but applies “in addition” to them. Since the enactment of the JJSO, jurisprudence by superior courts has been unable to uniformly address the jurisdiction of juvenile courts over crimes for which special courts have been enacted, particularly terrorism. As a result, juveniles continue to be tried as adults by special courts whose procedures fail to comply with internationally agreed fair trial standards and are sentenced to death.

CONCLUSION AND RECOMMENDATIONS

The current juvenile justice system fails to meet international standards particularly in its consistent failure in identifying and extending protections to juvenile offenders and therefore, is unable to fulfil Pakistan’s international legal obligations to protect juvenile offenders from capital punishment.

These fundamental failing and international human rights obligations necessitate that the Government of Pakistan do the following:

- 
- A** *Reinstate the moratorium on the death penalty and launch investigations into cases where juvenility is alleged.*
 - B** *Formulate and enforce Age Determination Protocols.*
 - C** *Admit post-conviction reviews on the basis of new evidence.*
 - D** *Publish data on juveniles on death row.*
 - E** *Amend the Anti- Terrorism Act, 1997.*
 - F** *Implement the Presidential Notification.*

INTRODUCTION: A BROKEN CRIMINAL JUSTICE SYSTEM RESUMES EXECUTIONS

On 10 June 2015, Aftab Bahadur was executed. Arrested at the age of fifteen for the murder of a woman and her two children, Aftab protested his innocence to the very end. The only eye witness who testified against Aftab recanted his statement by claiming that he had been coerced by police to provide his damning testimony. In fact, he admitted, that Aftab had never been present at the scene of the crime. The Supreme Court of Pakistan, however, refused to consider the exculpatory evidence stating that a fresh appeal was untimely. Aftab Bahadur therefore, marched to the gallows at the age of 38 after having spent over 22 years on Pakistan's death row.

He was executed on 9 June 2015.

Like 160 countries in the world, Pakistan has enacted legislation prohibiting the sentencing and imposition of the death penalty against juvenile offenders - persons who commit crimes before turning eighteen years of age.⁴ The Government of Pakistan is, additionally, a party to both the United Nations International Covenant on Civil and Political Rights (ICCPR) and Convention on the Rights of the Child (CRC) which categorically prohibit all form of capital punishment for juvenile offenders. However, despite the explicit bar, cases of juvenile offenders such as Aftab Bahadur are far from the exception.

On 16 December 2014, the Government of Pakistan lifted a six-year de facto moratorium on the death penalty as a necessary measure to curb terrorism. At the time, official figures estimated the death row population at around 8000.⁵ With thousands of prisoners at risk, the Government of Pakistan executed over 420 prisoners between the periods December 2014 to December 2016 – out of which only 16 percent were convicted of crimes pertaining to terrorism.⁶ The figure is even more problematic considering that in as many as 88 percent of terrorism cases there was no link to a terrorist organisation or anything that can reasonably be defined as terrorism.⁷

As a result of a criminal justice system that violates international human rights standards at each stage of arrest, investigation, trial, sentencing and punishment the death penalty is disproportionately applied to the most vulnerable of Pakistan's population- the mentally ill, physically disabled and juvenile offenders.⁸ Since the moratorium was lifted, at least 6 juvenile offenders have been executed despite credible evidence in support of their juvenility. With an average of 6 executions per week, hundreds remain at risk of imminent execution.⁹

Pakistan's failure to protect juvenile offenders from the death penalty since the resumption of executions has

⁴Child Rights International Network (CRIN), *The Death Penalty Inhuman Sentencing of Children*, <https://www.crin.org/en/home/campaigns/inhuman-sentencing/problem/death-penalty> (visited January 16, 2017)

⁵There is currently no confirmed figure for Pakistan's death row population. In December 2014, the Ministry of Interior and the Ministry of Law and Justice stated claimed that 8,261 prisoners were on death row in Pakistan, see Zahid Gishkori, 8,261: Hanging in the Balance, EXPRESS TRIBUNE, December, 18, 2014, <http://tribune.com.pk/story/808727/6261-prisoners-hanging-in-the-balance/>

⁶Justice Project Pakistan[JPP], *Lifting the moratorium, Two Years on*, December, 18, 2016, [http://us3.campaign-archive1.com/?u=4d452280bc016abdd37a94bc6&id=a7b923b616&e=\[UNIQID\]](http://us3.campaign-archive1.com/?u=4d452280bc016abdd37a94bc6&id=a7b923b616&e=[UNIQID])

⁷Id.

⁸See Justice Project Pakistan & Allard K. Lowenstein International Human Rights Clinic, *A most Serious Crime: Pakistan's Unlawful Use of the Death Penalty*, 2-3, (2016) [hereinafter JPP-Lowenstein, *Death Penalty Report*]

⁹Id.

drawn sharp criticisms from international actors. In June 2015, four United Nations experts whilst urging the Government of Pakistan to halt the execution of juvenile offenders condemned the existence of “several hundred” juvenile offenders on death row as a violation of its international law obligations.¹¹ Similarly, in June 2016 the UN Committee on the Rights of the Child urged the Government of Pakistan to stay the executions of all juvenile offenders and reopen all cases where there was even the slightest indication of the minority of the accused at the time of the commission of the alleged offence.¹²

Pakistan enacted the Juvenile Justice System Ordinance (JJSO) in 2000 in order to bring its criminal justice system in conformity with its obligations under the United Nations Convention on the Rights of the Child. The law prohibits executions of juveniles and makes provisions separate courts, trials and detention centres from judges and lawyers. However, in the 17 years that have passed since the JJSO came into force, it remains virtually ignored in practice. Firstly, the law was enacted without retrospective force – thereby denying its protection to juvenile offenders sentenced to death prior to its enactment in 2000. A Presidential Notification granted a “special remission” for all juvenile offenders whose death sentences were confirmed prior to the JJSO on the basis of an inquiry into their juvenility. However, such inquiries were seldom conducted and when they were the investigation was replete with incompetence, inefficiency and violations of human rights standards.

Pakistan has also consistently failed to set up juvenile courts, borstal institutions and provisions for effective legal aid for juveniles as provided under the JJSO. In a context marred with low birth registration and a lack of sensitization of law enforcement and judiciary to juvenile delinquency, a significant number of juvenile offenders fall outside the few institutional safeguards actually implemented in practice. As a result, the juvenile justice system is rarely applied to those it is designed to protect, resulting in a significant number of death sentences being meted out to juvenile offenders. Once sentenced these juvenile offenders are denied effective recourse to appeals and post-conviction reliefs, even in the face of exonerating evidence. All of these aforementioned problems constitute violations of international law and taken together reveals a broken criminal justice system that fails to protect juvenile offenders from the most severe and irreversible form of punishment – the death penalty.

This report documents the many ways that Pakistan’s juvenile justice system fails its juvenile offenders and results in the Government of Pakistan’s unlawful and arbitrary implementation of the death penalty against juvenile offenders. The report analyzes individual cases of juvenile offenders, represented by the Justice Project Pakistan, who have been executed or those currently awaiting executions to highlight the many junctures at which violations occur starting from the arrest to the juvenile’s unlawful march to the gallows. The analysis from the individual cases is supplanted by interviews of key stakeholders working with the juvenile justice system in Pakistan, as activists, lawyers, prosecutors, academics, government officials and the judiciary.

The violations highlighted in this report compel the conclusion that even though the Government of Pakistan has consistently maintained that no executions of juvenile offenders have taken place, the lack of implementation of protective safeguards and protocols particularly whilst conducting age determination investigations means that

⁹ See Justice Project Pakistan & Allard K. Lowenstein International Human Rights Clinic, *A most Serious Crime: Pakistan’s Unlawful Use of the Death Penalty*, 2-3, (2016) [hereinafter JPP-Lowenstein, *Death Penalty Report*]

¹⁰ *Id.*

¹¹ U.N Office of the High Commissioner on Human Rights, *UN experts urge Pakistan not to execute juveniles* (Mar. 20, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15729&LangID=E>

The panel included Christof Heyns (the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions), Juan E. Mendez (UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), and Kirsten Sandberg (UN Chairperson on the UN Committee on the Rights of the Child).

¹² *Concluding Observations of the Comm. On the Rights of the Child: Pakistan*, para 24, U.N Doc. CRC/C/PAK/CO/5 (July 2016)

juvenile offenders continue to be executed. Pakistan's violations of international human rights law at each stage of its juvenile justice system have essentially created a situation where the country is unable to identify juvenile offenders and therefore, continues executions, unfettered, on the assumption that all those who come into contact with criminal justice system are adults.

The irreversible nature of the violations mandates that Pakistan reinstate a moratorium of its application on the death penalty and launch an independent investigation into all death row cases particularly those marked by allegations of juvenility. Additionally, in order to prevent future executions of juvenile offenders and to ensure that they are extended the requisite protections under international human rights standards requires a comprehensive reform of its juvenile justice system starting from the determination of age at the time of arrest to the grant of mercy prior to execution.

A PROHIBITION ON EXECUTIONS OF JUVENILE OFFENDERS UNDER INTERNATIONAL LAW

The execution of offenders under the age of 18 years is squarely prohibited in international law by a number of multi-lateral treaties. The prohibition is determined by the age of the offender at the time of committing the alleged crime and does not cease when the juvenile turns 18. The United Nations Convention on the Rights of the Child, which Pakistan ratified in 1990, dictates under Article 37 (a) that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age.” Additionally, the International Covenant on Civil and Political Rights (ICCPR) – ratified by Pakistan in 2008- under Article 6(4) states that “sentences of death shall not be imposed for crimes committed by the persons below 18 years of age.”

