



The status of restorative justice in Pakistani legal system: An analysis of Pakistani laws with special reference to certain case studies

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Abstract

Restorative Justice has been the much needed aspect of almost every nation to be included in the main stream legal system. Most of the developed countries have incorporated it in to its statutes and similarly feeling the need Pakistan has also strived hard to bring in the Restorative Justice System. Taking to the customary history, traces are found in the form of arbitration and mediation groups known as the Jirga and Panchayet system in the many areas of Pakistan and evidentially in the subcontinent. Pakistan has manifested certain laws and rules to ensure immediate justice to victims of a crime and to restore offenders to the society especially the juvenile offenders and to bring sustainable peace and harmony.

Keywords: pakistan, restorative justice, legal system, juvenile, jirga, case study

Introduction

Restorative justice system as mentioned in the beginning of the thesis strives to settle disputes more efficiently and within no time as the aggrieved parties are brought in to sphere and mentality that ultimate goal of the dispute is reparation and the disputes needs to be settled in a healthy and peaceful environment and the case applies to the sphere of criminal and civil disputes of Pakistan. Hundreds of thousands of cases are pending before courts and the pile is increasing day by day. A system was needed to make efficient and easy settlement of disputes of almost all nature so the initiative was taken in 2008 by the KPK Police alongside by Justice Peace International and Asia Foundation in the major regions of Peshawar and Abbottabad to settle disputes outside courts ^[1].

This was the first of its nature from the social perspective however a lot is done before and after that in legislation. This chapter will bring into light the status of Pakistani Laws standing for standing for Restorative Justice and will try to critically argue in comparison to other laws of different countries mentioned previously.

2. The probation and parole system

The word “probation” is derived from the latin word “probatus” meaning “tested” or “proved”.. In other words release of an offender from detention, subject to a period of good behavior under supervision. According to law dictionary] “The act of proving; evidence; proof. Also trial; test; the time of novitiate. Used In the latter sense the monastic orders. In modern criminal administration, allowing a person convicted of some minor offense (particularly juvenile offenders) to go at large, under a

suspension of sentence, during good behavior, and generally under the supervision or guardianship of a “probation officer” ^[2]. The word ‘Parole’ comes from the French word “je donne ma parole” meaning ‘I give my word’, while the dictionary definition is ‘word of honour’. You’ll most frequently hear it in relation to prisoners, who promise to fulfill certain conditions in return for an early release from jail. When the authority i trying to decide whether a prisoner is ready for parole, they have a parole hearing. Parole can also mean “password.” It is “conditional release of a person from prison prior to the end of the maximum sentence imposed”

In other words “Early release of a prisoner who is then subject to continued monitoring as well as compliance with certain terms and conditions for a specified period.” Parole is an integral part of the correctional process. It is a kind of consideration granted to the prisoners to help them to come back into the mainstream of life. It is nothing but an instrument of social rehabilitation of the prisoner. In recent times, however, the concept has seen a wide shift with parole been utilized by the rich and influential class to escape the prison sentence ^[3].

Correctional services like Probation and Parole is also important in the administration of Criminal Justice and in the method of mainstreaming criminals as it is an integral part of the total structure of the punishment system in a contemporary legal world. It also serves as an alternative to imprisonment especially of short-term and has now taken within its purview all the offences except those punishable with death or imprisonment for life. Probation and parole is granted to a prisoner under certain special circumstances and under some prevailing laws. It is

¹<https://www.dawn.com/news/937464>, October 16, 2008 edition last assessed on September 06, 2019.

²https://pljlawsite.com/2016art2.htm#_ftnref13 last assessed on September 06, 2019

³ibid.

subjected to certain limitations and conditions imposed by the releasing authority.

The underlying idea behind the concept of probation and parole is the realization by the society that the man behind the bars is still the member of his family and society, that he has the same human wants, urges, duties and obligations. The rehabilitative purpose of sentencing would be promoted by permitting him to fulfill those basic human needs and social duties by occasionally permitting him to live for short periods in his home as well as in the community where he has his roots. There are certain recognized circumstances under which parole is usually granted. If a member of the prisoner's family dies or become seriously ill, or the marriage of his son or daughter is to be celebrated, the authority used to release the prisoner. In certain cases the prisoners are temporarily released on parole to enable them to carry on agricultural operations. The release on parole for whatever reason shall, however, be subject to the discretion of authorities.

