

Child Protection and the Juvenile Justice System
Pakistan:
A Case Study of Khyber Pakhtunkhwa



By

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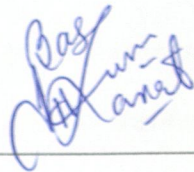
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ABSTRACT

This research explores the juvenile justice system in Khyber Pakhtunkhwa province of Pakistan. Juvenile justice is a policy area that focuses on child welfare in the area of criminal justice. Research on juvenile justice system in Pakistan has remained dismal though.

This thesis, based on qualitative research methodology, explores how the Juvenile Justice System Ordinance-2000 has played in Khyber Pakhtunkhwa. Central thesis of this research is that there is a significant gap between the theory and practice of the juvenile justice system in Pakistan, based on many grounds including religious as well as cultural. The juvenile justice like most other social policies is a transplanted institution. Throughout this thesis, it was found that juvenile justice means different things to different people. The legal documents are hardly followed in practice. Police officers use discretionary powers in extending benefits or otherwise, of JJSO to an offender. Prosecution rarely, if ever, raises the question of age of the offender. There is no difference in adult and a juvenile trial for prosecutors. Courts use the same procedures and methods as used for adults. There are a significant number of offenders in prison. The probation officers have meager resources to perform this extra duty as a protector of the rights of the child involved in criminal litigations at all stages.

This study found that the law-in-the-books did not have any real relationship with what presently happens in police stations, the courts, probation services, and prison settings. The thesis concludes by arguing that this basically represents a failure in the institutional transplantation of ideas and systems that have not worked in the Pakistani context. The answer, it is suggested, is synthesis of 'old' and 'new' practices around the world—i.e. restorative justice or greater reliance upon practices that better coincide with the religious, cultural and normative codes of Pakistani society.

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Blessings and Peace be upon the Prophet Muhammad (pbuh) who connected the humanity to Almighty Allah, who is the best teacher and guide there is.

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ACRONYMS

- ADR: Alternative Dispute Resolution
- APP: Assistant Public Prosecutor
- ASI: Assistant Sub-Inspector
- ASP: Assistant Superintendent of Police
- BPS: Basic Pay Scale
- CC: Civil Court
- CIA: Central Intelligence Agency
- CJCC: Criminal Justice Coordination Committee
- CNSA: Control of Narcotics-Substance Act
- CPS: Crown Prosecution Services
- CPU: Child Protection Unit
- CRC: Convention on the Rights of the Child
- CrPC: Code of Criminal Procedure
- DFID: Department for International Development
- DG: Director General
- DHQ: District Head Quarter
- DI Khan: Dera Ismail Khan
- DIG: Deputy Inspector General Police
- DPO: District Police Officer
- DPP: District Public Prosecutor
- DSP: Deputy Superintendent of Police
- EU: European Union
- FIR: First Information Report
- IBRD: International Bank for Reconstruction and Development
- IG: Inspector General
- IMF: International Monetary Fund
- INGO: International Non-Governmental Organization
- IO: Investigation Officer
- JJS: Juvenile Justice
- JJSO: Juvenile Justice System
- KG: Kilo Gram
- KPK: Khyber Pakhtunkhwa
- LLB: Legum Baccalaureus (Bachelor of Laws)
- MIT: Massachusetts Institute of Technology
- NGO: Non-Governmental Organizations
- NICC: National Institute of Criminalistics and Criminology
- NWFP: North-West Frontier Province
- PCPC: Police Child Protection Center
- PIDE: Pakistan Institute for Development Economics
- PLD: Pakistan Legal Decisions
- PLJ: Pakistan Law Journal
- PP: Public Prosecutor
- PPC: Pakistan Penal Code
- SCMR: Supreme Court Monthly Review
- SHO: Station House Officer
- SI: Sub-Inspector

- SIR: Social Investigation Report
- SP: Superintendent of Police
- SPARC: Society for the Protection of the Rights of the Child
- SSP: Senior Superintendent of Police
- UK: United Kingdom
- UN: United Nations
- UNICEF: United Nations Children Fund
- UP: Utter Pradesh
- US(A): United States (of America)
- USD: US Dollars
- VIPs: Very Important Persons
- VOM: Victim-Offender Mediation
- VORP: Victim-Offender Reconciliation Program
- WW: World War

CHAPTER I:

Introduction

CHAPTER I: INTRODUCTION

Protecting the child is gaining much interest throughout the world. More programmes are launched for child protection; more funds are being allocated for well-being of children. The world today seems much more concerned for the future of the children, far better than it did until the mid20th century. Protecting the child has become one of the most important agenda for the United Nations Organization (UN). The UN's convention related to children has been one of the most successful conventions. It is the only convention that has been ratified by the entire world except the United States of America and Somalia. The UN has even established a separate body committed to concerns for children, i.e. UNICEF. Protecting the children from physical abuse, sexual abuse, protecting the child from violence, promoting child welfare, ensuring child protection, eradicating child prostitution, fighting against child labour, protecting child forced marriages, child trafficking, child kidnapping and the like terms are the invention of the recent past—the 20th century.

Children do need protection from various forms of violence and abuse. However, there are some situations where children themselves become perpetrators of some heinous acts—acts which are injurious for the society. Delinquency is a major area of concern in developed and developing countries alike. Previously, delinquents were considered as criminal¹ responsible for their acts as the adults². Thus, tougher policies were suggested for dealing with such offenders. However, with the advent of child psychology, social welfare, and related fields, this idea gradually changed. The young offenders are

¹ John Adams. (1849). *Summary Jurisdiction: A Charge to the Grand Jury of the Quarter Sessions of the County of Middlesex* (No. 59972). JT Norris. Retrieved January 12, 2014 from http://books.google.com.pk/books?hl=en&lr=&id=T84DAAAAQAAJ&oi=fnd&pg=PA1&dq=Delinquency,+state+as+parent&ots=LjJFomiTbf&sig=K_xPqUfEiBCqf_oyE5vWsXKZR0#v=onepage&q&f=false

² A child below 7 years was consider incapable of committing an offence. However, a child of above 7 was mostly treated as adult.

considered to be of persons of immature understanding who are in need of education, protection and welfare³.

There is a separate body of programmes for concerns of children who are involved in crime. That separate area of child protection is the juvenile justice or the juvenile justice system. The juvenile justice system is the formal response of the society towards the problem of juvenile delinquency.

1.1 Statement of the Problem

Research on the juvenile justice system in Pakistan has remained dismal. Imran Ahmad Sajid (the researcher) pointed out a few gaps and recommended some policy guidelines for the juvenile justice system in Pakistan⁴. Age is the determining factor whether an offender should enter the juvenile justice or the criminal justice system. Determination of an offender's age, therefore, remained an issue of debate for the most part⁵. The Juvenile Justice System Ordinance, 2000, commonly known as JJSO, is the first legislation on the juvenile justice in Pakistan. This legislation prohibited capital punishment for juvenile offenders. It does not, however, clearly sets out the procedure for determining the age of offender. Khurshid Iqbal, therefore, argues that the juvenile Justice System ordinance, 2000 (herein after JJSO) and other relevant statutes in the field are inconsistent in determining the age of juvenile offenders⁶. Similarly, Aziz and Adil identified some technical issues in the JJSO 2000, e.g. they identified that the "[law] quintessentially addresses issues dealing with procedure of trial and interim custody during litigation of

³ J. Morel. (1894). The Need of Special Accommodation for the Degenerate. *The British Journal of Psychiatry*, 40(171), Pp.597-605.

⁴ Imran Ahmad Sajid. (2009, Oct). Juvenile Justice Policy in Pakistan: Gaps Identification and Role of Key Stakeholders. *Pakistan Journal of Criminology*, 1(3), Pp.119-139.

⁵ Khurshid Iqbal (2009, Oct). Judging Juvenility, Determination of Age of Juvenile Offenders under Pakistan's Juvenile Justice System. *Pakistan Journal of Criminology*, 2(3), pp.105-118.

⁶ Ibid.

*criminal nature and not with the protection, rehabilitation and reorganization of juvenile [in] criminal justice.”*⁷

One study conducted by M L Kachwaha found that about 10 percent of the convicted jail population is juvenile⁸. Almost half of the convicted juvenile prison population is involved in property crimes, e.g. theft or pick-pocketing. However, 30% of the juveniles are convicted for violent crimes. Similarly, 10-15% are convicted for drug crimes⁹.

It is noticeable that studies on the juvenile justice system in Pakistan remained focused on the impacts of this new approach on police, prosecution, courts and probation and the legal implications and issues¹⁰. Juveniles in prisons also got attention by the researchers¹¹. The implication of new laws upon the protection of the rights of the juvenile offenders has also got the attention of researchers.

There are numerous issues in the juvenile justice system in Pakistan. For example, in society like Pakistan where religion has a pervasive role and affect, the status of a child is determined on basis of the religious interpretation/ Islamic jurisprudence with little or no relevance to the internationally recognized definition of a child. The common perception of a child in Pakistani society is that any boy or girl when reaches puberty at the age of 13-15 (to the maximum) is no more a child and all laws whether religious or mundane applies to him/ her if so required. This situation has made the matter more complex as the present JJSO is in clear contradiction with the current cultural and religious concept of a

⁷ Abdul Aziz and Kamran Adil. (2009, Oct). Criminal Justice for Juveniles: International and National Law. *Pakistan Journal of Criminology*, 1(3), pp.139-148.

⁸ M L Kachwaha. (1982). *Juvenile Delinquency and Drug Abuse Problem in Pakistan*. UNAFEI Report for 1981 and Resource Material Series Number 21, P 127-135. Retrieved December 12, 2012 from <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=91262>

⁹ Ibid

¹⁰ Muhammad Saeed. (2009, Oct). A Critical Review of Juvenile Justice Law in Pakistan. *Pakistan Journal of Criminology*, 2(3), Pp.97-104; and also Khurshid Iqbal (2009, Oct). *Op. Cit.*

¹¹ Mashood Ahmad Mirza. (2009, Oct). Alternative to Imprisonment for the Juveniles: A Case Study of Pakistan. *Pakistan Journal of Criminology*, 1(3), Pp.47-72.

child and particularly an offender. This also negates the general concept of the sources of law which are religious or cultural than need based.

In the same way, the situation in Khyber Pakhtunkhwa (KPK: See Chapter 3 for more discussion on KPK) province is also not better than other parts of the country. There is no juvenile prison or Borstal institution in the KPK¹². Similarly, the police stations have no separate place to keep the juvenile offenders away from the adult accused in the police lock-ups. Next, there are no separate juvenile courts in any part of the country, including KPK. In this context it is apt to know as to what strategies are adopted by criminal justice community—particularly the police, courts and prison system—to deal with juvenile cases, keeping in view the legal requirements and institutional/infrastructural barriers.

One part of the debate stems from the fact that the new the juvenile justice approach is based on the welfare or protectionist model—a model focusing on the needs rather than deeds of the juvenile¹³. Although well intentioned in its purpose, the provisions of JJSO, the infrastructure at hand and the socio-cultural conditions are somewhat at odds with each other. This oddity has led to a significant level of abuse of the law and created enormous difficulties for the stakeholders in criminal justice.

Similarly, it is common in the police community to argue that due to the softer response of the law towards juvenile offenders/criminals, it has become a norm to use children/juvenile in crimes—particularly Norco-trafficking and, in some cases, murders. Under the law, no child can be punished to death in any case¹⁴. On the other hand, the police and other institutions are consistently accused of violating the rights of the

¹² Personal Communication with Syed Khizar, Deputy Director, Regional Directorate of Human Rights, on December 12, 2011.

¹³ Ian O'Connor and Margaret Cameron (2002). Juvenile Justice in Australia. In Graycar A., & Grabosky P. (Eds). *The Cambridge Handbook of Australian Criminology*. Melbourne, Australia: Cambridge University Press. p. 213.

¹⁴ Article 12 (a) of the JJSO, 2000.

child/juvenile. The police are said to be involved in making an adult a juvenile and showing a juvenile as an adult¹⁵.

Researchers agree that the most crucial element in the criminal procedures concerning child is the “age of criminal responsibility”¹⁶. Therefore, the definition of a child/juvenile has generated a significant debate around the country. However, these debates are more concerned with legal implications than the societal¹⁷. Although international laws provide for the state parties to determine the age of juvenile in the light of relevant social, cultural and other conditions¹⁸, JJSO fixed the age of child/juvenile below 18 years—an age considered too high by many in Pakistan. This definition of child, it is argued, and some other issues in the law (and different definitions of child/adult in other laws in Pakistan) have made it prone to abuse and inapplicable in Pakistan.

To this researcher, part of the debate stems from the fact that the definition of the child and the age of criminal responsibility are confused and are considered as one and the same thing in Pakistan. However, the age of the child is different to the age of criminal responsibility. In Australia e.g. a child is defined as less than 18 years, but the child can be prosecuted and held responsible for crimes over the age of 14, and in some cases over the age of 10¹⁹.

In 2009-10, I worked with the Khyber Pakhtunkhwa Police as a trainer in the juvenile justice system.²⁰ In that project, I worked in Peshawar, Mardan, Hangu, Kohat, Bannu,

¹⁵Personal Communication with Fasihuddin, Director, Human Rights, Khyber Pakhtunkhwa Police Department.on December 12, 2011.

¹⁶Mashood Ahmad Mirza. (2009, Oct). *Op. Cit.*

¹⁷KhurshidIqbal (2009, Oct); and Muhammad Saeed.(2009, Oct). *Op. Cit.*

¹⁸United Nations Convention on the Rights of the Child, 1989; and also, United Nations Committee on the Rights of the Child, General Comments 10, 2007. Retrieved Nov 12, 2011 from

http://www2.ohchr.org/english/bodies/crc/docs/GC10_en.doc

¹⁹ Email communication with Prof. Adam Tomison, Australian National University, on May 21, 2012

²⁰ The project was a joint venture of Pakistan Society of Criminology, Save the Children Sweden and Khyber Pakhtunkhwa Police.

Malakand, and Hazara police ranges.²¹ In that project, I got the chance to interact with judges, prosecutors, police investigation officers, probation officers and prison officials on the issue of the juvenile justice in Khyber Pakhtunkhwa. During question/answer and discussion sessions of those trainings, I got a lot of knowledge regarding the practical difficulties in the juvenile justice system. I wrote a paper in *Pakistan Journal of Criminology* titled "the Juvenile Justice Policy: Gaps Identification and the Role of Key Stakeholders in Pakistan".²² This experience and preliminary research motivated me to further investigate the issue of the juvenile justice system.

1.2 Significance of the Study

There are many reasons to conduct a study on the issues in the juvenile justice system in Pakistan with special reference to Khyber Pakhtunkhwa, definition of a child, problems and issues in implementation of juvenile laws, JJSO in particular, faced by the police, prosecution, courts, probation, the abuse of juvenile rights in prisons, and the abuse of juvenile laws by the officials. First, understanding the incompatibility of the prevailing international standards and local conditions can help the international community to reconsider the standards. Further, it will help the civil society in particular to redraw their strategies keeping in view the local religio-cultural conditions. Second, establishing a local definition of a child and identifying problems and issues in the implementation of JJSO in its current state will help decision makers to reconsider the decisions and review the current legislation. It will also help to reduce the pressure from the international community on the policy makers to draw policies in accordance with the international standards without considering the local conditions. Third, the researchers have often

²¹ Note that the entire province of Khyber Pakhtunkhwa is divided into seven (7) police ranges including Peshawar range, Mardan range, Malakand Range, Hazara range, Kohat range, Bannu range and D.I.Khan range. I worked in six (6) of these ranges.

²² Imran Ahmad Sajid. (2009, Oct). Juvenile Justice Policy: Gaps Identification and the Role of Key Stakeholders in Pakistan. *Pakistan Journal of Criminology*, 1(3), Pp.119-139.

studied juvenile's age from a legal point of view but overlooked to establish definition of a juvenile from the community/cultural point of view. The results based on a localist perspective will add up a missing area in the scholarly literature on the juvenile justice in Pakistan. Finally, the implementation of the recommendations of this study will help in establishing a more practicable juvenile justice system in Pakistan that suits the interest of the child.

1.3 Purpose of the Study

In the context of the prevalent ambivalent situation of the juvenile justice system in Pakistan, this study is carried to find out answers to many questions. First, it aims at the public perception of a child/juvenile through drawing an indigenous definition and image of a child and childhood.

In poor countries in general and the poor and Islamic countries in particular like Pakistan, the economic conditions of a family do matter. In these societies, culturally, a male child in particular is an economic asset and an insurance policy for parents in their old age. In such countries, children's roles are very different. Children take on considerable responsibilities, and see this as part of their obligations to their families²³. A son of 13-15 years is considered an adult and is expected to shoulder most if not all, economic responsibilities if the father so desires or the father is not able to earn enough to support the family expenditures. Consequently, the practice of 'child labor' prevails under the economic pressures. Not only child labor but also the practice of early marriages or child marriages exists.

Secondly, this study aims at finding the problems in the implementation of JJSO. As already mentioned, the judiciary, the police and the legal fraternity in Pakistan has

²³ Virginia Morrow. (2011). Understanding children and childhood. Center for Children and Young People, Southern Cross University, Australia. Retrieved August 13, 2015 from http://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1027&context=ccyp_pubs

frowned the JJSO in terms of its applicability and its abuse by those who want to manipulate the law. This situation has created a rift between the major components of the society i.e. judiciary and executive. This study will find the gap between the public perception and the legal community.

Thirdly, the study targets to find out the strategies adopted by the criminal justice community for dealing with juvenile cases in the absence of proper institutional-structural arrangements. As it is an established fact that the infrastructural arrangements for dealing with juveniles are in clear dismal. There is no juvenile prison, or correctional institution in the KPK. Similarly, the police stations have no separate place to keep the juvenile offenders away from the adult accused in the police lock-ups. Next, there are no separate juvenile courts in any part of the country, including KPK. In this context, it is apt to know that what strategies are adopted by criminal justice community—particularly the police, courts, and prison system— to deal with juvenile cases, keeping in view the legal requirements and institutional/infrastructural barriers.

Lastly, this study is carried out to find out the abuse of juvenile laws, especially the JJSO by the concerned officials and the society. On the one hand, it is common in the police community to argue that due to the softer response of the law towards juvenile offenders/criminals, it has become a norm to use children/juvenile in crimes—particularly Norco-trafficking and, in some cases, murders. Under the law, no child can be punished to death in any case²⁴. On the other hand, however, the police, and other institutions, are consistently being accused of violating the rights of the child/juveniles. The police is said to be involved in making an adult a juvenile and vice versa.

²⁴ Article 10(a) of the Juvenile Justice System Ordinance, 2000

This is a qualitative, descriptive, explanatory study on the Juvenile Justice System Ordinance in Pakistan. This study is about the problems in the implementation of the newly adopted law entitled the Juvenile Justice System Ordinance 2000. It is known that there are many impediments in the way of its implementation like the cultural aspirations of the people from a young man of eighteen years who is not considered as a child, the religious interpretation of an adult as well as the court system and the institutional inefficiencies.

1.4 Organization of the Thesis

This dissertation consists of eight chapters.

Chapter—I introduces the concept and practices of the Juvenile Justice System in Pakistan and elsewhere. It highlights its origin as well as the problems associated with the implementation of the JJSO in Pakistan on the basis of culture, religion, courts structure and the institutional incapacities. This chapter justifies the need to conduct the present research.

Chapter—II introduces the readers to the contemporary child protection and the juvenile justices system in the world. The chapter discusses the situation of the juvenile justice system in Pakistan. It also presents the significance of this study for various stakeholders. It reviews the literature on child, juvenile, delinquency, child protection, the juvenile justice system, and the case of Pakistan. In other words, this chapter constitutes the literature review of the study which is a common practice among the academic community, the world over.

Chapter—III consists of the area profile and the plan of research adopted for the present study. It specifically presents the methods used for this research and the characteristics of

the respondents of this study. The chapter also justifies why qualitative method was adopted for the present research.

Chapters—IV, V, VI and VII present the data collected through in-depth interviews, documents and field-notes.

Chapter—VIII evaluates the research findings in institutional transplantation framework.

Chapter—IX, the last chapter is the summary and conclusion of the present research work and provides a way forward for Pakistan. It also provides a way forward for Pakistan.

CHAPTER II:

The Juvenile Justice System: Concept and Practices

CHAPTER II: THE JUVENILE JUSTICE SYSTEM: CONCEPT AND PRACTICES

The previous chapter built the case for the juvenile justice. This chapter introduces the concept of the juvenile justice system in the context of criminal justice and welfare. It is divided into three sub-sections. Part—I discusses concepts related to the juvenile justice including juvenility, delinquency, criminal justice, and the philosophical foundation of the juvenile justice, etc. It ends with discussion on competing models of the juvenile justice around the world. Part—II discusses the juvenile justice practices around the world such as in Denmark, Finland, the UK, the USA, Australia and Nepal etc so that readers have a view of what is practiced in other parts of the world. The Juvenile justice in England and Wales has been separately discussed in detail as Pakistan got its criminal justice system from the old colonial power of Great Britain. Part—III presents the existing picture of the juvenile justice in Pakistan as seen by other researchers in the context of child protection.

PART—I: THE JUVENILE JUSTICE: CONCEPTS, PHILOSOPHY AND MODELS

2.1 Who is a Juvenile?

There is no dearth of literature on the juvenile justice at international level explaining who is a juvenile and what is juvenility? These questions, at first, seem very straight forward and simple. A juvenile is any human being who is not an adult. Likewise, juvenility is a stage of life before adulthood. However, when does a juvenile specifically lose his juvenility and become an adult? And at what specific age the juvenility is converted into adulthood? This question has created difficulties for the researchers, law experts and other stakeholder dealing with criminal cases involving children in Pakistani context. In this section, I look at this issue in detail.

There seems to be no consensus among literary and legal fraternities on the definition of the term. For example a juvenile, as defined in Cambridge Advanced Learner's Dictionary, is "a young person who is not old enough to be considered an adult". Similarly, in *Oxford Advanced Learner's Dictionary 8th edition*, a juvenile is a "young person who is not yet an adult"¹.

In legal context, a juvenile is "someone who falls within an age range specified by the state law"². This legal ceiling varies the world over, from the lower limit of 7 to the upper limit of 18 years. The Dictionary of American Criminal Justice, Criminology and Criminal Law defines juvenile as,

*"a person under statutorily specified age (usually between seventeen or eighteen years of age) who is potentially under the jurisdiction of the juvenile court"*³.

The researchers, however, also use a more broad term—Youth or Adolescent—to include the teenagers and adolescents under the definition of juvenile in criminal context⁴.

According to Article 1 of the UN Convention on the Rights of the Child (hereinafter CRC) and Section 2 (b) of the Juvenile Justice System Ordinance 2000 (hereinafter JJSO 2000), a juvenile is any person below "the age of 18 years." Nonetheless, in CRC and JJSO, the word 'child' is used as synonym for 'juvenile.' Likewise, "The Beijing Rules" Section 2.2(a) specifically uses the word juvenile and states that "A juvenile is a child or

¹ "Juvenile". (2010). Oxford Advanced Learner's Dictionary.(8th Edition). Oxford: Oxford University Press.

² Preston Elrod and R. Scott Ryder.(2005). *Juvenile Justice A Social, Historical, and Legal Perspective* (2nded.). Mississauga, Canada: Johnes and Bartlett Publishers. p.4.

³ David N. Falcon. (2005). *Dictionary of American Criminal Justice, Criminology, and Criminal Law*.(1sted.). New York: Pearson Prentice Hall's.

⁴ Tim Newburn. (2002). Young People, Crime, and Youth Justice. In Mike Marguire, Rod Morgan and Robert Reiner. (Eds.)*The Oxford Handbook of Criminology*. New York: Oxford University Press.

young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult”⁵.

2.2 Juvenile VS Child – Conceptual Understanding

The words ‘juvenile’ and ‘child’ are often synonymously used. National laws of Pakistan also use the term juvenile and child synonymously. The word juvenile has not been defined in any of the law in Pakistan. Instead, the definition of a child is given in its place in both national and provincial laws. Even the JJSO 2000 gives the definition of a ‘child’ instead of a juvenile.⁶ Similarly, the Child Protection and Welfare Act 2010 of Khyber Pakhtunkhwa also give definition of a child instead of using the word juvenile⁷. Likewise, the Punjab Youthful Offenders Ordinance 1983 has defined a child instead of juvenile or youth⁸. Pakistan Penal Code 1960 used the word ‘minor’ in its place⁹. Nonetheless, there is a difference between the two.

As already reproduced the definitions given by the two prestigious dictionaries, a juvenile is defined as a “*young person who is not yet an adult.*”¹⁰. From these two definitions of the word ‘juvenile’ presented in first paragraph of this chapter, one gets the impression

⁵ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) Section 2.2- For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts.

(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.

⁶ Juvenile Justice System Ordinance 2000, Article 2 (b). “Child” means a person who at the time of commission of an offence has not attained the age of eighteen years.

⁷ Khyber Pakhtunkhwa Child Protection and Welfare Act 2010, Article 2 (d). “child” for the purpose of this Act means a natural person who has not attained the age of eighteen years.

⁸ Punjab Youthful Offenders Ordinance 1983, Section 2 (a) “child” means a person who at the time of initiation of any proceedings against him under the Ordinance or at the time of his arrest in connection with which any proceedings are initiated against him under the Ordinance has not attained the age of fifteen years .

⁹ Pakistan Penal Code 1860, Article 299-Section (i). “minor” means a person who is not an adult.

¹⁰ “Juvenile”. (2010). Oxford Advanced Learner’s Dictionary.(8th Edition). Oxford: Oxford University Press.

that the word 'juvenile' is associated more with adult than with the child. A juvenile is always contrasted against an adult.

On the other hand, it is the word 'child' that has been extensively studied across disciplines. The *Mariam-Webster's Dictionary and Thesaurus*, defines 'child' as 'a young person especially between infancy and youth'¹¹. From this source, one gets the impression that the word child is associated more with infancy and earlier stage of human development. A child is usually contrasted against an infant. Virginia Morrow discusses the definitional issues of child and childhood in details¹². She found that there are legal, and relational definitions. Historically, childhood in the UK and Australia was defined at the age when the children left school. This meant that the notion of 'child' was flexible as the school leaving age gradually increased over time¹³. It is 15 years now.

In Pakistan, the only national law which specifically differentiates between a child, an adolescent and an adult is the colonial Factories Act of 1834. According to this Act, any person below fifteen years of age is a child. Similarly, any person above seventeen (17) years of age is an adult. The adolescent is someone between the definition of a child and an adult, i.e. a person who is above fifteen but below seventeen years of age.

For the sake of analysis, it can be said that the age of childhood comes after infancy while the age of juvenility comes after childhood. Some researchers use a more appropriate term for juvenile, i.e. adolescent.

This century debate over definition of child (as given in CRC and adopted in JJSO by Pakistan), nonetheless, ignores a vast area of developmental importance. A human

¹¹ 'Child' (2008). *Mariam-Webster's Dictionary and Thesaurus* [DVD].

¹² Virginia Morrow. (2011). *Understanding children and childhood*. Center for Children and Young People, Southern Cross University, Australia. Retrieved August 13, 2015 from http://epubs.scu.edu.au/cgi/viewcontent.cgi?article=1027&context=ccyp_pubs

¹³ *Ibid*

organism is not born as a child, rather there are different levels of development. From birth to age two years is the period of infancy. This is not of importance to criminal law. From about age two years to seventh or 8th year is the period of childhood. The period of boyhood/girlhood extends from 7th or 8th year to 12th or 14th year in females and 14th to 16th year in males. Adolescence extends from boyhood to 20 or 24¹⁴. The existing criminal law, however, ignores childhood, boyhood/girlhood and adolescence as important categories for legal implications. It brings children, boys/girls, and youth into a single definition of 'child'.

