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THE RIGHT OF JUVENILES TO A FAIR TRIAL UNDER THE JUVENILE JUSTICE SYSTEM OF PAKISTAN: EXAMINING THE FAIRNESS OF A JUVENILE TRIAL IN DISTRICT SHANGLA OF KHYBER PAKHTUNKHWA

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Abstract

This research study examines the fairness of a juvenile accused's (JA) trial in a juvenile court (JC) in district Shangla of Khyber Pakhtunkhwa province of Pakistan. The aim is to ensure the fairness of the trial proceedings in JCs in accord with the national and international standards of juvenile justice. There are widespread concerns that juveniles are not provided with the right to a fair trial in trial courts in Pakistan. The study adopts a qualitative data collection method, which involves interviews with various stakeholders of the juvenile justice system (JJS) like judges of the JCs, prosecutors, defence lawyers, police, probation officers in order to identify the areas of further improvements. Moreover, observation is also used as a research tool to assess the fairness of a murder trial proceedings in a JC. The study found that sufficient fair trial safeguards are available to a JA within the domestic legal framework of JJS of Pakistan. The study further found that sufficient fair trial safeguards are provided to the JA in murder trial observed. However, there are still some areas, where the trial proceedings fall short of the national and international standards of juvenile justice. Moreover, there is a serious issue of the implementation of the national JJS. The study recommends various recommendations to ensure the fairness juvenile trials in Pakistan in line with international best practices of juvenile justice.

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Keywords: *Juvenile Accused, Juvenile Justice System, Fair Trial Rights, Juvenile Trial, Shangla, Pakistan.*

Introduction

"The Pen has been lifted from three [persons]: from the sleeping person until he awakens, from the minor until he grows up, and from the insane person until he comes to his senses." (Saying of the Holy Prophet P.B.U.H, Sunan Ibn Majaj Hadith No. 2041)

In recent years, many countries have established separate juvenile justice systems (JJS) keeping in view the tender age of juvenile offenders. (Jepsen & Jensen, 2006; Khatiwada, 2008; Zimring et al, 2015; Lane & Krohn, 2015) Pakistan has signed and ratified the UN Convention on the Right of the Child (CRC) on 20th September 1990 and 12th November 1990 respectively. Consequently, in 2000, Pakistan has also introduced Juvenile Justice System Ordinance (JJSO) to fulfil its international legal commitment (Khaliq, 2017). In 2018, Pakistan has repealed the JJSO and a new law Juvenile Justice System Act (JJSA) was introduced with the vision to "…provide for criminal justice system and social integration of juveniles". In stark contrast to conventional criminal justice system (CJS), JJS is designed to exclusively deal with the juvenile offenders keeping in view their tender age and the objective to reintegrate and rehabilitate them back into the society (Sajid, et al, 2020; Hafiz, et al, 2022).

Article 10-A of the Constitution of Pakistan expressly guarantees the right to a fair trial (R2FT) to every accused including a JA (JA). Moreover, due process right of a criminal accused is also guaranteed under Article 4 of the Constitution. Although, Pakistan's domestic JJS provides certain fair trial rights (FTRs) to JA; nevertheless, nationally and internationally there are widespread criticisms that it doesn't provide a JA with the Constitutionally guaranteed R2FT in line with the international minimum standards of juvenile justice. Therefore, this study is designed to investigate and find out whether a JA is really provided with the R2FT in juvenile courts (JC) in Pakistan. The main purpose of this research study is to evaluate the fairness of a juvenile trial in JC on the litmus test of the R2FT and internationally recognised minimum standards of juvenile justice. The main argument of this study is that a JA should be provided with the R2FT in accord with the internationally recognised minimum standards of juvenile justice. The study adopts a 'human-rights' approach to the JJS (Jepsen & Jensen, 2006).

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2. Research Methodology

The attempted murder trial of a JA in JC in district Shangla of KP was monitored as a case study. The researcher has personally monitored the whole proceedings of the selected case right from the initial phase of registration till the conclusion of the trial proceedings in JC. The researcher has also gone through the police record of the case, court transcripts and casefile as a part of the methodology. Being a senior prosecutor, the researcher did not face any hurdle in observing the police investigation and attending the court proceedings. Also, semi-structure interviews were conducted with the various stakeholders of the JJS in district Shangla to evaluate the fairness of the trial proceedings. The study is guided by the international standards of juvenile justice as found in international human rights instruments and expounded by the international human rights monitoring mechanisms. Finally, the national legislations on juvenile justice and jurisprudence of the superior courts are also consulted.

3. The R2FT of a Juvenile Offender in International Law

International human rights instruments guarantee various FTRs to every accused irrespective of the age differentiation (Ahmad & Qayum, 2022; Webb & Cloony, 2020) However, under international law, JA are afforded some additional safeguards in addition to the FTRs for adult accused. For instance, according to UN Human Rights Committee (HRC) General Comment (GC) 32, JA are entitled to some extra special safeguards in addition to general international fair trial standards. In its GC on Article 14 (4) of the ICCPR, HRC has clearly mentioned that in addition to special safeguards, JA are also entitled to the similar safeguards as are provided to major accused within the meaning of Article 14 of the Covenant (Wong & Roy, 2002). For this purpose, the Convention on the Right of Child (CRC) is a major universal legal instrument exclusively dedicated for the safeguard and promotion of the rights of the minors including JA. Needless to mention that in addition to special FTRs for juveniles, the general FTRs are also enshrined in Article 40 (2)(a) and (b) and various other provisions of the CRC. In case of Nortier v. The Netherland, ECHR has also held that JA "…are fully entitled as adults to benefits from all the Convention [European Convention on Human Rights] requirements for a fair trial." The Committee on the Right of the Child (CRC Committee) is the observing body established under the CRC. In addition, the UN Beijing Rules also exclusively deal with the right of the juvenile offenders. Moreover, the Havana Rules and the UN Riyadh Guidelines deal with the rights of the juveniles as well (Qazi, et al, 2023). The international standards on juvenile justice inter alia include establishment of national JJS, definition of a child as an individual below 18-year of age, setting a lowest age of criminal responsibility, finding various alternatives to