Intergovernmental bodies have also repeatedly called for the exclusion of child offenders from the death penalty on the basis that the use of the death penalty against child offenders is contrary to international law. Several of the relevant resolutions have been adopted without a vote, a sign of strong consensus among states that their provisions should be observed.¹³ For example, in 1984 the UN Economic and Social Council (ECOSOC) adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (“ECOSOC Safeguards”). Safeguard 3 of this instrument states: “Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death. . .” The ECOSOC Safeguards were endorsed by the UN General Assembly in resolution 39/118 of 14 December 1984, adopted without a vote.

The international community realises that for the purposes of criminal justice children are inherently different from adults and thus merit special considerations throughout the legal process, particularly during sentencing. The ICCPR accordingly provides that “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation and that the “accused juvenile persons will be separated from adults and brought as speedily as possible for adjudication.”¹⁴ Similarly the CRC reiterates these special protections mandating that every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so.¹⁵

Capital punishment – the most severe of punishments – fails to take into account the child’s limited culpability and disallows opportunities for rehabilitation or redemption. Therefore, international law categorically prohibits the sentencing of juvenile offender to death and their executions.

I PAKISTAN FACES CRITICISM FROM THE UNITED NATIONS

Since lifting the moratorium on the death penalty, the Government of Pakistan has faced consistent criticism from the international diplomatic community on account of its failure to respect international human rights obligations. On 20 March 2015, four UN human rights experts urged the Government of Pakistan to halt the execution of juvenile offender, Shafqat Hussain, noting that “several hundred” prisoners on Pakistan’s death row “may have been sentenced for crimes they committed as children.”¹⁶ The experts emphasized that “Shafqat’s confessions were obtained after he was reportedly tortured over a period of nine days by police officers after his arrest in 2004.”¹⁷ The UN experts reiterated their condemnation of the imminent execution of Shafqat Hussain in June 2015.¹⁸ The experts stressed that, “Under Pakistani law and articles 6 of the International Covenant on Civil and Political Rights and 37.1 the Convention on the Rights of the Child, the death sentence cannot be imposed on a defendant who was under 18 at the time of the crime”¹⁹

¹³ Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under International Law*, 3, July 2013.

¹⁴ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 10(2)(b) [hereinafter ICCPR]. In *Thomas v Jamaica, the detention of the defendant from the ages of 15 to 17 with adult prisoners violated article 10(2)(b) and (3)*. U.N. Doc. CCPR/C/49/D/321/1988 (1993).

¹⁵ United Nations Convention on the Rights of The Child [hereinafter CRC], U.N. Doc. A/RES/44/25, art 37 (c)

¹⁶ *Supra* note 8

¹⁷ *Id.*

¹⁸ U.N Office of the Commissioner on Human Rights, *Pakistan Must Immediately halt execution of Child Offender Shafqat Hussain- UN experts urge*, (5 June 2015). <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16046&LangID=E>

¹⁹ *Id.*

Shafqat, however, was executed in August 2015.

Additionally, in May 2016, Pakistan's fulfilment of its obligations under the United Nations Convention on the Rights of the Child was reviewed by the UN Committee on the Rights of the Child. In its Concluding Observations the committee noted that it "is seriously alarmed by reports of the execution of several individuals for offences committed while they were under the age of 18 years, or where the age of the individual was contested following the lifting of the moratorium on the death penalty in December 2014, despite numerous calls from the international community and the United Nations in this regard".²⁰ The Committee also expressed its concern regarding the large number of juvenile offenders on death row and that "these persons have limited access to procedures for challenging their sentences on the basis of their age."²¹ The Committee therefore recommended the government to order a stay in executions involving minors and launch a review of all cases where there is an indication that the accused was a juvenile with a view to rather release him/her or commute his/her sentences.²²

However, despite facing continued censure from the international diplomatic community, the Government of Pakistan continues to sentence and execute juvenile offenders in violation of international legal standards.

²⁰ *Supra* note 9

²¹ *Id.*

²² *Id.*

Committee on the Rights of the Child to Pakistan on its Fifth Periodic Report

JUNE 2016

Pakistan has been a signatory to the Convention of the Rights of the Child since 1990. Under the terms of the Treaty, Pakistan's progress towards compliance with convention rights is regularly monitored by a committee of concerned experts known as the Committee on the Rights of the Child (the Committee). Most recently the Committee outlined its current areas of concern and recommendations following a review of Pakistan's fifth periodic report conducted in June 2016. The following is a brief summary of the Committee's concluding observations in the field of criminal justice:

■ INADEQUATE LEGISLATIVE PROTECTIONS

- 01 There are legal inconsistencies concerning the definition of a child at federal, provincial and territorial levels and between secular and Sharia law. A uniform definition of a child as every individual below 18 years of age should be adopted, and all laws including the Zina and Hadood Ordinances should be amended to reflect this.
- 02 The low minimum age of criminal responsibility (10 years) should be increased to an internationally accepted level.

■ UNLAWFUL EXECUTIONS OF JUVENILE OFFENDERS

- 03 There are reports of the execution of several individuals for offences committed while under the age of 18 years or where age was contested, as well as a large number of persons currently on death row for crimes committed while under the age of 18 who have limited access to procedures for challenging their sentence on the basis of their age.
- 04 Pakistan must review all cases where there is any indication that a prisoner sentenced to death might be or have been a juvenile, with a view to either releasing the concerned prisoners or commuting their sentence to prison terms. This should also apply to cases where the crime was committed before the JJSO's entry into force.
- 05 Pakistan should provide data on the number of children, and the number of persons alleged to have committed a crime while under the age of 18 years on death row.

■ INADEQUATE BIRTH REGISTRATION

- 06 Pakistan has established an optional chip-based card system to encourage birth registration but only about 30 percent of children have been registered at birth (lowest rates are in Balochistan and FATA). Low awareness, complicated procedures and high fees as well as the lack of effective measures to ensure registration of children from marginalized and disadvantaged groups is a challenge. Pakistan should:

Promote timely birth registration, especially among marginalized and disadvantaged communities and educate the public about the consequences of non-registration

Remove all fees and simplify the procedures related to birth registration, including through the development of mobile registration units;

B JUVENILE JUSTICE SYSTEM IN PAKISTAN: A FLAWED LEGAL ORDER

I JUVENILE JUSTICE SYSTEM ORDINANCE 2000: OVERVIEW

The Juvenile Justice System Ordinance, 2000 (JJSO) is the most recent and primary law underlying the conduct of juvenile justice in Pakistan. The law was promulgated to “provide for the protection of children in criminal litigation, their rehabilitation in society, re-organization of Juvenile Courts.”²³ The legislation delineates separate and strengthened safeguards for juveniles below the age of 18 involved in criminal litigation with an aim to rehabilitate and reintegrate them back into society. The law provides the following key safeguards:

- Prohibition of the sentencing of juvenile offenders to death, or labour during their imprisonment (Section 12).
- Establishment of exclusive juvenile courts with exclusive jurisdiction to try cases involving juvenile offenders. (Section 4(3)).
- Prohibition of joint trial of a child together with an adult (Section 5).
- Protection of identity of the child from publication in any public medium including newspapers, magazine, journal.
- Right to legal assistance at the expense of the state for juvenile offenders. Such legal assistance must be provided by a legal practitioner with at least 5 years of standing at the Bar (Section 3).
- Obligation of the arresting officer to inform the guardian of the arrested child at the earliest possible opportunity following the arrest of the child and the details of the Juvenile Court before which the child will be produced (section 10(1)(a)).
- Possibility of being released on probation under the care of a guardian for a child convicted by a Juvenile Court (Section 11 (a)).

Since its enactment, the JJSO has been marred by a lack of implementation and political will. In 2004, a full Bench of the Lahore High Court declared the JJSO to be “unreasonable, unconstitutional and impracticable” and revoked it with immediate effect. The Court accepted the argument of the applicant wherein he stated that the JJSO was unconstitutional as it unduly protected minors.²⁴ In February, 2005 the Supreme Court admitted appeals filed by the Federal Government and the Society for the Protection of the Rights of the Child (SPARC) against the 2004 judgment and stayed it, pending a final decision on the case. The case has been pending since.²⁵ Therefore, the status of the legislation hangs in limbo and could potentially be revoked if the case is bought before the Supreme Court.