3 The probations of offenders ordinance 1960

One of the systems, which played a very important role in the rehabilitation and reformation of offender, was probation system^[4]. Probation of Offenders Ordinance, 1960 was promulgated under which benefit of probation had been made available to the offenders. Said Ordinance was enacted to provide for the release of offenders on probation or admonition and for matters connected therewith. Reformation and rehabilitation were the keynote of Probation of Offenders Ordinance, 1960 and its object was to prevent turning of offenders into criminals by their association with hardened criminals within the walls of the prisons. Probation of Offenders Ordinance, 1960 empowered the Court to release on probation an offender found guilty of having committed an offence not punishable with death or imprisonment for life or for the description mentioned in Ss.4 & 5 of said Ordinance.

Sole intention of S.4 of Probation of Offenders Ordinance, 1960 was that accused should be given a chance of reformation without even subjecting him to probation system. Reformation and rehabilitation of offender would be incomplete unless he could live a life free from stigma and stigmatization was bound to occur to offender once a Court convicted him and chances of survival through earning, were jeopardized largely. Section 11 of Probation of Offenders Ordinance, 1960, would give effect to rehabilitative concern by removing disqualification attached to conviction of an offender who had been released under S.4 or S.5 of the Ordinance^{[5], [6]}.

The concepts of punishment were to reform an offender so that after serving out sentence he should become a beneficial member of the society. Present state of affairs in the jails was such where a person once entered into it, then instead of coming out as a reformed person, he would come out as a hardened criminal. Basic and main idea of punishment was reformation, which apparently was not available in the jails. Keeping in view basic principle of punishment, Legislature had enacted Probation of Offenders Ordinance, 1960, with a view that instead of sentencing offenders at once after proving them guilty, they

should be sent on probation keeping in view the offence and its punishment and for that purpose S.5 of Probation of Offenders Ordinance, 1960 had provided certain categories of offences for which a convict could not be sent on probation and for offence which carried punishment of imprisonment for life or death.

In view of present conditions of jail where offenders instead of reforming them self comes out as hardened criminals. Even otherwise sending accused on probation would help in reforming accused, because if accused were sent to jail, then they would be mixed up with hardened criminals and their future might be damaged. If accused were sent on probation then society would be benefited as accused during period of probation would not commit any similar offence or other offence and society, in circumstances would feel safe at the hands of accused.

4. Juvenile justice system ordinance, 2000

In July 2000, Juvenile Justice System Ordinance, 2000, was promulgated to provide for protection to children involved in criminal litigation and their rehabilitation in the society. Juvenile Justice System Ordinance, 2000 had to be given a liberal interpretation to achieve its objects and to create conditions and environment so that children below the age of "18" years involved in criminal litigation could be provided an opportunity to become useful and respectable members of society. Person below 18 years of age would be entitled to benefits and privileges under Juvenile Justice System Ordinance, 2000. Child in ordinary course would be released on bail or placed under custody of a Probation Officer and no punishment of death would be awarded to him and he would not be handcuffed, put in fetters or given any corporeal punishment. Purpose of trial of a juvenile was not punitive or retributive, but it was reformative. Juvenile must learn lesson certainly the hard way and reform himself to become a useful and responsible member of the society^[7].

Reading of S.11 of Juvenile Justice System Ordinance, 2000 provided that the Juvenile Court, after it had decided, that the accused juvenile had committed the offence, might, if it thought appropriate, pass order for releasing the juvenile on probation. Juvenile Court had discretion to decide the issue of release of juvenile on probation but by not exercising such discretion or inaction in exercising such discretion, the Juvenile Court would offend the dictates of law. But the Court would on conclusion of an inquiry or trial, notwithstanding anything contained in airy law, if would think fit, could direct the child offender to be released on probation for good conduct and place such child under the security of guardian or any suitable person executing a bond or without surety as the Court could require for the good behavior and wellbeing of the child for any period not exceeding the period of imprisonment awarded to such child. Juvenile Court was under legal obligation to consider said provisions before recording any conviction. Juvenile Court, in the present case, did not adhere to said provisions.