Today, many see childhood as a social construct¹⁵. It varies over time and place. The idea was first proposed by the French social historian Phillipe Ariès¹⁶ who made the famous (and controversial) claim that 'In medieval society the idea of childhood did not exist. Although Phillipe Ariès did not develop the concept of social construction¹⁷, what he meant was that the idea of childhood is socially constructed. What it means is that the definition of childhood has varied and varies over time and place. For example, he argued that children existed alongside adults, working with adults, with no distinctive practices (or clothes) focused on them as children. Gradually, however, aristocracy singled out their children for education which was extended to middle-class over the period of two and three centuries. Likewise, in the US Viviana Zelizer¹⁸ explored that while children

¹⁴ Micaiah Hill and Caroline Frances CORNWALLIS (1853). *Two Prize Essays on Juvenile Delinquency*. Smith, Elder and Co. Retrieved January 14, 2014 from

<http://books.google.com/books?id=7roiAAAAMAAJ&oe=UTF-8>

¹⁵ J.M. Qvortrup, G. Sgritta Bardy, and H. Wintersberger, eds. (1994). *Childhood Matters: Social Theory, Practice, and Politics*. Aldershot, UK: Avebury

¹⁶ Phillipe Ariès. (1979). *Centuries of childhood: A social history of family life*. London: Penguin.

¹⁷ A social construction might be defined as 'a theoretical perspective that explores the ways in which "reality" is negotiated in everyday life through people's interactions and through sets of discourses'. In other words, it relates to the idea that different 'realities' arise from the interactions people have with each other and their environment. In this sense, sociological theory argues that 'reality' is socially constructed. James, A., & James, A. (2008). *Key concepts in childhood studies*. UK: Sage.

¹⁸ Viviana Zelizer. (1985). *Pricing the priceless child: The changing social value of children*. New York: Basic Books

gradually became 'economically useless', as they no longer undertake wage labour, they instead became 'emotionally priceless', giving meaning to their parents' lives.

Most of the heated debate over the juvenile justice in Pakistan is over the age (as will be discussed in Chapters IV, V, VI). In particular, the questions are raised over a girl or boy of 15 and above years. In other words, the questions are raised over the actions of adolescents and not children. Providing adolescents the same leverage as children, boys and girls, seems illogical. However, for researcher purpose, fixing the exact age for defining a social category, such as child, juvenile, youth, adolescent, is of little use. For researchers, these concepts are social constructed.

2.3 Debate over definition of Child in Pakistan

Today, any policy debate on children cannot overlook the provisions of the UN CRC. As a consequence, all legislations and policies pertaining to children in Pakistan revert to CRC for guidance. It wouldn't be out of place to discuss what lead to the development of CRC in the first place. Paula S. Fass¹⁹ is an expert on child rights history. She argues that two historical events lead to the enactment of UN CRC. First was the anti-child labour legislations of 19th century in the UK, USA and European countries. The second event was the first and second World Wars that set the stage for UN CRC.

For centuries, children have been working in the fields with families. But the 19th century brought children out of their homes to the factories where they worked as labourers and not with the family. For factories, children were a cheap source of labour that could easily be exploited. By the mid of 19th century, many anti-child labour movements began who exposed the exploitation of children by the factory owners. Some of the writers, such as Charls Dickens, depicted children exploitation in factories in his novel *Oliver Twist*.

¹⁹ Paula S. Fass. (2011, January). A Historical Context for the United Nations Convention on the Rights of the Child. In *The ANNALS of the American Academy of Political and Social Science*, 633 (1). Pp. 17-29

These movements were holding the ideals that children need protection from the kind of exploitation. By the late 19th century, anti-child labour legislations were enacted that often go along-with compulsory schooling. These legislations identified that children have certain rights, that state should step-in to protect those rights in the absence or presence of parents, that children are weak and dependent, that children are vulnerable, and that children need protection and a conducive environment, and that children's place is school and not factories.

The 19th century set the stage for the 20th century where children were protected. The world was preparing for that. Then those two wars happened. In both wars children suffered the most. These wars were full of events where militaries invaded and killed entire village populations—including intentional killings of children. In the WWI, there were propaganda posters of German invasion of Belgium, where children are speared by bayonets, these are seen on various kinds of war posters²⁰. After the WWI, the League of Nations was established so that what happened in the WWI, should not happen again. It failed though. In the WWII, killings of the children of Jews, Gypsies and others by the Nazis meant there was no real protection for children. Fass argues that this set the stage for not only the UN CRC of 1989 but also of the Universal Declaration of the Rights of the Child in 1959.

With this historical background, CRC's provisions ask for three kinds of rights of children, protection rights, provision rights and participation rights. It set the age boundary for adulthood at 18. The under 18 are consider vulnerable and having distinct developmental needs. With this understanding, this convention has been adopted by all the countries around the globe except US and Somalia. Its provisions are incorporated in

²⁰ Paula Fass. (2011, Feb 25): *How History has Shaped Children's Rights*. interview with Stephanie Marudas. The American Academy of Political and Social Science. Retrieved August 13, 2015 from <http://www.aapss.org/news/2011/02/25/paula-fass-how-history-has-shaped-children-s-rights>

legislations pertaining to children throughout the world. Nonetheless, it has been heatedly debated by many. Abdul Aziz and Kamran Adil found several shortcomings in the definition of a child as given in CRC. They state that "CRC defines a 'child' and its language gives the expression as if the basic criterion in order to determine a 'child' is that he is one who has not attained age of majority according to the law applicable to him (i.e. his national law)²¹. Nonetheless, it further states that in the absence of a nationally specified age of majority, a 'child' is a human being below eighteen (18) years of age. Interestingly many researchers²² have found that, Article 1 of CRC, which gives the definition of a 'child' seems to have given rise to many questions²³. In order to appreciate those questions by the researchers, a first look on the wording of the Article might be helpful. It states thus:

"Article-1. For the purpose of present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."

The questions, which cropped up about the definition of a child may be formulated as:

1. what about a person who is exactly 18 years of age (as the article specifies that a child is one who is below eighteen)?
2. secondly, as the language of Article suggests that the basic yardstick to determine age is the national law of individual, which, if absent, the 18 years age cap provided by the Convention will come into play but what

²¹ Abdul Aziz & Kamran Adil. (2009, Oct). Criminal Justice for Juveniles: International and National Law. In *Pakistan Journal of Criminology*, 1(3), Pp. 139 – 148

²² Khurshid Iqbal. (2009, Oct). Judging Juvenility: Determination of age of Juvenile Offenders under Pakistan's Juvenile Justice System. *Pakistan Journal of Criminology*, 1(3), Pp.105-118.

²³ Abdul Aziz & Kamran Adil. (2009, Oct). Criminal Justice for Juveniles: International and National Law. *Pakistan Journal of Criminology*, 1(3), Pp.139 – 148.

will happen if national law of a country enacts the age of majority above eighteen years in contrast to the CRC?

In respect of former, it may be stated that the benefit of the Convention should be extended to the accused; while the latter may be catered to in two ways: first, those who favour international law might be of the view that the international law shall prevail, on the other hand, the ones who uphold the doctrine of supremacy of national law over the international law might be of the view that the national law shall prevail.

As the Juvenile Justice System Ordinance, 2000 has its roots in CRC, and it also defines a child below eighteen (18) years of age, therefore, it is essential to cater for an answer to the above two questions.

The above two propositions, according to Abdul Aziz and Kamran Adil needs contemplation by the people engaged in the drafting of the Convention. It is importantly so, for the obvious reason that many countries have incorporated the Convention into their national laws and there the Convention may be referred to for the purposes of interpretation as 'extrinsic evidence'.

2.4 What is Juvenile Delinquency?

Behaviors' can be viewed as points on a continuum. From earliest times, certain acts have been universally forbidden, or proscribed. Some examples are rape, incest, murder, treason, kidnapping, and rebellion. These acts fall at the forbidden end of the behavioral continuum. Approved or prescribed acts, such as getting married, having children, or having a job fall at the opposite, or approved end. Most socially acceptable behaviours fell somewhere near the middle and are generally referred to as folkways. Mores or societal norms and customs were generally enforced through the use of strong social disapproval, such as ostracism, exile, punishment, and even death. Mores were also

reinforced through the use of rewards or strong social approval, such as money and land, dowries, and fertility rites.

As societies progressed, their loosely structured sanctions became codified and referred to as laws. However, the enforcement was gradually taken out of the hands of the general citizenry and given to special law enforcement groups²⁴.

The term juvenile delinquency is often used for a broad range of behaviours like noisy teenage gathering, truancy, shop-lifting, breaking and entering, and car lifting etc²⁵. In the words of Elrod and Ryder (2005), [juvenile] delinquency consists of those behaviours that are prohibited by the family or juvenile code of the state and that subject minors (i.e. persons not legally adult) to the jurisdiction of the juvenile court²⁶.

Generally, the behaviours prohibited by the juvenile courts are grouped into two categories: (1) behaviours that would be defined as criminal offences if committed by adults (e.g. dacoity, property crime, burglary, robbery, motor vehicle theft, drug pushing and paddling etc.) and (2) behaviours that are prohibited only for minors, which are, in some countries, called status offences²⁷. James F. Short states that the term 'juvenile delinquency' is a relatively new and legal term for a very old phenomenon²⁸.

2.5 What is Criminal Justice System?

Criminal Justice System, like all other systems has input, processing, and output mechanisms. It starts when a free citizen (any person) commits an offence against a

²⁴Gennaro F. Vito and Julie C. Kunselman.(2012). *Juvenile Justice Today*. NJ, USA: Pearson Prentice Hall Inc. p.4.

²⁵John Scott, Gordon Marshall.(2005). *Oxford Dictionary of Sociology*. New York: Oxford University Press.

²⁶Elrod, Preston and Ryder, R. Scott. (2005). *Juvenile Justice A Social, Historical, and Legal Perspective* (2nd ed.). Mississauga, Canada: Johnes and Bartlett Publishers. p.4

²⁷ Ibid.

²⁸James F. Short, Jr. (1968) "The Study of Delinquency" in David L. Sills (Eds.), *International Encyclopedia of the Social Sciences*. (Vol.3). New York: The Macmillan Company & The Free Press. pp.74-80.

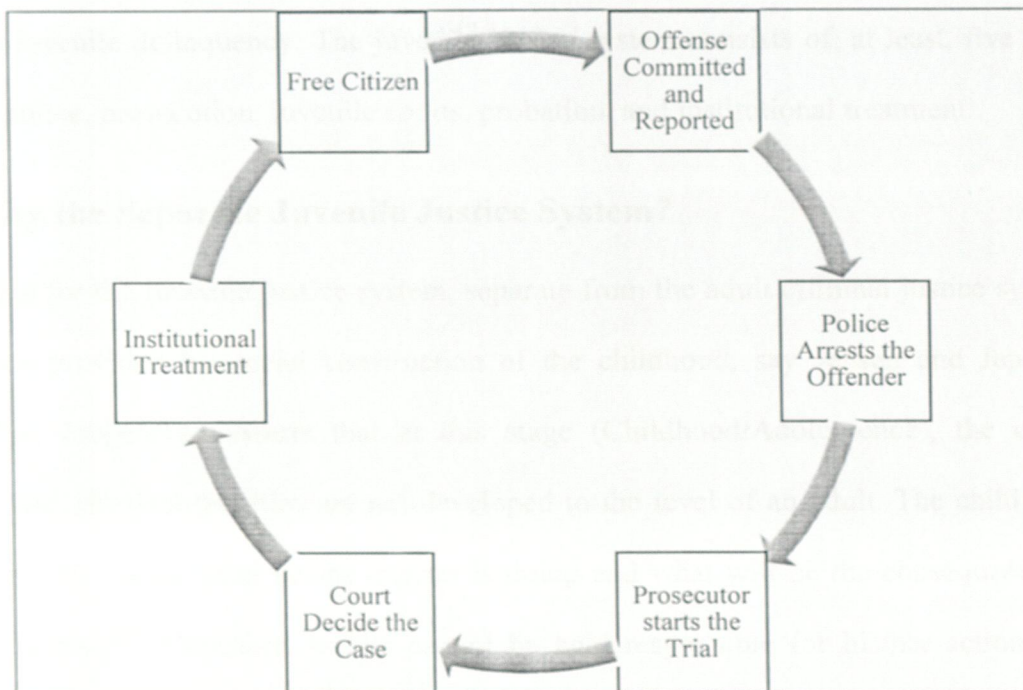
person, property or the state. If that offence goes unreported, is not counted as recorded crime in police registers. On the other hand, if it is reported to the police or the police itself discover the commission of the offence, then the offender comes in contact with the police. This is the first contact of the person with the criminal justice system. The next phase is booking and detailed investigation of the offence. The police gather all the evidence against the offender and provide the complete case to the prosecutor. The prosecutor's duty is to prosecute the offender in the criminal court. In the light of the evidence provided to the court, the judge decides whether the offender is guilty or not guilty. If he/she is found not guilty, he/she is released as a free citizen. However, if found guilty, the court decides the quantification of sentence. The sentence can be in many forms – fine, imprisonment, hard labour, or capital punishment. Sentence also varies with the nature and severity of punishment. The Pakistan Penal Code, 1860 lists numerous sentencing guidelines for various misdeeds. The JJSO overruled death penalty of children. Besides this, sentencing for theft, burglary, trespassing, rash driving, sexual abuse, and others are provided in the Penal Code. On the other hand, if the offender is found to have committed the offence for the first time the court usually handovers the case to the Probation department for rehabilitation of the offender. In most cases, the offender is sent to a prison. All the institutions dealing with sentence of the offender are known as Correction Institutions. After completing his/her sentence, the person is again a free citizen (Seen Figure 2.1).

For almost all sociologists criminal justice system is a formal mechanism of social control, attempts by society to regulate people's overt behaviours²⁹. A criminal justice

²⁹ John J. Macionis. (2008). *Sociology*. (12th Edition). New Jersey: Pearson Prentice Hall, p.220.

system, according to Macionis is a formal response by police, courts, and prison officials to alleged violations of the law³⁰.

Figure 2.1 A Model of Criminal Justice System



Source: Self generated

2.6 The Juvenile Justice System: Between Welfare and Justice Systems

The corner-stone of the juvenile justice philosophy, for Weisheit and Alexender, has been the principle of *parens-patriae*. Under this principle, the state was to act in *loco parentis* or as a substitute parent to the child. According to Curtis, the concept is English in origin and was developed specifically to allow the state to intervene on behalf of dependent children, usually those with money. It was not originally applied to delinquent children,

³⁰Ibid.

claimed Curtis, and thus the concept of rehabilitation was not regarded as relevant³¹. Today however, the main purpose of the juvenile justice is to protect the best interest of the child and to protect the community. The juvenile justice system is about just handling of juvenile offenders³². In other words, it is the formal response that society gives to counter juvenile delinquency. The juvenile justice system consists of, at least, five main actors; police, prosecution, juvenile courts, probation, and institutional treatment.

2.7 Why the Separate Juvenile Justice System?

The basis for the juvenile justice system, separate from the adult criminal justice system, has been provided by social construction of the childhood, say Jensen and Jepsen³³. Likewise, Junger-Tas asserts that at this stage (Childhood/Adolescence), the child's mental and physical faculties are not developed to the level of an adult. The child lacks the ability to realize what he/she exactly is doing and what will be the consequences of his/her actions³⁴. Therefore, he/she cannot be held responsible for his/her actions like adults. On the basis of this notion, children in conflict with law are in need of nurturing and guidance to grow into responsible adults, and they deserve a chance to rectify their law violating actions³⁵.

Further, Mashood Mirza argues that children do not necessarily fall into the category of aware individuals and, hence, there is a strong justification for specially designed laws

³¹ G.B. Curtis. (1976). The Checkered Career of Parens Patriae: The State as Parent or Tyrant? in Barry W. Hancock and Paul M. Sharp. (Eds.), *Criminal Justice in America*. (3rd ed.). New Jersey: Prentice Hall. P.329.

³² Rashad Aziz and Rafiq Khan. (2008) "Juvenile Justice, Unjust Justice System" in *The State of Pakistan's Children 2008*. (pp.129-166). Islamabad: SPARC.

³³ Eric L. Jensen and Jorgen Jepsen. (2006). Conclusions: Themes, Trends, and Challenges. In F. L. Felstiner and F. Johannes. (Eds.). *Juvenile Law Violators, Human Rights, & The Development of New Juvenile Justice System*. Portland, USA: Hart Publishing. p.443.

³⁴ Junger-Tas, J. (2006). Trends in International Juvenile Justice: What Conclusions Can be Drawn? In Junger-Tas J., & Decker H. S. (Eds). *International Handbook of Juvenile Justice*. Dordrecht, Netherlands: Springer. p.21

³⁵ Eric L. Jensen and Jorgen Jepsen. *Op.Cit.* p.444.

and, more importantly, specially designed machineries to implement the laws³⁶. Furthermore, one report of Amnesty International found that in most of the juvenile cases they have been used by the adults³⁷. Jensen and Jepsen add that the juveniles are unaware of the consequences of their acts and, therefore, they less deserve to be blamed for an offence³⁸.

On the basis of arguments cited above, a juvenile justice system, independent of and separate from the adult criminal justice system, is justifiable and the human beings (usually children) below a certain age should be dealt with differently than the adult criminals but the main question again arise that who is a child? A young man of 18 years or a person below 15 years?

2.8 Competing Models of the Juvenile Justice System

Globally, there are two competing models of the juvenile justice that are heatedly debated: (i) welfare model and (ii) justice model³⁹. A third model has recently gained popularity: restorative justice model. Each model holds different assumption of crime causation, construction of the nature of juvenile crime, how should juvenile crime be defined in law, and how the state should respond to juvenile crime? In this section, we briefly discuss all these models.

2.8.1 Welfare Model

For much of the juvenile justice history (since its inception in early 1900s), the welfare model dominated the juvenile justice practices around the world. Historically, children

³⁶ Mashood Ahmed Mirza. (2009, Oct). Alternative to Imprisonment for the Juveniles: A Case Study of Pakistan. *Pakistan Journal of Criminology*. 1(3), Pp.47-72.

³⁷ Pakistan: Denial of Basic Rights for Child Prisoners. (2003). Retrieved Nov 03, 2009 from Amnesty International USA: <http://www.amnestyusa.org/document.php?id=ENGASA33021005&lang=e>

³⁸ Eric L. Jensen and Jorgen Jepsen. (2006). *Op.Cit.*

³⁹ Ian O'Connor and Margaret Cameron (2002). Juvenile Justice in Australia. In Graycar A., & Grabosky P. (Eds). *The Cambridge Handbook of Australian Criminology*. Melbourne, Australia: Cambridge University Press. p. 213.

were treated as adults in criminal cases. There was no separate court system for children. Criminal justice system was dominated by the classical philosophy that emphasized *free will*. Crime was considered a choice of individual's free will. Therefore, punishment was focused on deterrence, abstaining the individual from crime, rather than reforming the individual. It was applied equally to both adults and juveniles. Later in the 19th century, it was acknowledged that children's needs are different and they are vulnerable. The development of the principle of '*doli incapax*'⁴⁰ in English common law led to the development of juvenile courts. This principle was also reflected in colonial laws as provided in Indian Penal Code 1860 (now Pakistan Penal Code) section 82, 83. By the end of 19th century, separate juvenile courts started to emerge around the world. These Courts were founded on the principle that young offenders were victims of their environments; they needed help rather than punishment. This "*positivist*" approach is the basis of the "welfare model of youth justice"⁴¹.

This model holds the following major assumptions: First, this model holds that crime is not caused by the individual's rational decisions but it is the outcome of social and interfamilial factors, i.e. social and moral decay and poor parenting. Social Strain Theories, such as Robert K. Merton's *Anomie*⁴² and Albert Cohen (1955) *delinquent boys*⁴³, provided basis for welfare or rehabilitation model. These theories emphasize the role of social environment in producing delinquent behaviour. Clearly, they assume the juvenile to be a product of society. Criminality is seen as a symptom of personal and social factors. In this context, the juvenile is seen in need of assistance and

⁴⁰ incapable of crime

⁴¹ AP Walsh. (n.d.). *Youth justice model v the welfare model: have we got the balance right?* The Youth Court of New Zealand. Retrieved August 13, 2015 from <http://www.justice.govt.nz/courts/youth/publications-and-media/speeches/youth-justice-model-v-the-welfare-model>

⁴² Merton, R. K. (1959). Social conformity, deviation, and opportunity structures: A comment on the contributions of Durkheim and Cloward. *American Sociological Review*, 177-189.

⁴³ Albert Cohen. (1955). *Delinquent boys; the culture of the gang*. New York, NY, US: Free Press

rehabilitation⁴⁴. Second, it holds the assumption that criminal responsibility does not lie upon the offender. Offender is responsible only for the consequences of his act. It has been reflected in many court cases. For example, in *Graham v. Florida*, the Supreme Court of the United States announced that “when compared to an adult murderer, a juvenile [nonhomicide] offender has a twice diminished moral culpability”⁴⁵. Third, reference point of welfare model is the juvenile offender. Fourth, the objective of welfare model, then, is to respond to individual needs. The energies are focused on removing the personal and societal conditions that lead to a particular crime. Fifth, this model proposes an informal, and flexible juvenile justice process⁴⁶. Diversion is the major policy, such as practiced in many US states and counties and other countries⁴⁷. Sixth, the key professionals in this model are youth experts and the juvenile justice workers (social workers). Last, the source of information is social report and medical reports⁴⁸.

The welfare model is criticized on the ground that rehabilitation efforts do not work, and indeed the states effort of rehabilitation has contributed to the increase in rate of delinquency.⁴⁹ Critics argued the unfettered powers of the Courts ignored due processes⁵⁰ and there are times when one needs to get tough on the offenders. For example, Craig S. Lerner⁵¹ states that “...what certain crimes reveal is that that there are violent juvenile

⁴⁴ Adam Graycar. (Edt.).(2002) *A Cambridge Handbook of Australian Criminology*. London: Cambridge University Press. P. 213

⁴⁵ Craig S. Lerner. (2011). *Juvenile criminal responsibility: can malice supply the want of years?* [Research Paper Series 11-34]. George Mason University School of Law and Economics

⁴⁶ Eef Goedseels. (n.d.). *Youth justice models in theory and practice*. [brief presentation of PhD project]. National Institute of Criminalistics and Criminology (NICC)

⁴⁷ Department of Public Safety. (2013). *Juvenile Diversion in North Carolina*. Division of Juvenile Justice, Department of Public Safety, United States. Retrieved August 13, 2015 from <https://www.nccrimecontrol.org/div/JJ/DJJ-DiversionReport-final-web.pdf>

⁴⁸ Eef Goedseels. (n.d.). *Op. Cit.*

⁴⁹ Adam Graycar. (Edt.).(2002) *A Cambridge Handbook of Australian Criminology*. London: Cambridge University Press. P. 213

⁵⁰ AP Walsh. (n.d.). *Youth justice model v the welfare model: have we got the balance right?* The Youth Court of New Zealand. Retrieved August 13, 2015 from <http://www.justice.govt.nz/courts/youth/publications-and-media/speeches/youth-justice-model-v-the-welfare-model>

⁵¹ Craig S. Lerner. (2011). *Op. Cit.*

offenders—fortunately rare—who are as least as mature and culpable as the typical adult violent offender.”

2.8.2 Justice Model

Much of the 20th century was dominated by ‘welfare model’ of the juvenile justice. Justice model gained attention in the later parts of 20th century. In the 1970s through 1990s, concerns were arising about the frequent and violent young offenders. For example, according to the Federal Bureau of Investigation, the number of juveniles who committed murder, forcible rape, robbery, and aggravated assault increased 99% in the past decade⁵² (See Table 2.1 for details of youth crime). Such huge increases in juvenile violent crimes lead to the demand for a tougher approach towards juvenile offenders. Consequently, countries around the world enacted tougher legislations. In the US, the Supreme Court already made number of landmark decision back in late 1960s that advocated due-process criminal-style proceedings in youth courts⁵³. Similarly, the 1982 Criminal Justice Act in England focused on the importance of due process and accountability. It represented a clear ideological shift away from 1969 Act⁵⁴. Likewise, the 1984 Young Offenders Act in Canada also limit the powers of Youth Courts that enjoyed extensive jurisdictions over youth under the 1908 Canadian Juvenile Delinquents Act. In short, there is a revival of classical thinking in the justice system that emphasizes the due process and deterrence principles. This lead to the development of ‘Justice Model’.

⁵² Shannon F. McLatchey. (1999). Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach. In *Journal of Law & Public Policy*, 10, 401

⁵³ Emily Watt. (2003). A History of Youth Justice in New Zealand. New Zealand Youth Court (p.4). Retrieved August 13, 2015 from <http://www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf>

⁵⁴ Wittman, M.R. (1995). *Juvenile Justice Legislation in New Zealand 1974 – 1989: the process of lawmaking*. Unpublished LLM dissertation. Victoria University of Wellington, Wellington.

Table 2.1 Percentage of Arrests of Those Ages 10-17, by Offense

Nature of Crime	1970	1980	1990	1993	1997	1998
Murder	0.08	0.09	0.15	0.17	0.09	0.08
Rape	0.20	0.22	0.27	0.26	0.19	0.20
Robbery	1.81	2.11	1.91	2.18	1.44	1.27
Aggravated Assault	1.27	1.90	2.93	3.37	2.68	2.76
Index violent crime	3.36	4.32	5.26	5.98	4.40	4.31
Burglary	8.82	10.61	6.35	5.71	4.55	4.37
Larceny	18.34	20.49	20.96	19.32	17.52	16.10
Motor Vehicle Theft	4.49	2.97	4.25	3.80	2.38	2.09
Arson	0.28	0.35	0.32	0.36	0.31	0.31
Index property crime	31.92	34.42	31.89	29.18	24.76	22.87
Other assaults	3.13	4.02	6.76	7.73	8.43	9.00
Vandalism	4.31	5.40	5.64	5.72	4.63	4.72
Weapons	1.05	1.21	1.85	2.62	1.85	1.74
Drug abuse violations	4.90	5.10	3.77	4.71	7.90	7.99
Disorderly Conduct	7.48	5.96	5.49	6.04	7.59	7.17
Curfew and loitering	6.56	3.36	3.75	4.30	6.59	7.41
Runaways	10.99	7.11	7.95	7.61	6.95	6.32
Other Offenses	26.29	29.11	27.64	26.12	26.90	28.46
Nonindex crime	64.72	61.26	62.85	64.84	70.84	72.81
Total	100.00	100.00	100.00	100.00	100.00	100.00

Source: Data from Federal Bureau of Investigation, 1971 to 1999⁵⁵.