In its state report to the UN Human Rights Committee, the Government of Pakistan claims that the JJSO will soon be replaced by the Juvenile Justice System Bill, 2015 in “order to: harmonize the Juvenile Justice System in conformity with international standards.”²⁶ On 21 December 2016, the Bill was passed on to Law Review Committee of the Cabinet for further debate.²⁷

II LACK OF IMPLEMENTATION OF JUVENILE SAFEGUARDS

Almost 17 years following the promulgation of the JJSO, the Government of Pakistan has consistently failed to implement its provisions. Juvenile offenders are meted the same treatment as hardened criminals. Given the dismal rates of birth registration in the country, juvenile offenders who are arrested often lack any identification documents. Police officers in Pakistan also remain largely unaware of their duty to conduct an age determination

²³ *Juvenile Justice System Ordinance of 2000 (XXII of 2000) [hereinafter JJSO], preamble*

²⁴ See SC suspends LHC Judgment: Juvenile Justice Ordinance. DAWN (Feb 13, 2005), <http://www.dawn.com/news/402002>

²⁵ *Id.*

²⁶ U.N Human Rights Committee [hereinafter HRC], UN Human Rights Committee: Initial State Party Report: Pakistan, 39, November, 24, 2015, CCPR/C/PAK/1

²⁷ Khudayar Mohla, Cases through Diversion: Minister Deliberates upon Draft Juvenile Justice Bill 2016, BUSINESS RECORDER, December, 21, 2016,

<http://www.brecorder.com/general-news/172:pakistan/115493:cases-through-diversion--minister-deliberates-upon-draft-juvenile-justice-bill-2016?date=2016-12-21>

in the absence of such documents before the start of legal proceedings. As a result, children are kept in prison with adults until a plea of juvenility is raised at the trial stage. Juvenile offenders are subjected to heinous torture by police who coerce them into providing damning confessions that eventually form the basis of convictions and death sentences. A study by Justice Project Pakistan in collaboration with Yale Law School, Allard K Lowenstein International Human Rights Clinic discovered 58 cases of torture of juveniles out of a sample of 1,867 Medico-Legal Certificates (MLCs).²⁸

Pakistan has also failed to provide children with legal assistance when they come in contact with the law despite it being right guaranteed under the JJSO. Panels of lawyers constituted by the provincial governments to fulfil the right remain ineffective due to a lack of budgetary allocation resulting in negligible remuneration.²⁹ Based on UNICEF estimates, almost 89 percent of children charged with bailable offences are in prison primarily because of their inability to afford a lawyer.³⁰ Lack of legal aid also means that juveniles are also less likely to raise juvenility pleas during investigation and trial, and therefore, fall outside the ambit of the JJSO. As discussed in this report, courts are extremely unlikely to admit pleas of juvenility raised during appeals or post-conviction reviews. This results in countless juvenile offenders being sentenced to death and executed.

Despite the JJSO's explicit obligation to establish separate juvenile courts in all provinces, not a single juvenile court exists in the country.³¹ The Government attempts to get around this obligation by notifying regular District and Sessions Judges, Additional District and Sessions Judges, Senior Civil Judges and Judicial Magistrates as special juvenile courts. Therefore, regular judges are empowered to act as juvenile judges alongside discharging their regular duties. However, judges notified as "Juvenile Judges" are hardly ever provided with additionally training to sensitize them on how to deal with juvenile offender in a manner consistent with human rights standards. Additionally, the designated courts do not abide by most safeguards provided under the JJSO – courts remain open to the public and cases for juveniles are heard alongside those for adults.³² Furthermore, juvenile judges are often overburdened resulting in a slow judicial processes which lead to juveniles being detained for even longer than adults.

In spite of the provisions of the JJSO, no specialised detention facilities or borstal institutions have been established in Khyber-Pakhtunkhwa and Balochistan. Punjab, the country's most densely populated province, has only two borstal institutions whereas Sindh currently has four.³³ Borstal institutions in both Punjab and Sindh operate in sub-par conditions and are run by prison administration of the two provinces who are untrained to handle juveniles in detention.



"There is a huge gap between the text of JJSO and the way it is practiced because judges and police are not trained on it in their academies. Like any tool, it is useless if no one knows how to use it"

- Valerie Khan

²⁸ Justice Project Pakistan & Allard K. Lowenstein International Human Rights Clinic, *Abuse of Juveniles By The Faisalabad Police*, 2-3, (June 2014) Available at https://www.law.yale.edu/system/files/documents/pdf/JPP_Abuse_of_Juveniles_Follow_Up_Report_053014.pdf

²⁹ Society of the Protection of the Rights of Children (SPARC), *Juvenile Justice* http://www.sparcpk.org/2015/sopc2014/JJ_Final.pdf

³⁰ Pakistan: Child Advocacy Groups Press for Reform of Justice System. IRIN News. Web. 2014.

<http://www.irinnews.org/www.irinnews.org/report/26010/pakistan-child-advocacy-groups-press-for-reform-of-justice-system>

³¹ *Supra* note 26

³² Interview with Iftikhar Mubarak, *Plan International*. Date: 25.11.2016

³³ International Crisis Group, *Reforming Pakistan's Prison System*, 18, (October 2011)

³⁴ *Supra* note 29

AFTAB BAHADUR

Age at time of conviction: 15

Years on death row: 23

Status: Executed on 10 June 2015

A victim of tainted evidence obtained through torture and witness intimidation

In 1992, Aftab Bahadur, a 15-year-old plumber's apprentice, and his co-worker Ghulam Mustafa were arrested and charged with the murder of a woman and her two sons. The deceased were the wife and children of a local businessman, who hailed from an influential family.

The case was tried under the now defunct and much maligned Speedy Trials Act of 1991, under which the police was required to submit the results of their investigation within 14 days to the Special Court, which in turn, had a maximum of a month to conclude the trial. This gave the defendants little time to prepare their case while simultaneously encouraging the police to falsify evidence and pin the blame on a vulnerable defendant.

Aftab, a poor teenager from a minority Christian community, proved to be that easy target. Aftab was arrested on the basis of the eye-witness testimony of Fateh Muhammad, an elderly servant at the household who was allegedly found unconscious in a park near the house on the night of the murders. The Speedy Court relied extensively on Fateh's testimony to convict and sentence Aftab to death.

However, later on Fateh came clean and retracted his statement to Aftab's lawyers. He professed that he was tortured by the police and coerced by his employer to place Aftab and Ghulam at the scene, while in truth Fateh had not witnessed the crime.

Aftab's co-accused Ghulam was also tortured into implicating Aftab, but he too later on retracted his statement. Furthermore, Aftab's fingerprints were claimed to have been found at the scene of the crime but, during the trial, Aftab recounted how the police took him to the scene of the crime and brutalized him until he put his oil-doused hand on a cupboard.

According to Aftab's government issued documents, his date of birth was in 1977. But despite being 15 years old at the time, the police recorded his age as 21. Aftab and his counsel did not realize age to be a mitigating factor and failed to raise this issue during the proceedings.

Aftab spent the next 23 years, his entire adulthood, behind bars in a state of being "between life and death." By all accounts he was a model prisoner and a painter who honed his artistry in jail.

Despite his extremely strong case for innocence and juvenility which involved the only witnesses retracting their statements, Aftab was executed in 2015 after his mercy petition was rejected.

C THE JUVENILE JUSTICE LEGAL FRAMEWORK IS NOT GIVEN RETROSPECTIVE FORCE

The JJSO was not expressly enacted retroactively. Therefore, juvenile offenders sentenced to death before 2001 were left with no recourse to the protection from the death penalty. However, the President of Pakistan issued Notification No. F.8/41/2001-Ptns dated 13.12.2001 (Notification) in exercise of his powers under Article 45 of the Constitution of Pakistan 1973. As per this notification, special remission under Article 45 is to be granted to all juveniles sentenced to death whose sentences were confirmed by the High Court before 17 December 2001, and their death sentence is to be commuted to life imprisonment. The relevant part of the Presidential Notification reads as under:

"The death sentence of those condemned prisoners who were juvenile as defined in the Juvenile Justice System Ordinance, 2000 at the time of commission of offence stands converted to life imprisonment provided that the death sentence has been awarded under Tazir and not Qisas or under other Hudood Laws."

Under the Notification, the special remission on the death sentence to life imprisonment was to accrue on the basis of an inquiry to determine age by an executive committee constituted specifically for this purpose. The executive committee was to include "an expert, Home Secretary, I.G Prisons and Superintendent of the Jail where the condemned prisoner is housed".

However, the operation of this notification subsequently became the subject of proceedings before the Supreme Court in case titled **Ziaullah vs. Najebullah** [PLD 2003 SC 656]. The Court held that:

"The President of Pakistan has allowed special remission... to the juvenile offenders who were below 18 years at the time of commission of the offence to claim the benefit... [and we] hold that the Committee constituted by the Home Secretary, Government of Punjab for purpose of determining age of an accused... has no lawful authority to do so... the matters can be referred to concerned Sessions Judge, who also exercises powers of Juvenile Court."

The Supreme Court opined that questions relating to the determination of age in terms of Section 7 of the JJSO "can only be determined by a judicial forum for it is a question of fact which can be settled judiciously for the purpose of treated the accused to be a juvenile offender" and that such an exercise of judicial function cannot be exercised by an executive committee.

On 18 August 2003, the Government of Punjab issued a letter to the Registrar of the Lahore High Court setting out the eligibility criterion for the special remission for juveniles under the Presidential Notification.³⁵ The letter stated that all juvenile offenders were entitled to remission if their death sentences were confirmed by the High Court before 17 December 2001. The letter confirmed that such remission was to accrue automatically without the need for the submission of a mercy petition under Article 45 of the Constitution. Attached with a letter was a list of juveniles with regards to whom the responsibility was placed on the Home Department to forward their claims to "the concerned District and Sessions Judge/Juvenile Court through the concerned Superintendent Jail." The letter additionally directed the Superintendent of all jails to intimate the condemned prisoners claiming special remission under the Notification to approach the respective Courts and vested them with the responsibility of informing the Home Department of the outcome of the court.

³⁵ Government of the Punjab, Home Department, Grant of Special Remission Under Article 45 of the Constitution to Condemned Prisoners, (Aug 19,2003)

In 2004, the Lahore High Court confirmed the Presidential Order. It ruled that a juvenile under sentence of death, whose case had been decided before the promulgation of the JJSO is still entitled to the protection of the JJSO. It asserted the retrospective effect of the JJSO in all cases, even those where the death sentences had been confirmed by the superior courts. The judgment related to the case of Sikander Hayat and Jamshed Ali who were both under 18 at the time of the alleged murder and whose death warrants had been issued. The District and Sessions judge in Jhelum, where the juveniles had originally been tried, had refused to commute the death sentences, as the Supreme Court had confirmed them.