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formal criminal prosecution, deprivation of liberty as a measure of last resort, notifying parent of the arrested juvenile and contact with the family, prohibition on keeping of juveniles with the major prisoners, substitution to deprivation of liberty to deal with juvenile offenders and limits on penal sanction (Helen, et al, 2017).

4. The R2FT of a Juvenile Offender under the JJS of Pakistan

As mentioned above, in 2000, Pakistan has promulgated JJSO which certain fair trial rights to the JA (Khaliq, 2017). For instance, the JJSO requires the setting up of separate JCs (JC) to exclusively conduct trial of juvenile offenders, defining of a juvenile as an individual of less than 18-year of age, prohibition on joint trial of a juvenile with a major accused, prohibition on making public the proceedings of juvenile cases, release of juvenile offenders on probation, recruitment of special panel of counsels to assist juvenile offenders in courts free of cost, prohibition on the use of handcuffs and fetters for juvenile offenders, limitations on imposing certain punishments on juvenile offenders, among others things. JJSO However, the protections of juveniles under JJSO was inadequate. (Amnesty International, 2005; Adil and Aziz, 2009; Jabeen, 2013) Therefore, in 2018, JJSO was repealed and a new law namely Juvenile Justice System Act (JJSA) was promulgated with the vision to remove the lacunas of the old law and bring more juvenile friendly legislation in line with the IFTS on juvenile justice. (Fatima, 2022) Many of the international minimum standards on juvenile justice are incorporated in JJSA, which were previously left unaddressed by the JJSO. They inter alia include generous provisions on release of juveniles on bail, alternatives to formal criminal prosecution, deprivation of liberty as method of last resort, simplification of the procedure of the determination of age of juveniles, establishment of observation homes and juvenile rehabilitation centres, disposition of juvenile cases through diversion, resolution of cases through referral, establishment of juvenile justice committee, removal of disqualification attached to conviction of juvenile offenders and prohibition on holding of juveniles with adults. Some critics believe that there are still many gaps and loopholes in the JJSA, however, this is out of the scope of this study. (Iftikhar, 2019; Hilal, 2021; Ijaz et al, 2021) In the next section, we will critically evaluate the fairness of selected juvenile trial in JC on the litmus test of the national and international standards of juvenile justice (Hafiz, et al, 2022).

5. Brief Case History of State v Gul Khan et al.

The case under observation falls within the territorial jurisdiction of police station Danday of district Shangla. In this case, a JA Gul Khan (a pseudonym) was charged for attempting to

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commit the murder of another person and injuring another one. Police arrested the accused and his age was verified through birth certificate as 17-year and 9-month meaning thereby that he was juvenile at the time of the crime. He was kept for 24-hour inside the police lockup within the police station and initially cursory interrogated. Then he was produced before the local Magistrate with the request to grant his 5-day physical remand for the purpose of further interrogation. However, Magistrate only granted 2-day physical remand with the condition to conduct his pre and post-medical examination. Police records show that during interrogation, the JA confessed his guilt and disclosed the location of the weapons used in the commission of the crime. Initially, the police recorded the statement of JA under Section 161 CrPC and then produced him before the Magistrate for recording his confessional statement within the meaning of Section 164-364 CrPC. In court of Magistrate, the JA straightaway refused to record his confessional statement and consequently he was sent to judicial lockup. On completion of criminal investigation, police sent the case file to District Public Prosecutor (DPP) for scrutiny and put in court. DPP decided that there are sufficient incriminating materials to prosecute the JA in a JC. After taking cognizance, Magistrate sent the case to Sessions Judge cum JC for conducting trial. JC recorded the statements of thirteen prosecution witnesses (PWs) and then heard the arguments of both the prosecution and defence counsels. At the conclusion of the trial proceedings, JC found the accused not guilty of all the charges and acquitted him.

Table 1: Brief Details of the Case.

S. No.	Description	Details
1	Date of the Commission of Offence	06th February 2019
2	Age of the Accused at the Time of the Commission of the Offence	17-Year & 09-Month
3	Date of the Arrest of the JA	08th February 2019
4	Name of the Court	Sessions Judge Cum JC Shangla
5	Criminal Charges against the JA	324, 337 F (III), 337 A (II)(I) PPC
6	Number of PWs in Police Final Report	22
7	Number of PWs Examined in JC	13
8	Total Number of Hearings	21
9	Date of Final Judgement	27th November 2019
10	Acquitted or Convicted	Acquitted

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6. Examining Fairness of the Criminal Proceedings