4.1 Case study of probation and restorative justice

It will be not out of place to mention here a judgment of Quetta High Court regarding community service reported in PLD 2014 Balochistan 100^[8].

⁴ sec, 4 and 5, the probations of offenders ordinance 1960

⁵ The probation of offenders ordinance, 1960

⁶ibid.

⁷S.11 of Juvenile Justice System Ordinance, 2000

⁸pld 2014 balochistan 100

In this case the accused were convicted for hunting two female Markhors and were sentenced to imprisonment for six months and fine but Lower Appellate Court reduced the sentence to imprisonment for ten days validity. High Court in exercise of revisional jurisdiction maintained sentence of imprisonment for six months imposed by Trial Court and set aside the order of Lower Appellate Court to such extent that accused were admitted to probation upon executing requisite bonds. Probation would be for the minimum prescribed period of one year. Condition of probation and of the bond would be for accused to render community service by planting twenty five trees each and to take care of them for the period of their probation. In case any tree did not survive, it would be replaced by another. High Court estimated that time spent on planting and nurturing one tree for a year would be four hours, therefore, duration of community service to be rendered by each accused in respect of 25 trees would come to 100 hours of community service. Revision was disposed of accordingly.

5. The juvenile justice system act 2018

On May 18 2018, the President of Pakistan approved the Juvenile Justice System Act (JJSA) 2018, which was passed by the Parliament earlier this year. The JJSA 2018 is very different from JJSO 2000, and the following are some of its salient new features.

5.1 Right of legal assistance

Every juvenile or child victim of an offence shall have the right of legal assistance at the expense of the State. A juvenile shall be informed about his right of legal assistance within 24 hours of taking him into custody.

5.2 Observation home

This means a place where a juvenile is kept temporarily after being apprehended by police as well as after obtaining remand from juvenile court or otherwise for conducting inquiry or investigation. Observation Homes shall be made separately from police stations.

5.3 Juvenile rehabilitation centre

This is a special kind of prison established exclusively for keeping juvenile offenders. The convicted juvenile, shall be confined to the premises till the completion of period of imprisonment or until they turn 18 years of age. Here convicts can receive an education as well as vocational or technical training for their development and includes certified institutions including women crises centers.

5.4 Determination of age mechanism

JJS Act 2018 makes it compulsory upon the ranking officer-in-charge, or the investigation officer, to make an enquiry to determine the age of any such alleged offender, who physically appears or claims to be a juvenile. Age shall be determined on basis of accused person's birth certificate, educational certificates or any other pertinent documents. In absence of such documents,

age of such accused person may be determined on the basis of a medical examination report by a medical officer^[9].

5.5 Disposal of cases through diversion

This is an alternative process of determining the responsibility and treatment of a juvenile on the basis of his social, cultural, economic, psychological and educational background, without resorting to formal judicial proceedings. The complaint against a juvenile shall be referred to the Juvenile Justice Committee for disposal through diversion. All offences, either minor or major, shall be compoundable for purpose of diversion. For major offences, diversion can only be exercised if the age of the juvenile is not more than 16 years.

5.6 Juvenile justice committee

This shall dispose of cases through diversion within a period of one month from the date of the referral. The Committee shall dispose of a case with consent of the complainant by resorting to different options, including restitution of movable property, reparation of the damage caused, written or oral apology, participation in community service, payments of fine and costs of the proceedings, placement in juvenile rehabilitation centre; and written and oral reprimand. If the offence has been committed against a State and not against an individual; the Committee may dispose of the case through diversion with consent of the concerned public prosecutor. The Committee shall also perform inspection of Observation Homes and Juvenile Rehabilitation Centres and may give directions to concerned persons for welfare and social re-integration of juveniles kept in these places^[10].

