

Juvenile Justice

Address by Hon'ble Mr. Justice Ali Mohammad Magray Judge High Court of J&K at two day workshop on "Juvenile Justice" held in Convocation Centre Jammu on 10th and 11th of December 2016

Hon'ble Judges, dignitaries, learned Judicial Officers, ladies and gentlemen.

1. The topic of this Workshop "the J&K Juvenile Justice System" bears an intrinsic call to have a critical examination of the law or laws which have been framed by or are in vogue in the State of Jammu and Kashmir governing or concerning, in any way or manner, the children in our State. Such critical examination cannot be had in abstract; there has to be a context with reference to which the effectiveness of such laws, their implementation and our achievements would need to be weighed. I am sure the participants are fully aware of the context and the reference point. However, I may need to remind myself the background of our commitment to the cause of children made at the International forum. That would certainly help in understanding and analysing the relevant System in the State and its effective handling by those who have been entrusted with this noble task.

2. History may have witnessed before some international treaties outlining the rights of children, it was only in 1946 that the United Nations declared the rights of children and established the United Nations International Children's Emergency Fund. Later, in 1989, the international community adopted the United Nations Convention on the Rights of the Child. This was the first internationally adopted and legally binding document concerning the rights of children. This Convention covered four major categories of child rights, namely, Right to Life, Right to Development, Right to Protection and Right to Participation. I may refer here to and give an overview of few of the covenants of the Convention.

3. According to Article 1 of the Convention a child is any person who has not reached the age of eighteen unless a different age of maturity is specified in any country's law. In terms of Article 2, duty is cast on each State to uphold the articles in the Convention and apply them to all children regardless of their family's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. It was ordained that the State should protect the child against all forms of discrimination. Article 4 of the Convention enshrined that the State must make laws, implement policies and programmes and undertake other measures to ensure that the rights set out in the Convention are fulfilled. In terms of Article 6 of the Convention, the States recognised that every child has the inherent right to life, and every State must work to ensure the survival and development of the child. Article 8 said that a child has the right to preserve his/her identity including nationality, name and family relations without unlawful interference. Article 9 envisaged that every child has the right not to be separated from their parents against his/her will unless it is in his/her best interest. Any legal proceeding of separation shall be attended by all involved parties including the parents. The child has the right to maintain contact with his/her parent as long as it's not against his/her best interest. If the State is the cause of separation then the parents, child or any other family member has the right to know the whereabouts of the absent member. Article 12 covenanted that the State shall ensure the child's right to form and express views with regard to things that affect him/her in accordance with the maturity and age of the child. A child shall hence be allowed to be heard in any judicial proceeding concerning the child, directly or indirectly through a representative. Similarly, the other Articles of the Convention recognised the child's right to free expression, right to information and ideas of all kinds and in any medium – of course restricted by the violation of others rights or a threat to national security; right to freedom of thought, conscience and religion which includes the parents' right to guide the child in this regard; right to freedom of association and peaceful assembly unless the act is illegal or harmful to others;

right to privacy and the right to be protected by law against such interference of attacks; right to protection by the State when they are temporarily or permanently deprived of their family environment or if the environment has proven to be harmful for them. It is enjoined that the State shall find alternate care for the child such as foster care, adoption or Kafalah of Islamic law, the right to continue the cultural, linguistic and religious background of the child should be continued; right of a child to have access to national and international information that is aimed at the child's well being. The States are enjoined upon to ensure the recognition of responsibility of both parents to care for a child as long as it is in her/his best interest; to take all types of actions to protect the child from any form of abuse, exploitation or neglect; to create systems to ensure the child receives all needed support in form of prevention, protection and rehabilitation. Every child has the right to access health services and attain the highest degree of health. To do so the state shall reduce the infant mortality rate, ensure medical assistance, provide prenatal and post natal care of mothers and child, combat diseases and malnutrition, create awareness of correct health practises, and development preventive measure to protect children from possible risks. The state shall also abolish all traditional practises detrimental to a child's health. The States have recognised that children with disabilities (mental or physical) have the right to a life with dignity and all other rights of this convention. The State also recognises the need to provide children with disabilities with special care, family assistance, free education, health, training, etc in accordance with the family's financial situation and aim for the child's social integration. The state shall also take measure to prevent the disabilities in children.

4. There are several, rather, numerous other Articles in the Convention which recognise the general human rights of children and cast duty and obligation on the States to make laws and formulate policies for the welfare and wellbeing of children.