Pre-Trial Proceedings

According to Section 11 of the JJSA, CrPC is also applicable to the investigation and prosecution of crimes, where juveniles are in conflict with penal law. Section 7 of the JJSA requires that every case, where juvenile is accused to be investigated by an officer at minimum of the rank of Sub-Inspector under the supervision of a senior officer. In particular, Section 17 of the JJSA provides special safeguards for female offenders, which stipulates that no female JA in any situations shall be arrested or investigated by a male officer. During this study, the researcher has observed that unfortunately police investigating officers are not properly trained in investigating juvenile delinquency cases. Observation further reveals that by and large police are unaware about the existence of JJSA and various rights available to JA under this law. Research studies also show that police investigate juvenile delinquency cases in routine manner like ordinary crime (Seenen et al, 2015). Hence, there is a dire need that police generally and investigating officers in particular should be properly trained in investigating juvenile delinquency matters and the various FTRs available to the JA under the JJSA. In this regard, a senior retired police officer has suggested that Police Investigating School in Peshawar should offer on-job short courses to IOs on JJSA and other international human rights instruments on juvenile justice.

Rule 12.1 of the Beijing Rules stipulates that special police units can also be established which has the exclusive responsibility to deal with juvenile offenders in conflict with penal law. Hence, where possible such like special units may be established and police officers posted in these units should be imparted skills and training in investigating juvenile delinquency cases. It is further proposed that instead of CrPC, a special procedural law should be enacted for the investigation, prosecution and trial of juvenile cases. In case under observation, the researcher has observed that although investigation was carried out by an officer of the rank of inspector, however, the statuary requirement of the supervision and oversight of senior police officer was found lacking.

Sub-section (2) of Section 7 of JJSA requires that local social welfare officer or probation officer shall assist the investigating officer in investigation of juvenile delinquency cases in order to prepare Social Investigation Report (SIR), which is to be annexed with *Challan* under Section 173 CrPC. However, the researcher has observed that IO has neither consulted the local probation officer or social welfare officer at any stage of the criminal investigation nor annexed SIR with the final report under Section 173 CrPC. It is, therefore, proposed that as a statuary requirement, in every juvenile case, SIR should be annexed with the *Challan*, which covers

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subject like the general character of the JA, educational and social background, previous crime history, if any and other ancillary matters. The researcher has also observed that during the whole process of criminal investigation, IO has not consulted DPP for any legal guidance.

Section 8 of the JJSA describes the procedure for determining the age of JA. It stipulates that SHO or IO will determine the age of a JA on the foundation of birth certificates or educational documents or any other relevant papers. In case documents are missing, then issue of the age of JA is resolved on the basis of medical examination. Whenever, an accused is brought under Section 167 CRPC then Sub-section (3) of Section 8 of the JJSA also enjoins upon the remanding court to note down its findings about the age of the accused on the basis of the available record. However, it has been observed that Remanding Courts usually don't bother to record their findings about the age of juvenile at this stage. Mr. Shaibar Khan advocate has also remarked that unfortunately remanding Judicial Magistrates are not making proper efforts to make independent inquiry about the age of the accused at this stage. He added that sometimes a lot of controversies and court litigations arise about the age of a JA, which could be reduced, if remanding Magistrates properly discharge their statutory duties at this stage.

In case under observation, on 08th February 2019, SHO arrested JA and recorded his age as seventeen years and nine months in memo of the card of arrest on the basis of birth registration certificate procured form NDRA and hence he was declared juvenile for the purposes of the present case, which qualifies him to the benefits and concessions provided in JJSA. However, the researcher has observed that this ideal situation doesn't happens in every juvenile case but rather sometimes the matter of the age of juvenile becomes a big controversy and legal battle between the parties. Mr. Ali Bahadar Khan advocate has remarked that police sometimes record the age of arrested young persons arbitrarily and in haphazard manner without due regard to the documentary evidence. He suggested that police-arresting officer should correctly record the age of the arrested person at the time of arrest so that he or she can benefit from the JJSA. Research studies shows that recording age of a JA at later stages create legal complications, which lead to prolonged litigations between the parties (Iqbal, 2009).

In Afsar Zamin case, Sindh High Court (SHC) has observed that if the issue of age of the accused has been determined as a condition precedent in accordance with law, a JA would be entitled to statutory right of release on bail or even the criminal charge "against him has not been framed." Similarly, in case of Sultan Ahmad v Additional Sessions Judge, Supreme Court of Pakistan (SCP) has also observed that the claim of juvenility should be raised at the earliest point of time preferably at the time of criminal investigation. In case reported as 2012 PCrLJ 897, it has been held that where a question arises as to the age of accused and there are two

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opinions available, the courts is required to lean in favour of the opinion, which would go in favour of the accused standing trial before court.

Section 5 of the JJSA obligates SHO to inform the guardian of the arrested juvenile of his/her taking into custody and also to inform him or her about the name, date and time of the JC. The preceding section of law further enjoins SHO to inform the local Probation Officer about the arrested juvenile so that he or she can obtain information about the arrested juvenile and accordingly prepare Social Investigation Report, which could be of help for JC in conducting trial. Moreover, Section 3 (2) of the JJSA obligates the arresting police officer to inform the juvenile about his or her rights provided under the JJSA by a legal counsel within 20 hours of taking to custody. However, the researcher has observed that SHO neither informed the guardian nor the probation officer about such arrest and further he also not informed JA about his rights available under the JJSA. Personal observation shows police arresting officers are totally not aware about the above statuary requirements. For instance, a senior police officer has stated on the condition of anonymity that has has no knowledge to intimate the guardian or probation officer about the arrest of the JA.