The Justice Model holds different assumptions. First, the justice model holds that the offender himself is responsible for his/her act. Individuals behave according to their free will. Second, criminal act is a breach of law and that the criminal responsibility lies upon the offender. It states that the individual is responsible for his/her acts and their consequences. Third, the point of reference in this model is the offence rather than the offender. It says 'what crime has been committed?' instead of 'who has committed the crime?' Fourth, the objective of justice model, then, is restoration of moral/legal balance. Fifth, it proposes highly structured formal juvenile justice process. The punishment should be given in proportion to the offence committed. Sixth, the key professional in this model are judges and lawyers. Seventh, the source of information are police reports,

⁵⁵ Joan McCord, Cathy Spatz Widom, and Nancy A. Crowell. (Eds). (2001). *Juvenile Crime Juvenile Justice Panel On Juvenile Crime: Prevention, Treatment, And Control*. Washington, DC: National Academy Press. p.33

charges, and the law. Last, this model proposes swift, certain and appropriate punishment for the offenders so that they do not reoffend⁵⁶.

In short, Emily Watt⁵⁷ observed that “in some respects the justice model is an inversion of welfare ideals, focusing on: offending, not the offender; responsibility and freewill, not determinism; equality of sanction, not individual treatment; and determinate sanctions rather than indeterminate rehabilitation.”

The Justice Model is also criticized on many grounds. Many argue that the model deliberately ignores the causes of crime, especially issues of social disadvantage. Placing importance on punishment can lead to injustice in itself⁵⁸. Likewise, studies found that the tougher approach on juveniles have no impact on youth crime rate⁵⁹.

2.8.3 Restorative Justice Model

Restorative justice model is a deviation away from traditionalistic welfare and justice models. Many maintain that restorative justice is the resurgence of centuries old tradition of informal justice practices⁶⁰. Braithwaite (1997) maintains that restorative justice has been the dominant model of criminal justice throughout most of human history. This model started gaining popularity in 1970s. The term ‘restorative justice’, nonetheless, did not exist at the time. The term gradually emerged in the writings of Mackey⁶¹, Zehr⁶²,

⁵⁶ Adam Graycar. (Edt.).(2002) *A Cambridge Handbook of Australian Criminology*. London: Cambridge University Press. p. 214

⁵⁷ Emily Watt. (2003). *A History of Youth Justice in New Zealand*. New Zealand Youth Court (p.4). Retrieved August 13, 2015 from <http://www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf>

⁵⁸ Ibid

⁵⁹ EL Jensen & LK Metsger. (1994). A test of the deterrent effect of legislative waiver on violent juvenile crime. *Crime & Delinquency* 40, (1); 96.

⁶⁰ John Braithwaite. (1997). *Restorative justice: Assessing an immodest theory and a pessimistic theory*. Review essay prepared for the University of Toronto law course, Restorative Justice: Theory and Practice in Criminal Law and Business Regulation. [Online] <http://www.aic.gov.au>

⁶¹ V. Mackey. (1981). *Punishment in the Scripture and Tradition of Judaism, Christianity and Islam*. Privately published.

Colson and Van Ness⁶³, Wright⁶⁴, and Van Ness and Strong⁶⁵. According to K. Daly and R. Immarigeon, restorative justice evolved from different groups of people who were experimenting with alternative practices such as Victim-offender mediation, family group conferences, sentencing circles, victim impact panels, and other processes⁶⁶. Although there are varying referents of restorative justice, there is a general consensus over what it does. It emphasizes the repair of harms and of ruptured social bonds resulting from crime; it focuses on the relationships between crime victims, offenders, and society⁶⁷.

Researchers agree that the key event that led to re-emergence of restorative justice was the first victim-offender mediation program 1974 that occurred in Canada when two offenders charged with vandalism met with their victims to establish restitution agreements. Since then, similar programmes have been developed throughout the world⁶⁸. The present restorative justice model is a result of many practices prevalent since 1970s. It includes alternative to prison and minimum use of incarceration⁶⁹, development of community justice boards and neighborhood justice centers⁷⁰, Victim-Offender

⁶² H. Zehr. (1985). *Retributive Justice, Restorative Justice*. Elkhart, IN: Mennonite Central Committee U.S. Office of Criminal Justice.

⁶³ C. Colson and D. Van Ness. (1989). *Convicted: New Hope for Ending America's Crime Crisis*. Westchester, IL: Crossway Books.

⁶⁴ M. Wright. (1991). *Justice for Victims and Offenders*. Bristol, PA: Open University Press.

⁶⁵ D. Van Ness. and K.H. Strong. (1997). *Restoring Justice*. Cincinnati: Anderson Publishing Co.

⁶⁶ K. Daly and R. Immarigeon (1998) The past, present, and future of restorative justice: some critical reflections. In *The Contemporary Justice Review* 1 (1): 21-45

⁶⁷ K. Daly and R. Immarigeon (1998) The past, present, and future of restorative justice: some critical reflections. In *The Contemporary Justice Review* 1 (1): 21-45.

⁶⁸ Department of Justice. (2015). *The Effects of Restorative Justice Programming: A Review of the Empirical*. Government of Canada. Retrieved August 14, 2015 from http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p2.html

⁶⁹ For details see Fay Honey Knopp. (1976). *Instead of Prisons: A Handbook for Abolitionists*. Syracuse: Safer Society Press.

⁷⁰ For details see G.C. Pavlich. (1996). *Justice Fragmented: Mediating Community Disputes under Postmodern Conditions*. New York: Routledge.

Reconciliation Programs (VORPs)⁷¹, Victim-Offender Mediation (VOMs), Victims Advocacy, Family Group Conference⁷², Sentencing Circles⁷³, and other practices.

Table 2.2 Competing Models of the Juvenile Justice

	Welfare model	Retributive / justice model	Restorative model
Perception of criminality	Symptom of personal, social factors	Breach of the law Choice, free will	Action that inflicts damage upon others Conflict
Responsibility	Not responsible for the offence, responsible for the consequences Passive responsibility (just cooperate)	Responsible for the offence and consequences Passive responsibility (taking punishment)	Responsible for the offence and consequences Actively (learn to) take up responsibility
Main focus (reference point)	Offender	Offence	Damage / harm
Purpose of the intervention	Treatment, (re)education Help Protection (of juvenile)	Retribution Deterrence Confirmation of the rule Moral disapproval Moral reform	Restoration of the harm caused (Reconciliation)
General objective	Respond to individual needs <i>Crime prevention</i>	Restoration of a moral / legal balance <i>Crime prevention</i>	Restoration of a social balance <i>Crime prevention</i>
Nature of the process	Informal, flexible procedures	Formal procedures	Informal, extrajudicial and voluntary processes
Duration of the intervention	Indeterminate (until objective has been achieved)	Fixed, determinate	Flexible, to be mutually agreed
Proportionality	In proportion to individual needs	In proportion to the offence	In proportion to the harm caused
Key professional	Youth experts	Judges Lawyers	Moderators, mediators
Source of information	Social / medical reports	Police reports / charges Law	Perception / significance of parties involved

Source: Goedseels, E. (n.d.). *Youth justice models in theory and practice*. [brief presentation of PhD project]. National Institute of Criminalistics and Criminology (NICC)

Restorative justice holds many assumptions. First, it holds that criminal conduct is action that inflicts damage upon others. Second, it holds that the individual is responsible for the offence and consequences. The offenders role is active in taking up the responsibility.

⁷¹ For details see H. Zehr. (1990). *Changes Lenses*. Scottsdale, PA: Herald Press.

⁷² For details see G. Maxwell and A. Morris. (1993). *Family, Victims and Culture: Youth Justice in New Zealand*. Wellington, NZ: Social Policy Agency and Institute of Criminology, Victoria University of Wellington.

⁷³ For details see R. Ross. (1992). *Dancing with a Ghost - Exploring Indian Reality*. Toronto: Octopus Publishing.

Third, main focus of this model is on damage/harm done to the victim and the community. Fourth, it holds that the purpose of intervention is to restore a social balance and prevent further crime. Fifth, it advocates an informal, extra judicial and voluntary process of the juvenile justice. Sixth, it holds that the punishment should be in proportion to the harm caused to the victim or community. Seventh, it holds that the key professionals in the juvenile justice system are moderators and mediators. Last, it holds that the source of information are perception/significance of parties involved⁷⁴.

From the discussion on three prevalent models of juvenile justice, it is clear that no model is present in its purest form in any country of the world. There are overlapping trends of these models throughout the world. For a comparison of all the models see Table 2.2 below.

⁷⁴ Eef Goedseels. (n.d). *Op. Cit.*

PART—II: THE JUVENILE JUSTICE AROUND THE WORLD

2.9 The Juvenile Justice around the World

For Lipsey, *et.al.*⁷⁵ the juvenile justice system across the globe has two overarching and intertwined goals: (1) ensuring public safety and (2) reduce criminal behaviour of the juveniles. Juvenility is a stage of immaturity in life. It is in the best interest of the society as well as of the juvenile to protect him/her from reoffending thereby safe-guarding society from any additional harm done to it by the juvenile. Secondly, the juvenile have a longer life-span to lead. It is in no way fruitful or beneficial to the society to leave such juveniles in the hands of the relatively harsh criminal justice system. It has been revealed by many studies that those who are tried by the adult criminal justice system have higher chances of recidivism and criminal career. The goal of the juvenile justice system, therefore, must be to rehabilitate the young offenders and reduce their further criminal behaviour in order to improve their chances to prosper as productive citizens. A large amount of the energies of the juvenile justice system are directed towards treatment programmes such as community supervision, probation, custodial and non-custodial care. However, as pointed out by Lipsey *et.al.*⁷⁶, the effectiveness of such programmes has always been problematic.

Nordic countries are the first to enact legislations on child welfare and the juvenile justice. Harrikari⁷⁷ discusses the making of child welfare and the juvenile justice legislation in Finland during the last half of the 19th century to first half of the 20th.century. He argues that legislation is an important instrument in the development of

⁷⁵ Lipsey, M.W., Howell, J.C., Kelly, M.R., Chapman, G., and Carver, D. (2010). *Improving the Effectiveness of Juvenile Justice Programs: A New Perspective on Evidence-Based Practice*. Center for Juvenile Justice Reform. Georgetown University.

⁷⁶ Ibid

⁷⁷ T. Harrikari. (2011). The Making of the First Child Welfare and Juvenile Crime Acts in Finland 1897–1943. *Social Work and Society*, 9(2)<http://nbn-resolving.de/urn:nbn:de:101:1-201110263900>.

the concept of modern childhood. The Finnish child welfare and the juvenile justice legislation did not occur in vacuum. He describes that the first Nordic child welfare Act was enacted in Norway in 1896, in Sweden 1902, and in Denmark in 1905. Although a move was made in Finnish legislature in 1897 for child welfare and the juvenile justice, it took almost forty (40) years when the first child welfare act was enacted in 1936 and, the first Juvenile Justice Act was enacted in 1940⁷⁸. A Juvenile Crime Committee was constituted in 1937 to formulate legislation on juvenile criminals. The Committee revised the criminal sanction system. The committee acknowledged the difference between childhood and youth. The 1937 Committee was significantly influenced by Rafael Rosenqvist's categorization of child and juvenile. Rafael Rosenqvist identified the beginning of youth with puberty⁷⁹. Thus, the Committee formulated three chronological categories (i) childhood(ii) the age of 14-16 referring to puberty, and (iii) the age until 23' when personality finally begins to shape.

Harrikari argues that during the first half of the previous century, it was believed in by the Finnish legislators that;

"providing child welfare and juvenile Acts would automatically bring along improvement to children's lives and circumstances, perhaps even solve fundamental and long-term societal problems"⁸⁰.

However, he laments that it is not the case nowadays. He acknowledges legislation as an important instrument for promoting transformation in a nation state, but emphasizes the use of other instruments as well. Legislation alone cannot eliminate societal problems⁸¹.

Wormer⁸² identifies striking discrepancies in the theory and practice of Norwegian juvenile justice system. In Norwegian legislation, there is no punishment for crimes

⁷⁸Ibid.

⁷⁹A.R. Rosenqvist. (1915) *Murrosikäjakasvatus*. Helsinki, Otava. *c.f.* Harrikari, T. (2011). The Making of the First Child Welfare and Juvenile Crime Acts in Finland 1897–1943. in *Social Work and Society*, 9(2)<http://nbn-resolving.de/urn:nbn:de:101:1-201110263900>

⁸⁰T. Harrikari. (2011). *Op.Cit.*

⁸¹Ibid

committed by a child under 15 years. The older juveniles may be tried and be sentenced to prison by the courts though. In practice, Wormer adds, the public prosecutors transfer the juvenile case to the "social office". The social office receives the case through a social worker from the police. The idea is "treatment" instead of "prosecution". The social office keeps the children in youth home or mental institution. They are then presented before the juvenile welfare board that determines the case disposition. The board's members (five in number) are elected by the municipal council for a four years term. However, most of the board members (almost all of them are women) are non-professionals. The social office presents the facts before the board. Wormer further adds that the juveniles, their parents, or their attorneys have no opportunity to rebut any of the testimony or cross examine the witnesses before the board.

He found that children usually receive harsher treatment than adults for similar offences. He argues that in theory, Norwegian Juvenile Justice System may be characterized for children welfare, but in practice "*the system is characterized by oppression of children and their parents under the guise of 'care and protection'.*" Likewise, where care and protection were intended, power and secrecy have prevailed. He concludes, "*the juvenile justice in Norway today parallels the juvenile justice of yesterday in America.*"⁸³

Although **Denmark** was one of the earliest countries to adopt the juvenile justice legislations, Two western experts in the field of the juvenile justice (Kyvsgaard and Japsen) argue that Denmark does not, in principle, has any juvenile justice system⁸⁴. The age of criminal responsibility in Danish law is 15 years. The offenders below 15 are dealt exclusively by the social welfare authorities. The offenders above 15 are dealt by the

⁸² K. Y. Wormer. (1990). Norway's Juvenile Justice System: A Journey Back in Time. In *Correction Today*, 52(5).106-113.

⁸³Ibid

⁸⁴ B. Kyvsgaard. (2004). Youth Justice in Denmark: in Tonry, M. and Doob, A.N. (Edited). *From Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*. Chicago: University of Chicago Press. P 349-390,

ordinary court system, even adolescents between 15 -18 are also dealt by the adult criminal courts. There is no juvenile court system as in the US, UK, Norway, Switzerland, China and Australia. Nevertheless, there is an overlap between social welfare system and the court system in cases of adolescents for the age 15 – 17 and in some cases 21. As in Pakistan and other developing nations, young offenders aged 15—17 are still placed in local jails or prison rather than in secure social service institutions in Denmark⁸⁵. In law books, the age of criminal responsibility is 15 while in practice it is lowered down to 12 years by the social welfare institutions. Control is the key word in social welfare institutions working for problem-children. He terms social welfare system as 'closed prisons'.

Japsen⁸⁶ sees Danish juvenile justice system moving from welfare model of Nordic countries to crime control model of the USA. This paradigm shift in overall Danish criminal justice policy has been a result of politicizing of criminal justice policy. The huge wave of immigrants and settlement of non-Danish population in urban ghettos has resulted in violent encounters between Danish and immigrant youth gangs. Usually, such gang wars are over turfs and drug markets. Resultantly, the native population feels insecure of the non-native and demands more tougher policies for dealing with youth crimes.

In **Germany**, the idea of systematic social control for minors began in the early 1900s. Although the first legislation concerning juvenile offenders took place in 1922 and 1923, the idea of separate care for young offenders began as early as 1908. Since 1908, some

⁸⁵ Jorgon Jepsen. (2006). *Juvenile Justice in Denmark: From Social Welfare to Repression*. In Jensen, E.L., and Jepsen, J. (Edts) *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing, pp.213-262

⁸⁶ Ibid

courts, particularly in Berlin, Frankfurt and Cologne, began to develop separate chambers that specialized in issues concerning juvenile delinquents⁸⁷.

The German juvenile justice system is based on three principles; (1) principles of subsidiarity or minimum intervention, (2) principle of proportionality, and (3) the principle of juvenile court sanctions as the last resort. As against the British juvenile justice system, where police cautioning plays a considerable role, in German juvenile justice system, the juvenile court prosecutors play the key role. All diversions are provided for only at the juvenile court prosecutor or juvenile court judge level.

There are at least four levels of diversion: (1) diversion without any sanction (non-intervention), (2) diversion with education, (3) diversion with intervention, and (4) diversion at the court level. The first level of diversion is given priority in cases of petty offences. The second level diversion, i.e. diversion with education, involves parents, school etc. In the third level of diversion, the juvenile court prosecutor proposes the judge to impose "minor sanction, such as warning, community service (usually between 10 to 40 hours), mediation, participation in training courses for traffic offenders or certain obligations such as restitution, an apology to the victim, community service or a fine etc⁸⁸." Once the minor fulfils these obligations, the juvenile court prosecutor, with cooperation of juvenile judge, dismisses the case. The fourth level diversion takes place at the juvenile court level. It is the combination of diversions one to three. The overarching principle in the juvenile court is the principle of minimum intervention. Imprisonment is

⁸⁷ F. Dunkel. (2006). Juvenile Justice in Germany. In Jensen, E.L., & Jespen, J. (Edited). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing. Pp.115-153.

⁸⁸ Ibid .

used as a measure of last resort and only if the educational or disciplinary measures seem to be inappropriate⁸⁹.

Denkul further reports that the German juvenile justice policy is a pendulum between tolerance and repression, i.e. between welfare and crime control. The policy shift takes place as a result of varying trends in juvenile offences⁹⁰.

In his essay Jensen describes how the present US juvenile justice system has evolved from welfare model to 'get-tough' model and again back to welfare model. He argues that a society's social construction of childhood and adolescence as created by political claim-makers and solidified in public perceptions by the media are important elements in determining the shape and direction of the juvenile justice system. He presents the example of the US. As a result of Progressive movement of the 1800s, the definition of child changed from 'little adult' to that of an immature child in need of 'proper' socialization and nurturing to develop into responsible adults. This realization of childhood as an age of immaturity resulted in three of youth-oriented policies: (1) child labour laws, (2) compulsory school attendance, and (3) the juvenile court⁹¹. This resulted in the development of the 1st US Juvenile Court in Chicago in 1899⁹² which operated under the philosophy of *parens-patriae*⁹³.

"The parens-patriae doctrine emerged in the USA in the case of Mary Ann Crouse in 1838. In that case, the Pennsylvania Supreme Court ruled that the child Mary Ann could be removed from the custody of her father and placed in the Philadelphia House of Refuge because she was a poor child and in danger of growing up to be a pauper; she had committed no crime. The court asserted the parens-patriae doctrine

⁸⁹ Juvenile Justice Act 1990, SS. 5 and 17(2). (Germany)

⁹⁰ F. Dunkel. (2006). *Op.Cit.*

⁹¹ B.C. Feld. (1999). *Bad Kids: Race and the Transformation of the Juvenile Court*. New York: Oxford University Press.

⁹² This court was founded in Chicago, Illinois in 1899 by female reformers connected with the city's Hull-House Settlement and its Women's Club.

⁹³ E.L. Jensen. (2006). An Historical Overview of the American Juvenile Justice System. in Jensen, E.L., & Jespen, J. (Edited). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing. Pp.83-98: See Also T.J. Bernard. (1992). *The Cycle of Juvenile Justice*. New York: Oxford University Press.

when affirming the decision of a lower court to remove custody from the father and place her in an institution"⁹⁴.

The emphasis of the juvenile court was to 'help' and 'rehabilitate' not punish⁹⁵.

This philosophy prevailed until Ronald Reagan's arrival to the presidential office that changed the conception of delinquent youths in need of care and protection to that of justice. Reagan introduced the 'crime control model' for the juvenile justice. It was based upon five principles namely;

1. Preventive detention—holding juveniles believed to be a risk to public safety in secure holds before appearing in court;
2. Transfer of juveniles charged with specified crimes to an adult criminal court;
3. Mandatory and determinate sentencing for violent juveniles;
4. Increased confinement of juveniles; and
5. Enforcement of the death penalty for juveniles convicted of committing aggravated murder.

The emphasis was not on crime as social problem but crime as a justice problem⁹⁶. He concludes that;

*"based on American experience, it is prudent to advise nations in the midst of developing and implementing the juvenile justice system to take a path based on empirically supported models of human development, research on the causes of delinquency and the associated theories, best practices as established by research, and human rights principles"*⁹⁷.

⁹⁴ E.L. Jensen. (2006). An Historical Overview of the American Juvenile Justice System. In Jensen, E.L., & Jespen, J. (Edited). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing. Pp. 83-97

⁹⁵ Ibid

⁹⁶ S.A. Regnery. (1986). "A Federal Perspective on Juvenile Justice Reform" in *Crime and Delinquency*, 32, 39-51.

⁹⁷ E.L. Jensen. (2006). An Historical Overview of the American Juvenile Justice System. In Jensen, E.L., & Jespen, J. (Edited). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing. Pp. 83-97

The **Spanish** juvenile justice system follows a mix-approach to the juvenile justice. It does not follow the welfare model. It is also far from purely correctional and repressive approach. Cuesta classifies Spanish juvenile justice system as 'responsibility model'. In this model minors can be held responsible, but the declaration of their penal responsibility is not answered by punishment, but by 'measures' that should be oriented to serve the best interest of the child⁹⁸.

2.10 The Juvenile Justice System in England and Wales

The juvenile justice in England and Wales is showing a growing tendency towards restorative justice, relying more on informal mechanism for handling cases involving youth. England and Wales have one of the lowest age of criminal responsibility in the entire Europe. An offender as young as of 10 years of age is criminally liable for his actions under the provision of Section 50 of Children and Young Persons Act, 1933⁹⁹. In British law, there is a distinction between the definition of a child and a young person. A child is a person who is under 14 years of age while a young person is a person who has attained the age of 14 years but is under the age of 18 year as per Section 117 of Crime and Disorder Act, 1998.

The juvenile justice is administered by Youth Courts. Youth Courts are specially constituted magistrates' courts for dealing with young offenders under 18 years of age. The Youth Court is adversarial in nature but the procedure is less formal than in adult magistrates' courts. Usually, members of the public are restricted from attending the

⁹⁸ JLD.L. Cuesta. (2006). *The New Spanish Penal System on Delinquency*. In Jensen, E.L., & Jespen, J. (Edited). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing. Pp.100-113.

⁹⁹ J. Graham and C. Moore. (2006). *Beyond Welfare versus Justice: Juvenile Justice in England and Wales*. In Junger-Tas, J., and Decker S.H. (edited). *International Handbook of Juvenile Justice*. Dordrecht, The Netherlands: Springer. Pp.65-92

court's proceedings but the media is allowed to report the court proceedings without publishing the name of the offender unless the court authorizes it.

The Youth Courts magistrates are chosen from a special panel. It consists of three members. Out of the three, it is compulsory that at least one must be a man and one must be a woman. Such magistrates are no paid magistrates. Rather, they are members of the public. As the legal matters are technical in nature, the magistrates rely on the advice of justices' clerks (legal advisors) on matters of law. In some cities, however, District Judges are appointed; they are full time, salaried professional with legal qualifications who adjudicate alone¹⁰⁰.

It corresponds with the overall aim of the youth justice system of England and Wales as provided in Section 37(1) of the Crime and Disorder Act 1998,¹⁰¹ the purpose of pre-court disposition is "to prevent young people from being sucked into the youth justice system too early and also offer them an opportunity and help them stop reoffending." Note that there is no exclusive police for children in England and Wales. The police have a considerable amount of discretion while dealing with juvenile cases. The most widely used pre-court measure by the police is informal verbal warnings. There is no record of informal verbal warnings. Such warning may occur either at the police station or it may occur on the spot. In either cases, no further actions are taken. In cases when informal warning fails and is considered inappropriate, the police may decide to issue a reprimand or a Final Warning. "A reprimand is a final verbal warning. A reprimand is a formal verbal warning by the police to a juvenile who admits responsibility for a minor first

¹⁰⁰ J. Graham and C. Moore. (2006). *Op. Cit.*

¹⁰¹ Section 37 (1) of the Crime and Disorder Act 1998 establishes that the principal aim of the youth justice system is "to prevent offending by children and young persons."

offence. A Final Warning is a formal verbal warning given by the police to a young person who admits responsibility for a minor offence for a first or second offence¹⁰².”

There is a considerable ambiguity on pretrial arrangements in England and Wales. In principle, a magistrate can “remand a young person in custody or on bail, with or without conditions¹⁰³.” Defendants are rarely denied bail. Imprisonment, or Custodial remands are used as a measure of last resort. Bail may be refused on at least five grounds: (i) if the defendant had a past history of breaching bail conditions, (ii) if it is believed that the defendant is likely to commit further offences while on bail, (iii) if it is believed that the defendant may interfere with witnesses, (iv) if it is estimated that the defendant may not appear in the court, and (v) in many cases, if it is believed that the defendant’s welfare and protection is better in custodial care¹⁰⁴. The decision to grant or not to grant bail is usually based on a report from the Social Worker or Probation Officer (as in Pakistan).

There are no national sentencing guidelines applicable to juveniles in England and Wales. At least six (6) principles guide the court sentencing¹⁰⁵. The first, which is the most important one, relates to the seriousness of current offence. It states that the sentencing must be granted as per the seriousness of the current offence. In the case of sexual and violent offence there is a need to protect public from further harm being inflicted by the offender. The second principle relates to the best interest or welfare of the child/young person. Contrary to what is being practiced in Pakistan, this principle is secondary to the first principle of seriousness.

¹⁰² J. Graham and C. Moore. (2006). *Op.Cit.*

¹⁰³ *Ibid*

¹⁰⁴ *Ibid*

¹⁰⁵ *Ibid*

The third principle applies to those offenders who are under the age of 15. It specifies the role of parents. Under this principles, it is expected that the parents might attend the court and pay any fines or compensation.

Fourth principle relates to the special status of offenders who are 16- and 17-year-olds. Such defendants are in a transitional stage between childhood and adulthood. Under this principles, it is believed that a flexible approach to sentencing should be adopted. Courts can impose full range of community sentences.

The fifth principle relates in particular to demanding community sentences and most custodial sentences. According to this principle, a court should consider a presentence report before sentencing. This report is usually submitted by a social worker or probation officer. It attempts to reach an opinion on the most suitable sentence for the offender based on information relating to the offender and the circumstances of the offence, including mitigating factors. This practice is legally prevalent in Pakistan. However, it is very rare in Khyber Pakhtunkhwa for the courts to ask for a Social Investigation Report from a Probation Officer.

The sixth and the last principle of court sentencing is concerned with timeliness. In 1997, the average time from arrest to sentence was 142 days which dropped to 81 days in 1999. In 2003, this time dropped even further to 55 days.¹⁰⁶ Note that this timeliness is a big problem in Pakistan where there is no fixed time from arrest to sentence. In principle, this has to be done in maximum of four (4) months period or 120 days. In practice however, it takes years for sentence to be issued.

¹⁰⁶ J. Graham and C. Moore. (2006). Beyond Welfare versus Justice: Juvenile Justice in England and Wales. In Junger-Tas, J., and Decker S.H. (edited). *International Handbook of Juvenile Justice*. Dordrecht, The Netherlands: Springer. Pp.65-92

PART—III

THE JUVENILE JUSTICE SYSTEM IN PAKISTAN

2.11 The Juvenile Justice System in Pakistan

There is a large body of literature that studies the issues of child protection in Pakistan. Nonetheless, little attention is given to the juvenile justice system. Since 1990s, the interest in protection of the rights of the child has got momentum, particularly after the ratification of the Convention on the Rights of the Child (CRC) by Pakistan¹⁰⁷. The interest of the researchers¹⁰⁸ is attracted toward child abuse (sexual, physical, psychological and emotional abuse), child labour, child beggary, child trafficking, and other areas in which children were seen as a victim of ruthless customs and conditions of the society. The researchers have been focusing on effects of these problems on the social, psychological, economic and educational aspects of the child.