5. Since the children are prone to come into conflict with the laws as a result of being accused or suspected of committing a crime, there is always likelihood that their fundamental rights may be violated. To meet such an eventuality, the States under the aforesaid Convention have recognised the right of every such child to be treated in a manner which is consistent with the promotion of the child's sense of dignity and worth. One of the foundational requirements of States under the aforesaid Convention is the formulation and establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law. This requires juvenile justice system to ensure that children in conflict with the law are treated in a manner substantially different than adults at all stages of the proceedings.

6. As we know, Justice, in the layman's sense, is putting right the wrong done to a person. But when it comes to the wrong doing by a juvenile, the Juvenile Justice Legislation and Procedures, the authorities and institutions have to be different than applicable to adults which provide different yard sticks and mechanisms that we call as "Juvenile Justice System". It is very important to bear in mind that States have also been enjoined upon to prescribe a minimum age below which a child is presumed not to have the capacity to commit a crime.

7. In our country, as we all know, at the Union level the Government of India had enacted a law on the subject even much prior to the adoption of the Convention on the Rights of a Child by the General Assembly of the United Nations. The Act was known as the Juvenile Justice Act, 1986. Naturally, it did not take much time for our country to ratify the aforesaid Convention. Since the United Nations Convention outlined the right of the child to reintegration into society avoiding judicial proceedings, the Government of India, with a view to fulfilling the Articles of the Convention felt the need and rewrote the law. Accordingly, the Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted. However, this Act too was later repealed and replaced by the

Juvenile Justice (Care and Protection of Children) Act, 2015 which has come into force on January 1, 2016.

8. In the State of Jammu and Kashmir, likewise, the State Legislature had enacted the Jammu and Kashmir Juvenile Justice Act, 1997 (Act No.VIII of 1997). This Act was repealed by the Jammu and Kashmir Juvenile Justice (Care and Project of Children) Act, 2013 (Act No.VII of 2013). In this Act, a 'juvenile' or 'child' is defined to mean a person who has not completed eighteenth year of age. It makes provisions *vis-a-vis* two groups of children: first, the Juvenile in conflict with law; and second, the Child in need of care and protection. Under the Act 'Juvenile in conflict with law' means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Thus the Act protects not only the rights of a Juvenile, but also of a person's rights when he/she was a Juvenile. Meaning that if a crime or an incident took place while the person was a juvenile, and then during the proceeding the juvenile ceased to be of the age, the case would continue as if the juvenile has not turned eighteen yet.

9. The Act provides numerous mechanisms containing safeguards and protections for both the Juvenile in conflict with law and the Child in need of care and protection. Then the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Rules, 2014 stand framed in terms of Section 68 of the Act which provides for and prescribes the procedure to attain the affirmed and noble objectives of the Act.

10. However, insofar as the implementation of the provisions of the Act in the State are concerned, the truth being bitter as always, the picture is not rosy. And I must fairly concede, I am equally responsible for the lapse, for, I have not been able to effectively perform my part of a responsibility cast upon me.

11. In this connection, a few facts may be mentioned. Chapter-II of the Act deals with Juvenile in Conflict with law. Section 4 thereunder provides for

establishment of Juvenile Justice Board for a District or a group of Districts in the State. The Government was to constitute such Boards within a period of one year from the date of commencement of the Act. They have not done it so far. Such Boards were to comprise of a Judicial Magistrate having special knowledge or training in child psychology or child welfare, and two social workers with the distinction of having been actively involved in health, education or welfare activities pertaining to children for at least seven years. Presently, the power exercisable by such Boards *vis-a-vis* the Juveniles in conflict with law under the Act is being exercised by the respective Chief Judicial Magistrates having jurisdiction in the area in terms of sub-section (6) of Section 4 of the Act. The Juvenile in Conflict with Law cases can be heard only in the Juvenile Justice Board and not by another court. Of course, the powers of the Juvenile Justice Board can be exercised by the High Court or Court of Session, Srinagar/Jammu when the proceedings come before them in appeal, revision or otherwise. In terms of the provisions under the said Chapter-II, the Government is required to set up a number of institutions where the needs and protection of juveniles may be fulfilled. For the reception and rehabilitation of Juveniles in Conflict with Law, the Government is required to set up Observation Homes and Special Homes in every district or group of districts. The state may directly set up these homes or contract a voluntary organisation to do so. Observation homes are institutions for juveniles while their proceedings are underway. After the proceedings of a particular case are complete, the Juvenile Justice Board may decide that the rehabilitation of the child is not complete and hence place them in a Special home for no longer than three years.