The researcher has further observed that unfortunately police are totally unaware of the statuary role of Probation Officer under the JJSA. In this regard, Mr. Shair Ali, a senior judicial officer has remarked that under the JJSA, probation officer has got a key role, who has to collect all the relevant information and other material circumstances about the arrested juvenile, which help a JC in disposing of the case. He suggested that police investigating officers should be trained and made aware of the role of Probation Officer concerning investigation of juvenile cases. He further suggested that district probation service should be also strengthened and clear guidelines should be issued to all the stakeholders about the role of probation officers in dealing with cases of juvenile delinquency.

Section 20 of JJSA provides for the establishment of Observation Home. Section 2 (p) of the JJSA defines ‘Observation Home’ as a place where a juvenile is kept for the time being after arrest by the police and also at the time of remand and during the time of criminal investigation. However, the government has not yet established any Observation Home in any district including Shangla. In case under observation, the local police produced the JA before the remanding court within 20 hours of the arrest. However, it has been noticed that after arrest, JA was detained in police station with adults, which clearly violates the above mandatory provision of law. Similar, at the time of approval of physical remand from the court, JA was again kept in police station, which was again sheer violation of the provisions of JJSA and might expose the juvenile to any abuses. Furthermore, it has been observed JA are transported

in the same prison van, where adult accused are transported, which is also violation of the provisions and spirit of the JJSO. Mr. Bahruddin Khan, a senior retired police officer remarked that contrary to the spirit of JJSA, most police officers treat JA as adult and accordingly keep them with adult prisoners. He suggested that on arrest of the juvenile, police should immediately contact the probation officer who will be given the custody of juvenile to keep him or her in Observation Home but in no circumstances a juvenile should be kept in police station or jail. He further proposed that police should be sensitized and trained about the rights of juvenile offenders.

Article 37 (d) of the CRC states that each imprisoned juvenile should be guaranteed the right to contest the legitimacy of his or her detention in front of a court of law and prompt decision thereto. Section 6 of the JJSA also provides for the concessionary release on bail of JA. Most importantly, Sub-section (3) of Section 6 of the JJSA treats all major or minor offences as bailable in cases of JA. Under JJSA, offences are classified into three different categories: a) Minor, which is defined as an offence carrying a punishment of incarceration upto 3-year with or without fine. In such like minor offences, juvenile is entitled to bail with or without sureties by the JC. b) Major, which is a crime carrying a punishment of incarceration in excess of 3-year and upto 7-year. Bail, in such like major offences is to be granted with or without sureties. c) Heinous, which is defined an offence of brutal, serious or shocking to public morality and punishable with death sentence or life imprisonment or incarceration in excess of 7-year. In such like heinous offences, where juvenile is of less than 16 years of age then he or she is entitled to bail. However, if juvenile is more than of 16 years of age then grant of bail is discretionary power of the JC. Article 37 (b) of the CRC further enjoins that, as a general rule, juvenile should not be confined and where necessary imprisonment must only be opted as a measure of last option and for the minimum period of time.

In case under observation, JA submitted his post-arrest bail application through counsel in the Court of Sessions Judge. However, the Judge rejected his bail application reasoning that he is directly nominated for the commission of offence in a promptly lodged FIR, wherein specific role of striking axe blows on the head of injured Bakht Rahim was given to him. The Judge further reasoned that prima facie the medico legal report supports the version of the complainant as stated in FIR. The Court continued to reason that the punishment for the levelled penal sections of law is death or life imprisonment, which means the offences come within the prohibitory clause of Section 497 CrPC. Aggrieved by the bail rejection order of Sessions Judge, JA lodged post-arrest bail application in PHC, Mingora Bench/Dar-ul-Qaza, Swat, which granted him post-arrest bail and ordered jail authorities to release him forthwith

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subject to furnishing of bail bonds to Pakistani Rupees 300,000/- with two sureties each in the like amount. In its bail granting order, PHC reasoned that record shows JA is blamed for inflicting injuries on head of Bakht Rahim through axe blows, the corresponding offences for which don't come within the prohibitory clause of Section 497 CrPC. The Court further reasoned that according to the record, JA is also blamed for sharing common intention with the principal accused, however, this is a matter of further inquiry as provided in Section 497 (5) of the CrPC. Finally, PHC concluded that there is a wide scope of further inquiry into the guilt of the JA, hence, he is entitled to the extra-ordinary concession of bail. Overall, in this case, JA was kept in pre-trial detention for about one month until Peshawar High Court (PHC) has ordered to release him on bail.

The researcher has observed that there are cases, where juveniles are kept in pre-trial detentions for many years and acquitted at the conclusion of the trials without rewarding any compensation for the period they spent in jails. Mr. Fayaz Ahmad advocate has stated that in heinous crimes, lower courts are generally reluctant to extend the concessions of release on bail to JA during pre-trial stage. He further added that lower courts send majority of the juveniles accused to judicial lock-up as under-trial prisoners instead of releasing them on bail. He suggested that before sending back a JA to jail or judicial lockup, Judicial Magistrates should satisfy themselves about his age and if he is declared to be a juvenile then concessions provided in the JJSA should be extended to him keeping in view the best interest of the JA. Mr. Abdus Saboor advocate has remarked that under Section 6 (4) of the JJSA, bail granting court can decline bail to a JA over and above 16-year of age, if he has allegedly committed a crime of heinous type, which seems to be discriminatory in nature and ultra vires of the international human rights instruments on juvenile justice. In Naeem Khan v the State, PHC has observed that JJSO is a special law promulgated to protect the rights of the juvenile offenders, as they deserve special consideration due to their young age and hence this law is required to be generously construed in favour of the accused and where his or her age is one day below eighteen years then he or she should fall in the definition of 'child' as contemplated under Section 2(b) of the JJSO and thus be allowed bail though booked for an offence carrying a punishment of death subject to certain exceptions.