The pressure, influence and affluence of the international organizations or internationally sponsored / backed home-based organizations have conditioned the government of Pakistan to enact new laws or bring changes in existing laws relating to children¹⁰⁹. One of these laws is the Juvenile Justice System Ordinance, 2000 (herein after JJSO) which speaks for the protection of the rights of the child involved in criminal litigations (Preamble of JJSO, 2000). It was the Juvenile Justice System Ordinance, 2000 which specifically discussed the juvenile offenders/victims at national level for the first time. It began a new trend in the country—by establishing of a separate justice system for juveniles. Although provisions were there in the existent laws regarding the protection of the children, e.g. Pakistan Penal Code (PPC) under Articles 82, 83 and 299; Code of

¹⁰⁷ For example, V. Parekh. (1999). *Prison bound: the denial of juvenile justice in Pakistan*. New York: Human Rights Watch.

¹⁰⁸ Uzma Gillani (2009, Oct). Child Sexual Abuse in Pakistan. *Pakistan Journal of Criminology*, 2(3), Pp.81-96; and also Shakeel Ahmad Imtiaz (2009, Oct). The Plight of Street Children in Quetta, Baluchistan. *Pakistan Journal of Criminology*, 2(3), Pp.149-168.

¹⁰⁹ See For example, V. Parekh. (1999). *Op.Cit.*

Criminal Procedures (Cr. PC) 1898, Section 299 and other laws related to child protection like Factories Act, 1934, Punjab and Youthful Offenders Ordinance, 1983. However, establishment of a completely separate the juvenile justice system with provision for a separate juvenile Court was the credit of JJSO.

Moreover, Pakistan is a country where the legal system is a legacy of the colonial era with no or little necessary amendments due to its Islamic character¹¹⁰. The laws enacted and policies made still have the imprint of the same colonial mind-set. With reference to juveniles, Pakistan has an obligation under the international conventions related to child (particularly the Convention on the Rights of the Child, hereinafter CRC) to take specific measures to bring reforms in its laws, policies and institutions so that the best interests of the child are served¹¹¹. Prior to the JJSO 2000, only two provinces in Pakistan had juvenile laws: Sindh and the Punjab. The Khyber Pakhtunkhwa and Baluchistan had no such laws before the implementation of the JJSO 2000. The juvenile justice system in Pakistan is administered under numerous laws. These are:

1. Sindh Children Act, 1955;
2. Punjab Children Ordinance, 1983;
3. Punjab Youthful Offenders Ordinance, 1983;
4. Sindh Borstal Schools Act, 1955
5. Punjab Borstal Act, 1926;

¹¹⁰Muhammad Ahmad Munir. (2006). *Therapeutic Jurisprudence in Pakistan Juvenile Delinquency & the Role of the Defense Lawyer*. Retrieved Nov 15, 2011 from <http://www.ajja.org.au/TherapJurisp06/Monograph%20Papers/6%20Munir.pdf>.

¹¹¹CRC Article 3 (1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 4: "State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation."

6. Punjab Supervision & Control of Children Homes Act, 1976;
7. Reformatory Schools Act, 1897;
8. Juvenile Smoking Ordinance, 1959;
9. Probation of Offenders Ordinance, 1960;
10. Employment of Children Act, 1991;
11. Bonded Labour System (Abolition) Act, 1992; and
12. Child Welfare and Protection Act of Khyber Pakhtunkhwa, 2010

The JJSO 2000 is one of the most recent laws but since its inception, it has mostly remained ineffective. The reasons are manifold and complex. There are some practical difficulties in the contents, context and implementation of JJSO 2000.

Not only had the lack of awareness among the concerned departments and institutions, the components of criminal justice system lacked proper infrastructure to implement the JJSO 2000 as well¹¹². The situation of the juvenile justice system in Pakistan is really in doldrums. The spirit of the CRC and other international rules and guidelines¹¹³ is that justice system dealing with child in conflict with law should focus primarily on *reintegration* (emphasis added) of the child into society and encouraging him/her to play a constructive role as a youth in the society. However, the approach and spirit of these international rules and guideline is direly missing in Pakistan. The national reports of child rights agencies admit that the concept of the juvenile justice system has failed to gain ground in Pakistan and its implementation has lagged far behind.¹¹⁴

Likewise, the ultimate aim of a separate juvenile justices system is to stop reoffending and prevent the juvenile from entering into an adult criminal carrier. However, there have

¹¹² Imran Ahmad Sajid. (2009, Oct). Juvenile Justice Policy: Gaps Identification and Role of Key Stakeholders in Pakistan. *Pakistan Journal of Criminology*, 1(3), Pp.119-138.

¹¹³ like the Riyadh Guidelines (1990), and the Beijing Rules (1985).

¹¹⁴ Rashid Aziz and Rafiq Khan.(2008). Juvenile Justice, Unjust Justice System. In *The State of Pakistan's Children 2008*. (129-166). Islamabad: SPARC.

been concerns in the criminal justice community, particularly the police¹¹⁵ that instead of preventing reoffending, re-socializing and reintegrating,¹¹⁶ the present separate juvenile justices system has contributed towards upsurge in the juvenile delinquency. Two crime heads are often presented as evidence—murder and narco-trafficking. There are evidences that experiencing juvenile detention can socialize young people into further criminal behaviour¹¹⁷. Second, that juvenile offenders may be recruited into further criminal activity, in part because the young people are not likely to end up in an adult prison until they are 18 and commit acts – hence they are more likely to be able to escape serious penalty and will then be available to commit further crimes¹¹⁸.

There is also a broader argument that the intent of the juvenile justice system is to divert young people from crime and use therapeutic jurisprudence to achieve this – diverting all but those who commit serious offences away from detention, and then attempting to rehabilitate those in detention. It should be noted that all of this requires a system to be set up to achieve these goals, else little will be achieved¹¹⁹.

The data on juvenile offences in KPK for the year 2010 also supplements the argument. According to the data, injuries, murder, theft, and drug crimes remained at the top of the list of crimes reported to the police in fifteen (15) districts of KPK in the year 2010¹²⁰. (See Table 2.1 below for details of crimes by juveniles in KPK for the year 2010). This data is inconclusive as it does not provide any further details. For example, it is not clear whether these murders were committed individually or in groups. It is argued that due to

¹¹⁵ From an interview with Fasihuddin (PSP) on April 5, 2010.

¹¹⁶ Josine Junger-Tas. (2006). Trends in International Juvenile Justice: What Conclusions Can be Drawn?. In Junger-Tas J., & Decker H. S. (Eds). *International Handbook of Juvenile Justice*. Dordrecht, Netherlands: Springer. p.511.

¹¹⁷ Varana D. Bezruki and C. Hill. (1999). *An Evaluation of Secure Juvenile Detention*. Madison WI: Legislative Audit Bureau.

¹¹⁸ Email Communication with Prof. Adam Tomison, Australian National University, on May 21, 2012

¹¹⁹ Ibid

¹²⁰ The data has been taken from the Office of the Director General Human Rights, KPK Police Department, Central Police Office, KPK and is still unpublished.

the softer response by the law towards juveniles, the criminal elements use them in murders and/or narco-trafficking (as will be discussed in the chapters to come).

Table 2.3 Crimes Committed by Juveniles in KPK (15 Districts), 2010

Nature of Crime by Juvenile in KPK 2010	Frequency	%age
Agriculture related offences	1	1%
Agriculture/Land Dispute	1	1%
Criminal Intimidation/Threat	1	1%
Drug Crime	6	6%
Fighting/Threatened to Kill/Home Dispute	1	1%
Firing on Land dispute	1	1%
Injury/Hurt	49	50%
Murder	14	14%
Smuggling of explosive materials	1	1%
Snatching Motor Car	1	1%
Theft	9	9%
Traffic Crimes/ offences	6	6%
Un Natural Act	6	6%
Weapon	1	1%
Total	98	100%

Source: Office of the Director General Human Rights, KPK Police Department, Central Police Office, Peshawar.

The higher judiciary of Pakistan has also shown its reservation regarding the impact of JJSO. The Lahore High Court took this issue and termed the Juvenile Justice System Ordinance (JJSO) 2000, as “*unconstitutional, unreasonable and impracticable because it contained such downright absurdities as to create havoc in the country's criminal justice system.*” The ruling says:

“The Ordinance is promoting falsehood, lies, forgeries and corruption in society at a large scale and a law which corrupts the society at large in the name of protection for children is not worth retaining on the statute book. Destruction of the moral fiber of the society as a whole is once again too big a price to be paid for the protection of children. ... A law which contains the incentive for and has tendencies to corrupt the society in such a manner is counterproductive, paradoxical and at odds with the ‘protection of law’ contemplated by the provisions of Articles 4 and 25 of the Constitution”¹²¹.

¹²¹ *Farooq Ahmed v. Federation of Pakistan*. (2005). Writ Petition No. 20645 of 2002, decided on 6th December, 2004. Lahore High Court, Lahore: PLD.15

The court also ordered that all accused, who had been tried as juvenile between the date of the promulgation of the ordinance (July 1, 2000) and the announcement of the judgment (Dec 6, 2004), are to prove their age at the time of the commission of the offence to claim immunity from death sentence¹²². The civil society and international community, such as Amnesty International, strongly reacted to this decision and criticized at length the arguments mentioned in the court's decisions¹²³. The Amnesty International report criticized that "the judgment of the Lahore High Court appears to indicate a lack of care for, even hostility towards children¹²⁴." However, since the data on juvenile offending is rarely published by any law-enforcement agency, there has been no empirical evidence to support any of the sides.

It should not be ignored that the modern criminal justice system is mostly drawn from the Western legal developments. Similarly, in Pakistan, the criminal justice system is a colonial legacy, which is based on strict militaristic model of policing. The juvenile justice system, adopted since 2000, is also based on the Western ideologies of the juvenile justice, which does not coincide within the cultural frame of Pakistani society. The theme

Constitution of Pakistan, 1973: Article 4, Right of Individual to be Dealt with in Accordance with Law, etc. (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Where he may be, and of every other person for the time being within Pakistan. (2) In particular, (a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law; (b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and (c) no person shall be compelled to do that which the law does not require him to do.

Article 25, Equality of Citizens. (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

¹²² *Pakistan: Lahore High Court Strikes Down Juvenile Law*. (2005). ACR Weekly Newsletter Vol. 4, No. 04 (26 January 2005). Retrieved Nov 12, 2011 from <http://acr.hrschool.org/mainfile.php/0214/418/>

¹²³ *Pakistan: Amnesty International's Comments On The Lahore High Court Judgment Of December 2004 Revoking The Juvenile Justice System Ordinance*. (30 September 2005). Retrieved Nov 15, 2011 from http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PK/AI_PAK_UPR_S2_2008anx_asa330262005.p

¹²⁴ *Ibid*

of this system is protectionist. However, a question arises that can an imported law be successfully implemented? The question needs empirical exploratory answer.

The literature on global juvenile justice practices reveals that the pendulum of the juvenile justice swings from welfare to control and again from control to welfare. One thing that the literature reveals is that the juvenile justice policies in the developed countries are based on research findings. When there is an increasing trend in juvenile delinquency, the policy of control and retribution takes place instead of welfare. However, when the delinquency trends move downward, the policies also shift towards education, protection and welfare of the offenders. If the offence is against a person, then whose welfare is prime; of the victims' or the offenders'? Should the victim get welfare at the cost of the victims loss?

Unfortunately, as in many other developing countries, the juvenile justice practices in Pakistan are not based on research findings. There is no mechanism for collecting data on juvenile delinquency. The Khyber Pakhtunkhwa Police in collaboration with Pakistan Society of Criminology, attempted to record and publish the official data on juvenile delinquency. However, the project was abandoned within two years for the reasons unknown¹²⁵. The police do not compile age-wise data on offenders. Even though, the government regularly submits report to the UN Committee on the Rights of the Child each year. Yet these reports are not available to public. There are no published reports that record any trends in juvenile delinquency.

The criminal justice administration at district level is carried out by a District Police Officer (DPO), a Session Judge, a Probation Officer, a District Public Prosecutor (DPP), and a Superintendent Jail. For juveniles in criminal justice, the Child Protection and

¹²⁵ The report can be found online at http://www.pakistansocietyofcriminology.com/publications/2012_03_27_148.pdf

Welfare Commission has established Child Protection Units (CPU) in selected districts of the province including Peshawar, Nowshera, Swabi, Mardan, Kohat, Bannu, Buner, Swat, and Abbotabad. It is pertinent to mention that Child Protection Units are not specific for the juveniles in criminal justice. Rather, CPUs serve multi-dimensional purposes. Its main focus is on protection of children at-risk. The CPUs cover issues such as child health, school problems, runaway problems, problem of homelessness, problem of family relations, elopement, and other issues related to child welfare and protection.

Summary

This chapter outlined numerous concepts related to the juvenile justice. The concept such as child, childhood, juvenile, youth, juvenile delinquency, the criminal justice system, the juvenile justice system, and others were discussed at length to provide the reader with a background of terminologies used in the juvenile justice literature. It also discussed competing models of the juvenile justice around the world. The welfare, justice and restorative justice models were discussed at length to provide the reader with existing debates over what shape the juvenile justice should take and what are the recent trends in the juvenile justice. This chapter further went on from discussing the philosophy and the need for separate juvenile justice to discussing the juvenile justice practices around the world. The chapter provided a separate discussion on British juvenile justice system as Pakistani system is derivative of the British system. Finally, the chapter provided an insight into situation of juvenile justice system in Pakistan.

CHAPTER III:
RESEARCH METHODOLOGY

CHAPTER III:

PART I
RESEARCH AREA PROFILE

**Research
Methodology**

CHAPTER III: RESEARCH METHODOLOGY

The first chapter of this thesis built a case for the juvenile justice in Pakistan. The second chapter provided conceptual and international understanding of the juvenile justice practices with a focus on Pakistan. This Chapter has two parts. In Part –I, I will described the ethnographic features of the area under study that is the KPK. In the Part-II, I discussed the research methodology that was adopted for this study. It introduces the research aims and objectives along-with the design of research, tools for data collection and problems faced in the field.

PART-I RESEARCH AREA PROFILE

3.1 Khyber Pakhtunkhwa: Ethnographic Profile of the Study Area

Khyber Pakhtunkhwa, formerly known as North West Frontier Province (NWFP) was carved out of the Punjab province in 1901 due to its turbulent political nature. It is situated at Iranian and Eurasian land plates¹ with the Latitude and Longitude of 34.95N and 72.33E respectively². On the North-East of the province is situated Azad Kashmir and Northern Areas of Pakistan. On the east is Punjab province, on the north-west is Afghanistan, and Balochistan to the south-west³. The Khyber Pakhtunkhwa is largely located on the Iranian plateau and Eurasian land plate, while peripheral eastern regions are located near the Indian subcontinent and this has led to seismic activity in the past. It

¹ Government of Khyber Pakhtunkhwa. (2014). Geography. in *Khyber Pakhtunkhwa: Official Gateway to Government*. Retrieved December 12, 2014 from <http://www.khyberpakhtunkhwa.gov.pk/aboutus/Geography.php>

² Khyber Pakhtunkhwa Latitude and Longitude. (2014). in *DistancesFrom.Com*. Retrieved December 12, 2014 from <http://www.distancesfrom.com/pk/Khyber-Pakhtunkhwa-latitude-longitude-Khyber-Pakhtunkhwa-latitude-Khyber-Pakhtunkhwa-longitude/LatLongHistory/171955.aspx>

³ Khyber Pakhtunkhwa. (2009). Encyclopædia Britannica. In *Encyclopædia Britannica 2009 Student and Home Edition*. Chicago: Encyclopædia Britannica.

is situated not only in the north-west of Pakistan but also of the indo-Pakistan sub-continent and hence was named as North-West Frontier Province (NWFP).

It is spread over an area of 74,521 square kilometers. There are no exact demographic statistics on Khyber Pakhtunkhwa. The official statistics are more than 15 years old. The last census was carried out in 1998. According to 1998 census, the population of the province was 17.736 million⁴. Since independence in 1947, the population growth remained above 2%. According to Economic Survey of Pakistan 2011-12, which is being published by the Ministry of Finance, Islamabad, the estimated population of Khyber Pakhtunkhwa for 2011 was 23.77 million, i.e. 13.42% of the total national population⁵. The population density was 238 in 1998 while it increased to 319 as of 2011. This population include over 4.4 million Afghan immigrants who live in this area.

Administratively, the province is divided into seven divisions namely, Peshawar, Mardan, Malakand, Kohat, Hazara, Bannu and D.I.Khan, each under the administrative control of a Divisional Commissioner. These seven divisions are further divided into 25 districts for administrative purposes each under the control of Deputy Commissioner. The criminal justice administration in each district is carried out by a District Police Officer (DPO), a Session Judge, a Probation Officer, a District Public Prosecutor (DPP), and a Superintendent Jail. For juveniles in criminal justice, the Child Protection and Welfare Commission has established Child Protection Units (CPU) in selected districts of the province including Peshawar, Nowshera, Swabi, Mardan, Kohat, Bannu, Buner, Swat, and Abbotabad. It is pertinent to mention that Child Protection Units are not specific for the juveniles in criminal justice. Rather, CPUs serve multi-dimensional purposes.

⁴Government of Khyber Pakhtunkhwa.(n.d.).Area and Population. In *Khyber Pakhtunkhwa Official Gateway to Government*. Retrieved December 22, 2014 from <http://www.khyberpakhtunkhwa.gov.pk/aboutus/Area-Population.php>

⁵Government of Pakistan.(2012). *Economic Survey of Pakistan 2011-12*.(, Table 7, Chapter 12). Islamabad: Ministry of Finance.

Similarly, at each Divisional headquarters there sits a Deputy Inspector General of Police looking after the police matter in all the affiliate districts.

The sample area is mostly occupied by Pakhtoon (whose language is Pukhto), Pashtoon (Urdu, Baluchi), Pathans (English) and Afghans (Persian, Pushto). The main tribe is divided into many sub-tribes, *qam/qaum*, the largest social unit (now each one a tribe by itself). Each occupies a specific territorial area, and has a distinct dress and dialect of the *Pukhto* language. The *qam* is further divided into sub-tribes or *khels*⁶, a collection of a few extended families. An extended family is called *Koranai* or *Khandan*. Pukhtoos mostly live in joint families, where parents and their married sons and their children live together under the same roof so long as compatibility permits.

Some parts of Khyber Pakhtunkhwa, including Peshawar, Hazara, Kohat, and DI Khan are populated by Hindkowanans who speak Hindko language. Others such as Kohistan and Chitral are occupied by Kohistanis and Chitralis respectively, with their distinctive culture and language. However, majority of the population is Muslim.

Peshawar, the capital city of Khyber Pakhtunkhwa, has the most diverse population. Peshawar is one of the oldest cities in the world. Until the past century, the city was encircled by an inner city wall like the city wall of Yorkshire, UK. Parts of this wall can still be found here. The old gates of the city wall still survived to the present day.

Besides these, there is a significant majority of Afghan refugees in the sample area. Most of the refugees have merged into local population. They got married with local people and also have Pakistani National Identity Cards. It is generally believed that the Afghan *Mohajirs* have got these cards through illegal means. The local population has a strong negative attitude towards them. They are considered second grade citizens. It is a

⁶Sultan-i-Rome. (2013). *The North-West Frontier: Khyber Pakhtunkhwa: Essays on History*. Karachi: Oxford University Press.p.14

common proverb in the sample area “*Ka Afghany tol hum da Sroozaro Shi, nu Talee ba ye da peetalo ye*” This mean an Afghani is always of a mixed nature or untrustworthy or you cannot trust him totally.

Majority of Pukhtoons still live a tribal life, and behaviour is largely governed by informal and traditional laws and tribal codes, Pukhtoonwali. The central concepts are *Gherat* (honour, associated with bravery or defending one’s ego) *Nang*⁷ (associated with sacrifice, unconditional support or obligation) and *Izzat*⁸ (respect associated with ego of a person). If a Pukhtoon utter the word ‘*Khabara da Izzat da*’ his words of honour, he will not change his position taken in front of others even if he comes to the conclusion that his initial decision was not the best one. The greatest insult Pukhtoon can receive, and for which he will kill, is being called a person without honour ‘*Begherata*’ (a person who would not dare to take his revenge) or ‘*Dala*’ (a person dependent upon others), generally signifying a person who acts against, or fails to respect, the social norms.

Thus, the life of a Pukhtoon seems a continuous struggle between independence and dependence. On the one hand, he is trying to keep his independence and individuality, while on the other he is seeking power and influence—to make other people dependent. It is a common saying that ‘a Pukhtoon is one who does it and not one who speaks it’. Pukhtoonwali has specific features, including *Jargah*⁹ (tribal council), *Melmastia*¹⁰ (hospitality or the honourable use of material goods), *Hujra*¹¹ (men’s guest house), *badal*¹² (vendetta), revenge or exchange), *Toor* and *Peghoor*¹³ (stigma and sarcasm),

⁷ Sultan-i-Rome. (2013). *The North-West Frontier: Khyber Pakhtunkhwa: Essays on History*. Karachi: Oxford University Press.p.99

⁸ Ibid

⁹ Robert Warburton(Sir),. (1900, 2007).*Eighteen Years in Khyber, 1879-1898*. Lahore. Sang-e-Meel Publications.p.43

¹⁰ Javaid Iqbal Qari. (2008). *Pakistan Encyclopedia of Folklore, NWFP*. Volume 2. Lahore: LokVirsa/Al-Faisal Nashran.p.448

¹¹ Sultan-i-Rome.(2013). *Op.Cit.* p.111

¹² AzamBaig. (2009). *Pakhtunkhwa Today*. Peshawar: Dunya Pvt. Ltd.p.52

*Tarboorwali*¹⁴ (kinship, lineage system or power blocks within a *Khel* competing for power and prestige) and *Nanawati*¹⁵ (arrangements for an apology by a wrongdoer through mediators), *Lakhkar* (Local army against a larger common enemy), *Badruga*¹⁶ (guarantee for security), and *Ashar*¹⁷ (mutual cooperation or assistance, particularly in farming). These concepts have deep meaning and embody deep-rooted feelings of social stratification and adherence to custom and tradition.

Pukhtoos, are patriarchal, patrilineal and patrilocal. They claim their descent to a common ancestor in Afghanistan and in theory all Pukhtoos

are equal¹⁸. Everybody having his name on the genealogical chart of the *khel* has a right to inheritance, no matter how small. The village area encompasses all lands over which *khels* have ownership rights. These are defined in terms of measurement units like 'Motai', 'Rupai', 'Paisa' and 'Nimakai'¹⁹. The total number of shares relate to the whole of the village area. Each type of arable land, whether annually or seasonally irrigated or rain fed is geographically divided. Communal land, *Shamilat*²⁰, is normally left for pasture, graveyards and mosques, as well, recently, as for schools and other official buildings. *Shamelat* areas are not divided.

The joint family system has not only political but also economic implications. Politically it gives strength to the family and having a large number of males in a *khel* family is socially desirable. In a poor subsistence economy all earners contribute to the family

¹³ Sultan-i-Rome.(2013). *Op.Cit*.p. 101-107

¹⁴ Ibid, p.111

¹⁵ Azam Baig. (2009). *Op.Cit*.Pp.45-93

¹⁶ Ibid

¹⁷ Pashtunwali. (2014, December 26). In *Wikipedia, The Free Encyclopedia*. Retrieved 06:21, January 3, 2015, from <http://en.wikipedia.org/w/index.php?title=Pashtunwali&oldid=639697680>

¹⁸ D.N. Wilber et al. (1969). *Pakistan: Its People, its Society, its Culture*. New Haven: HRFA Press. Pp.149-151

¹⁹ Amir Zada Asad. (1999). *Opium and Heroin Production in Pakistan*.(PhD Thesis). University of Hull, UK.p.156

²⁰ Ibid

purse, kept by the head of the family, either the father or the elder brother, and each one obtains according to his needs, irrespective of earning status. The difference between father and sons and between elder and younger brother is observed.

Badal or vendetta requires retaliation to be exacted when any physical or social injury is done to a member or prestige of the family²¹. If a family member is killed, it is the responsibility of the large family to take revenge. As a result, feuds and factions continue for centuries—Pukhtoon say that if you take revenge after one hundred years, it is not too late. This practice of *Badal* is one of the many reasons that juveniles are used in heinous crimes of murder. *Badal*, however, is not solely negative, and also entails reciprocity of help and support at a time of need. So food and shelter, or physical help or money, offered when a person is away from his group and village, is remembered and reciprocated to people of that area.

Pukhtoons are very sensitive to their code of honour, and do not tolerate transgression irrespective of the status of the transgressor. Women and landed property are the two symbols of honour and shame: insult to a woman is *Toor*²² shame and stigma; and *Toor* is interpreted vary widely, so that a stranger in a village cannot ask a young woman about his host, or even for travel directions. Any hint of sexual relations between a male and a female is a great stigma and shame for the family of the women, and can only be washed away with the blood of those involved—so both are killed. In many cases, however, the woman is killed but the man makes good his escape, so becoming a fugitive for life, unable to return home unless a compromise is reached between the two families. This

²¹ AzamBaig. (2009). *Pakhtunkhwa Today*. Peshawar: Dunya Pvt. Ltd.p.52

²² Sultan-i-Rome.(2013). *Op.Cit*.p. 101-107

often involves *Swara*²³, a woman from the aggressor family being married into family of the aggrieved.

Accordingly, women are closely guarded indeed kept in *purdah*, which normally restricts them to housekeeping, though they may also work on the family lands if a male relative looks after them. Unprotected women work in other's households as domestic servants.

Various cultural practices keep the Pukhtoons always in debt to each other. As a result a Pukhtoon will keep a good gun at home rather than having good food; he will keep and save money to feed his guest and reciprocate his social obligations, but have a poor life himself; he will sell land in preference to allowing his women work for money. Federal laws are contrary to such cultural practices but a corrupt judicial system encourages the people to decide their matters themselves, either through a *Jargah* or with a rifle. An outsider may initially think Pukhtoons society lawless and disorganized, but these unwritten laws in fact keep it peaceful and organized. Here it is pertinent to mention that the state criminal justice system is usually consulted as part of vendetta or doing more harm to the competing party. A common saying that goes in KPK is that "*Khudy dy Thanra Kacharai o Haspatal na lary sata*" which means "May God keep you away from criminal justice system and hospitals". It means the involvement of criminal justice system is the least preferred in any matter.

This raises big question regarding. If tradition is so strong, what is or ought to be the relationship between secular powers/national state in dealing with justice and criminal justice? How or whether multiple tribal family groups therefore need an overarching authority? I shall leave these questions here for future researchers to answer.

²³Sultan-i-Rome.(2013). *Op.Cit.*p. 105

As mentioned, issues are decided by a *Jargah*, the grand assembly of local men, which decides communal matters or conflicts pertaining to individuals or sub-tribes. The composition and nature of the *Jargah* varies. Among the Afridies, Momands, Utmankhels and Shinwaries of Khyber Agency, Momand Agency, and Bajorh Agency, where people have a relatively egalitarian outlook, people sit in a circle emphasizing equality, with no head of the council. The matter to be dealt with is argued and argued until a solution comes out but the voting system is never used. Among Yousafzai in Dir, a *Jargah* consists of the representatives of the major power groups. The *Jargah* is variable in membership, reflecting the power relations of the moment and having a composition acceptable to all sides: it is this that gives it its authority. It is not a permanent body, but one which can be formed at different levels depending on the nature and level of conflict and the involvement of the village section.