Despite the existence of the Notification and the letter by the Government of Punjab, juveniles sentenced prior to the enactment of the JJSO continue to be denied its protections. Requests by prisoners and/or family members for an inquiry regarding their juvenility under the Presidential Notification continue to be denied by the provincial Home Departments and the Courts. This includes requests made by those prisoners whose names were included in the list in the letter from the Home Department, Government of Punjab dated 18 August 2003. An analysis of case studies reveals that there is simply a lack of awareness regarding the effect of the Notification amongst the provincial home departments and the Sessions Judges who are responsible for its implementation. Sessions Judges invariably refuse to overturn decisions of the Appellate Courts despite the existence of credible evidence in support of juvenility.

Courts frequently deny requests for age determination for juveniles sentenced prior to the enactment of the JJSO on the grounds that on account of all appeals having been exhausted the question of the age cannot be reopened or even worse, that a plea of juvenility may only be raised during the investigation or trial. Therefore, the accused persons are often caught in an impossible situation – the JJSO was not in existence at the start of their proceedings and they can no longer rely upon it as it is too late.

Muhammad Anwar was sentenced to death in 1998 for a crime allegedly committed when he was just 17 years old. Following the 2001 special remission, his family submitted an application to the Home Department requesting that he be granted the special remission on the basis of his age. Although an age determination inquiry was initiated by the Home Department – which gathered contemporaneous birth records showing Anwar to have been a juvenile at the time of the offence – this inquiry was never completed due to the decision in Ziaullah set out above. Since then, Anwar's family have tried every possible means to request an age determination from the Sessions Court, submitting no fewer than four applications. In over a decade and a half, however, no forum has ever taken a final decision on this issue. In December 2014 Anwar came within hours of execution and he remains at serious risk of receiving another execution warrant.

Muhammad Azam was another juvenile offender who was arrested in 1998 for murder and convicted and sentenced to death by an Anti-Terrorism Court vide judgment dated 8 July 1999 - prior to the promulgation of the JJSO. Copies of his birth records, jail records, including a copy of the birth roll all confirm that he was 17 when he was first admitted into custody. Jail records also demonstrate that Azam was initially held in Youthful Offenders Industrial School Karachi – a borstal institution specially designed for juvenile offenders. Following the 2001 Notification the jail authorities, on 9 August 2004, sent a request to the trial Court asking the Court to make a determination of Muhammad Azam's age to ascertain whether his sentence should be commuted. The request was however rejected by the court on the basis that no plea of majority was raised during the course of the trial and on the basis that the trial court was already functus officio following the conclusion of the appeals.

³⁶ <http://www.dawn.com/news/350914/islamabad-no-death-sentence-for-juveniles-lhc>

D JUDGING JUVENILITY: DETERMINATION OF AGE UNDER PAKISTAN'S JUVENILE JUSTICE SYSTEM

I FAILURE TO REGISTER BIRTHS LEADS TO RELIANCE ON ARBITRARY VISUAL AGE ASSESSMENTS

Pakistan has one of the lowest rates of birth registration in the world. There are nearly 10 million children below the age of 5 years that are currently unregistered with the figure growing by nearly 3 million every year.³⁷ Article 7 of the CRC specifies that every child has the right to be registered at birth without any discrimination. Apart from being the primary and first legal acknowledgement of a child's existence, birth registration is central to ensuring that children are not treated as adults when they are brought into contact with the criminal justice system as accused parties. The Government of Pakistan's failure to fulfil the right to birth registration for its children means that the criminal justice system is marred by a high risk of wrongful arrests, detention and executions of child offenders.

The responsibility of birth registration falls within the jurisdiction of the National Database and Registration Authority (NADRA) established in 2000. The current administrative framework requires that new-borns be registered within the shortest time possible after birth. However, based on official figures, only 34 percent of children under the age of 5 have been registered.³⁸ Rates of registration also vary drastically between the different provinces with 74 percent children in ICT, 46 percent in Punjab, 25 percent in Sindh, 23 percent in Gilgit-Baltistan, 10 percent in Khyber-Pakhtunkhwa and less than 8 percent in Balochistan being registered.³⁹ Birth registration is also linked to economic status with only 5 percent registration for children in the lowest wealth quintile.⁴⁰ Furthermore, only 32 percent of the population in Pakistan has a birth certificate whereas 46 percent of the population has no form of registration.⁴¹ As a result, upon arrest a significant proportion of the juvenile population possesses no form of evidence to prove their juvenility and is likely tried and sentenced as adult offenders. Based on registration figures, juvenile offenders belonging to impoverished socio-economic backgrounds are more likely to be victims of wrongful arrests.

Under Section 10 of the JJSO it is the responsibility of the arresting officer to determine whether the person who has been arrested is a child or an adult. However, the law posits no mandatory requirement for the police to investigate the age of the accused at the time of the arrest and even the First Information Report (FIR)⁴² does not contain a column to record the age of the accused.⁴³ A lack of sensitization to juvenile justice safeguards, often leads to police failing to investigate the age of the accused persons in their custody. Since recording the age of the accused remains the discretion of the police, they also often deliberately overlook it in order to retain custody of the accused and to deny them the protections accorded to them under the JJSO. Interviews with civil society actors reveal that even when police are trained in juvenile justice safeguards they refuse to abide by them owing to a bias against juvenile offenders. It is common belief amongst police officers that despite the existing legal framework juvenile offender should not be given special treatment within the criminal justice system.⁴⁴

In cases where the police choose to record the age of the accused, it is predominantly based on a cursory visual assessment. The low rate of birth registration combined with an absence of protocols prescribing the method of determination of age leads to the police to record ages of accused persons based on their observation of their

³⁷UNICEF, *Progress Report 2013-2015: Results for Children in Pakistan: Birth Registration*, 7-8, (July 2015), https://www.unicef.org/pakistan/Birthregistration_LR.pdf

³⁸National Institute of Population Studies (NIPS), *Pakistan: Demographic and Health Survey: 2012-2013*, 19-22, (December 2013)

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²FIR is a written document prepared by police on receiving information regarding the commission of a cognisable offence.

⁴³Interview with Mr. Atif Adnan Khan, Legal Aid at SAHIL. Date: 25. 11.2016

⁴⁴Interview with Iftikhar Mubarak, Date: 26.11.2016

physical appearance in a high number of cases. In practice, police are inclined to record the age of the accused as much higher than it appears. Based on JPP's experience dealing with cases of juvenile offenders, in cases where the appearance of the accused leaves little doubt of his juvenility the police invariably record his/her age as "16/17" whereas where an accused's physical appearance does not make his/her juvenility obvious the police records it as "22/23." 45



"The police station is the first step where most of the problems of age determination start. To save themselves from complexities, they do not write proper ages."

- Tayyaba Javed, Project Director, Sanjog

According to jail authorities, the medical examination conducted when an accused person enters a jail is also based primarily on visual observation. Similarly, even the age of the prisoner recorded in their statement before the court under S. 342 of the Code of Criminal Procedure is also based on an assessment of his/her physical appearance. Even though the prisoner formally signs these statements, they are usually unaware of their contents on account of a majority being illiterate. The problematic nature of relying upon the age of the accused under S. 342 was highlighted recently by the Supreme Court of Pakistan in Muhammad Raheel v. State (PLD 2015 SC 145) in the following words: "Recording of an accused's person's age under S. 342 Cr. PC. is invariably based upon a cursory visual assessment which can substantially be off the mark, as proverbially, appearances can be deceptive" 46

Despite the Supreme Court's ruling, trial and appellate courts continue to attach presumptions of correctness on visual assessments by police of age.⁴⁷ This becomes particularly problematic as courts inevitably put the burden of proof upon the juvenile offenders who are not extended any benefit of doubt.⁴⁸ As a result, juvenile offenders, particularly those lacking documentary evidence of age, are in a virtually impossible position to challenge the falsified and/or arbitrary assessments. Even in instances where juvenile offenders are in possession of official documentary record supporting their juvenility, such record is dismissed in favour of arbitrary visual assessments by police.⁴⁹ Reliance upon arbitrary age assessments is in violation of Pakistan's international human rights obligations under the Convention on the Rights of the Child. The United Nations Committee on the Rights of the Child (CRC Committee) has made clear in its General Comment No. 10 that in the absence of proof of age "the child is entitled to a reliable medical or social investigation that may establish his/her age." 50 In its List of Issues (LOI) issued to the Government of Pakistan during the review of the fifth periodic state report, the CRC Committee accordingly asked:

"Please explain to what extent visual assessments of a child's age by the police or other law enforcement officials in the process of issuing an arrest or jail certificate complies with a child's entitlement to a reliable medical or social investigation into his or her age." 51

The Government of Pakistan in its reply to the LOI failed to furnish any adequate response.