Section 5 of the JJSA enjoins to keep the arrested JA in Juvenile Rehabilitation Centre. Section 2(k) of the JJSA defines 'Juvenile Rehabilitation Centre' as a place, where a JA is kept and imparted education, vocation and technical training to develop his or her mental, moral and physiological growth. Section 5 of the JJSA is in line with Article 37 (v) of the CRC, which states that a juvenile should be separated from adult prisoners. However, in case under

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observation, JA was kept together with adult offenders in Jail. Mr. Fayaz Ahmad, a senior counsel has stated that keeping JA together with adult prisoners often expose them to abuse, torture, sexual abuse, harassment and ill treatment. For instance, in 2015, a juvenile inmate of the Peshawar Central Jail has lodged complaint with the Sessions Judge Peshawar about sexual abuse inside jail and wherein he alleged that prison officials are supplying juvenile prisoners to adult prisoners for the purpose of prostitution. (Shah, 2015)

Article 3 (1) of the CRC stipulates that the best interest of the child should be the primary goal in all actions and decisions related to the juvenile offenders. Section 2 (a) of the JJSA defines the term 'best interest of the child' as "the basis for any decision taken regarding the child to ensure fulfilment of his basic rights and needs, identity, social well-beings, physical, emotional and psychological development." In Husnain Khan v the State, Federal Shariat Court (FSC) has remarked that the purpose of JJSO is to treat and reform juvenile delinquents and further to keep them away from the destructive impact of prisons, which otherwise has to tell its toll and thus juveniles are only incarcerated as a last resort. In another case reported as 2014 YLR 2879, it has been held that the purpose of JJSO appears to be that accused of tender age is saved from humiliating condition in jail and further he should not be mixed up with other criminals in jail so as to make them useful citizens of the country. In situations, where JA are not released on bail then they should be sent to Juvenile Rehabilitation Centre or Observation Homes instead of keeping them in judicial lock-up or prisons as it is not a secret that jails conditions in Pakistan are very poor, which make juveniles highly vulnerable to many abuses.

Section 10 of the JJSA stipulates the provincial government in consultation with the Sessions Judge shall establish a Juvenile Justice Committee in every district, which shall be composed of Judicial Magistrate, District Public Prosecutor, a lawyer and probation officer. Recently, in January 2020, KPK government has established Juvenile Justice Committees in every district, which is a positive development. Section 9 of the JJSA provides for the referring of juveniles related cases to Juvenile Justice Committee to dispose it through diversion instead of resorting to the formal criminal justice system (CJS). Section 1 (d) of the JJSA defines 'diversion' as alternative process to determine the culpability and treatment of juvenile offender on the basis of his or her "social, economic, psychological and educational background" without recourse to ordinary CJS. According to Section 9 (4) of the JJSA, diversion inter alia include placement of JA in Juvenile Rehabilitation Centre, apology, reprimand, participation in community service and payment of fine.

There is no doubt that prosecution and punishment of the juvenile offender does not help in reforming him or her rather sometimes it does more harm than reformation in the shape of

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physical or sexual abuse of JA in detention centres or jails. CRC, Riyadh Guidelines and Beijing Rules all demand that national JJS should primarily focus on reintegration of the juveniles' offenders into society instead of the conventional method of criminal prosecution and punishment. Article 40 (3)(b) of CRC requires States parties to take measures and corrective methods prior to the commencement of formal criminal trial and without resorting to the judicial proceedings. In case under observation, no referral was to Juvenile Justice Committee for disposal of the case through diversion. In this regard, Mr. Muhammad Iqbal, a senior lawyer has remarked that by going through the conventional CJS, juveniles are generally branded as criminals, a stigma which remained for the whole of their lives.

Section 9 of the JJSA authorises police to refer a case to Juvenile Justice Committee at any stage of the criminal investigation and for this purpose all offences either minor or major are treated as compoundable. However, in major crimes, diversion can only be resorted, where the age of JA is not more than sixteen years. Under Sub-section (3) of Section 9 of JJSA, where a case is referred to Juvenile Justice Committee then submission of the Challan under Section 173 CrPC is postponed till the final order of the Committee. Juvenile Justice Committee is required to decide cases though diversion within a time frame of 1-month from the date of referral. Under Section 9 (4) of the JJSA, Juvenile Justice Committee is required to decide the referred case with the consent of the complainant. Where the offence is committed against the State and not against a private party then under Proviso to Section 9 (4) of the JJSA, the Committee can dispose of the case with the consent of the prosecutor. In practice, however, it is observed that police do not refer cases to Juvenile Justice Committee for the purposes of diversion as in present case. It is, therefore, suggested that police and prosecution should comply with the provisions of Section 9 of the JJSA and refer cases of JA to Juvenile Justice Committees instead of mechanically resorting to a formal trial and prosecution. In this connection, Mr. Muhammad Murtaza, district probation officer has remarked that focus should be on reintegrating delinquent juvenile offenders into society otherwise they would be deprived of their constitutionally guaranteed R2FT.