Usually, a *Jargah* is conducted at the *Hujrah*²⁴ of a *Khan* or *Malak* (land lords), who usually is a strong political figure of the area. The *Khan* or *Malak* has a strong influence on *Jargah* proceedings. However, he too cannot go against the decision of *Jargah* once it is made. *Jargahs* have the two main tasks of problem solving and regulation, to prevent problems from happening in the first place or from getting out of hand if they do. The decision of *Jargah* is final and enforced by the society; decisions are reformatory in nature than punitive.

Jargah system is very popular in Khyber Pakhtunkhwa. Most of the minor and major issues are usually resolved through *Jargah*. This practice helps reduce the burden on police and courts. Some parts of the *Jargah* system are in contradiction to constitutional

²⁴Ibid

provision²⁵. However, the practice is widely observed and acknowledged. It also reduces the time and money of the parties seeking justice. In some parts of the province, they proved to be effective in many respects²⁶. However, others claim that these committees proved to be of no service²⁷. *Jargah* can be integrated into other systems. Not only criminal but most of the civil disputes are also resolved through *Jargah*.

This shows that Pashtun culture is very much accommodative and even murder cases are settled out of the courts through the institution of *Jargah* and other means of social control. Nonetheless, there are still issues surrounding place of *Jargah* system as a traditional and legitimate alternative dispute resolution system, and whether and how these can be integrated into other systems.

²⁵Barakatullah and Imran Ahmad Sajid. (2014, Jul-Dec). Jirga System in Pakhtun Society: An Informal Mechanism for Dispute Resolution. *Pakistan Journal of Criminology*, 5(2), Pp.45-60

²⁶Nizar Ahmad, FarhatUllah, Amir Zada Asad &Shagufta Shah. (2014, Jul-Dec). Local Peace Committees: Potentials Contributing Factors in the Peace-building Process in Conflict-Affected Areas of Pakistan {A Case Study of Maidan, (Lower Dir) in the Province Khyber Pakhtunkhwa. *Pakistan Journal of Criminology*, 5(2), Pp.103-114

²⁷Sardar Faisal. (2014, December 20). Thana Kachaheri Culture se Nijat. In *Daily Aaj*.

PART II: RESEARCH METHODOLOGY

3.2 Research Objectives

The present research attempts to develop an understanding of the juvenile justice system in Khyber Pakhtunkhwa²⁸ and establishes the logic that is responsible for enacting the present juvenile justice system²⁹ albeit more practical and viable means of dispute settlement and rehabilitation of the offenders are culturally comprehensible in the shape of *Jargah* (grand assembly) and *Nanawatior* (pardoning). Specifically, the study seeks to achieve the following objectives;

1. to know about the 'why' of implementation of the JJSO in Pakistan;
2. to find out the problems in the implementation of the Law for juveniles, i.e. the Juvenile Justice System Ordinance, 2000;
3. to find out the strategies adopted by the criminal justice community for dealing with juvenile cases in the absence of proper institutional-structural arrangements; and
4. to find out the abuse of JJSO by the concerned officials and the society.

As the juvenile justice system is composed of five components namely police, prosecution, courts, probation, and institutional treatment (prison or Borstal), therefore the present research asks separate questions regarding each of the component.

The questions asked from the stakeholder included questions like what were the views of the Stake holders of the system i.e. Police department, judges, prosecutors, probation

²⁸ By this I mean the exploration of the present system.

²⁹ By this I mean to explain why the juvenile justice system is in its present state.

officers and the prison officials regarding juvenile offenders and the juvenile justice system?

3.3 Research Design and Process

The criminal justice system in Pakistan is based on the British colonial system of pre 1947 era. The juvenile justice system that took the present shape after 2000, however, is based on the principles of CRC. The underlying philosophy is rehabilitation, diversion and reintegration of the juveniles in the community. Thus, the present study attempts to understand whether the criminal justice system that is based on colonial basis can modify itself from retributive to rehabilitative system. For exploring this purpose, this study adopted Case Study design to look into the juvenile justice system in Khyber Pakhtunkhwa. The next step in the research was the selection of the study area.

3.4 Nature of Respondents

There have been numerous studies that looked on the juvenile justice system from courts or legal perspective³⁰. However, this is perhaps one of the few studies that look at the juvenile justice system from the perspective of all who were involved in the process. It includes the police, who are the first contact of the juvenile offender; prosecution, who prosecute the case on behalf of the state; judges, who analyze the juvenile case and who have to decide and issue orders regarding juvenility of the offender and the kind of punishment to be awarded; the probation officers, who have been given extra role of social worker and psychosocial counselor as well; the prison officials, including the Borstal officials who manage the detention facilities for juveniles; the juveniles, in prison

³⁰Muhammad Amir Munir. (2007). Juvenile Justice System Ordinance, 2000 - Theory (2007). *Pakistan Law Journal*, p. 52; and see also Khurshid Iqbal (2009, Oct). Judging Juvenility, Determination of Age of Juvenile Offenders under Pakistan's Juvenile Justice System. *Pakistan Journal of Criminology*, 2 (3), Pp.105-118

or who have been to prison (who have experienced the system); and NGO representatives who work for the protection of the rights of the child in criminal justice.

The *raison d'être* is to get a comprehensive picture of various complexities in the juvenile justice system in Khyber Pakhtunkhwa.

3.5 Research Strategy

Research strategy varies depending on the nature of the research³¹. For this research, I used triangulation as a strategy for data collection. Triangulation, according to Lawrence Neuman "builds on the principle that we learn more by observing from multiple perspectives than by looking from only a single perspective." L. Cohen and L. Manion define triangulation as an "attempt to map out, or explain more fully, the richness and complexity of human behavior by studying it from more than one standpoint."³² There are different types of triangulation (e.g. data triangulation, investigator triangulation, theory triangulation, methodological triangulation, and environmental triangulation).³³ I used data triangulation, one of the most popular methods of triangulation for this research.³⁴

In data triangulation, more than one source of information is used. The underlying philosophy is to enhance the validity and conceptual strength of the study³⁵. In this research, the sources of information were the police officers, the prosecutors, the judges,

³¹ Lawrence Neuman. (2009). *Social Research Methods: Qualitative and Quantitative Approaches*. Pearson; Allyn and Bacon. P.230

³² L. Cohen & L. Manion. (2000). *Research methods in education*. [5th edition]. Routledge. p. 254.

³³ For more information on triangulation, please see Lisa A. Guion, David C. Diehl, and Debra McDonald. (2013). Triangulation: Establishing the Validity of Qualitative Studies. In *University of Florida IFAS Extension*. Retrieved December 12, 2013 from <https://edis.ifas.ufl.edu/fy394>

³⁴ N. Denzin. (2006). *Sociological Methods: A Sourcebook*, [5th edition]. Aldine Transaction.

³⁵ L.A. Guion, C.D. Diehl, and D. McDonald. (2013). Triangulation: Establishing the Validity of Qualitative Studies. In *University of Florida IFAS Extension*. Retrieved December 12, 2013 from <https://edis.ifas.ufl.edu/fy394>

the probation officers, the juveniles in prison or on probation and the Civil Society representatives.³⁶

Every method has its own advantages and disadvantages. My interest was to capture the views of all the stakeholders in the juvenile justice system regarding juvenility and the issues they are facing in the process. A single source of information, e.g. the police officers, cannot provide a comprehensive picture of the phenomena. Therefore, I used all the stakeholders as a source of information. I could have used methodological triangulation as well, i.e. using qualitative and quantitative method for data collection. However, that was more costly and more time consuming. The reason I resorted to present methodology is that it is easy to implement. Likewise, more sources of information give more insight into a problem. Further, the inconsistencies in data set are more easily recognized in this method³⁷. Basharat Hussain and P. Francis argue that using more than one source of information ensures that the problems associated with one source may be compensated for or counter-balanced by the strengths of another³⁸. Such a method produces more reliable and accurate information³⁹.

3.8 Sampling Strategy

As mentioned in chapter-I, this is a qualitative, descriptive and explanatory study on the JJSO 2000 and its implementation.

³⁶ In-depth interviews could be conducted with each of these groups to gain insight into their perspectives on program outcomes. During the analysis stage, feedback from the stakeholder groups would be compared to determine areas of agreement as well as areas of divergence.

³⁷ Fu-Jin Shih. (2006). The Use of Triangulation in Social Science Research. In *National Cheng Kung University, Teaching & Researching Development Division*. Retrieved December 12, 2013 from moodle.ncku.edu.tw

³⁸ P. Francis. (2000). Getting Criminological Research Started. In Francis, P., Davies, P., & Jupp, V. (Ed.) *Doing Criminological Research*. London: Sage Publications. Pp. 29-52; and Basharat Hussain. (2009). *Social Reintegration of Offenders: The Role of the Probation Service in North West Frontier Province, Pakistan*. [PhD Thesis]. The University of Hull, UK.

³⁹ M. Maguire. (2000). Researching Street Criminals: A neglected art. In R. King and E. Wincup (eds.) *Doing Research on Crime and Justice*. Oxford: Oxford University Press, pp. 121-152.

*"Qualitative researchers aim to gather an in-depth understanding of human behavior and the reasons that govern such behavior. The qualitative method investigates the why and how of decision making, not just what, where, when. Hence, smaller but focused samples are more often needed than large samples"*⁴⁰.

Experts recommend purposive, snow-ball and quota sampling⁴¹, all used for different situation. In case of snow-balling, a known sample is used to know an unknown sample and in this way the sample size is obtained. Similar is the case with quota sampling.

*"Purposive sampling is a common sampling strategy according to preselected criteria relevant to a particular research question. Sample sizes, which may or may not be fixed prior to data collection, depend on the resources and time available, as well as the study's objectives. Purposive sampling is therefore most successful when data review and analysis are done in conjunction with data collection"*⁴².

In qualitative studies the purposive sampling is the best one suiting the nature as well as purpose of data collection. Like in this study, the respondents were known but it was not known that who will agree for an interview and who was the best and possessed the knowledge about the juvenile cases in the province. Before going into the field some judges, Police officers, probation officers and Prosecution officers were asked about 'who' was dealing most with such cases and a few names were told. Then those few names were contacted and requested for an interview on the subject matter.

So the strategy was based on purposive sampling. The purpose was to interview either a particular person well versed in his field or the person who was willing for the interview. The respondents included judges, prosecutors, police investigation officers (IO) and Police officers (officers of the rank of Assistant Superintendent of Police or above), prison administrators, NGO representatives, Probation officers, and juveniles who have been to prison.

⁴⁰ Norman Denzin, Lincoln K. & Yvonna S. (Eds.). (2005). *The Sage Handbook of Qualitative Research* (3rd ed.). Thousand Oaks : Sage. p.176.

⁴¹ Natasha Mack et.al. (2005). *Qualitative Research Methods: A Data Collector's Field Guide*. North Carolina: US-AID. p.5

⁴² Ibid

There are seven (7) police ranges in Khyber Pakhtunkhwa namely Peshawar range, Mardan range, Hazara range, Bannu range, Kohat range, and Malakand range. Each range consists of more than one district. The range-wise sample was collected from the entire province (See Table 3.1 for details). I started with Peshawar range, which was easy to access and then gradually moved out to Mardan range, Swat, Hazara, Kohat, Bannu and D.I. Khan ranges.

Table 3.1: Sampling Strategy

Type of Respondent		Interviewed
Judges*		07 (one in each division)
Prosecutors		07 (one in each division)
Police	IOs	21 (Three in each division/ range)
	Officers	07 (The senior police officer in the district.
Prison Staff		03 (Supdts/ deputy sudts.. F\from three prisons)
NGOs		03(All Peshawar based)
Probation officers		7 (one in each division)
Juveniles		07 (One in each division)
TOTAL		62

*Judges mean Judicial Magistrate/Civil Judge or Session Judge or Senior Session Judge)

3.9 Tools for Data Collection

I used multiple tools for data collection in this research including; Primary data (In-depth Interviews), Secondary/ Documentary Data (including official statistics obtained from the probation offices, Central Police Office, IG Prison Office, and from NGOs like SPARC's report) and Observation and Field Notes. By combining the data through these three tools, I tried to develop a comprehensive picture of the issues involved in the juvenile justice process in Khyber Pakhtunkhwa.

3.9.1 Protracted or In-depth Interviews

An interview is like a conversation where an interviewer asks questions or discusses issues with the people⁴³. Like conversation, it is a social event with two or more participants. According to P. Davies⁴⁴ an interview is a meeting of people where personal and social interaction occurs⁴⁵. Lawrence Neuman⁴⁶ states that

"An interview is a short-term, secondary social interaction between two strangers with the explicit purpose of one person obtaining specific information from the other."

According to E.G.Mishler⁴⁷,

"The interviewer's presence and form of involvement—how she or he listens, attends, encourages, interrupts, digresses, initiates topics, and terminates responses—is integral to the respondent's account."

Natasha et.al adds that "in-depth interviews are effective qualitative method for getting people make to talk of personal feelings, opinions, and experiences". She further adds that "the interviewer also get an opportunity to gain insight into how people make statements and order the world⁴⁸."

In this research interviews were conducted separately from police personnel, prosecution officers, probation officers, judges, prison officials, NGO representatives and juveniles.

⁴³ L. Blaxter, C. Hughes, and M. Tight. (2001). *How to Research*. [2nd Edition]. Buckingham: Open University Press.p.171

⁴⁴ Pamela Davies. (2006). Interview. In Victor Jupp. (Eds). *The SAGE Dictionary of Social Research Methods*. Sage Publications. Retrieved March 12, 2013 from <http://srmo.sagepub.com/view/the-sage-dictionary-of-social-research-methods/n106.xml>

⁴⁵ Ibid

⁴⁶ Lawrence Neuman. (2009). *Social Research Methods: Qualitative and Quantitative Approaches*. Pearson/ Allyn and Bacon.p.145

⁴⁷ E.G. Mishler. (1986). *Research interviewing: Context and narrative*. Cambridge: Harvard University Press.p.35

⁴⁸ Natasha Mack, et. al. (2005). *Qualitative Research Methods: A Data Collector's Field Guide*. North Carolina: Family Health International. p.29.

All these interviews were quite protracted or in-depth which means, according to Milena and others, in-depth interview is a technique designed to elicit a vivid picture of the participant's perspective on the topic under discussion⁴⁹.

The interviews with the police and judges were of a more formal nature. The interview with the prosecutors and probation officers were of a more informal nature. The judges and police official were more on their guard and more careful in what they were speaking. However, prosecutors and probation officers seem more open to talk. The interviews with the respondents had three dimensional focus: first, general problems faced by the respondents in juvenile cases; second, find out the problems and issues that each of the respondents face while interacting with other agencies of the juvenile justice; and finally, the perception of the respondents regarding juvenile and delinquent.

Lawrence Neuman suggests that in unstructured interviews, the most important thing is that "you must listen. Do not interrupt frequently." In each of the interviews, some of the findings from the previous interview and my own experience would also come under discussion. In addition, all the interviews were conducted in a language most suitable to the respondents (mostly in Pashto and Urdu). Overall, the interviews were a mix of English, Urdu and Pashto language.

Considerable attention was given to the length of the interviews. The time of the interview varied from 30 minutes with the police officials to about two hours with some judges and probation officers.

Further, in field interviews, the interviewer and the interviewee both are continuously interacting and conversing on the problem under discussion. No matter how strong the

⁴⁹ Zaharia Rodica Milena & Grundey Dainora & Stancu Alin. (2008). Qualitative Research Methods: A Comparison Between Focus-Group And In-Depth Interview. In *Annals of Faculty of Economics*, 4(1), Pp. 1279-1283

memory of a person is, it is nearly impossible to remember all the talks and interactions of the interview as it is. Relying on the memory is not suggested by Barnard. Therefore, researchers suggest the use of 'tape recorder' or note book or both with the permission of the respondents⁵⁰.

In this research, both, the audio recording device and note-book were used. Instead of tape-recorder, which is now becoming obsolete, I used a digital audio recorder which is easily available in the market. However, in order to ensure proper digital audio recording of the interviews, along with the digital Audio recorder, the sound recording application of the Smart Phone was also used for recording.

Contrary to B.A. Cole, who found that government officials usually avoid recording,⁵¹ none of the other government officials, including judges, prosecutors, and probation officers, refused to get the interview recorded. The police, nonetheless, did not give permission for audio or video recording of the interviews. Therefore, the interviews with the police were not recorded. Nonetheless, a detailed transcription of those interviews was made immediately after the interview.

All the interviews with the police officials, prosecutors, probation officers, and NGO representatives were made in their respective offices. Some of the interviews with the judges were made at a place more suitable and comfortable to them. Similarly, the interviews with the probationers and juveniles in conflict with law were made in the office of the probation officer and at the convenience of juvenile who have served some time period in prisons respectively.

⁵⁰ See For example Peter Henshall and David Ingram (1991). *The news manual : a training book for journalists*. Sydney : Poroman Press; see also T.J. Bernard. (1992). *The Cycle of Juvenile Justice*. New York: Oxford University Press.

⁵¹ Cole, B.A. (1990b). Rough Justice: Criminal Proceedings in Nigerian Magistrates Courts. *International Journal of the Sociology of Law*, 18 (3), Pp.299 – 316.

3.9.2 Secondary Data

Documentary analysis is one of the important tools in all researches. As stated by Blaxter *et. al.*⁵², “all research involve, to a greater or lesser extent, the use and analysis of documents.” Documentary analysis involves the careful consideration of a range of related questions. Official documents and statistics provide a starting point for many researches⁵³. However, what data is used in a research (e.g. statistics or descriptive reports etc) depends upon the nature of the study under consideration⁵⁴.

Secondary data was used for numerous reasons. First, collecting that data is extremely time consuming and require a handsome amount of financial budget. Unfortunately, this research is constrained by time as well as finances. Limited time and finances are available. Secondly, if the required data is already available, it will be a waste of time and resources to re-collect the available data. Finally, the secondary data is used to supplement, modify, or contradict the primary data⁵⁵.

In this research, each of the chapters in the analysis has been supplemented by secondary data. The documents used were official statistics, case files, NGO reports, and legal published reports (i.e. legal digest, SCMR, PLD and PLJ). The official statistics obtained from numerous sources.

⁵² L. Blaxter, C. Hughes, and M. Tight. (2001). *How to Research*. [2nd Edition]. Buckingham: Open University Press.p.171

⁵³ P. Francis. (2000). Getting Criminological Research Started. In Francis, P., Davies, P., & Jupp, V. (Ed.) *Doing Criminological Research*. London: Sage Publications. Pp. 29-52

⁵⁴ Basharat Hussain. (2009). Social Reintegration of Offenders: The Role of the Probation Service in North West Frontier Province, Pakistan. PhD Thesis. The University of Hull, UK.

⁵⁵ L. Blaxter, C. Hughes, and M. Tight. (2001). *How to Research*. [2nd Edition]. Buckingham: Open University Press.

3.9.3 Observation and Field Notes

In addition to questionnaire, interview and documents, observation and field notes are a strong tool for data collection. As mentioned earlier, this research used triangulation design. C. Martin⁵⁶ suggests that triangulation can be immensely valuable.

For example, observational techniques combined with interviewing and documentary research allow the researcher to start with some preliminary observation, move into the interview phase whilst conducting the documentary research alongside, and conclude with more observation.⁵⁷

Similarly, C. Martin⁵⁸ also suggests that using field notes is also vital. They are a powerful memory aid and are used to record events and personal impressions. Therefore, in conjunction with interviews and documents, observation also made and field notes were also taken.

The observation played a minor role in this research. The researcher observed the interaction of the probation officer and the juvenile probationer. Observation was a vital tool for this research. The observation was made in the office of the probation officers and in prisons.

Field notes played a crucial role in this research. The researchers usually forgets the important details of observation and interview unless they are recorded immediately. Field notes include many things including personal responses and sensory impressions⁵⁹.

⁵⁶ C. Martin. (2000). Doing Research in a Prison Setting. In Jupp, V., Davies, P., & Francis, P. (Eds). *Doing Criminological Research*. London: Sage

⁵⁷ Martin, C. (2000). Doing Research in a Prison Setting. In Jupp, V., Davies, P., & Francis, P. (Eds). *Doing Criminological Research*. London: Sage. pp.215-233.

⁵⁸ C. Martin, C. (2000). Doing Research in a Prison Setting. In Jupp, V., Davies, P., & Francis, P. (Eds). *Doing Criminological Research*. London: Sage

⁵⁹ F. Chiseri-Strater and B.S. Sunstein. (1997). *Field Working: Reading and Writing Research*. New Jersey: Blair Press

In this research, field-notes played an important role. The tone of voice and the environment of the interview was recorded after each interview.

3.10 Gaining Access to the Study Area and Study Subjects

This was an overt research and gaining was more formal than covert. The issue of access involved viz access to documents, libraries, institutions, people, and government departments⁶⁰. Gaining access is a process of negotiation and re-negotiation⁶¹.

In this research, I used formal and informal means to gain access to study area and research participants.

Official permission was taken from Additional IG Police (Investigation), DG Prosecution, I.G Prisons, and Director Parole and Probation. No official permission was taken from any official body for interviewing Civil / Session Judges. Interviews with judges were conducted with their personal permission.

Numerous problems emerged during data collection. Traveling to the study area was one of the major problems. Besides traveling to research participants, there were delays in official permission. There was no other way but to wait for the permission. A frequent follow-up was carried out for obtaining permission letter. Obtaining case documents from the police record was another difficulty in this research. However, it was obtained from the Office of Additional Inspector General (Investigation), Central Police Office, Peshawar and from the library of Pakistan Society of Criminology. Another problem in research was contacting juveniles who have gone through the criminal justice system. This was mostly overcome with the help of probation officers.

⁶⁰ L. Blaxter, C. Hughes, and M. Tight. (2001). *How to Research*. [2nd Edition]. Buckingham: Open University Press.

⁶¹ G. Hughes. (2000). Understanding the Politics of Criminological Research. In Jupp, V., Davies, P., & Francis, P. (Eds). *Doing Criminological Research*. London: Sage. pp.234-248.

3.11 Data Analysis

Data analysis is defined "as the process a researcher uses to reduce data to a story and its interpretation. Data analysis is the process of reducing large amounts of collected data to make sense of them"⁶²

It is suggest that data analysis be done as soon as the data are collected in the field, and as soon as possible after the data have been collected. This means both, while the researcher is still in the field, and later, when the researcher is no longer in the field.

In-the-field analysis includes writing and notes taking, description or reporting and explanation, and transcription (record/ copy/ text).

Many experts have used different methods of qualitative data analysis according to their own concerns. If they are all accumulated, this gives the following most used methods of analysis:

Ethnographic Analysis 'Narrative Analysis, Phenomenological Analysis and Constant Comparative Analysis'⁶³ while Bernard has enumerated six methods of qualitative data analysis such as (1) Hermeneutic/Interpretive Analysis,(2)Narrative/Performance Analysis, (3) Discourse Analysis,(4) Grounded Theory Analysis, (5) Content Analysis, and (6) Cross-cultural Analysis⁶⁴.

For this study we have used a pick-n-mix approach of methods. They are ethnographic analysis, Content analysis and Discourse analysis.

As we have presented an ethnographic profile of the research area to elucidate the salient features of the culture with respect to dispute resolution or conflict resolution. We mentioned that *Jargah* is a system which helps resolve even murder cases out of the court

⁶² LeCompte, M. D., & Schensul, J. J. (1999). *Analyzing and Interpreting Ethnographic Data*. (Walnut Creek, CA: AltaMira Press),p.13.

⁶³ S.B. Merriam. (1998). *Qualitative research and case study applications in education*. San Francisco: Jossey-Bass.

⁶⁴ Russel H. Bernard. (1994). *Research methods in anthropology: qualitative and quantitative approaches* (second edition). Walnut Creek, CA: AltaMira Press.

in an amicable way. The best feature of the *Jargah* system is that the decisions are reformatory and not punitive. In case of Police, we have observed that they mostly apply the same procedure to resolve the issues of the juveniles and in many cases the litigation is avoided.

We have also held protracted interviews with police officers, judges, Prosecutors, and probation officers etc. Part of the analysis is based on these discourses with these officials or stakeholders. The content analysis is that part which has been studied in the books, reports, journals etc. and we have concluded some inferences from them.

3.12 Ethical Issues

Research often involves reporting intimate and detailed information regarding the respondents. Ethical issues are more likely to arise in predominantly qualitative researches⁶⁵. It is because of a close relation between a researcher and the respondent in qualitative research. The issues of privacy, informed consent, secrecy, being truthful and desirability of the research are bound to arise in research process.

In this research, I assured the privacy of the research participants. Most of the interviews were conducted in the private settings or at the place that was the most convenient and the most suitable for the respondent.

Most of the interviews were recorded into a digital audio recording device. However, a verbal consent was taken from the respondents before the interview. Some of the respondents denied a consent. Therefore, such interviews were not recorded in audio device. In such cases, I tried to note down the key points of the interview on a note book.

⁶⁵ L. Blaxter, C. Hughes, and M. Tight. (2001). *How to Research*. [2nd Edition]. Buckingham: Open University Press.p.158

Secrecy of the respondents was also assured to the maximum length possible. Those who requested anonymity, their names were not acknowledged.

Lastly, I reported the findings as they were being reported in the research process. The words of the respondents are used as they have been spoken (not in the native language but a translated version).

Summary

In this chapter, I explained the core objectives of this research along with key questions that are to be answered in the chapters to follow. It also explained why I selected this particular topic and the province of Khyber Pakhtunkhwa. Further, this chapter provided details on the tools for data collection. This research uses triangulation of data. Interview, Field notes, and Documents were used as a tool for data collection. The chapter also justified why I resorted to triangulation of data. A key element of this chapter was to explain how did I gain access to study area and research participants. Although quantitative methods could also have been used, yet this chapter also justifies why I used qualitative method for conducting research. Lastly, I also explained the sampling strategy adopted in this research.

CHAPTER IV:

Police's Perspective on the Juvenile Justice in Khyber Pakhtunkhwa

CHAPTER IV: POLICE'S PERSPECTIVE ON THE JUVENILE JUSTICE IN KHYBER PAKHTUNKHWA

The previous chapter introduced the methodology of the present study. This chapter on data analysis discusses the police system in Pakistan. It presents a brief history of the police and its structure and function in Pakistan. Towards the end, this chapter discusses the police perspective on the juvenile justice in Khyber Pakhtunkhwa.

4.1 Introduction

Police plays the key role in deciding youth cases in many countries including England and Wales. In Pakistan, the police have considerable discretion in juvenile cases in deciding how to respond. In England and Wales, the police also have a considerable discretion over juvenile cases, but those are sanctioned by the law¹.

The examination of the juvenile justice process usually begins with the police². The Police play a critical role in the juvenile justice; in fact, they are the primary gate-keepers of the formal justice process³. Indeed, the decisions made by the police determine who will become the client of the formal juvenile justice process. Police are the most visible symbol of the entire process within a locality. When citizens believe that juveniles are engaging in illegal or problem behaviours and seek the assistance of a formal juvenile justice agency, it is to the police that they usually turn. Although, Child Protection Units have been established in 2009, only in Khyber Pakhtunkhwa, the confidence of the communities is yet to be built on Child Protection Units (CPUs). Like the responses of

¹ J. Graham and C. Moore. (2006) "Beyond Welfare versus Justice: Juvenile Justice in England and Wales" in Junger-Tas, J., and Decker S.H. (ed) *International Handbook of Juvenile Justice*. Dordrecht, The Netherlands: Pp.65-92

² P. Elrod and Scott R. Ruder. (2005). *Juvenile Justice: A Social, Historical, and Legal Perspective* (2nd Ed.). Boston: Jones and Bartlett Publishers.