⁴⁵See Case Study of Ansar Iqbal on pg X

⁴⁶Para 7

⁴⁷"...the age of the appellant was recorded as 21 years in the statement under Section 342 Cr.P.C, which is part of the judicial record, and presumption of correctness is attached to it unless rebutted. Both the documents mentioned above [i.e. Form-B and School Leaving Certificate] are not reliable to rebut the age recorded in the statement under Section 342 Cr.P.C." (para 8) Niaz Muhammad v. Umar Ali (2009 PCr.LJ91)[Peshawar]

⁴⁸"Claim of Juvenility was based upon an assertion of fact and the onus to prove such fact was upon the accused person and if he failed to establish such fact through positive evidence then no advantage could be taken by him on such score and no benefit of any doubt regarding his age could be extended to him" (para 7) Muhammad Raheel v. The State (PLD 2015 Supreme Court 145)

⁴⁹Supra note 40

⁵⁰Comm. On Rights of the Child, General Comment No. 10, para 39, U.N. Doc CRC/C/GC/10 (2007)

⁵¹Comm. On Rights of the Child. List of Issues in relation to the fifth periodic report of Pakistan, para 25, CRC/C/PAK/Q/5 (2015)

Report of the Secretary General on the Question on the Death Penalty (A/HRC/33/20)

Submitted to the Human Rights Council (33rd Session)

12 JULY 2016

"Methods and procedures in some States result in the judgment of juveniles as adults and, subsequently, the subjection of juveniles to the death penalty. In Pakistan, trial courts are obliged to determine the defendant's age. Courts, however, reportedly often fail to undertake that assessment and place the burden of proof of age upon the defendant, despite a significant number of citizens possessing no official documentation with which to prove their age. During the reporting period, cases were reported where proof was presented but disregarded by the court in favour of visual assessments conducted by the police or unverified documentation supplied by the claimant, or where evidence was dismissed due to it being raised at the "incorrect" stage of proceedings." (para 53)

“

"Most children who are arrested are poor or illiterate and thus unaware of their rights under the JJSO. As a result, they do not know the importance of recording their age."

- Atif Adnan Khan, Sahil

ANSAR IQBAL

Age at time of conviction: 14

Years on death row: 29

Status: Executed on 29 September 2015

Sentenced to death on the basis of police's visual assessment of his age

Ansar Iqbal was 14 years old when he was arrested along with co-accused Ghulam Shabbir for the alleged murder of his neighbour in 1994. Both Ansar and Ghulam claimed to be under the age of 18 at the time of occurrence (on 9 June 1994) and at the time of the trial that commenced two years later. During his trial, Ansar's lawyer produced both a School Leaving Certificate and a certified copy of the government birth record, Form-B in support of his juvenility. In his statement under S. 342, Ansar recorded his age as 17 years and 6 months at the time of recording the statement on 23 July 1996 – which is also consistent with the documentary evidence produced. However, the trial court dismissed the School Leaving Certificate and the Form B (on the ground that it was a duplicate document that bore discrepancies). Ghulam Shabbir similarly maintained his juvenility at trial and offered his Form-B National Registration document in support. However, the trial court dismissed this document as well, on the grounds that it appeared fake.

Having dismissed all documentary evidence in support of Ghulam and Ansar's juvenility, the trial Court chose to rely upon the police's assessment that Ansar appeared to be "22/23" years of age and sentenced him to death. Similarly, despite dismissing Ghulam's juvenility, the trial court spared him the sentence of death on the grounds that the police had recorded his age as "16/17 years." The Court noted:

"As far as Ghulam Shabbir is concerned, according to the police papers he is stated to be 16/17 years old and according to the injunction of Islam the punishment of Qisas is not applicable to him therefore I convict him u/s 302-C PPC and he is sentenced to undergo imprisonment for 20 years."

Following this, Ansar raised his juvenility on appeal to the Lahore High Court, which dismissed the claim on the same grounds as the trial Court – that no witnesses had been produced to prove the authenticity of the records and so they could not be relied upon.

The Lahore High Court reiterated the difference in treatment between Ansar and Ghulam's juvenility claims, however, and partly allowed Ghulam's appeal on account of his juvenility. His sentence was altered from Section 302(c) PPC to Section 308 PPC and his sentence was reduced from life imprisonment to 14 years. Similarly, the Supreme Court of Pakistan rejected Ansar's appeal vide its judgment dated 19 May 2009.

On 21 February 2015, Ansar Iqbal was finally issued a government issued birth certificate by the National Database and Registration Authority (NADRA) which gave him the same date of birth as provided on the Form-B national registration form produced at trial. The document was submitted to the Supreme Court of Pakistan and a review of his sentence of his execution was requested. The Supreme Court, however, termed the review as time barred and refused to consider it. Ansar Iqbal was executed on 29 September 2015.

II ADJUDICATION OF JUVENILITY CLAIMS FALLS SHORT OF INTERNATIONAL LAW STANDARDS

An absence of comprehensive guidance on how and when to determine age of an accused person has marred a significant number of trials of juvenile offenders with confusion and arbitrariness. There is no prescribed process under either the Pakistan Penal Code (PPC) or the Code of Criminal Procedure (CrPC) to determine the age of a prisoner at the time of arrest and during the trial. Section 7 of the JJSO is the sole provision under Pakistani law dealing with determination of age inquiries. It simply states: "If a question arises as to whether a person before it is a child for the purposes of this Ordinance, the juvenile court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child." This section clearly does not contain sufficient detail to ensure that determinations of age are conducted in accordance with international standards, including those set out in General Observation 6 of the Committee on the Rights of the Child, which states that the assessment on the age of a child "must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, s/he should be treated as such."⁵²

Condemning the failure of the current juvenile justice framework in identifying juvenile offenders and protecting them from executions the CRC Committee, in its Concluding Observations to Pakistan's fifth periodic state report, recommended that the Government of Pakistan "establish effective age determination mechanisms in order to ensure that in cases where there is no proof of age, the child is entitled to a proper investigation to establish his or her age and, in the case of conflicting or inconclusive evidence, has the right to the rule of the benefit of the doubt."⁵³

a LACK OF AGE DETERMINATION PROTOCOLS LEADS TO CONFLICTING JUDGMENTS ON THE EVIDENTIARY VALUE OF DIFFERENT TYPES OF EVIDENCE

Contrary to international legal jurisprudence, the burden of proof is posited on the accused person in age determination proceedings under Section 7, JJSO who is also not accorded any benefit of doubt. The Supreme Court of Pakistan in Muhammad Raheel v. State unequivocally stated that "claim of juvenility was based upon an assertion of fact and the onus to prove such fact was upon the accused person and if he failed to establish such fact through positive evidence then no advantage could be taken by him on such score and no benefit of any doubt regarding his age can be extended to him."⁵⁴ As discussed above, given the low rate of birth registration such a burden is virtually impossible to dispel in majority of the cases. Even where government registration documents are present, they are often disbelieved by the courts at both trial and appellate levels.⁵⁵ In the absence of any protocols governing the determination of age by courts and no benefit of doubt being accorded to the accused the eventual outcome is that the court invariably relies upon the evidence that disputed the juvenility plea of the accused regardless of its nature.⁵⁶ Domestic jurisprudence is conflicted on evidentiary value of conflicting records, and an empirical analysis of judgements under Section 7 demonstrates that there is no apparent consistency of age determination procedure adopted by the courts; in practice they are free to choose any evidence that favours the verdict of their choice.

Justice Project Pakistan has analyzed around 140 reported cases, since the beginning of the operation of the JJSO in 2000 to 2016, wherein a plea of juvenility under Section 7 of the JJSO had been raised by an accused person.

⁵²UN Committee on the Rights of the Child, General comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin (1 September 2005)(CRC/GC/2005/6), para 31 <<http://www.refworld.org/docid/42dd174b4.html>> accessed on 4 March 2016

⁵³Supra note 9, para 25

⁵⁴PLD 2015 Supreme Court 145

⁵⁵Supra note

⁵⁶Supra note 43

The analysis looked at the way four different types of evidence (statement under S. 342, medical evidence, birth certificate/Form-B and school leaving certificate) had been considered across these cases, noting where judges had placed reliance on each, and where they had rejected each:

- 7 of the cases analyzed included a decision on whether a defendant's statement under Section 342 of the Code of Criminal Procedure 1898 (i.e. the defendant's statement at trial) should be relied on as primary evidence of age. In two cases the statement was refused while in five it was accepted. The Section 342 statement is the statement made by the accused at trial. Often, accused persons will not expressly mention their age if they are not aware that it may have relevance to criminal proceedings, and the age may be inaccurately recorded, or may not even be recorded at all. Based on JPP's experience, during the trial, the court officer often just copies the police records regarding the age into the statement without questioning the accused and/or giving him a chance to rebut.
- 49 of the cases analyzed included a decision on whether a medical board report should be relied on over and above documentary forms of evidence. In 12 of these cases, the opinion of the board was rejected in favour of the documentary evidence, but in 37, it was accepted despite contradictory documentary evidence. Overreliance on medical tests can be dangerous, however, and experts in the field have made it clear that there is no "silver bullet" method that will give government and agencies an 'objective' and 'scientific' answer as to the precise chronological age of an individual.⁵⁷ As explained later in the report, results of medical tests such as ossification tests of the kind used in Pakistan are not reliable when used on persons with ethnic backgrounds from Asia, Africa, and Middle East.
- 44 of the cases analyzed included a decision on whether the defendant's birth certificate should be relied on. In 28 cases the certificate was not accepted, while in 16 cases it was. Where birth certificates are not relied on, it is usually because the courts believe that such certificates are false or fabricated, despite the fact that these are government-issued documents. In the Supreme Court case of *Ali Hasan alias Jamshed v the State* it was held that so far as the National Database and Registration Authority's record is concerned, there is no objection that the entry made therein may not be conclusive proof of the age of petitioner.⁵⁸ If even government-issued identity documents can be ignored by the courts in determining juvenility, then the defendant is placed in an impossible position if they are to be required to prove their age.
- 36 of the cases analyzed included a decision on whether the defendant's school leaving certificate should be relied on. In 23 cases it was not accepted, while in 13 cases it was. As with birth certificates, courts frequently refuse to rely on these documents on the basis that they may be fabricated, despite the fact that these are government issued documents.