5.7 Separate challan and trial of juvenile offenders:

A juvenile shall not be charged with and tried for an offence together with an adult person. But if it is in the interests of justice to hold a joint trial of a juvenile and an adult, the juvenile court may dispense with the physical presence of the juvenile and they may be allowed to join the Court proceedings through audio-visual technology link^[11].

5.8 Imposition of penalty for disclosure of identity of juvenile or to publish proceedings of juvenile court

JJS Act 2018 exclusively bars revealing the identity of an accused juvenile to the public without the authorisation in writing of the juvenile or their next-of-kin. The S.H.O, investigating officer or the juvenile court can also grant permission in this regard^[12].

5.9 Special provisions for female juveniles

Female juveniles shall not in any circumstances be apprehended or investigated by a male police officer or released on probation under supervision of a male officer. A female juvenile shall only be kept in a Juvenile Rehabilitation Centre established or certified exclusively for female inmates^[13].

5.10 Removal of disqualification attached with conviction

A juvenile offender convicted under the provisions of JJS Act 2018 shall not suffer a disqualification, if any attaching to a conviction of an offence under such law^[14].

⁹ juvenile justice act 2018

¹⁰ juvenile justice act 2018

¹¹ ibid.

¹² ibid

¹³ juvenile justice act 2018

¹⁴ ibid

5.11 Preventive detention

No child shall be arrested under any of the laws dealing with preventive detention or under the provisions of chapter VIII of the Code of criminal procedure ^[15].

6. The Punjab good conduct prisoners (temporary release) act, 1962.

Section 3 and 4 of this Act mentions temporary release and conditions for the temporary release of prisoners. Sections are as follow ^[16].

6.1 Temporary release of prisoners on certain grounds

The State Government may, in consultation with the District Magistrate and subject to such conditions and in such manner as may be prescribed, release temporarily for a period specified in sub-section (2) any prisoner if the State Government is satisfied that -

A member of the prisoner's family had died or is seriously ill; or the marriage of the prisoner's son or daughter is to be celebrated; or the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence or it is desirable to do so for any other sufficient cause.

(2) The period for which a prisoner may be released shall be determined by the State Government so as not to exceed and where the prisoner is to be released on the ground specified in clause (a) of sub-section (1), four weeks or where the prisoner is to be released on the ground specified in clause (b) or clause (d) of sub-section (1), four weeks; and where the prisoner is to be released on the ground specified in clause (c) of sub-section (1), six weeks.

(3) The period of release under this section shall not count towards the total period of the release of a prisoner.

(4) The State Government may by notification authorise any officer to exercise its power under this section in respect of all or any of the grounds specified therein ^[17, 18].

6.2 Temporary release of prisoners on furlough

The State Government or any other officer authorised by it in this behalf may, in consultation with the District Magistrate and subject to such conditions and in such manner as may be prescribed, release temporarily, on furlough, any prisoner who has been sentenced to a term of imprisonment of not less than five years, and who has, immediately before the date of his temporary release undergone imprisonment for a period of three years, excluding remissions; and has not during such period committed any jail offence and has earned at least three annual good conduct remissions ^[19].

7. Guardian and Ward Act 1890

The Act authorizes the District Courts to appoint guardians of the person or property of a minor when the natural guardian as per the minor's personal law or the testamentary guardian appointed

under a will fails to discharge his or her duties towards the minor. It provides a complete procedural code laying down the rights and obligations of guardians, the procedure for their removal and replacement, and remedies for misconduct by them. It is an umbrella legislation that supplements the personal laws governing guardianship issues under every religion ^[20].

Under this Act, the father is the guardian of the minor child until he is found unfit to be the guardian of a minor female child. In deciding such questions, the welfare of the minor child is the paramount consideration and such a question cannot be decided merely based upon the rights of the parties under the law ^[21].

8 The Punjab village Panchayats and Neighbourhood act 2019

The purpose behind this Act was to form certain local villages and neighborhood which would be individually provided with funds and sufficient powers to function its duties accordingly as per the law. The primary function of these Panchayats is to look after the infrastructure and cleanliness of the villages and along with this they would also settle disputes and function in the cases when the disobedience of a member of the village would expect to create nuisance at large. This Panchayat have the powers to fine the disobeying member and to ensure that he would not cause such inconvenience in future ^[22].