³ Ibid

other institutions to juvenile offenders, police response is best understood by examining the historical development of policing particularly, as it relates to juveniles.

4.2 History of Police in the Sub-Continent

History of policing in the sub-continent is the history of discussion over pre-colonial (community) and post-colonial (corrupt) policing. Contrary to the common belief the historical roots of the present day police and policing go beyond the British Colonial period to the *Mughals*. The *Mughals* ruled this area for about Over three hundred (1526-1857) years. The *Mughals* were very good administrators. In *Mughal* period the police was divided into two distinct bodies under the *Faujdar* and *Kotwal* respectively. A *Faujdar* was the head of *Sarkar*, a district. The *Faujdar* drew mostly on the villagers themselves to perform policing duties within the village. When an ordinary crime was committed, the inhabitants of the village were held responsible. The landlords were expected to maintain peace and order within their estates as well as to curb crimes and arrest criminals⁴. As a consequence, rather than relying on the formal criminal justice system to punish juvenile and adult offenders, the villagers relied more on family and local institutions.

However, in cities, the police functions were carried out by *Kotwal*. The names still persist in the communities in Pakistan. Even one police station in Peshawar city is called "Kotwali Police Station". The city was divided into *Mohallas* Communities. Each *Mohalla* was policed by a mohalla head man (*Meer-e-Mohallah* or *Muhalladar* commonly known as *Mir Sahib*). Besides policing, the *Kotwal* performed many civil functions as well including record of roads, streets, lanes, houses, inhabitants by class, income and mode of expenses. He also kept a record of prices of commodities, checked

⁴ M. K. Chaudhry (1997). *Policing in Pakistan*. Lahore: Vanguard Books.

weights and measures and ensured that animals like bulls were not slaughtered. Building hotels *Sarai* for travelers and keeping an eye on city gates were also included into his functions. The *Kotwal* kept a network of informers for criminal intelligence. It was his personal responsibility to arrest thieves and robbers and to affect recoveries of stolen property. From the look of it, it can be inferred that the main concern of the police at the time was robbers or protection to public and private properties. The small and petty crimes were being informally handled by the residents of the *mohallas* through informal institutions.

During the colonial period police was an attached part of the regular army. After the war of independence or war of mutiny depending one's perspective of 1857, the colonial power made a commission to investigate the causes of the Muslims' upsurge and the resultant law and order situation. In 1861, the commission submitted its recommendations and made police an independent department detaching it from the military. All the officers of the police were Britons while the rest of force consisted of the local people. Police was answerable to the District Magistrate or Deputy Commissioner who had dual powers of the district executive head and the district judicial head. The Deputy Commissioner usually used to be a Briton and later on may be an Indian of the Indian Civil Services group. The Police wielded many powers and discretion.

4.3 History of Police in Pakistan

The Britons came to this area as merchants but gradually occupied the area and successfully the *Mughals* were overthrown by them. The British colonials who settled in the un-divided India brought with them a variety of institutions and practices, including English common law, a new court system, a new punishment for crimes, and new policing practices. Pakistan inherited the same on attaining independence in 1947 and till

this day most of the police laws and procedures are the same as they were immediately after 1858 under the Commission of 1861 known as Police laws 1861. The colonial law, however, had a number of shortcomings including inefficiency, corruption, and political interference. Policing during colonial period was primarily reactive. Colonial police was based on Military model which was designed to meet the colonial needs⁵. It does not mean that the Colonial model of policing was not effective. But it can only serve the purpose of the rulers instead of the population. Therefore, rather than relying on the formal mechanism to control juvenile crimes and adult criminal behaviours, communities in colonial period relied more heavily on the family and other informal institutions.

Like Pakistan, the US also remained a British colony. Elrod and Ryder (2005) described a very interesting scenario of the Colonial police there. They observed

*"Police officers owed their allegiance to political bosses and the police officials who awarded them their positions rather than to the public. As a consequence, they were careful to act in ways that protected the politically powerful, sometimes by ignoring illegal activities, such as gambling, prostitution, and after-hours liquor sales, and sometime by participating in such activities themselves"*⁶.

They further state that

*"Early police officers exhibited contempt for problem youth"*⁷.

Fortunately for the US, they got rid of that colonial mindset within the police through numerous reforms. However, Pakistan was not fortunate enough. The police in Pakistan are still heavily under political influence⁸. Instead of public, the police officials owe their

⁵ Fasihuddin. (2011) "Human Rights Friendly Policing: A Paradigm Shift in Pakistan (A case study of Khyber Pakhtunkhwa)". Paper Presented at the Conference of the Asian Association of Police Studies, New Haven, USA. June 13-15, 2011) *Conference Proceedings*; see also Jordan 1998; Sherman 1992a, 1993; Reiner 2000a: 121-4 in Oxford Handbook of Criminology. Pp.998-999

⁶ Elrod, P., and Ruder, R. Scott. (2005). *Juvenile Justice: A Social, Historical, and Legal Perspective*, [2nd Edition]. Boston: Jones and Bartlett Publishers. Pp.121-136

⁷ Ibid.

⁸ Tariq Khosa. (July 20, 2014). "Police Restructuring" *The Daily Dawn*; see also Tariq Khosa. (July 09, 2014) "Who will police the police"? *The Daily Dawn*.

allegiance to the political leaders and senior officials who can award them any post. Whenever a police van passes near someone, they feel paranoid instead of protected. Similarly, there is a mix feeling regarding problem juvenile in the police. Some feel contempt towards them while others show concern over such children. Before discussing police – juvenile relationship in Khyber Pakhtunkhwa, first let us understand the police structure in Pakistan.

4.4 Police Structure and Organization in Pakistan

The present police structure has a significant imprint of the colonial police. Under the present system, policing is a provincial subject.

At national level, there are about 10 police agencies including (1) Provincial Police Departments, (2) Federal Investigation Agency (FIA) (3) Intelligence Bureau, (4) Anti-Narcotics Force, (5) Frontier Constabulary, (6) Pakistan Railway Police, (7) National Highways and Motorways Police, (8) Islamabad Capital Police, (9) AJK Police and (10) Gilgit-Baltistan Area Police.

At the peak, there is the Inspector General (IGP) of Police, who is the head of the police department in the each province. The IGP is assisted by Deputy Inspector General of Police (DIG) who is the head of a police range (consists of several districts). The DIG is assisted by District Police Officer (DPO) who can be a Superintendent of Police or Senior Superintendent of Police (SP/SSP). The DPO is assisted by the Deputy Superintendent of Police (DSP) or an Assistant Superintendent of Police (ASP) who heads a circle or a *tehsil* (sub district/ a revenue area). The DSP is assisted by the Station House Officer (SHO) who is usually an Inspector, Sub-Inspector, or Assistant Sub-Inspector with⁹ other

⁹Fasihuddin.(2010). Police and Policing in Pakistan. in *Pakistan Journal of Criminology*. Volume 2/ Number 2 / June 2010.Pp.131-146; also see Fasihuddin.(2011). Police and Policing in Pakistan. in *Criminology Year Book*. New Delhi: Manas Publications.

necessary contingent force. All these ranks and files of officers is trained on the Irish constabulary pattern—which was the armed police force of the United Kingdom in Ireland from the early nineteenth century until 1922¹⁰—rather than on London Metropolitan Police pattern—developed by Sir. Robert Peel through Metropolitan Police Act 1829—with vast powers and discretions.

4.5 Description of a Police Station

A police station is the basic operational unit of the police in a given or a specified locality.

Till 1990s in rural areas the catchment area of a police station was a *tehsil* or subdivision area while in urban area the police station covered an area heaving a [population up to hundred thousand population. The station is being headed by an SHO or Station holding Officer, mostly an officer of an inspector level assisted by one -two sub-inspectors, assistant sub-inspectors and constables. The number of the officials in a police station depends upon the population as well as the crime-nature of the area.

A typical police station in Khyber Pakhtunkhwa is a mini fortress. An armed guard stands on the gate and one or two police men on top of the building. The entry of any ordinary person, may be a victim of a crime, to the SHO office or the *Muharrar* the Police Station Clerk, depend upon the sweet well of the *Sentry Badshah* the external guard at the main gate who interviews the visitor(s) and then allow or put them off to come some other time or SHO and the *Muharrar* or Little Khans (sub-inspector (SI) / Assistant sub-inspectors(ASIs) are out on *Gasht* patrolling. Mostly, entrance to the police station is materialized when the palm of the *Sentry Badshah* is greased through a very little amount say 20-50 rupees. If the visitor(s) is an affluential or influential of the area or belongs to

¹⁰ J.J. Tobias. (1975). *Police and the Public in the United Kingdom*, in "Police Forces in History". London: Sage Publications

the SHO close circle, *sentry badsha* salutes him/them and opens the main gate for them to enter and sit in the SHO/ *Muharrar*'s office, served with cold drink or tea.

Recently, in the after- math of the 9/11 or the war on terror, many Police Station have been blown up and since then, as precautionary measures, the police station is protected all around with sand bags, protective wires, and many other hurdles so that a terrorist may not enter easily or collide his carbide-laden vehicle with the wall of the building and destroy it. When anyone visits a police station, he is halted at about 10-50 meters in front of the main gate of the police station by a guard with an AK-47 in hand, protective helmet on head, and another one with a Heavy Machine Gun (HMG), his finger on trigger inside the sand bags protection, , and with bullet proof jacket. If the guard is satisfied from the visitor, only then he will let him/her pass the hurdles. The main gate of the police station is a huge metallic, or in some cases, wooden gate. This main gate is opened only for the officers. The ordinary people, and the complainants have to enter through a small entrance of a window size, within the main gate. At the main gate, the visitor is again asked to explain the purpose of his visit and to bargain his entrance. After these explanations, the visitor finally gets into a police station. The difficulty doesn't end here, though. Where to go in the police station, there is no one to guide, and there are no guidelines for this either. The visitor has to ask the guard for guidance.

A typical police station contains office of the SHO, office of the *Moharrar*, office of the Investigation Officer, Store Room, Record Room, Lock-up, and a few other rooms.

4.6 Police Station Administration

Officer in-charge of a police station is ordinarily an Inspector or a Sub-Inspector, commonly known as SHO *Mashar Khan* (Station House Officer). The name was coined by the colonial masters. According to Police Rules, 1934, Volume 3 Chapter XXII,

Section 22.1¹¹, which explains the terms of reference and responsibilities of the SHO, he, in addition to other duties, is primarily responsible for the effective working management, good conduct and discipline of local police, for the preservation of peace and the prevention and detection of crime.¹² In addition, it is also the duty of the SHO that he has "to acquire detailed and accurate local knowledge, secure the whole-hearted cooperation of his village headmen and *Chaukidars*, watchmen (no more now a days) encourage them to give him information, assist him in this work and range themselves loyally on the side of the administration. Through them, and his own subordinates, he is required to keep a strict watch over all known bad characters, and he shall communicate all intelligence of the moment to his superiors and to other police stations without delay¹³. Presently, one may find it difficult to differentiate between a good and bad visitor or accused in a police station premise. Instead of law-abiding behavior, it is the social class that mediates criminality.

An SHO is also considered as the head of all the investigations. It is required of him to conduct the investigations by himself, so far as circumstances permit. However, under the new set-up after the promulgation of the Police Order 2002, there is a separate Investigation Officer (IO), known as *tafteeshi afsar*, in each police station. This Investigation Officer is usually a Sub-Inspector (SI) in rank. He is assisted by an Assistant Sub-Inspector (ASI). In a police station, there are one or more than one Assistant Sub-Inspectors, depending upon the nature and number of crimes in a police station locality.

¹¹ sadly in 62 years we are still following most of the obsolete colonial paradigm.

¹² Police Rules, 1934, Volume 3 Chapter XXII, Section 22.1

¹³ Police Rules, 1934, Volume 3 Chapter XXII, Section 22.2

It is pertinent to mention that under the new system (Police Order 2002), the police have been divided into i) Prevention, and ii) Investigation sections at all levels. Therefore, at the police station, there is separate staff for investigation and operation, all under the SHO.

Besides Investigation and Prevention staff, there is a Station Clerk in the police station as well, known as *Moharrar*. A Station Clerk is a literate head constable or ASI, who, under the control and supervision of the officer in charge acts as clerk, accountant, record-keeper and custodian of government and other property at a police station. He is also assisted by one or more assistant clerks or *Madad Moharra* Assistant Clerk¹⁴. In addition to this staff, a Police Station also houses a number of constables, depending upon the situation of crime in its locality.

In addition to all these personages and officers, there is another very important person in the Police Station, may be a police man or ordinary person appointed by the SHO with immense powers and privileges and works as a front man of the SHO known as *Kar-e-Khas* literally means 'special Person'.

A *Kar-e-Khas* is assigned the duties of collecting the fixed money from the beggars in the Police Station area, milk-sellers who sell adulterated milk, butchers, bakers, vendor who do their business without a valid license and flout the laws of the price committees, pick-pockets and all other criminals with whom the Police Station has a monthly fixed amount called as '*Bhattha*'. The *Kar-e-Khas* has a special role in particular to struck a deal with the murderers in case of a murder, the smugglers or drug traffickers, or any other crime of heinous nature. The person who can afford the cost of such crimes and criminalities have to satisfy the *kar-e-khas* before satisfying the SHO or the law.

¹⁴ Police Rules, 1934, Volume 3 Chapter XXII, Section 22.3

Ordinary people, prefer to afford victimization with the hands of the perpetrators than going to any Police station where they are subjected to all kinds of insult, derogation and even financial losses for no crimes of them.

In this regard a report of CIA, twenty years back, is an eye opener about general corruption in Pakistan and, particularly the corruption among police as thus¹⁵

"Pakistan is at a stage in its development wherein corruption is simply the norm. Those who have any kind of influence or access to the corridors of political powers flout the laws of the land with impunity. Pakistanis are not far wrong in their belief that the country's elite leaders, politicians, industrialists, generals, bankers, landlords with few exceptions, use their positions to enrich themselves, their families, their relatives... positions throughout the public service are valued for the wealth their holders can amass: jobs in the country's bureaucracy are literally purchased: those moving up or laterally to more lucrative positions buy it from those above. And, if the highest bidder lacks the capacity to honour his bid right away, he simply takes the money out of the salaries of those below him. This has affected the police as much as any other part of the administration. Jobs in the police from the Station House Officer (SHO or Thanidar) at the bottom of the management cadre to the provincial Inspector General of Police are now routinely sold"¹⁵.

Even senior police officers also acknowledge the existence of wide spread corruption in police¹⁶. A police station is the last place where a law abiding and a sane person would want to go in Pakistan. It is not considered a place for children. In the sections that follow, I will discuss the state of affairs of the juvenile justice at police station level.

4.7 Juveniles and the Police Station

The first contact of the juvenile in the criminal justice system, who breaches the law, is the police. Within the police, it is the Operational Police force which is the first agency of contact of the juvenile. Astonishingly, a survey report of the Pakistan Society of Criminology, 2010¹⁷ shows that amongst the 5,000 police officials specifically trained in 2009, on the Juvenile Justice System and Child Rights, the Juvenile Justice System

¹⁵ CIA Report on Heroin In Pakistan, "Sowing the Winds" in *Friday Times* (Lahore: 26 March, 1992.) p.17

¹⁶ Muhammad Shaoib Suddle. (1990). Reforming Pakistan Police: an overview. 120th International Senior Seminar Visiting Experts' Papers. UNAFEI. P.94

¹⁷ REPORT ON New Data Collection System For Child Victims and Juvenile Offenders in Khyber Pakhtunkhwa, Pakistan. (2010). Peshawar: Pakistan Society of Criminology. P.21.

Ordinance, 2000 was known to only 5% of the participants. Furthermore, only 10% heard the name of JJSO. The rest were even unaware whether there is any law regarding juvenile or not. It is significant to mention that about 80% of the participants were from Prevention wing of the police¹⁸. The preventive staff of the police station is trained to pursue, fight and arrest the hardened criminals. When a juvenile comes in contact with such a police, its behaviour can only be imagined. Encountering the police by juvenile offender can have long lasting repercussions on the juvenile.

4.7.1 Crime Committed by Juveniles

The most common crimes committed by juveniles are drug trafficking, and drug related crimes, theft, pick-pocketing, rip and run, injury, lurking house-trespass (burglary), house breaking, and many times murder as well.

"Mostly, the juveniles are involved in drug trafficking, theft, injuries, murder and attempt to murder. If juvenile commit a crime, we call their parents and snub the juvenile and tell him not to commit the crime again. If he does so again, we will be sending him to the prison¹⁹."

It shows that the first level response of the police to juvenile offences, particularly in offences of petty nature, is informal verbal warning. As shown in Chapter II, this verbal warning is considerably used in England and Wales²⁰. This warning may take place on the spot or at the police station level. Once the warning is issued, no further action is taken. This verbal warning has no legal status in Pakistan though.

4.7.2 Juvenile, Handcuffs and Lock-ups

According to JJSO 2000, a juvenile who breaches a section of the law, shall not be handcuffed (Section 12.b). In the same way, the juvenile shall not be put in lock-ups with

¹⁸Ibid. p.21.

¹⁹ Interview with Shad Jehan (Not original name) Investigation Officer, November 2012: Peshawar

²⁰ Graham, J. and Moore, C. (2006) "Beyond Welfare versus Justice: Juvenile Justice in England and Wales" in Junger-Tas, J., and Decker S.H. (Ed). *International Handbook of Juvenile Justice*. Dordrecht, The Netherlands: Springer.

adults as well (Section 10.3). When the police were asked regarding this aspect, it was denied. The police officials said that they never hand-cuff the juvenile unless they are sure that the juvenile would run away. Similarly, the police argue that they do not keep the juveniles in lock-ups with adults. What they do is to keep him in a separate room (may be an isolated room used for isolation), within the room of an investigation officer or SHO etc. but not in the lock-ups.

“Look dear, when we know that somebody is a juvenile, and it is quite obvious in most of the cases, we don't lock them up in our lock-up. Similarly, we do not handcuff them. We keep them here in our room, in our office, or somewhere else, but not in the lock-ups²¹.”

One investigation officer argued that they do this out of humanity and out of religious concerns, as their religion, Islam also emphasizes on tender treatment with the children.

It is Islamic injection that the child should be treated with mercy. “Bache k sath shafqat karo” (be nice to the child). It is our culture, tradition, as well as our religious duty to be kind to children. If we are harsh with a juvenile, if we deal him like we deal the adults, that juvenile may become a professional thief or a dacoit, or a robber. We should treat the children in such a way that they should get reformed. Our Holy Prophet (PBUH) is a very good example before us. He would pray for those who would be against him. Why shouldn't we treat our juveniles with kindness?²²”

It is easy to point fingers to the police that they do not follow the law. But at the same place another police man contradicted his fellow man and said;-

“what shall we do then, if not handcuff? When we arrest a juvenile by running after him for miles, what should we do then if not handcuff? Encircle him within the circle of 5 to 10 policemen? Or shall we make a mini mobile cage for the juvenile?²³”

Police are confused where to keep a juvenile accused of an offence. There is no effective the juvenile justice system. The police officers, trained in juvenile issues are needed for juvenile intervention.

²¹ Interview with Faheem Khan (Not original name) Police Investigation Officer, June 2013: Bannu

²² Interview with Shad Jehan (Not original name) Police Investigation Officer, November 2012: Peshawar

²³ Interview with Riaz Dilawar (Not original name) Police Investigation Officer, December 2012: Mardan

4.7.3 Juvenile and Corporal Punishment by the Police

It is a common allegation against the police that they severely beat and torture a juvenile after formal arrest. A poor kid get sort of treatment while the children of rich and powerful are treated like VIPs. The police respondents denied. When the researcher asked one of them said that

"No, this doesn't happen. Neither during arrest, nor during investigation. What is shown in Movies and Dramas, the police beat the juvenile and the juvenile says "Polisaa nor me hum owaha" (o policeman, beat me a little more... meaning, I won't get corrected no matter how much you beat me). This doesn't happen. We are human after all and we all have children, brothers and sisters²⁴."

The juveniles' experience clearly contradicts this police claim. The police beating and torture is a usual practice in police stations whether the offender is a juvenile or an adult.

As one juvenile commented

"when I was arrested, they closed my eyes with a band. They took me to a prison and opened my eyes. There they tied my hands while my knees were between my arms. They put a rod between my arms and knees so that I would not be able to move my arms or legs. They, then, put me on a chair where I was held by the rod. After that, they started beating me on buttocks and on my legs not letting me ask why I was being beaten. I was not told what are the allegations against me. They use to beat me from morning to evening. This lasted for eight (8) days²⁵."

A 2012 report of the 'Society for the protection and care of Children' herein after SPARC) an NGO working for child rights, reported that a 9th grade student died from police torture in Mardan, Khyber Pakhtunkhwa in August 2012. The boy was arrested after his neighbor accused him of robbery. On visit of his parents to the Police Station (Shergar, district Mardan) to see their child, they found the 14 year old critically injured because of police torture. The parents shifted the bruised child to District Headquarters Hospital Mardan. The child was so tortured that he could not succumb to the torture and

²⁴ Ibid

²⁵ Interview with Tilawat Gul (Not original name) Juvenile, July 2013: Kohat

died in hospital²⁶. The locals protested and blocked the main road but what happened, the political leaders, who are mostly hand in glove with police, silenced the poor parents instead of police accountability.

The major reason behind police beating is the lack of investigation skills on the one hand and political influence and corruption on the other hand. It is a common practice in Khyber Pakhtunkhwa and other parts of the country to bribe the police so that the opposite party are harshly dealt with by them. One juvenile revealed his ordeal as;

“Our enemies bribed the police for my arrest. I was arrested and frequently shifted from one police station to the other. I was severely beaten on feet sole, slapped on face, kicked in the stomach, and stroked on the back. The Thanadar (SHO) was telling me that he will beat me more and more and make me hate the police so that I become a (badmaash) hardened criminal in future. I apprehend that one day they will kill me in the fake police encounter²⁷.”

4.7.4 Juvenile Arrest and Information to parents and Probation Officer

Upon arrest of the juvenile, he is brought to the police station. Within the police station, the juvenile is interrogated by the Investigation Officer. It was found that the general tendency of the police is to divert the juvenile from the formal criminal justice system, if the juvenile is involved in a minor crime, e.g. theft, drug smuggling, injury etc.

“Mostly, we try to resolve the juvenile cases at police station level. We record them in our “Roznamcha” (daily diary). It is extremely rare for us to put up a case of the juvenile to the court. If the case is of heinous nature, only then we put it up to the court²⁸.”

It is a mandatory under the Juvenile Justice System Ordinance 2000, Article- 10, that when a juvenile is arrested, the police will immediately inform his parents and the

²⁶The State of Pakistan's Children 2012. Islamabad: SPARC.p.122

²⁷ Interview with Raheem Jan (Not original name) Juvenile, April 2013: Bannu

²⁸ Interview with Shafiq ur Rehman (Not original name) Police Investigation Officer, February 2013: Kohat

probation officer²⁹. Although it is a legal provision, the police seem reluctant to contact the probation officer. On the other hand, the police deny this allegation against them. The police officials interviewed in this research said that they do contact the probation officer. The probation officer is always there on their call. However, one police respondent said that when they call the probation officers, they do not visit the police station.

“Usually, the Probation Officers do not come to the police station. For the entire Peshawar district, we have only two (2) probation officers. I think they can't manage to reach all the police station in this Capital city³⁰.”

On the contrary, the probation officers complain that it is very rare that the police contact them in juvenile cases. This is discussed in Chapter VI on Correctional Services. When the researcher put this allegation of the probation officers that “the police never called them for a juvenile case”, one police respondent said that;

“Look dear! I told you that it is extremely rare for us to put-up a case of the juvenile to the court. Most often, we resolve the case at police station level. (Bohot he kamparchakartehyn) . We rarely register an FIR³¹.”

It can be easily inferred that the police very rarely contact the probation officer; police usually resolve a juvenile's case within the police station informally; probation officers do not visit the police station; and that the number of probation officers in a district is extremely low (only 21 male probation officers and 7 female probation officers in the

²⁹ JJSO 2000 Article 10 (1) Where a child is arrested for commission of an offence, the officer in-charge of the police station in which the child is detained, shall, as soon as may be, inform.. (a) the guardian of the child, if he can be found, of such arrest and inform him of the time, date and name of the Juvenile Court before which the child shall be produced; and; (b) the concerned Probation Officer to enable him to obtain such information about the child and other material circumstances which may be of assistance to the juvenile Court for making inquiry.

³⁰ Interview with Rustam Khan (Not original name) Police Investigation Officer, July 2013: Swat

³¹ Interview with Shehzad Waseem (Not original name) Police Investigation Officer, August 2013: Hazara

entire province of 26 districts, See Annex II-b). This is not unique to Khyber Pakhtunkhwa³².

4.7.5 Juvenile and the Question of Age

Legally, any child who is not of the age of 18 years is considered a child/juvenile. The juvenile justice facility is extended to every person who on the day of the commission of the offence, is below 18 years of age.

During the investigation, it is the duty of the Investigation Officer under Police Rules Form 26/7 to write down the exact age of the offender. The common practice for the police is that they very rarely show the exact age of an offender. An Investigation Officer was interviewed and asked how do they determine the age of the accused? He said that

“We ask for school certificate, or we determine it through physical make-up of the offender. Or if the case is severe, we determine the age through medical reports. The doctors know that whether he is above or below 18 years³³.”

In practice, however, class also plays a significant role in determining ones age. Its typical example can be seen in Shahzeb’s murder case, which took place in December 2012. Shahzeb Khan, son of a Police officer who had a little quarrel with his friends Siraj Talpur and Shahrugh Jataoi, sons of a feudal lords of Sindh. After killing, Talpure and Jataoi absconded to Dubai. It was under the direction of the Supreme Court and as a consequence of the campaign of the mass media particularly the print media that brought Talpure and Jataoi back to Pakistan. Doctors initially declared him a juvenile. But after

³² For further details, see UN Office of the High Commissioner for Human Rights report on Pakistan, United Nations. (2005). PAKISTAN: Protection of juveniles in the criminal justice system remains inadequate. London: UN OHCHR. Retrieved July 12, 2013 from [http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PK/AI_PAK_UPR_S2_2008anx_asa330212005.p](http://lib.ohchr.org/HRBodies/UPR/Documents/Session2/PK/AI_PAK_UPR_S2_2008anx_asa330212005.pdf)

³³ Interview with Zar Shad (Not original name) Police Investigation Officer, June 2013: Swat

the Supreme Court's persistent intervention, a board of doctors declared one of the murderers Shahrukh Jataoi to be adult³⁴.

One of the most experienced Investigation Officers in Peshawar³⁵ said that they have very serious problems in determination of the age of an accused. There is no immediate mechanism for determination of the age of an accused. In the same manner, the police request the court for permission to conduct the medical examination. However, this medical examination report takes about 10 to 12 days, and sometimes even more. The reason it takes such a long duration for medial report is the mechanism involved. The police requests the hospital for age determination. The hospital Medical Superintended (MS) constitutes a medical board. MS is a busy man and constitution of the board may take a few days. Once the board is constituted, a date is fixed for examination (few more days). Once the examination is conducted on the day, the report is forwarded to the police (in few more days). During those days, the status of the accused is undefined. So where to keep the accused in lock-ups or let him free till the report, and may be prone to many other abuses.