In addition to analysing the cases in which different types of evidence were relied upon, JPP also analysed the cases to determine whether or not the courts of Pakistan recognised the principle that where there was doubt as to the age of the accused this should be interpreted in favour of the accused. In 8 of the cases, the court considered whether the burden of proof should be on the defendant to prove juvenility, or whether the JJSO should be interpreted liberally. In 5 of these cases, the court held that the law should be interpreted liberally. In three others, they held that the burden of proof should be placed squarely on the defendant. In practice, however, the lower courts most frequently require the defendant to prove the issue of juvenility, a burden which is difficult to dispel.

This lack of consistency and clarity has already resulted in the execution of a number of people who were under 18 at the time of their alleged offence and has also resulted in lengthy custodial sentences and other punishments being imposed on juvenile offenders in violation of domestic and international law.

⁵⁷Aynsley-Green, T.J. Cole, H. Crawley, N. Lessof, L.R. Boagi and R.M.M Wallace, *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, *British Medical Bulletin* (2012).

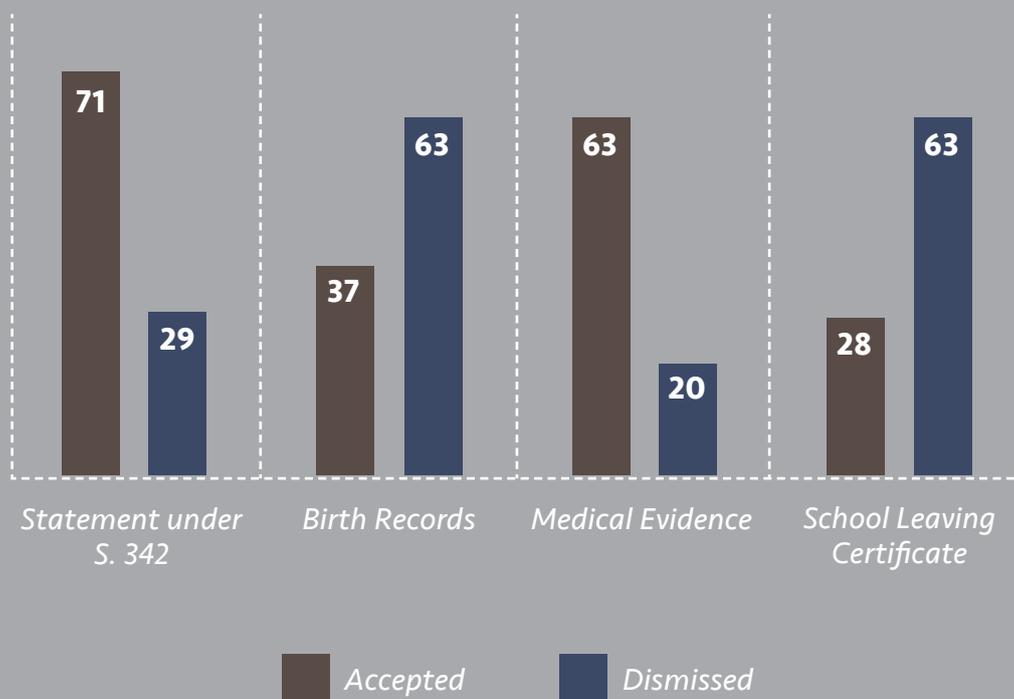
⁵⁸*Ali Hasan alias Jamshed v. The State* (2012 SCMR 242)

Consideration of Evidence by Courts in Determination of Age Proceedings

TOTAL CASES: 184

PERIOD: 2000 – 2016

TYPE OF EVIDENCE	ACCEPTED	DISMISSED	TOTAL
Statement under S. 342 Criminal Penal Code	05	02	07
Birth Records	16	28	44
Medical Evidence	37	12	59
School Leaving Certificate	13	23	36



b JUVENILITY PLEAS ARE ONLY ENTERTAINED AT THE "CORRECT" STAGE OF PROCEEDINGS

The Government of Pakistan in its replies to the list of issues outlined by the CRC Committee to the fifth periodic report claimed that **"the information such as 'age' can be presented or corrected at different stages i.e., i) initial statement at the time of arrest, ii) arrest certificate (huliya form), iii) first version of statements recorded under Section 161 of Cr.PC, iv) initial entry in police diary (zimni), v) recording of statements under Section 164 of Cr.PC, vi) recording of evidence, vii) statements of accused person under Sections 340 and 342 of Cr. P.C., viii) appeal to High Court, ix) reference/appeal/revision petitions at Supreme Court of Pakistan."**

Contrary to the Government's claim, courts have ruled in several cases that a plea of juvenility is only admissible if it is raised at the time of investigation and trial and that a delayed claim "must be visited with an adverse inference against [the accused]." ⁵⁹ As a result, courts in Pakistan refuse to admit evidence of juvenility if raised at the appellate stages or during post-conviction reviews.

The Supreme Court of Pakistan in *Muhammad Raheel v. The State* stated that "accused had never claimed at any stage of the trial that he was a child, he had never agitated before the High Court that he was a juvenile, and he had led no evidence before any court regarding his date of birth. Any belated attempt made by the appellant in this regard before the Supreme Court may not be met with approval or acceptance." In the *Muhammad Aslam v. The State* (PLD 2009 SC 777), the Supreme Court similarly opined that "such a plea must be taken by the accused at the earlier possible opportunity preferably during the course of investigation so that the requisite evidence about the age of accused could also be properly collected during the said exercise of collection of evidence and any delayed claim on the said account should be met by adverse inferences." ⁶⁰

The unwillingness of the superior judiciary to entertain inquiries into age during the appellate stages of a case or even after the appeals have been concluded has certainly led to the execution of a number of juveniles.

Faisal Mahmood was initially sentenced to life imprisonment for a crime committed when he was just 17 years old. His trial was conducted prior to the introduction of the JJSO and no specific mention of his age was mentioned in the trial judgment. Following an appeal to the High Court by the victim's family, however, Mr Mahmood's sentence was increased to death. At an appeal before the Supreme Court, Mr Mahmood's counsel, supported by the Deputy Prosecutor General, argued that since Mr Mahmood was seventeen at the time of the trial, his sentence should not be increased. The Supreme Court did not challenge the fact that he was seventeen at the time of his arrest but stated that since his "minority" had not been raised at the original trial he should not receive the benefit of the JJSO.

Furthermore, the Constitution of Pakistan under Article 187 grants the Supreme Court of Pakistan "the power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or in any matter before it." In its Initial Report to the Human Rights Committee regarding its compliance with the International Covenant on Civil and Political Rights (ICCPR) report, submitted on 19 October 2015, the Government of Pakistan stated that under Pakistan's Constitution a conviction could be reversed on the basis of information which surfaces after conviction. The relevant paragraph of the report reads: **Information which surfaces after conviction may be placed before a court under Articles 199 and 187 of the Constitution, and coupled with the courts inherent power to recall an order passed mistakenly, a conviction may be reversed. [emphasis added]** ⁶¹

This problem is further compounded by the extremely short notice period permitted between the issuance of a

⁵⁹*Muhammad Raheel v. The State* (PLD 2015 SC 145); *Baber Shahzad v. The State* (2007 YLR 2151) [Lahore]

⁶⁰Para 11

⁶¹*Supra* note 23, para.136

warrant and the date of execution. While this period varies between the provinces and regions, it is consistently extremely short. In Punjab, prior to the lifting of the moratorium, the time between the issuance of a black warrant and the execution of a convict was between 14 to 21 days. However, ten days after the moratorium was lifted, an amendment was introduced in the High Court Rules and Orders as a result of which the time between the issuance of the warrant and the execution of the convict was decreased to a minimum of three days and a maximum of eight days. This unreasonably short timeframe places severe limits on the possibilities for resolving cases in which evidence of juvenility only arises post-conviction.



"In our engagement with the public, we have observed that people generally do not consider juvenile offenders to be children. Unfortunately, most of our judges are simple reflections of this societal attitude."

- Iftikhar Mubarak, - Activist, Plan International

c COURTS RELY UPON UNRELIABLE MEDICAL TESTING IN AGE DETERMINATION PROCEEDINGS

On account of the distrust accorded by the judiciary to government records in age determination proceedings, courts commonly rely upon medical tests as determinative proof of age. Section 7 of the JJSO requires that in the event that a plea of juvenility is raised "the juvenile court shall record a finding after such an inquiry which shall include a medical report." The most commonly used form of medical tests in Pakistan for the determination of age is an ossification test where the age is determined on the basis of using x-rays of bone density, conducted by a medical board comprising of three or more doctors established by the court for this purpose.

Determination of age through medical tests such as the ossification tests does not offer conclusive proof of age. Problems with "testing" age through "medical" procedures have been thoroughly explored by doctors in the context of immigration controls in Europe:

First, imaging of bones or teeth can never indicate precisely the chronological age of the individual. Images can only provide an estimate compared with images from control subjects, and within the very substantial range of normal development during adolescence. Methods such as ossification testing were not designed to assess disputed chronological age—they were prepared for medical use in diagnosing and monitoring disorders of growth.

Second, the assessment of age should be undertaken through a comparative assessment of the image of the individual against standards of normality for the population from which the person originates. Such standards are simply not available for children and young people from many countries in Asia, Africa or the Middle East, and it is unsatisfactory to assess their images from the standards derived from Caucasian, European or North American children.