9. Cost of litigation act 2017

The federal government on Wednesday enforced the "Costs of Litigation Act 2017" in all the courts of Islamabad Capital Territory (ICT) including the Islamabad High Court. This law contains the framework for reduction of delays in disposal of cases and deterrence against false and frivolous cases ^[23].

According to the Act, before the decision of a civil case, it will be mandatory for the parties to file details of actual costs incurred by them and the court shall award the costs to the successful party. Similarly, if a party seeks an adjournment, the court may grant adjournment subject to payment of minimum costs of Rs 5000 to the other party. In case of false and frivolous allegation, the court may award special costs over and above the aforementioned cost. These provisions apply to all civil proceedings including suits, appeals, revisions, reviews and executions etc.

Similarly, in the criminal cases if any person or party seeks adjournment, the court may grant such adjournments subject to the payment of at least Rs 10,000 as costs to the other party. If the complainant has levelled false or frivolous allegations against the accused, upon acquittal of the accused, the court may direct the complainant to pay costs up to Rs 100,000 to the acquitted accused.

10 The protection against harassment of women at the work place act 2010

The Protection against Harassment of Women at the Workplace Act 2010 must be appreciated since it is the first of its kind to address harassment as a significant legal issue, which is violative of a woman's right to work in Pakistan. By protecting a woman's

¹⁵ chapter viii, crpc

¹⁶the punjab good conduct prisoners (temporary release) act, 1962.

¹⁷ibid

¹⁸sec 3 and 4, the punjab good conduct prisoners (temporary release) act, 1962.

¹⁹The punjab good conduct prisoners (temporary release) act, 1962.

²⁰guardian and ward act 1890

²¹sumedhanagpal v. State of delhi, (2000) 9 scc 745.

²²the punjab village panchayats and neighbourhood act 2019

²³cost of litigation act 2017

right to work, the Act affirms the Government's commitment towards fulfilling its international treaty obligations such as those under UDHR and CEDAW. Moreover, it has allowed women to raise their voice against harassment at the workplace and has provided them an equal opportunity to earn livelihood, which will eventually lead to greater women participation in the workforce and the economy of the country. However, the Government of Pakistan needs to take several legal measures to ensure the effective implementation of the Act^[24].

In light of our above analysis, some conclusions can be drawn and recommendations made. The Ombudsmen have a huge responsibility in cases related to workplace harassment. Since harassment is a subjective issue and thus cannot be easily assessed or measured, the context in which such acts take place and their intensity are important determining factors. This places a huge responsibility on the Ombudsmen to ensure that the application of the law is consistent with the objectives of the law and in consonance with the principles of justice, equity and fairness. Furthermore, it should be compulsory for organizations to conduct regular assessments with respect to incidents of harassment. Lastly, awareness-raising campaigns need to be conducted with the help of media and non-profit organizations so that more women are aware of their rights under the legislation and can therefore take advantage of it.

11. Rehabilitation centers

Rehabilitation centers are made across Pakistan to rehabilitate drug addicts especially the juvenile drug addicts whose future is at stake if not given proper attention or imprisoned in jails whether Juvenile or common jail. The purpose behind these centers is to eradicate these addictions and put an end to the habitual drug addicts as putting them behind bars will not bring sustainable peace and change in their lives as far as they are not purified of their habits and drugs. Some well-known rehabilitation centers in Pakistan are New Life, Sunny Trust, Nayi Roshni and MATRC etc.

12. Conclusion

We discussed the status of Pakistani laws from the perspective of Restorative Justice and we came across several laws which defines restorative Justice and which provides remedies to offender and victim both in cases of violence or crime. Restorative Justice promotes permanent and sustainable justice which is speedy justice simultaneously as the offer is made from both the aggrieved parties and the court is now also enrolled in to this procedure which has resulted in timely and legally implemented results or outcomes.

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²⁴the protection against harassment of women at the work place act 2010