Recently, Government of KPK has established Juvenile Justice Centres all across the province and also opened Observation Homes in each district in compliance with the provisions of JJSA so as to keep exclusively juvenile offenders, which is a positive development. It is suggested that staff for Juvenile Justice Centres and Observation Homes should be recruited at the earliest and further they should be given proper training in how to handle juvenile delinquency matters. It is further recommended that Observation Home and Juvenile Justice Centres should be given under the supervision of District Probation Officer rather than the prison officials, as the later

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are not properly trained to rehabilitate the juvenile offenders. Mr. Muhammad Murtaza, probation officer has remarked that generally, prison staffs treat juvenile offender as adult criminals instead of vulnerable segment of the society who needs special attention to rehabilitate.

Section 173 CrPC requires the police to complete every criminal investigation within the stipulated time period of fourteen days and submit final report [*Challan*] to the office of District Public Prosecutor. Section 4 b (ii) of the KPK Prosecution Act authorises the District Public Prosecutor to withhold the *Challan* for want of proper evidence and return to IO with the direction to remove the identified deficiencies and resubmit the Challan. At this stage, DPP is particularly required to correctly record the age of juvenile so as to entitle him or her to the benefits of the JJSA. As mentioned above, it is generally observed that police sometimes record the age of juvenile in a haphazard manner like eighteen/nineteen years, which create legal complications and deprive a JA from the benefits and concessions available under the JJSA. Therefore, DPP is required to ensure recording the true age of the JA before the formal commencement of the trial. DPP can also return case file to the concerned IO with the direction to record the age of juvenile as per the procedure laid down in Section 8 of the JJSA. In absence of documentary evidence, DPP should direct the police to get the accused examined by a medical board determine the age of the accused. Mr. Rafiullah, a senior prosecutor has suggested that DPP should also initiate disciplinary action against an investigating officer who intentionally misrepresents the age of juvenile or dishonestly conducted investigation in juvenile cases. He further suggested that in juvenile delinquency cases, close coordination should be established between IO and DPP during investigation phase. Needless to mention that recently in 2016, a new penal Section 166 (2) has also been inserted in PPC, which states that a public servant i.e. IO who fails to conduct criminal investigation properly or diligently should be penalised with 3-year incarceration or fine.

In-Trial Processes

Juveniles, who are not diverted from the conventional judicial proceedings, are presented before the JCs to conduct criminal trial in accordance with the procedure laid down in CrPC and JJSA. Uunder Section 11 (1) of the JJSA, JCs are required to follow the procedure laid down in CrPC to conduct trials against the JA unless and until the special law provided otherwise. It means that in addition to fair trial guarantees under the JJSA, minimum fair trial safeguards available under the CrPC are also applicable to the criminal proceedings before the JCs. In other words, both CrPC and JJSA are applicable to the proceedings before JCs and

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where the two laws conflict, the provisions of JJSA will have overriding effect over the CrPC. In a case reported as PLD 2005 Lahore 15, Lahore High Court has beautifully remarked that under our ordinary CJS, accused are generally perceived as the darling of the criminal court unless and until their guilt is established beyond the reasonable doubt by the prosecution and in cases where the accused is a juvenile "the romance about him usually receives a further sympatric boost. In another case reported as 2012 PCrLJ 142, it has been held that the purpose of the trial of the juvenile in JC is not punitive or retributive but rather to reform him so as to make him a useful and responsible member of the society.

Article 40 (2)(iii) of the CRC states that each JA should have the right to an impartial and independent court of competent jurisdiction to conduct his or her trial in a fair hearing in accordance with law. Section 4 of the JJSA provides for the establishment of JC, which has exclusive power to conduct trial of JA. It states that the provincial government in consultation with the concerned provincial High Court shall create or designate a JC for one or more Sessions division within a time frame of 3-month from the promulgation of JJSA. As of this writing, 220 courts are notified as JCs across the country and conferred the powers to try cases of juveniles in conflict with law. For this purpose, Government of KPK in consultation with PHC has designated courts of Sessions Judge, Additional Sessions Judge and Judicial Magistrate as JCs in KPK province to try JA. In this regard, Mr. Shah Irani, a senior lawyer has stated that it would be more in the best interest of juvenile offenders, if separate specialised JCs were established in every district of KPK, which has exclusive jurisdiction to conduct trials of juvenile offenders. He added that the existing designated courts are already overburdened with judicial work, therefore, it can be safely said that the existing procedure of mandating the ordinary courts to work as JCs is not in line with the spirit of the international standards of juvenile justice.

In 2017, a specialised JC was established in Lahore of Punjab province, which exclusively adjudicates juvenile delinquency offences. On March 16, 2019, Chief Justice of Peshawar High Court Weqar Ahmad Seth has formally inaugurated Child Protection Court in Peshawar under the KPK Child Protection and Welfare Act, 2010. KPK Child Protection and Welfare Act, inter alia, provides for the protection, care, welfare, training, education, reintegration and rehabilitation of children at risk. This newly established Child Protection Court has also been designated as JC under Section 4 of the JJSA and a judge of the rank of Additional Sessions Judge was appointed to preside over the Court. Hence, this experience could be replicated in all other districts of the KPK and proposed exclusive JCs should be established at least one in a division to deal with the juvenile delinquency cases. Mr. Wajid Ali, a judicial officer has

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stated that a presiding officer specially trained in juvenile delinquency matters will have more advantage to follow the laws and procedures laid down in JJSA and international human rights instruments as compared to ordinary courts which are tasked to work as JCs. He recommended that specialised courses on juvenile justice should be included in the curriculum of KPK Judicial Academy.