Third, although superficially easy to do, radiography demands expert interpretation by experienced paediatricians, dentists or radiologists.

⁶²Shafqat Hussain Versus President of Pakistan and others' Civil Petition No.1127 of 2015

⁶³Lahore High Court, Lahore Notification No. 402/Legis/H-D-4(HD). 24.12.2014

⁶⁴Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control, Aynsley-Green, T.J. Cole, H. Crawley, N. Lessof, L.R.

⁶⁵Boagi and R.M.M Wallace, *Br Med Bull* (2012) 102 (1): 17-42.

The United Nations Committee on the Rights of the Child in its Concluding Observations has on multiple occasions cited the need for official systems of age verification focusing on objective evidence such as birth and school records rather than on relying on medical testing for age assessment.⁶⁵

Similarly, the United Nations High Commissioner for Refugees: Guidelines on Protection and Care Preface that set out standards for the improved protection and care of refugee children draw caution to using “scientific procedures such as dental or bone X rays” by emphasizing that these methods can only estimate age and must therefore allow for margins of error. They suggest that when the age is uncertain, the child should be given the benefit of doubt.⁶⁶ The Separated Children in Europe Programme (SCEP) has also developed detailed recommendation for the practice of age assessment based on the UNHCR guidelines and the jurisprudence of the UN Committee on the Rights of the Child. In these recommendations the SCEP recommends that age assessment procedures including the dental and bone X rays must be carried as “a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual’s age.” The Recommendations also note that “that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure.”⁶⁷

Comparative jurisdictions such as India have similarly denounced placing too much reliance upon medical jurisprudence whilst determining the age of an individual. In the case of **Ram Deo Chauhan v. State of Assam**⁶⁸ the Supreme Court of India stated that “too much of reliance cannot be placed upon text books, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform.” Similarly in **Jaya Mala v. Home Secretary, Government of J & K**⁶⁹ the Supreme Court of India similarly opined the age ascertained by medical examination is not a conclusive proof of age and merely the opinion of the doctor. The Court additionally stated that “the margin of error in age ascertained by radiological examination is two years on each side”.

As a result of the abovementioned limitations, there is emerging jurisprudence by Courts in Pakistan that medical evidence in support of age must be approached with caution. In **Muhammad Shebaz v. The State** (2010 YLR 1812), the Lahore High Court stated that unrebutted documentary evidence could not be rebutted by the opinion made by medical board because in the ossification test the medical board always gives a tentative opinion.

However, despite diverging jurisprudence, courts in Pakistan continue to accept age assessments as an outcome of ossification tests as conclusive evidence of age determination proceedings – often in the face of credible documentary record. As mentioned above, JPP has discovered that since the enactment of the JJSO, courts have accepted medical evidence in 37 out of a total of 59 cases in which it was raised- often over unrebutted documentary record. For example, in **Ahmed Sher v. The State**⁷⁰, the Court ruled that a “bare perusal of the section [section 7] would show that the provisions of having a medical report is mandatory in nature”. In the case, the trial court had declared the accused as a juvenile on the basis of his School Leaving Certificate. In a revision of the order of the trial court the High Court remitted the order back stating that “it was obligatory for the trial Court to have a medical report to determine the age of the accused” despite the unrebutted School Leaving Certificate. Similarly, in **Muhammad Afzal v. The State** (2003 YLR 1983) the Lahore High Court set aside the Sessions of the High Court declaring the accused as a juvenile on the basis of a School record and opinion of the police. The Court opined that it was mandatory for the Court to set up a medical board to determine the age of the accused under the JJSO.

⁶⁵ Concluding Observations: Nepal 2005 and Concluding Observations: Bangladesh 2006 in Cipriani, 2009:135)

⁶⁶ UN High Commissioner for Refugees (UNHCR). Refugee Children: Guidelines on Protection and Care, 1994, https://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf

⁶⁷ Save the Children, UNHCR & UNICEF (2009) Separated Children in Europe Programme:

Statement of Good Practice, 4th Revised Edition, Save the Children, Denmark, https://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf

⁶⁸ AIR 2001 SC 2331

⁶⁹ 2006 PCRLJ 1450

⁷⁰ AIR 1982 SC 1297

E SAFEGUARDS FOR JUVENILES ARE NOT APPLIED TO TERRORISM TRIALS

According to Section 14 of the JJSO, the law does not repeal other laws but applies “in addition” to them.⁷¹ However, the ordinance also provides juvenile courts “exclusive jurisdictions to try cases in which a child is accused of commission of any offence.”⁷² Since the enactment of the JJSO, jurisprudence by superior courts has been unable to uniformly address the jurisdiction of juvenile courts over crimes for which special courts have been enacted, particularly terrorism. As a result, juveniles continue to be tried as adults by special courts whose procedures fail to comply with internationally agreed fair trial standards and are sentenced to death.

The Anti-Terrorism Act(ATA) was enacted in 1997 and provides for the establishment of anti-terrorism courts to try persons charged with terrorist act, and stipulates special procedures for the conduct of trials that fall within its ambit. The definition of “terrorist acts” under the ATA includes crimes such as rape and extortion to “strike terror or create of sense of fear and insecurity in the people or any section of the people.”⁷³

Under Section 32, the ATA is granted overriding effect over all laws currently in force. Upon reading Section 32 of the ATA in juxtaposition with Section 14 of the JJSO, courts often interpret the provisions of the ATA as meaning that for terrorism offences under the ATA the Anti-Terrorism Courts possess exclusive jurisdictions even for juvenile offenders. In the case of **Asadullah v the State**⁷⁴, the Sindh High Court recognised that the ATA held that “Section 14 of the JJSO strengthened the view that the court constituted under the ATA had jurisdiction over the scheduled offence, irrespective of any limit of age or any other class of offenders.” It was held that no indemnity or concession from the mandatory death sentence was to be provided to the juvenile offender. In the case of **Qamar Hussain Shah v. The State**⁷⁵ the court held that a juvenile charged under the ATA would be charged by the Anti Terrorism Courts (ATC) and not by the juvenile courts. The Full Bench of the Sindh High Court ruled that the ATC would not be bound by the rules of procedures required for juvenile courts. However, substantive protection not inconsistent with the ATA under the JJSO will be accorded by such courts while trying children.

⁷¹ JJSO, Section 14

⁷² JJSO, Section 4(3)

⁷³ Anti Terrorism Act, 1997 (Act No. XXVII of 1997)[hereinafter ATA], Section 1(b)

⁷⁴ 2011 PCRLJ 1022

⁷⁵ PLD 2006 Karachi 331

MOINUDDIN AND AZAM

Age at time of conviction: 17

Years on death row: 17

Status: Case Pending in Supreme Court

Tried as terrorists without juvenile safeguards

Azam (aka Abdur Rehman) and Moinuddin were arrested in 1998 and convicted in 1999 for murder and armed robbery. According to the accused, they went to a house to collect an unpaid debt but the homeowner refused to pay, resulting in a fight. Moinuddin had a pistol on his person, and in the scuffle the owner of the house was killed.

The investigating officer filed the case under the Anti-Terrorist Act (ATA), which meant the duo would face a harsher punishment and be tried without judicial safeguards. Confessions were extracted from the accused by severe torture, and the brutality of torture was such that Azam admitted to be someone else in order to stop the police from inflicting pain. Fabricated evidence and confessions obtained through torture ultimately led to death sentences being handed out to the two.

At the time of their arrest, both Azam and Moinuddin were 17 years of age. Though their conviction predates the implementation of the Juvenile Justice System Ordinance, the retrospective scope of JJSO means that both the accused should be barred from being executed. Indeed, there was an initial recognition of their adolescence as Azam, despite being tried as an adult was kept in a juvenile facility until he was awarded the death penalty. In 2004, the jail authorities had lodged an appeal to have both the prisoners' sentences reduced because of their ages but the appeal was rejected. Despite assurances from jail officials and a government doctor that both Azam and Moinuddin were 17 at the time of the crime, the court refused to take it into consideration. This is because the JJSO is not a supreme law, and as the ATA has no minimum limit on death penalty, the JJSO is not applied in "terrorism" cases.

Moreover, a compromise was reached between the complainant and Azam and Moinuddin and a pardon was granted. However, the ATA does not acknowledge compromises, therefore, their death sentences were upheld. Azam and Moinuddin have spent the past 17 years in jail. Despite having no links to any terrorist groups or evidence of having committed a terrorist act, they were tried under the anti-terror laws.

A black warrant was issued for their execution in 2015 but a stay of execution was obtained. Their case is currently pending in the Supreme Court.

Trials conducted by anti-terrorism courts entail expedited investigations and proceedings that must each be completed within 7 days. Combined with the mandatory period for completion of investigation the ATA suspends critical procedural safeguards leading to a heightened risk of torture. Section 21-H of the ATA permits the admission of confessions made before a police officer above the rank of a District Superintendent of Police as evidence against the accused persons. This essentially provides police with a license to torture suspects into providing incriminating confessions. Juveniles are most likely to be abused on account of their vulnerable position.