12. Then there have to be Special Juvenile Police Units. When a police officer comes in contact with a juvenile he must place the child with such Special Juvenile Police Unit who in turn have to report the child Before the Juvenile Justice Board without delay. The Police Officers have to be specifically and specially trained in dealing with Juveniles. When it comes to grant of bail, it is

available to juveniles in all cases as long as the Board finds the release of the child will not place him in any danger or in the influence of criminals. If the child is not released on bail he is only to be placed into the custody of an Observation Home. A duty is cast on the Special Juvenile Police Unit to inform the juvenile's parents of the arrest, as well as inform the Probation Officer who will make the necessary enquires about the child. Unfortunately, as of now neither any Special Juvenile Police Units have been set up, nor, to my understanding, any police officer has been specifically or specially trained in this regard. So far Observation Homes or Specials Homes for Juveniles in Conflict with Law are concerned, there is no such Home established. However, there are presently two children Homes – one each at Srinagar and at Jammu – functioning and the Division Bench of the High Court is overseeing the functioning of the said Homes in a PIL.

13. The provisions under Chapter II of the Act distinctly demonstrate how the inquiries need to be made and if a child is determined to be guilty of a crime, how they have to be dealt with. Since the topic is restricted to J&K Juvenile Justice System, I need not delve into the procedural part of it.

14. Then Chapter III deals with the Children in Need of Care and Protection. Their cases are to be heard by Child Welfare Committee. Unfortunately, such Committees as prescribed under Section 30 of the Act have also not come into being. The Constitution of the Committee is prescribed under Section 30(2) of the Act. The committee is supposed to have a chairperson and four other members. The purpose of the Child Welfare Committee is to provide for the care, treatment, protection, rehabilitation and development of the child and in doing so uphold the rights of the child. The committee may commit a child to the Children's home or a Shelter home if the child has no immediately available family or support system.

15. Like in the case of Juveniles in Conflict with Law, the Children in Need of Care and Protection are supposed to be provided with Children's Homes and

Shelter Homes. These Shelter homes are for children whose family cannot be located or whose case has been completed. The main aim is to restore the child to his family or family environment after determining the safety of the environment.

16. The fourth chapter of the Act deals with the importance of rehabilitation and social integration of the child as the purpose of the act.

17. The last chapter of the Act contains many miscellaneous provisions.

18. So, examining the provisions of the law as applicable in the State, it is wholly *pari materia* with the law on the subject applicable in rest of the country and commensurate with the United Nations Convention on the Rights of the Child. However, certain steps envisaged by various provisions of the Act to be taken by the Government have not yet been taken. Notwithstanding that lapse, I can say with certainty that we at the High Court level, on the judicial side, have ensured that the provisions of the Act are applied in their letter and spirit. Few of such instances may be quoted. In Bail Application no.09/2014 titled Sameer Nazir v State, decided on 18.03.2014, the Court, the accused was punished for the commission of offence under section 376 RPC and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.50,000. In appeal, an application for bail was made on the ground that as on the date of commission of the offence the convict was a Juvenile having been under the age of 18 years and, therefore, entitled to protection under the provisions of the Act. The matter was referred to Registrar Judicial, High Court, Srinagar for holding an enquiry to determine the age of the appellant as on the date of commission of the alleged offence. He was admitted to interim bail. Subsequently, on his plea being established, the Court passed appropriate orders therein. Likewise, in HCP no.467, Zubair Ahmad Shah v State of J&K, his lordship Hon'ble Mr. Justice Muzaffar Hussain Attar, finding the detenu to be a juvenile, quashed the detention order and ordered his immediate release from custody. Similarly, in another Habeas Corups petition, HC no.556/2016, Tajamul Rasool v State, his

lordship found the detinue to be a juvenile and directed the juvenile to be lodged in Juvenile Home at Srinagar. In HCP no.616/2016, Sahil Ahmad Khan v State, his lordship Hon'ble Mr. Justice Mohammad Yaqoob Mir by order dated 28.11.2016 ordered his lodgement in a Juvenile home at Srinagar.

19. Viewed thus, but for taking the effective follow up action by the Government under the provisions of the Act as identified earlier, the J&K Juvenile Justice System is as robust as it should be. It is expected that this Workshop will help us all understand the system in a better way so as to be able to implement the provisions of the Act in its letter and spirit.

20. Thank you all.