Section 4 (10) of the JJSA requires that the JC should convene its proceedings at a distinct location from where ordinary courts sit to conduct trials of other cases. Section 11 of JJSA further enjoins that no private individual should be present in any proceeding of the JC. In case under observation, contrary to this express provisions of law, the trial of juvenile was conducted inside the Sessions Court, where trials of the ordinary cases are conducted and further people other than parties to the case were also present. The researcher has noticed that as of this writing, there is no such facility of separate courtroom available in district Shangla and the situation is not different in parts of KPK.

Article 40 2 (ii) of CRC stipulates that every JA should have the right of legal assistance in preparation of his or her defence. Section 3 of the JJSA also stipulates that every JA should have the right of legal representation at State expense. Sub-section (3) of Section 3 of JJSA further states that any such counsel appointed by the government or JC should have at minimum 7-year standing at the Bar. In case under observation, guardian of the JA has engaged the services of an experienced private legal counsel to defend him in JC. However, the researcher has observed that the situation becomes worrisome for an indigent JA, who has not able to engage expensive lawyers. In this connection, Mr. Muhammad Arif, a senior counsel has stated that experience shows that the provision of free legal assistance at State expenses is on statute book only as till date no such counsel is appointed in any case in district Shangla. He added that sometimes juveniles accused of minor crimes are languishing in jails and are not provided with the legal assistance. The researcher has observed that sometimes the appointed counsels in pauper cases are unprepared and not pursing the trials of indigent cases diligently and with due care; therefore, check and balance system should be developed to monitor their performances.

Section 12 of the JJSA prohibits trial of juvenile together with an adult accused, which states that no JA may be charged or tried for a crime together with an adult accused. However, Section 12 further stipulates that where it is in the interest of JA to hold a joint trial with the adult person, then the JC can dispense with the physical presence of the juvenile and he or she may be allowed to attend the court proceedings through audio-visual technology. Article 40 2 (ii) of the CRC stipulates that every JA should be promptly notified of the charges against him or

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her. In present case, SHO has submitted two separate *Challans* one against JA and other against major co-accused for trial before the respective courts. The JC framed separate charge against JA in English language, which was read over to him in his maternal language Pashto. However, the researcher has observed that police sometimes ignores this mandatory provision of law and submit *Challan* of juvenile together with adults. In such like cases, either the Prosecution or Court then direct the Police to submit separate *Challan* of Juvenile under the JJSA, which is just a legal formality to be fulfilled instead of realising the benefits and rights accrued to the juvenile offender. Furthermore, personal observation shows that the JC records prosecution evidences in juvenile case simultaneously with adults co-accused and merely reproduces the testimonies of witnesses in juvenile case, which is already recorded in case of adult co-accused. In other words, trials of juvenile and adult co-accused are conducted on the same day, which seems to be against the spirit of the JJSA.

Section 14 of the JJSA empowers the JC to direct the Probation Officer to prepare a report at any stage of the judicial proceedings covering matters such as juvenile offender's character, social, moral and educational background; extra-judicial admission of juvenile's accused to have committed the alleged offence; any incriminating evidence, which shows that the juvenile committed the crime; any legal assistance furnished to the JA at all stages of the criminal proceedings; any possibility of compromise between the victim and juvenile parties and the possibility to send the juvenile to Juvenile Rehabilitation Centre or release on probation. Under sub-section (2) to Section 14 JJSA, any such report of the probation officer is treated as confidential. On receiving the report, Section 15 of the JJSA empowers the JC to release the JA or pass an order of community service, compensation to the victim, fine, counselling or release the juvenile offender on probation or direct that juvenile offender be sent to Juvenile Rehabilitation Centre until he or she attains the age of eighteen years. Contrary to the above express provisions of law, the researcher has observed that the JCs generally don't take any step to ask the District Probation Officer to prepare any such report regarding the JA pending trial but instead proceeds to dispose of the case in a conventional and routine manner. Mr. Sultan-e-Room, a senior lawyer has remarked that the main focus of JJSA and international human rights instruments on juvenile justice is to reintegrate the juvenile offenders into society, an approach that is totally missing in existing proceedings of the JCs in district Shangla. He suggested that the judges of JCs should focus on the primary aim of JJS as envisioned in the JJS, which is to rehabilitate and reintegrate the juvenile delinquents back into the society.

Section 5 (8) of the JJSA requires the JC to decide the case within six months of taking cognizance of offence. In situations, where the JC fails to decide the case within six months

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then sub-section (8) of Section 5 demands that the JC should seek extension from the concerned High Court with explaining the reason that why the Court failed to decide the case within the given statuary time period. In case, where the JC doesn't seek extension, the JA can also make such an application to the HC. In case under observation, on 20th May 2019, JC farmed charge and delivered its judgement on 27th November 2019, which means the Court took about six months to decide the case. Needless to say that the instant case was taken under the newly introduced Expeditious Justice Initiative,[1] otherwise, the researcher has observed that it takes longer than six months to decide criminal cases including cases of juvenile. For instance, there are many cases, where JA spent several years in jails as under-trial prisoners waiting for their trials to be concluded by the JCs. It is to remind to the readers that the conviction ratio in Pakistan is not high and at the end of the trials, most of these juveniles are acquitted by the JCs without any compensation for the time they spent in jails.