"In juvenile cases we do not have any immediate mechanism to determine the juvenility of the offender on the spot. Therefore, we have to request the court within 24 hours to give us permission for determination of the age of the offender through medical test. The court refers the case to Police Hospital. However, the Police Hospital does not have any kind of facility to determine the age of the offender. Therefore, the hospital refers us to Khyber Medical College (KMC). But the doctors in KMC do not take immediate interest in our case. We never get the report from the doctors on the same day. They tell us to come for the report tomorrow. When we go tomorrow, we are given another date, and then another, and so on. Usually, 10 to 12 days are wasted in this process³⁶."

³⁴Shahzeb murder: Shahrukh Jatoi above 19-yrs. (Feb 09, 2013). In *Daily The Nation*. Retrieved July 12, 2013 from <http://www.nation.com.pk/karachi/09-Feb-2013/shahzeb-murder-shahrukh-jatoi-above-19-yrs>

³⁵ Most of the Investigation Officers that I interviewed knew his name and referred me to interview him as well.

³⁶ Interview with Shehzad Waseem (Not original name) Police Investigation Officer, August 2013: Hazara

It is to note that such cases are medico-legal cases and have nothing to do with the Medical colleges. It is the jurisdiction of a Medico-legal Officer in a government hospital. Instead of going to the police hospital, why not to a big government hospital? What is wrong with it?

It is revealed that no immediate mechanism to determine the age on the spot or on the same day which normally takes more than 10 days to complete rendering the status of the accused undefined.

Fasihuddin, a senior police officer mentions in his Urdu booklet, *Child Rights, National and International Laws and the Role of the Police*, that the biggest problem the police create in juvenile cases is when they write the wrong age, or write it wrongfully. Mostly, the police writes the age as “mulzim ke umar 18/19 sal hy” (accused is of 18/19 years)³⁷ instead of registering the age as 18 or 19 years.

This practice has very deep impacts on the offenders. On the one side, the offender of 19 years of age can misuse the juvenile law for his own purpose. On the other hand a child of 18 years can also be wrongfully put to trail as adult. Similarly the report of SPARC mentions that the police usually write the age of a child as “mulzim Nojawan-ul-Umar hy” (the accused is of youthful age)³⁸.

Astonishingly, one police respondent, on the condition of anonymity surety that his name will not be disclosed in anyway) mentioned that the police usually avoid to show an accused as juvenile. When he was asked why do they do that, his response was quite astonishing.

³⁷ Fasihuddin. (2010). *Bacho k Haqooq: Mulki or Bain-ul-Aqwami Qawaneen or Police ka Kirdar*. Peshawar: Pakistan Society of Criminology. pp.67-68.

³⁸ Islamabad: Society for the Protection of the Rights of the Child (SPARC) (2012) *The State of Pakistan's Children 2012* Islamabad. (SPARC). Pp.119-152.

"If we arrest an offender of heinous crime, and his age happens to be 15 or 16 years of age, what we usually do is to write his age as 18 or 19 years. Why do we do that? It is because we have too many constraints. For example, if we declare that the offender is below 18 years of age, we have to contact Police Child Protection Center (PCPC). PCPC has only one mobile vehicle for transportation of juveniles from police station to PCPC. When we call them that we have a juvenile case, come and take him to the center, they respond that the mobile vehicle is out of station. Arrange for transportation on your own behalf. In such cases, we arrange a taxi etc. for the juvenile transportation at our own expenses. We are not paid by anyone for those expenses³⁹."

The reason why police practice is not to show an accused as juvenile is because of some constraint. Those constraints are that the juvenile offenders have to be dealt with a different procedure. That procedure incurs some extra responsibilities upon the shoulders of the police. The police have to contact the parents, the probation officer, take the accused for the medical examination. For all these purposes, the police at the police station do not have funds. They manage it through their own pockets. It was also re[ported by police that the first constraint is that the police have to arrange for the pick and drop from its own pocket. In the same way, the expenses of the medical examination of the juvenile, that are upto 3000 rupees, are also to be borne by the police from its own pocket.

But, if the accused is well-off, the police will show him as under age for return of some 'money' or *chai pani* bribes. Police never takes an accused on own expenses for check-up. It is always the parents who have to bear the burden of transportation and the *Chai Pani*. A police official said;

"The first one is that we have to arrange for the pick-and-drop of the juvenile on our own expenses. Not the police station fund but any person who is transporting the juvenile. In the like manner, we take the juvenile to the court on our personal expenses. If the court orders to conduct a medical test of the child (for age determination), which is usually in Khyber Medical College, then we have to take the child to

³⁹ Interview with Gul Shad (Not original name) Police Investigation Officer, January 2013: Mardan

KMC on our own expenses. There at KMC, they conduct at least two tests, test of jaws and test of wrist bone. They cost more than 3,000 rupee. We aren't paid for these expenses. We have to pay these expenses from our own. Likewise, the food and drinks of the child is also being borne by us on our personal expenses. No funds from the department⁴⁰."

It can be inferred from the police perspective that the police usually don't show juvenile of 14/15 years as under 18; no funds for transportation of juvenile to hospital or court are available; no funds for conduct of medical examination of the juvenile are available; no funds for the food and other expenses of the juvenile at the police station; and police bear all the expenditures (not from the department but each individual policeman who has the juvenile's custody, usually the Investigation Officer).

When a juvenile is shown as an adult, he is produced before a Magistrate court. Legally, the juvenile cases will be dealt with by a senior Session Judge. Nevertheless, the case will go to a Session Judge only when the juvenile is declared as a juvenile. Now if the police do not mention that the accused is a juvenile, and the juvenile is unable to hire a lawyer, it becomes the duty of Police Magistrate to ask for the exact age of the accused. However, the police Magistrates usually do not bother to ask such questions.

"If we do not determine the age of an offender and show him as an adult, and the offender's family cannot afford a lawyer, and they do not claim the age of juvenility, then it is supposed that the Judicial Magistrate himself shall ask for the age of the child and determine it. However, not a single magistrate does this. Magistrates never bother to ask if a juvenile is a juvenile or not⁴¹."

It was revealed that the magistrates generally never raise the question of age of an accused who is shown as adult by the police if the parents of the accused have no access or resources to challenge the Magistrate decision.

⁴⁰ Interview with Imtiaz Majeed (Not original name) Police Investigation Officer, December 2012: Peshawar

⁴¹ Interview with Gul Shad (Not original name) Police Investigation Officer, January 2013: Mardan

Here it is pertinent to mention that why there is not reliance upon birth documents rather than on medical examination in Pakistani context. The reasons are many. The birth registration culture has yet to gain ground in Pakistan. At the present, it is not considered essential to register birth of a child. There are even many adults, particularly in rural parts of Pakistan, who do not hold any National Identity Card or any other document proving their age or nationality. Further, in school certificates, usually a lower age is mentioned by the parents. It is an accepted cultural norm here. It helps their children gain a leverage of age when they pursue professional careers in the future⁴².

4.7.6 Juveniles being used by Adults in Crime

All the police respondents unanimously agreed that after the introduction of JJSO, the juveniles are being used in crimes very frequently.

"After introduction of JJSO, what we observed is that in most cases, the child is used as a key for crime. Every second crime that occur in our police station area, involves a child. You should come and sit with us for an entire day from morning to evening, and at the evening I will ask you what you have observed"⁴³.

One respondent responded to this question in this way:

"Yes, in 99% of cases this is true. "Chars kharsolo wala mashoom la wae che pady war k odregaa da kharsawa... talaba 200, 300 rupees darkam" (the ahsheesh peddlers ask a child to stand in the door and sell this drug, and he will be given 200 to 300 rupees a day)... yes they are used in crimes by the adults"⁴⁴.

Similarly, another respondent said that

"Mostly criminals use juvenile in 302 (murder) cases. Because they know that the juvenile will get released by the court and it happened here in our district. Go to Prosecutor and ask him. He will show you

⁴² As the age limit for most Government Jobs is 28 years at maximum, therefore parents write a lower age in school certificates so that their child can avail age benefit in the future.

⁴³ Interview with Shad Jehan (Not original name) Police Investigation Officer, November 2012: Peshawar
⁴⁴ Ibid

*the case as well. Likewise, people lie to the police and courts as well*⁴⁵.”

It is generally believed that “reason children may be in prison is because they are used as fall guys and scapegoats by adults, to commit crimes for them under coercion and duress. The people who use these children enjoy absolute impunity from the law. After they have been imprisoned, the gang leaders will bail them out, and they will be forced to commit yet another crime”⁴⁶. Nonetheless, there are no conclusive evidence that juveniles are used for crime because of JJSO.

In 2006, a juvenile named Zahid, was arrested together with an adult man namely Zary in the jurisdiction of Bhana Manri Police Station, Peshawar city area. They were charged on possession of drugs and ammunition. The FIR number 352 showed that Zary was the landlord of Mr. Zahid, rented out a quarter for living to him. It was Mr. Zary who lured and conditioned Zahid to sell drugs with him⁴⁷. This is not the only example that juveniles are used by adults for crimes. In Central jail Peshawar there are a dozen such cases under trial.

4.7.7 Juveniles and Reforms in Police

From the police perspective, the reforms needed in the Police role in juvenile cases are numerous.

The first suggestion that came from the police officials was regarding the complications in the age determination. It was suggested that the police at the police stations should be given the facility to determine the age of the offender by themselves through medical

⁴⁵ Interview with Shad Jehan (Not original name) Police Investigation Officer, November 2012: Peshawar

⁴⁶ Faqir Hussain. (n.d.). *The Main Dilemma Of The Criminal Justice System In Pakistan*. Retrieved August 14, 2015 from <http://www.lawteacher.net/free-law-essays/international-law/the-main-dilemma-law-essays.php#ftn8>

⁴⁷ Pakistan Society of Criminology (2009). *Training Material for Police on Juvenile Justice and the Police*. Peshawar: Pakistan Society of Criminology

examination etc. Further, that the test for determination of age be swift and prompt and should not take weeks.

"It is my suggestion that the police should be given the authority to determine the age of the offender by themselves through medical test etc. Furthermore,

It should be made compulsory on the hospitals to give high priority to such cases and the determination of age should not take more than 30 minutes⁴⁸."

One respondent suggested that the police have a lot of confusion where to keep a juvenile. For this, he suggested a separate juvenile lock-up for juveniles be established in every police station.

One of the most important aspects regarding juveniles is terrorism. The juvenile law does not apply to children involved or used in terrorist activities. However, one police respondent said that when the police arrest a child in terrorism case, the police do not receive any positive response from prosecution or Courts. This research found out that the police looks to the Prosecution for guidance and support.

"You know in India they caught Ajmal Qasab and not a single lawyer was ready to fight his case. On the other hand, when we arrest a terrorist here in Pakistan, there is a huge force of lawyers on his back⁴⁹."

It can be comprehended that police need immediate mechanism for age determination of an accused that should not long for days. Further, police expect positive response from prosecution.

Summary

This chapter discussed the situation of the juvenile justice at police station level. It is found that common crimes committed by juveniles are theft, drug smuggling, weapon

⁴⁸ Interview with Zia ur Rehman (Not original name) Police Investigation Officer, April 2013: Kohat

⁴⁹ Interview with Shad Jehan (Not original name) Police Investigation Officer, November 2012: Peshawar

possession, house lurking, injuries, and murder. Further, Police are confused where to keep a juvenile accused of an offence. There is no effective the juvenile justice system. For juvenile intervention you need officers who are trained in juvenile issues. Besides, social class plays a significant role in determining one's age whether juvenile or not. Police deny allegations regarding beating the juveniles. In practice, police use brutal beating very frequently.

Police usually resolve a juvenile's case within the police station informally. Police complain that the Probation Officers do not visit the police station. The reason is that the number of Probation Officers in a district is extremely low.

There is no immediate mechanism to determine the age on the spot or on the same day. Medical report takes more than 10 days to complete. Status of accused remains undefined during that period. Police don't show juvenile of 14/15 years as less than 18 years. Police have no funds for transportation of juvenile to hospital or court.

Police is extremely short of funds. Police have no funds for conduct of medical examination of the juvenile. Police have no funds for the food and other expenses of the juvenile at the police station. Police bear all the expenditures (not from the department but each individual policeman who has the juvenile's custody, usually the Investigation Officer).

Magistrates never raise the question of age of an accused who is shown as adult by the police. Juveniles are frequently used by adults in crimes.

CHAPTER V:

Prosecutions' Perspective on the Juvenile Justice in Khyber Pakhtunkhwa

CHAPTER V: PROSECUTIONS' PERSPECTIVE ON THE JUVENILE JUSTICE IN KHYBER PAKHTUNKHWA

This chapter discusses the role played and the issues faced by prosecution department in juvenile cases and the juveniles with the hands of prosecutors. This chapter discusses the meaning and philosophy of prosecution. It also discusses the history of prosecution department in Pakistan. It provides brief statistics of prosecution as well and finally discusses issues faced by prosecution department in juvenile cases.

5.1 Introduction

In German courts, the prosecutors play the key role in juvenile related justice system¹. In England and Wales, a prosecutor also has a considerable discretion whether to prosecute a young offender or not. The decision to prosecute is based on whether is it in the public interest to prosecute? This decision is made by keeping in view certain factors including the seriousness of the offence and whether the defendant has put right the loss or harm caused. If the prosecution office decides not to proceed, the case may be referred back to the police for reprimand or a final warning where these have not already been made².

In criminal law, prosecution means “a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime³.” Accordingly, prosecution also refers to “the government attorney charging and trying the case against a person accused of a crime.⁴”

¹ Frieder Dunkel. (2006) “*Juvenile Justice in Germany*” in Jensen, E.L., & Jespen, J. (ed). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Oregon: Hart Publishing. Pp.115-153.

² Graham, J. and Moore, C. (2006) “*Beyond Welfare versus Justice: Juvenile Justice in England and Wales*” in Junger-Tas, J., and Decker S.H. (ed). *International Handbook of Juvenile Justice*. (Dordrecht, The Netherlands: Springer), pp.65-92

³ “Prosecution.” (1968). in *Black's Law Dictionary*. By Henry Campbell Black. St. Paul, Minn: West Publishing.

⁴ “Prosecution”. (2014). in *Law.com*. Retrieved December 12, 2013 from <http://dictionary.law.com/Default.aspx?selected=1656>

A criminals' prosecution, on the other hand, is "an action or proceeding instituted in a proper court on behalf of the public for the purpose of securing the conviction and punishment of one accused of crime"⁵.

The office of the public prosecutor is an essential office in criminal justice system. According to Mirza, a public prosecutor is a public authority who, on behalf of society and in the public interest, ensures the application of the law where the breach of the law carries a criminal sanction (even in juvenile cases) and who takes into account both the rights of the individual and the necessary effectiveness of the criminal justice system⁶.

The duties of prosecutors are four fold—to the State, to the public, to the Court and to the accused. To remain objective and fair, not tilting to either side is one of the issues that the prosecutors face throughout the world. However, the prosecutors, in general, tend to get the accused convicted through the court. "Prosecutors are gatekeepers to the criminal justice process as stated by Avory⁷. The learned Judge stated that the prosecutor throughout a case, ought not to struggle for the verdict against the prisoner but... ought to bear themselves rather in the character of minister of justice assisting the administration of justice. Prosecutors have the exclusive right to screen facts obtained from the police and other sources to determine whether those facts are legally sufficient for prosecution⁸. In other words prosecutors are vested with the responsibility of checking the police investigation against due process of law⁹.

In order to evaluate the national prosecution system of Pakistan, it is expedient to have a bird eye view of international guidelines. Articles 12 and 13(a), United Nations

⁵ "Criminal Prosecution." In *Black's Law Dictionary*. Retrieved November 07, 2013 from <http://thelawdictionary.org/criminal-prosecution/#ixzz2jwMjGloM>

⁶ Mashood Mirza. (2010). Roles and Responsibilities of Public Prosecutors—A Case Study of Khyber Pakhtunkhwa Province. In *Pakistan Journal of Criminology*. Vol 2(3). July 2010. pp.1-13

⁷ Per Avory J in *R v Banks* [1916] 2 KB 621.

⁸ David L. Parry. (2005) *Essential Readings in Juvenile Justice* (New Jersey: Prentice Hall), p.199

⁹ Mashood Mirza. (2010). *Op.Cit.*

Guidelines on the Role of Prosecutors require prosecutors to remain impartial and indiscriminate while performing their duties. Similarly, the UN guidelines also require the prosecutor to exercise their powers without any kind of political interference¹⁰, which in some cases may not happen e.g. the case of Shah Zeb murder by Shah Rukh Jataoi¹¹, (Daily the *Dawn* October 21, 2013). It also emphasizes upon the coordination between various components of criminal justice system. Prosecution has to cooperate with all other criminal justice institutions in order to deliver a fair and effective service¹². Nonetheless, this is the most complex area in criminal justice system and the subsequent juvenile justice system.

Article 4.2(d) of 'International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures' provides that criminal proceedings should not be proceeded or initiated when the case is still not well found upon the evidence. Such evidence must be reliable and admissible. This, however, is not in practice (as is shown in this chapter in the section (The Juvenile Justice: The Problem of Prosecution). Furthermore, Article 16 of the 'United Nations Guidelines on the Role of Prosecutors' and Article 4.3(f) of the 'International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures' states that the prosecutors must refuse those evidences that are obtained by violating human rights, such as through torture or inhuman degrading punishment¹³. Similarly, it further provides that like all other professionals, prosecutors

¹⁰ Article 2.1, International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures

¹¹ No headway made in Shahrugh Jatoi escape case. (November 13, 2014). in *Daily Dawn*.

¹² Article 20, United Nations Guidelines on the Role of Prosecutors

¹³ Article 16, United Nations Guidelines on the Role of Prosecutors; Article 4.3(f), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures

must also remain objective in performing their duties. They must not bend to public or media pressure¹⁴.

On the other hand, the state must ensure that the prosecutors function independent of any kind of pressure or influence¹⁵. Until recently, this was not practiced in Pakistan. Prosecutor was under the direct control and supervision of the District Police Officer (SP/DPO). In 2005, the prosecutors were made independent.

5.2 Prosecution Services in Pakistan

Appointment of 'Public Prosecutors' is the responsibility of the provincial government in Pakistan as per Section 492 of Cr. PC¹⁶. Until recently i.e. before 2005, the prosecution system in Pakistan was archaic. There was no public prosecutor. Prosecutions were carried out by the police itself. The police appointed legal officers as public prosecutors in the rank of Deputy Superintendent of Police (DSP), Inspector and Sub-Inspector, usually a law graduate. Most often, miscarriages of justice occurred from time to time, at least partly because of the way that investigation, charging and case-presentation went hand in hand¹⁷. Under this system, prosecutors in districts were under the command of District Police Officer (DPO). Therefore, it was not possible to carry out an independent prosecution of the cases. Some critiques argue that this combination of police-prosecution in the same department was responsible for "poor prosecution and delay in the resolution

¹⁴ Article 13(b), United Nations Guidelines on the Role of Prosecutors; Articles 3(e) and (f); International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures

¹⁵ Article 4, United Nations Guidelines on the Role of Prosecutors; Article 6(a), International Association of Prosecution's Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures

¹⁶ Government of Pakistan. (1898). *THE CODE OF CRIMINAL PROCEDURE, 1898 (Pakistan) As amended by Act II of 1997*. Islamabad: The Gazette of Pakistan.

¹⁷ Chris Lewis. (2010) "Recent Changes in the English Public Prosecution Service" in *Pakistan Journal of Criminology*. Vol2.No.4.Oct, 2010.Pp.71-82

of court cases¹⁸.” Others see, however, the old system as to be swift as compared to the present one¹⁹.

An attempt in the past was made to separate prosecution from the police department in 1980s and the administrative control of prosecution was transferred from the police to the Law department.²⁰ Nonetheless, the controversy continued until the dawn of the 21st century. In the year 2002, under the Police Order, 2002, the prosecution services were placed under the administrative control of the Law Departments. In 2005, the prosecution was established as a separate institution in Khyber Pakhtunkhwa under the NWFP Prosecution Services Act, 2005. Now the provincial government of any political party in the office, recruit the public prosecutors, Assistant Prosecutors, government pleaders and so on. Mostly those law graduates are preferred who during student life or after graduation, have been loyal party workers. The very nature of the job is political and hence temporary and last when the party in government is relieved of responsibilities. This situation, has rendered the office of the prosecutors and pleaders vulnerable to corruption of all types to make a fortune before the government is wound up. All the four provinces in Pakistan have separate prosecution departments now.

But the police are not happy with losing all their powers to influence charging. There is still resentment within the police ranks and files regarding separation of prosecution. Such feelings are manifested whenever an accused is set free by the court on account of lack of evidence. In such cases, the police blame the prosecutor for being not capable of pursuing the case in the court properly. While the prosecutors blame the police for not providing proper evidence. As one prosecutor said that;

¹⁸ Mashood Mirza. (2010). *Op.Cit*

¹⁹ SherRehman, Inspector Frontier Reserve Police (FRP), Personal Communication/ Interview???, September 12, 2013

²⁰For example in 1986 in Sindh; see Zahid, Nasir and Wasim, Akmal, *The province of Sindh as a case study on the prosecution service*: <http://www.article2.org/mainfile.php/0704/333/as> on 12 July, 2010.

"[in juvenile cases]....The police don't write the exact date. They write 17/18 but not exact. They don't produce evidence from the medical board²¹."

As a result of the displeasure of the police the powers of the Prosecution Institution are a messy compromise. The Prosecutor is not expected to interview victims, witnesses or the suspects.

Moreover, the Prosecution Directorate is not the only prosecuting body. There are separate bodies to investigate and prosecute cases of fraud against the Revenue: offences against public welfare authorities: cases against Customs and Excise: and crime committed against banks and other financial institutions (and their customers) etc. Each prosecuting authority has its own legal basis and ways of working²².

The prosecution services institution, however, is not assertive in Pakistan. This claim is made on the bases of conviction in Pakistan. The measure for efficiency of prosecution services is the rate of conviction. However, in Pakistan, the conviction rate remained very low²³. For example, in rape cases, there have been zero convictions in the last five years²⁴. Compared to Pakistan, South Africa has 38 conviction rate, India 37%, USA and Australia 85%, and Japan 99%²⁵.

It might be argued that separate prosecution services are relatively new in Pakistan. But in England, the Crown Prosecution Services (CPS) was established only in 1986. Like in Pakistan, the CPS was also a very weak organization for the first 14 years. Since 2000, it

²¹ Interview with Prosecutor, July 01, 2013]. Name or fake name of the interviewee is needed

²² Mashood Mirza. (2010). *Op.Cit.*

²³ See Mashood Mirza (2010). *Op.Cit.*; and also Aroosa Shaukat. (May 29, 2014). Low conviction rate: Report seeks reforms in criminal justice system. In *Daily Express Tribune*

²⁴ Azam Khan. (June 30, 2014). Zero-conviction rate for rape: Senator proposes constitutional changes. In *Daily Express Tribune*.

²⁵ Muhammad Athar Waheed. (2010). Victims Of Crime In Pakistan. Participant Paper at 14th International Senior Seminar. UNAFEI. No81_14PA

has become more confident and influential in England. At the same time, it has taken on "more powers and issued many more guidelines, which influence all justice agencies"²⁶.

At district level, a district public prosecutor is empowered to initiate prosecution against an offender. In Khyber Pakhtunkhwa, the North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005 (hereinafter, the Prosecution Act) empowers a public prosecutor to carry out prosecution against an offender.

There is no difference in prosecution or prosecutor in adult or juvenile cases. Juvenile and adult prosecution is carried out by the same prosecutors within the same premises.

5.3 Prosecution Service in Khyber Pakhtunkhwa Province

In 2005, prosecution was established as an independent institution in the province. The scrutiny of the entire process, right from the FIR up to the conclusion of the case by the court, came under the Khyber Pakhtunkhwa Directorate of Prosecution.

It is not mandatory for the prosecutors to prosecute each and every case. The police have the discretion to pursue or not to pursue a case at the very initial stage (i.e. within the police station when the case has not been registered in FIR). In the same way, the prosecutors also have the option to continue with the prosecution, take no further action or divert away the case from the criminal justice system, subject to the prior approval from the concerned court.

Analogous to Brazil, El Salvador, India, Kenya, Malaysia, and England, and many other countries, Prosecutors in Khyber Pakhtunkhwa are not investigators. In these countries, and in Pakistan, the prosecutors do not have the authority to investigate the cases on their own. It is the police who carry out the investigation of the case and submit the case file to the prosecution office. The role of prosecution is very limited, i.e. screening and scrutiny

²⁶ Chris Lewis. (2010) "Recent Changes in the English Public Prosecution Service" in *Pakistan Journal of Criminology*. Vol.2.No.4.Oct, 2010.pp.71-82

of the case files, and deciding whether to prosecute or not. In order to ensure adequate evidence, the prosecutors are expected to advise the police. However, psychologically, the prosecutors are still not independent from the influence of the police. It is very rare for the prosecutors to advise the police on a case. The major reason for this messy situation is a disconnect between police and prosecution²⁷.

5.3.1 Organizational Structure and Responsibilities

The operational unit of the prosecution services is the Office of the District Public Prosecutor within a district. The District Public Prosecutor (DPP) is responsible for the administration of the prosecution services in a district (Section 8 of NWFP Prosecution Services Rules, 2005). The prosecution may be carried out by the Public Prosecutor, Deputy Public Prosecutor or Assistant Public Prosecutor.

The Directorate of Prosecution in Khyber Pakhtunkhwa has the following staff:

Table 5.1: Sanctioned Strength of the Prosecution Directorate

Position		Strength
Public Prosecutor		31
Deputy Prosecutor		45
Assistant Public Prosecutor	BPS-16	42
	BPS-14	84
Government Pleaders		9
Assistant Government Pleaders		31
Totals		242

Source: Dr. Faqir Hussain. (2011). The Judicial System of Pakistan. Islamabad. Retrieved August 28, 2011 from http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

At provincial level the prosecutions are administered by the Directorate of Public Prosecution, Khyber Pakhtunkhwa. The Directorate is divided into three sections: (i) prosecution and administration, (ii) the accounts, and (iii) establishment section. The

²⁷Fasihuddin (2013)“Criminology and Criminal Justice System in Pakistan”.in Liu, J., Jou, S., and Heberton, B. (ed). *Handbook of Asian Criminology*. London: Springer. P??????

Directorate is headed by a Director General Prosecution (DGP). The DG Prosecution is assisted by a Public Prosecutor (PP), a Director Legal and Director Administration / Accounts²⁸.

There are 222 prosecutors working in different hierarchies in Khyber Pakhtunkhwa (See Table 5.1). Keeping in view the burden of cases in the province, there is substantial amount of cases burden on each prosecutor.

5.3.2 Major functions of the Prosecution Directorate

The role of a public prosecutor begins once the police Investigation Officer submits the case to the court after investigation. What prosecution performs is, to ensure a fair trial of the accused. A typical police mind-set/belief in Pakistan is that every accused is a criminal. Therefore, under this mindset, the police want every case to be convicted no matter what. In doing so, sometimes, the due process of law and the right to fair trial are vulnerable to be compromised. Therefore, it is the duty of the prosecuting officer to ensure that the accused's right to fair trial is protected by remaining independent of the police influence.