Similarly, the prescribed period for the completion of the trial is too short to provide defendants the right to prepare an adequate defence as provided under Article 14(3) of the International Covenant on Civil and Political Rights. Additionally, while the JJSO prohibits the death penalty for juvenile offenders, the ATA makes the death penalty mandatory for persons found to have committed a terrorist act resulting in one or more deaths.⁷⁶

Muhammad Amin was 17 when he was arrested in 1998 for allegedly killing a man during a botched burglary. He was convicted for murder and given two death sentences by a Special Anti-Terrorism Court. Amin claimed that he was subjected to severe torture to confess to the shootings. Muhammad's age was raised on appeal, however documentary evidence of juvenility was deemed to "be of no avail so belatedly" and a medical assessment conducted after Muhammad had reached adulthood was relied upon instead. The Supreme Court also upheld his conviction and sentence on 19 March 2002. In 2004 he was pardoned for the murder conviction on behalf of the family of the victim. However, since Section 21-F of the ATA bars the remission of any sentence unless granted by the Government, Muhammad was executed on 21 March 2015 after spending over 17 years on death row.

“

“Police tortured me to try and make me confess. I was hung by my hands, beaten repeatedly with batons, punched, slapped and kicked. They held a gun to my head and said they would kill me if I did not confess. I was 17 years old at the time.”

Muhammad Amin

Juvenile offender executed on 31 March 2015

⁷⁶ ATA, Section 7

MUHAMMAD SARFARAZ

Age at time of conviction: 17

Years on death row: 22

Status: Executed on 10 May 2016

Juvenile offender executed after 22 years on death row

Muhammad Sarfaraz was arrested in 1993 at the age of 17 years and 3 months. During the course of his trial the Juvenile Justice System Ordinance had not been promulgated and thus the matter of his juvenility was not raised at the trial stage. Sarfaraz was convicted and sentenced to death on 21.01.1998.

Following the passage of the JJSO in 2001, the President issued a notification granting special remission to juveniles sentenced to death prior to the JJSO. In 2008, the Punjab Home Secretary wrote a letter to the Superintendent of Sarfaraz's jail about holding a juvenility inquiry for Sarfaraz, which was subsequently referred to the Sessions Court, Rawalpindi. During the inquiry, the file was misplaced by a member of the court staff and the juvenility inquiry was never conducted. The staff member was only reprimanded for this in 2012 when the senior most judge (Sessions Judge) of the Sessions Court wrote to the Additional Session Judge inquiring about the juvenility proceedings, but the Court erroneously concluded that it was no longer competent to conduct the inquiry. This decision was sent to the Punjab Home Department, as a consequence of which Sarfaraz's mercy petition was dismissed.

On 7 July 2015, the High Court upon learning that the Session's Court had misplaced the file directed it to "reconstruct it and "conclude the requisite inquiry" within 30 days. During the course of the inquiry the Session's Court dismissed the juvenility claim on the basis of conflicting documentary evidence in the form of a school record. Interestingly Sarfaraz's family maintains that he never enrolled in school.

On 6 October 2015, Sarfaraz's legal team challenged this inquiry before the Lahore High Court, Rawalpindi. However, on 9 March 2016, after 13 hearings before the Lahore High Court in which the case was transferred back and forth from the single bench to the division bench, on account of a failure to decide the correct forum, the High Court dismissed this challenge, and, thereafter a further warrant for Sarfaraz's execution was issued on 16 March 2016.

Efforts by Sarfaraz's lawyers to appeal this dismissal of his juvenility claim to the Supreme Court of Pakistan were deliberately frustrated by the jail authorities in Rawalpindi through obstructing their access to a necessary power of attorney from Sarfaraz; a requirement for proceedings before the Supreme Court. Sarfaraz's Supreme Court appeal was subsequently rejected and he was executed after spending 22 years behind bars. Despite the strong case for his juvenility, which included government issued certificates, he was executed on 10 May 2016. Sarfaraz's case speaks clearly about the failure of Pakistan's juvenile justice system to accord the benefit of doubt to juvenile offenders as required under international law, particularly at the stage of age determination. Had Sarfaraz's right to the benefit of doubt been respected he would have met a different outcome.

CONCLUSION AND RECOMMENDATIONS

The foregoing demonstrates that despite its insistence at international fora that no executions of juveniles have taken place in the country, the Government of Pakistan continues to violate its international commitments on account of its failure to recognize structural problems inherent under the current juvenile justice legal framework. Unless fundamental problems including birth registration, age determination procedures and lack of overriding effect of juvenile law are not addressed the current juvenile justice system will keep falling short of international standards particularly through consistently failing in identifying and extending protections to juvenile offenders and therefore executing them.

These fundamental failing and international human rights obligations necessitate that the Government of Pakistan do the following:

A REINSTATE THE MORATORIUM ON THE DEATH PENALTY AND LAUNCH INVESTIGATIONS INTO CASES WHERE JUVENILITY IS ALLEGED

The Government of Pakistan should reinstate the moratorium on the death penalty and cease issuance of any more death warrants. Once the moratorium is in place, prisoners on death row should be given the opportunity to file complaints to the National Commission on Human Rights and provincial human rights bodies including the Sindh Commission on Human Rights, alleging juvenility at the time of the commission of their alleged offences. The National Commission on Human Rights and provincial bodies should thereafter undertake a prima facie examination of the evidence provided. Cases where it is deemed that sufficient evidence has been provided in favour of juvenility should be forwarded to the Sessions Court for age determination proceedings under S. 7 of the JJSO. Sessions Court should ensure that the proceedings conform to age determination protocols (described below) and the National Commission on Human Rights should be joined as party to such proceedings. If as an outcome of such proceedings it is determined that the prisoner was a juvenile offender, then he/she should be granted automatic remission without the need to file another mercy petition.

B FORMULATE AND ENFORCE AGE DETERMINATION PROTOCOLS

Age determination protocols should be formulated and instituted at the level of arrest, trial, appeal and post- conviction review to dictate the procedure for recording of age at each stage of the proceedings. These protocols should be notified by the Ministry of Human Rights in cooperation with the national and provincial police and judicial academies and incorporated into High Court and Supreme Court Rules. These protocols should:

- a** Ensure that upon arrest police officers do not record a suspect's age unless the age recorded is based on identity documents and is confirmed by the accused. If no such documents are available, if the age in the documents is disputed by the suspect, or if there is any reason to doubt the age of the accused police must record this in writing and request a full age determination assessment can be conducted by a competent juvenile judge.

- b** Specify that the first stage of any age determination process must be a perusal of all official documentation relating to the accused's age and identity. Where documentation has been issued which corroborates the accused person's own account of their age at the time of the commission of an alleged offence, a strong presumption of correctness should attach to this documentation.
- c** Clarify that in cases where there doubt remains following the perusal of government issued documents, or where there is conflict between government issued documents, a full psycho-social investigation involving examination of relevant witnesses must be conducted. Relevant witnesses should be taken to include, inter alia, the accused, his family, anyone present at the time of his birth such as doctors or midwives, teachers, and other members of his local community.
- d** Clearly set out the fact that medical evidence relating to the age of the accused person is often inconclusive and cannot be relied upon over and above documentary evidence or a full psycho-social investigation.
- e** Ensure that where, following an age determination process which incorporates the steps set out above, any reasonable doubt remains as to the age of the accused, such doubt must be resolved in favour of the accused person and the court must determine that the person should be treated as a juvenile in conflict with the law.
- f** Ensure that an age determination assessment is conducted at whatever stage of proceedings the issue of juvenility is raised, even after the exhaustion of ordinary appellate proceedings. In any case where prima facie evidence of juvenility is presented a full judicial inquiry must immediately be conducted in accordance with these protocols. If, following such an inquiry, the court determines that the accused is entitled to be treated as a juvenile in conflict with the law, then a death sentence, if previously awarded, must be converted to life imprisonment. Where appropriate, a re-trial may be ordered and such trial should be conducted in accordance with the provisions of the juvenile justice system.

C ADMIT POST-CONVICTION REVIEWS ON THE BASIS OF NEW EVIDENCE

Whilst the Government of Pakistan has alleged in its initial reports under the ICCPR, that the Superior Courts hold the power to admit post-conviction reviews on the basis of exonerating evidence regarding innocence or juvenility, the Courts have repeatedly refused to reopen these proceedings on account of their being out of time. The Government of Pakistan needs to ensure that an institutional remedy – executive or judicial – available for accused persons in whose cases new evidence that could serve as a basis to mitigate his sentence is discovered.

D PUBLISH DATA ON JUVENILES ON DEATH ROW

The Government of Pakistan should collect and make publically available the total number of death row prisoners who were sentenced for crimes they alleged to have committed when they were below the age of 18 years. This number should also include prisoners who raised a plea of juvenility that was subsequently rejected.

E AMEND THE ANTI-TERRORISM ACT, 1997

Whilst the Government of Pakistan has alleged in its initial reports under the ICCPR, that the Superior Courts hold the power to admit post-conviction reviews on the basis of exonerating evidence regarding innocence or juvenility, the Courts have repeatedly refused to reopen these proceedings on account of their being out of time. The Government of Pakistan needs to ensure that an institutional remedy – executive or judicial – available for accused persons in whose cases new evidence that could serve as a basis to mitigate his sentence is discovered.

F IMPLEMENTATION OF THE PRESIDENTIAL NOTIFICATION

The Government of Pakistan should ensure that the Presidential Notification No. F.8/41/2001-Ptns dated 13 December 2001 is given full effect. As under the Notification, the provincial home departments should ensure that requests for juvenility inquiries for all juveniles sentenced prior to the enactment of the JJSO are forwarded to respective courts. The Courts should undertake such inquiries in accordance with age determination procedures that comply with international standards outline above. Sentences of those adjudged to be juvenile offenders should be commuted automatically without the need to resubmit a mercy petition under Article 45 of the Constitution of Pakistan.



Painting by Aftab Bahadur - Juvenile Offender Executed in 2015