7. Fair Trial Analysis

Based on the observations, the researcher is of the opinion that the overall proceedings were fair and conducted with the norms of national and international standards of juvenile justice. In particular, the following fair trial rights were respected: Establishment of national JJS; defining child as every individual below the age of 18-year; raising the lowest age of criminal responsibility; introducing statutory provisions on alternatives to formal criminal prosecution and punishment; introducing alternatives to deprivation of liberty of juvenile; imposing limits on penal sanctions of juveniles offenders; prohibition on custodial and torture and other degrading treatment of juveniles; conducting separate trial of JA; bar on disclosure of identity of the JA; removing the legal bar of disqualification attached to the conviction of juvenile offenders, among others.

Nevertheless, it transpires from the monitoring that some national and international standards of juvenile justice were not respected. They inter alia include: keeping of JA with adult in police station; lack of pre-trial detention facilities to exclusively keep JA; non-utilization of the provision of alternatives to formal criminal prosecution; non-compliance with the legal provision of loss of liberty as a measure of last resort only; police non-compliance with the rule of parental notification and contact with family; non-utilization of alternatives to deprivation of liberty; keeping of juveniles with adults in prisons; lack of free legal aid to

[1] Federal Judicial Academy prepared Expeditious Justice Initiative, which was later on approved by the National Judicial Policy-Making Committee of the Supreme Court of Pakistan.Under the Expeditious Justice Initiative, a Model Criminal Trial Court (MCTC) is established in each district to expeditiously decide criminal cases within a maximum period of six months.

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indigent JA and lack of strong coordination among the various actors of JJS.

8. Conclusion

This study concludes that the R2FT of a JA is sufficiently protected under the national legal framework of JJS. In other words, there are sufficient fair trial rights available to a JA within the JJS of Pakistan. Moreover, higher judiciary played a remarkable role in interpreting the various legal provisions on juvenile justice by adopting child-friendly approach and consequently produced a progressive jurisprudence on the subject. However, the real problem still lies in implementation of the national standards on juvenile justice in trial courts at district level. It goes without saying that the mere existence of law on statute books without proper implementation is of no use. It is hoped that the government will take drastic steps to make ensure the implementations of the suggested recommendations by all the stakeholders of the JJS in order to meaningfully guarantee the R2FT to a JA.

9. Recommendations

This study recommends the followings recommendations:

- Police arresting officers should be trained and sensitised about the various fair trial rights available to the JA under the JJSA.
- Police investigating officers should be trained and made aware of the crucial role of Probation Officer in investigating juvenile delinquency cases. Further, strong coordination should be established between the IO and probation officer during the whole process of investigation.
- IO should establish strong working relationship and coordination with the DPP and Probation Officer during the whole process of criminal investigation. Moreover, senior police officers should vigilantly supervise the process of criminal investigation in juvenile cases.
- As a general rule, arrest and detention of JA should be avoided in line with the spirit of JJSA and Article 37 (b) of the CRC and instead arrest can be resorted only as an option of last choice and for minimum time period.
- At the time of taking into custody of a JA, police should correctly note down the age of the juvenile so as to entitle him or her to the various rights available under the JJSA. Also, during police investigation, the Remanding Judicial Magistrate should record its findings about the age of a JA at the remand stage as required within the meaning of Section 8 of the JJSA.

- At the time physical remand, Remanding Court should expressly direct the police not to keep a JA in police station or jail with adult prisoners.
- At the pre-trial stage, police and prosecution should give more attention on diverting juvenile offenders from the formal the conventional CJS and utilize the various diversionary options available under JJSA to reintegrate them into the society.
- Staff of Observation Home and Juvenile Justice Centres should be properly trained in counselling and interviewing of juvenile offenders.
- Presiding officers and prosecutors of the JCs should not only be trained in national legal framework of juvenile justice but also international human rights instruments on juvenile justice.
- In line with the spirit of Section 4 (10) of the JJSA, special arrangements should be made to enable the JC to conduct trials of juvenile offenders in a separate courthouse from the ordinary courts.
- There should be an elaborate mechanism on appointing of experienced legal counsels for juvenile offenders to make meaningful section 3 of the JJSA.
- The concerned JC shall monitor the performance of the appointed counsel in juvenile cases and where necessary promptly engage the services of another dedicated counsel from the panel of lawyers. To attract competent lawyers, the legal remuneration should be fixed at a reasonable rate.
- Sessions Judge should be made authorised to appoint a panel of dedicated and experienced lawyers from the local Bar after consultation with the President of the District Bar Association, who are always available to represent a JA at State expenses. The appointed legal counsels should be imparted special special training in JJS.
- JC should not take up any other case on the day fixed for the recording of evidence or any other proceeding in juvenile case.
- There is a need for developing criminal sentencing guidelines in case of juvenile offenders keeping in view the basic principles of juvenile justice. Best interest of the juvenile offenders should be the top most consideration in all decisions regarding them as enjoined by Article 3(1) of the CRC.
- Instead of focusing on retributive theory of punishment, the JCs should pay more attention on diverting the JA from the conventional CJS.
- The JCs should expeditiously conclude trials of cases by holding day-to-day trials particularly in cases where bails are refused to JA.

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- The JCs shouldn't grant routine requests for adjournments of the cases but rather it may be granted only in exceptional circumstances.