When the Prosecution Act was promulgated in 2005, it was expected that the process of justice will become prompt, efficient and speedy now. However, the pendency of cases in the previous chapter shows that these expectations are yet to be materialized.

For a fair trial, the police register the cases and refer them to the prosecution. The prosecutor usually has three functions: (i) scrutinizing of investigation cases, (ii) preparation of charge sheets against the accused, and (iii) prosecution of the accused in the court²⁹.

²⁸ Chapter II of the Prosecution Act, 2005

²⁹ "Preamble of The North-West Frontier Province Prosecution Service (Constitution, Functions and Powers) Act, 2005 states that." WHEREAS it is expedient to reorganize and establish a Prosecution Institution with a view to achieving a speedy justice process in the North-West Frontier Province and for matters ancillary or incidental thereto."

Prosecutors evaluate the evidence in each case. After the evaluation of the evidence, the prosecutors make their recommendations for one of the three things: (i) filing revision, (ii) petitions or (iii) appeals against the orders and judgments. Moreover, the prosecutors also conduct cases in Courts. The prosecutor can also withdraw a case under section 494 of the Cr.PC.

5.4 The Problem of Prosecuting Juveniles in Khyber Pakhtunkhwa

First, with regard to the prosecution and trial, there is no difference between juvenile and adult prosecution and trial. The duties of the prosecutor remain the same in both the cases. Secondly, the most important issue in the juvenile justice system is the lack of coordination between its components. Prison and courts can have some coordination but the missing link is Probation department and Prosecution department. The probation is discussed in a separate chapter next. Prosecution Institution is the most important institution in the juvenile cases. According to Saleem Khan (not original name)

"If the entire juvenile justice system is compared to an arch then the key role in this system has to be played by 'prosecution'³⁰."

The question arises how does prosecution play the key role here? The answer follows as;

Overall, it is considered by many that the probation officer has to play the key role in juvenile cases. However, Probation comes at a later stage. First juvenile is arrested. Police investigate the case and produces evidence. Whatever evidence (s) is produced by the police against a juvenile offender, the prosecutors assesses their quality and validity. If there are any lacunae in a case file, it is not the duty of the prosecutor to find it out. Prosecutor has to find out the loopholes in all cases. Besides, prosecutors also pin-point the legal gaps if any. In addition to this, the prosecution can also send the case file back to

³⁰ Interview with Saleem Khan (Not Original Name) Public Prosecutor, January 2013: Peshawar

the Investigation Officers owing to the lack of vital evidence. However, prosecutors are not without their problems.

Noman Jamal (not original name) commented that

“With regard to juvenile, I would say that we the prosecutors need to have an update awareness regarding JJSO's provision. If a juvenile is arrested, or its trial is commenced, all the prosecutors should know what the provisions with regard to juvenile are³¹.”

Article 4.2(d) of ‘International Association of Prosecution’s Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures’ provides that criminal proceedings should not proceed if the case is not well founded upon the evidence. Such evidence must be reliable and admissible³². This unfortunately, is not practiced in Pakistan. It is very frequent to observe in the courts that numerous cases, both against juveniles and adults, are pending owing to the fact that the court refers the file back to the prosecution with instruction and identification of some lacunae. It is not that the courts are strict. It is due to one factor: i.e. the prosecution did not identify the gaps in the investigation of the police and did not advise or guide the police. Without any kind of scrutiny, which is the job of the prosecution, it forwards the file to the court. It means either prosecution is not aware of its role or efficient or it doesn’t take pain in performing its proper duties. Commenting on this a prosecutor Masood Khan (not original name) said;

“Why should the entire burden be on the Court? If we can do all this before a case goes to the court, it would be the proper due diligence. The work of prosecution is to evaluate the evidence provided by the police. If the prosecution found that there is a flaw, for example the age as 17/18, it should not go to the court. The prosecution is not aware of its due role. I mean “onkewo training nahihui” (the

³¹ Interview with Noman Jamal (Not original name) Public Prosecutor, Aug 2013]: Hazara

³² Article 4.2(d), International Association of Prosecution’s Standards of Professional Responsibility and Statement of the Essential Duties and Right of Procedures

prosecutors are not trained in that properly) what you should be doing? What is their job³³?"

As indicated in the Chapter VI, the entire burden of the due diligence is placed on the shoulders of the courts. The police refer a file to the prosecution and the prosecution forwards the same to the court; not performing its duty of scrutinizing and identifying the lacunae in the police investigation. Does it mean that the prosecution is still under the influence of the police? Noshervan Durrani (not original name) commented that

"Before 2005, Prosecution department was part of the Police in Pakistan. It is still being run on the same system without any improvement. We couldn't come out of our old jacket yet. Now we are independent but we don't know how to go about³⁴."

Similarly, Inam Khan (not original name), a Prosecutor, also referred to this and commented that

"Although we are independent now, but we have not got training as an independent prosecutor, therefore we are not able to assert ourselves in proper and effective way"³⁵.

It is quite unfortunate that besides proper training prosecutors behave like this. The prosecutors in Khyber Pakhtunkhwa conduct compulsory training of initial 6 months of which three months training is conducted in Federal Judicial Academy, Islamabad and another three months in various courts of lower level³⁶.

5.4.1 Juvenile and Adult Trial and the Prosecution

The trial in Khyber Pakhtunkhwa courts is a very cumbersome process. Sometimes, it may take more than four (4) months to even commence. In 2012, a total of 1398 juveniles were in prisons all over Pakistan. Out of the total, 1219 or 87% were under trial³⁷. The

³³ Interview with Masood Khan (Not original name) Public Prosecutor, May, 2013: Bannu

³⁴ Interview with Noshervan Durrani (Not original name) Public Prosecutor, April 2013: Mardan

³⁵ Interview with Inam Khan (not original name) Public Prosecutor, July 2013: Swat.

³⁶ Section 10(b) of NWFP Prosecution Service Rules, 2005

³⁷ The State of Pakistan's Children 2012.p. 136

law provides for a separate trial of juvenile even in the same case. The trials are conducted separately. There is no problem in that.

An adult trial in courts may constitute at least three kind of hearing namely initial hearing, fact-finding hearing, and dispositional hearing or decree. The juvenile trial is no different.

As put by Imran Kamal (not original name), a prosecutor

"With reference to work and procedures, there is no difference between the two. Only the trials are separate. Only Chalan (Final Report) is separate"³⁸.

There is no difference in juvenile trial. A juvenile has to pass through the same stages of the trial as for an adult. The prosecutors do not have a separate mechanism for juvenile trials. In the US, the prosecutors arrange a "Pre-trial Conference at the Initial Hearing At the Pretrial Conference, Prosecuting Attorney confers with the juvenile and counsel, and may reach an agreement wherein the juvenile will admit certain acts alleged conditioned upon a certain disposition"³⁹. This agreement is then submitted to the Juvenile Court for approval. However, no such practice is prevalent neither in Khyber Pakhtunkhwa nor Pakistan as a whole.

Juveniles are frequently tried in adult courts in Khyber Pakhtunkhwa. It is, however, not uncommon to try a juvenile in adult court in the US as well. For example, Keaira Brown was a 13 year old child. She was charged with murder. The judge at Wyandotte County, Kansas ruled that she be tried in adult courts. She became the youngest person in Wyandotte Country, Kansas ever to be tried as an adult⁴⁰.

³⁸ Interview with Imran Kamal (not original name) Public Prosecutor, Aug 2013: Hazara

³⁹ Hearings and Trial (n.d.) in *The Clark County Prosecuting Attorney*. Retrieved December 27, 2013 from <http://www.clarkprosecutor.org/html/juvenile/juvenile12.htm>

⁴⁰ Larry Siegel and Brandon Welsh. (2014). *Juvenile Delinquency: Theory, Practice, and Law*. [12th Edition]. Wadsworth Publishing.

5.4.2 Role of Prosecutor in Diversion

In many countries in the world (such as Germany and the UK), the prosecutors especially in juvenile cases, have the discretionary power to decide whether, and how, to prosecute or dismiss a case because of the petty nature of the offence⁴¹. The prosecutors have the power to divert a juvenile's case from formal criminal justice system. For example, in Germany, the prosecutors have a wide range of diversionary options at their disposal. The UK's juvenile justice system emphasis the police use of diversion (in the form of cautioning) in cases of petty crimes⁴². Police cautioning has a significant role in the British juvenile justice system. In Germany, however, such a practice is not allowed. The underlying reasons, as expounded by is the abuse of power by police that occurred during the Nazi regime⁴³. The police in Germany are strictly bound by legality. All the cases are referred to the juvenile court prosecutor. Diversionary measures are taken at juvenile court prosecutor level or juvenile court judge level⁴⁴.

The situation in Pakistan is different. The prosecutors' powers are very limited. The prosecutors in Pakistan do not have discretionary power to dismiss a juvenile case. Once a juvenile enters the system (criminal justice system), prosecution is obligatory. It is only for the court to decide what to do with the accused (whether to divert the case from formal proceedings and to release on probation or otherwise). As put forward by Mustafa Afridi (not original name)

"....our duties are very limited. We receive the case file from the Police IO, make corrections where necessary, and put the file to the concerned judge. We cannot investigate on our own. We cannot

⁴¹ Frieder Dunkel.(2006). Juvenile Justice in Germany.In Eric Jensen and Jorgen Jepsen. (eds). *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. Portland, USA: Hart Publishing.p.117

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

*impose punishment. This is the job of the court. We cannot act like a court*⁴⁵."

In England and Wales, prosecutors have significant role to play in juvenile cases. In Germany, prosecutors play the key role in deciding whether to prosecute or not to prosecute the case (See Chapter 2). Even, the prosecutor has many options for pre-trial diversions at his disposal. The prosecutors have very limited choice in juvenile cases in Pakistan. Their role is only to scrutinize the case.

Interestingly, the courts in Pakistan do not have a wide range of measures for juvenile correction as in many countries in the world. For example, in Poland, Article 6 of 1982 Juveniles Act contains the following measures:

"cautioning; obligation to behave in a certain way, especially to repair the damage, to offer an apology to the victim, to continue education at school or employment, to refrain from presence in certain milieus or places, to refrain from use of alcohol or drugs; responsible supervision by parents or by a custodian; supervision by a youth organization or other association, an employer or trusted person, who is obliged to guarantee the juvenile's proper conduct; supervision by a probation officer; directing the juvenile to a probation center, a social organization or institution providing care, therapy or training for juveniles, applied with the consent of these institutions or organizations; ordering the juvenile to be put in a foster family, in an appropriate child or educational institution or in a training and educational center; ordering the juvenile to undergo appropriate treatment for his/her mental handicap, mental illness, alcohol or drug abuse; withdrawal of driving license; forfeiture of the proceeds of a punishable act; correctional center; and some other measures".⁴⁶

Similarly, as mentioned before, cautioning is widely used in the UK by the police and, in Germany by the prosecutors.

⁴⁵ Interview with Mustafa Afridi (not original name) Public Prosecutor, Dec 2012: Peshawar
⁴⁶ Krzysztof Krajewski. (2006) "Juvenile Justice System in Poland" in Eric Jensen and Jorgen Jepsen. (ed.) *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice System*. (Portland: Hart Publishing), p.163.

Summary

This chapter discussed prosecution mechanism in Pakistan. It specifically described what the practices of prosecution with respect to juveniles are prevalent. Prosecution Institution is the Key to the juvenile justice system in Pakistan. It was found that most of the Prosecutors do not have updated awareness regarding provisions of JJSO. The work of prosecution is to evaluate the evidence provided by the police. Prosecution couldn't come out of its old jacket, i.e. from the influence of the police. Prosecution is independent but has no training as an independent prosecutor. There is no difference in juvenile and adult trial from prosecutor's reference point. Prosecutor has no role in juvenile diversion. The prosecutors have very limited choice in juvenile cases in Pakistan. Their role is only to scrutinize the case. Overall, this chapter gives the impression that the prosecutor's role has been neglected in the juvenile justice system in Khyber Pakhtunkhwa.

CHAPTER V:
A COURT'S PERSPECTIVE ON THE JUVENILE JUSTICE IN
KHYBER PAKHTUNKHWA

CHAPTER VI:

Courts' Perspective on the Juvenile Justice in Khyber Pakhtunkhwa

CHAPTER VI: COURTS' PERSPECTIVE ON THE JUVENILE JUSTICE IN KHYBER PAKHTUNKHWA

The previous two chapters of data analysis discussed the situation of the juvenile justice at police station level and at prosecution office level. This chapter discusses the issues with the courts in the juvenile cases. It starts with the philosophy of juvenile courts. It then follows the judicial system in Pakistan along with the courts' structure and procedure. Finally, it discusses the issues faced by the courts with respect to juvenile cases. The central theme of this chapter is that there is no difference in juvenile and adults in with respect to courts system and structure.

6.1 Introduction

As the juvenile passes through police arrest and prosecutorial intake, the next place for the juvenile is the juvenile court. A juvenile court is a separate court that has the power to oversee criminal cases involving juveniles. The juvenile justice philosophy requires for juvenile cases to be proceeded in a separate court with different structure from the general criminal court. It also requires judges to be trained and educated, inter alia, other matters related to law and crime, child psychology, juvenility, delinquency, and child behaviour. In Pakistan, there is no difference between an adult criminal court and a juvenile court. The same criminal courts have been declared as adult criminal courts due to many a reason. This chapter discusses the judicial system of Pakistan and the issues related to juvenile courts and juvenile cases.

This chapter provides a brief history and philosophy of juvenile courts. Next, it discusses the structure of judiciary. Further, it presents some of the judicial statistics. Lastly, it discusses issues at various levels in juvenile cases.

6.2 Philosophy and History of Juvenile Court

The idea of the juvenile justice has gained momentum as a result of the concern for young offenders in Scandinavia, Australia, the US and the UK. Previously there was no distinction between an adult and a minor in common criminal law¹. The minor was a person at maximum of seven years. In some instances, however, it could be raised to twelve if the offender was lacking in mental and moral maturity². The definition still prevails in Pakistan and a few other countries.

The underlying philosophy of the criminal justice was punishment instead of reformation. The punishment had two purposes. On the one side, it was meant to stop the criminal from committing further offences (i.e. incapacitation). On the other, it was meant to perform a deterrent function to the potential criminals. It was a warning to other possible wrongdoers. According to Julian W. Mack

“The child was arrested, put into prison, indicted by the court, tried by a magistrate, under all the forms and technicalities of criminal law, with the aim of ascertaining whether it had done the specific act—nothing else—and if it had, then visiting the punishment of the state upon it. Both were treated alike. Both were huddled together³.”

It resulted in negative consequences. Instead of rehabilitating and reforming the young offenders, the law and methods adopted for punishment permitted them to become outlaws and outcasts of the society. State attorneys did not bother to find out the history of the child, his environment, the circumstances in which the act was committed, and his association with other people. State did not ask about how the young person became criminal. State was interested but in one question⁴: “Has he committed this crime?” it did

¹ Shay Bilchik. (December 1999). *Juvenile Justice: A Century of Change*. US Department of Justice: Office of Juvenile Justice and Delinquency Programme. Retrieved January 12, 2014 from <https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf>

² Ibid

³ Julian W. Mack. (1909; 2005) “The Juvenile Court” in David L. Parry (eds). *Essential Readings in Juvenile Justice*. (New Jersey: Prentice Hall), Pp.61-67

⁴ Ibid

not inquire, "What is the best thing to do for this lad?" State's punishment was not meant for reformation but to inflict as much damage on the offender as he inflicted upon the society⁵.

"...[the law] apportions the same species of punishment to the inexperienced child, whose mind requires training in the way he should be, and to the old and hardened offender⁶."

The philosophy changed from punishment to rehabilitating the child. This change from punishment to rehabilitation was a result of definition of child in Europe. The definition changed from 'miniature adult'⁷ to person with less than fully developed moral and cognitive capacities⁸. Studies found a significant correlation between delinquent behaviour and the social environment in which the child lives⁹. Such studies promoted the idea that the delinquent children are not criminals to be punished rather they are at risk in need of care and protection¹⁰. The underlying idea was the principle of *parens patriae*¹¹. According to this philosophy, state is considered to act as a parent of any child who is in need of care and protection¹².

⁵ Julian W. Mack. (1909; 2005). *The Juvenile Court*. In David L. Parry (eds). Essential Readings in Juvenile Justice. New Jersey: Pearson Prentice Hall. pp.61-67

⁶ John Adams. (1849). *Summary Jurisdiction: A Charge to the Grand Jury of the Quarter Sessions of the County of Middlesex* (No. 59972). JT Norris. Retrieved January 12, 2014 from http://books.google.com.pk/books?hl=en&lr=&id=T84DAAAAQAAJ&oi=fnd&pg=PA1&dq=Delinquency,+state+as+parent&ots=LyJFomiTbf&sig=K_xPqUfEiBCqqf_oyE5vWsXKZR0#v=onepage&q&f=false

⁷ Ross W. Beales, Jr. (Oct, 1975). In Search of the Historical Child: Miniature Adulthood and Youth in Colonial New England. in *American Quarterly*, Vol. 27, No. 4, Ppp. 379-398

⁸ Shay Bilchik. (December 1999). *Juvenile Justice: A Century of Change*. US Department of Justice: Office of Juvenile Justice and Delinquency Programme. Retrieved January 12, 2014 from <https://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf>

⁹ For example George E. Dawson. (1896, 2012). *A Study in Youthful Degeneracy*. Clark: Routledge, Taylor and Francis; and also Edgar James Swift. (1898). *Heredity and Environment; A Study in Adolescence*. in *American Physical Education Review*, 3(3).Pp-170-178

¹⁰ For example Henry Smith Williams. (1897). What Shall Be Done with Dependent Children? in *The North American Review*, 164(485).Pp.404-414; and also Dr. Jules Morel. (1894). The Need of Special Accommodation for the Degenerate. in *The British Journal of Psychiatry*, 40(171), 597-605.

¹¹ W.G. Peterkin. (1897). Government by Injunction. in *Virginia Law Register*, 549-563.

¹² Julian W. Mack. (1909; 2005). *The Juvenile Court*. In David L. Parry (eds). Essential Readings in Juvenile Justice. New Jersey: Pearson Prentice Hall. pp.61-67

It is this thought—the thought that the child who has begun to go wrong is to be taken in hand by the state, not as an enemy but as a protector and guardian¹³—which led to the declaration of the Act under which the Juvenile Court of Cook County, Illinois, was opened in Chicago, on July 1st, 1899, the first juvenile court in the world¹⁴. Some, however, claim that the 1st juvenile court in the world was established in Australia in 1895¹⁵.

Following this development in the US and Australia, the previous century saw the development of juvenile courts in most of the countries in the world (e.g. Finland 1940, Germany 1922, England and Wales 1933). However, in Pakistan, this couldn't gain momentum until 2000. Until the dawn of the present century, children were dealt with through the colonial law of 1898. Child was a person who was above 7 years of age and below 12 years of age. The child was tried in the same adult court. There was no separate judicial officer to deal with juveniles. It was the Juvenile Justice System Ordinance, 2000 that established separate courts for juvenile offenders in Pakistan, though not on grounds but in legal documents¹⁶. It would be prudent to discuss the existing structure courts and justice system of Pakistan. This will provide a context in which to understand juvenile courts and its issues.

¹³ B. Flexner. (1910). The Juvenile Court-Its Legal Aspect. in *Annals of the American Academy of Political and Social Science*, 36(1), 49-56.

¹⁴ Julian W. Mack. (1909; 2005). *The Juvenile Court*. In David L. Parry (eds). *Essential Readings in Juvenile Justice*. New Jersey: Pearson Prentice Hall. pp.61-67; See Also Kathleen Daly. (). Conferencing in Australia and New Zealand: Variations, Research, Findings, and Prospects. in Allison Morris, Gabrielle Maxwell, Gabrielle M. Maxwell. (edited). *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*. Portland, Oregon: Hart Publishing. p. 69.

¹⁵ Joy Wundersitz. (1994). Family Conferencing and Juvenile Justice Reform in South Australia. in C. Alder and J. Wundersitz (eds.), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Canberra: Australian Institute of Criminology. Pp. 87-102

¹⁶ JJSO 2000: Preamble it is expedient to provide for protection of children involved in criminal litigation, their rehabilitation in society, re-organization of Juvenile Courts and matters connected therewith and incidental thereto; also JJSO Section (4) Juvenile Courts (1) The Provisional Government shall, in consultation with the chief Justice of High Court, by notification in the official Gazette, establish one or more juvenile Courts for any local area within its jurisdiction

6.3 Judicial System in Pakistan

The present judicial system in Pakistan is a legacy from the Colonial India with minor modifications after Independence in 1947. However, some (for example Faqir Hussain) deny this allegation and see the existing system as a mix of foreign-indigenous system¹⁷.

6.3.1 Structure of Judiciary

In practice, however, there are formal, informal and quasi-formal mechanisms of dispute resolution in Pakistan. The formal institutions are those established by the state to dispense justice. The informal mechanisms of dispute resolution, such as the *panchayat* and *jargah*, are cultural practices of dispute resolution.

In the Indian sub-continent, the informal mechanisms of dispute resolution have been functioning since unknown history. Koteliya was the first Hindu philosopher and historian who mentioned of Gram-pareshad or (gram=village and Pareshad= council) about 5000 BC and these Gram-pareshads were the progenitors of modern Local government system with judicial powers to settle local disputes¹⁸. In 3000 BC Megasthenes a Greek historian also wrote about the panchayat system in the sub-continent¹⁹.

The British colonials institutionalized the informal mechanism as Alternative Dispute Resolution (ADR) and established *Panchayats*, and *Jargah* Councils in colonial India. *Panchayats* system still officially prevails in much of the rural India as well as a system of disputes settlement in countries like Nepal and Bhutan. In 1959, with the introduction of Basic Democracies by General Ayub Khan, the *Panchayats*, however, were officially disbanded in Pakistan. Most of the functions of *Panchayat* were transferred to Chairman

¹⁷ Faqir Hussain. (2011) "The Judicial System of Pakistan. Islamabad" in *Supreme Court of Pakistan*. Retrieved August 28, 2011 from

http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

¹⁸ By U. B. Singh. (1998). *Administration System in India: Vedic Age to 1947*. New Delhi: APH Publishing Corporation. p.42

¹⁹ Prof. K.A. Nilakanta Sastri. (1988). *India in Early Greek and Latin Literature*. in Kallidaikurichi Aiyah Nilakanta Sastri. (edited). *Age of the Nandas and Mauryas*. New Delhi: Motilal Banarsidass.p.121.

of the Union Council/District Council. Albeit, the Basic Democracies have been disbanded in 1970s, the Chairmen of that time are still known in their respective villages as *Chairman Sahib*. In rural parts of Pakistan, *Panchayats* and *Jargahs* are still functional as an informal mechanism of dispute resolution (even most of the business matters are resolved through *Jargas* in Khyber Pakhtunkhwa).

The *jargah* system of justice is still prevalent and officially recognized in the tribal areas of KPK²⁰ including about 90% Baluchistan. *Sardari* and *Waderofaisala* (decision by feudal/ Chieftain) institutions also exist in other parts of the country at the informal level²¹.

Mostly, the juvenile offences that are not reported to the police are resolved through *jargah* or such other informal mechanisms. As mentioned in Chapter 4 on the Police, usually it is only in most extreme cases that the police register an FIR against a juvenile. In most cases, the police itself resolve the case through the *jargah*.

The existing formal judicial structure in Pakistan and India was established by the British colonial administrators. First, it was introduced in Bengal where British first stepped for trade and later conquered it²². Afterwards, it spread to entire India. Pakistan's formal judiciary and criminal procedures code follow the colonial judiciary structure. Juvenile courts are no exception. As mentioned by Yasin and Banuri,

"The functions of the courts are limited to interpretation of law. Judicial power is a system of sovereign powers vested in the judiciary. The courts derive their authority from the Pakistan Penal Code (PPC)

²⁰ Barakatullah and Imran Ahmad Sajid. (2013). Jirga System in Pukhtoon Society: An Informal Dispute Resolution Mechanism. in *Pakistan Journal of Criminology*, 5(2).Pp.45-60

²¹ FoqiaSadiq Khan. (2004). *Quest for Justice: Judicial System in Pakistan*. Islamabad: The Network for Consumer Protection. pp. 6-7

²² Faqir Hussain. (2011)"The Judicial System of Pakistan".Islamabad in*Supreme Court of Pakistan*. Retrieved August 28, 2011 from http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

1860 and the Code of Criminal Procedure (Cr. PC) 1898. The latter deals with practice and procedures and supplements the former²³".

The judiciary in Pakistan can be divided into two layers. First layer is that of superior judiciary while the second layer consists of lower or subordinate judiciary. The superior judiciary has the power to review all judicial decisions. It may be categorized as 'appellate courts'. It consists of the High Courts in each province and a Supreme Court at Islamabad. High Courts are established in capital cities of respective provinces. The Supreme Court is established in Islamabad, the federal capital of Pakistan.

The lower or subordinate judiciary functions at district level. The judiciary at district level has two forms:

1. Civil Courts; and
2. District and Session Courts.

Civil Courts are the lowest level courts in judicial hierarchy. Even within Civil Courts, there are further three classes namely (i) CC Class III (the junior-most with a limited jurisdiction); (ii) CC Class II (senior than Class III, but also with a limited jurisdiction); and (iii) CC Class I (senior-most in the CC category with unlimited jurisdiction). There are similar hierarchies in District and Session Courts.

The higher judiciary is constituted on the basis of Article 175 of the Constitution of Pakistan 1973. Some important and ideological cases are dealt with by The Federal *Shariat* Court, the Service/Administrative Tribunals, the Martial Law Courts, the Special Anti-Terrorist Courts and the Tax Tribunals²⁴.

²³ Muhammad Yasin and Tariq Banuri. (2004). *The Dispensation of Justice in Pakistan*. Islamabad: Oxford University Press. p.79

²⁴ Yasin, M and Banuri, T. (2004). *The Dispensation of Justice in Pakistan*. Islamabad: SDPI and Oxford University Press. p.79

Until 1977, judicial and administrative powers were a joint function of District Commissioner. In a report of the Law Reforms Commission recommended the separation of administration from judiciary²⁵. However, this separation did not produced any commendable results²⁶.

The respective jurisdictions of judges are codified in Criminal Procedure Code. It is pertinent to note that the Civil Courts, Class III are meant essentially for training purposes (See Figure 6.1 in Annexure II)

A criminal case proceeds in linear form in Pakistan. Each stage is dependent upon previous stage. In criminal case, the progression of a case is as follows:

1. The FIR (First Information Report) is registered.
2. Police presents the *Challan* (charge sheet) in order for the trail to commence.
3. The judge reads the allegations against the accused.
4. Prosecution present evidence, which is cross-examined by the accused (defendant).
5. Accused present evidence, which is cross-examined by the prosecution.
6. Arguments are heard from both sides.
7. Judgment is pronounced.

It is important to note that generally, for the proceeding to get underway, the accused are required to be present in the court. The case is held up if one or more of the accused are missing, unless their case is separated from those present.

The most important part in criminal justice system is played by the lower judiciary i.e. District Courts, Session Courts, and Courts of Magistrate (See Figure 5.2 in Annexure II)²⁷.

²⁵FoqiaSadiq Khan. (2004). *Quest for Justice: Judicial System in Pakistan*. Islamabad: The Network for Consumer Protection. P.8

²⁶FoqiaSadiq Khan. (2004). *Quest for Justice: Judicial System in Pakistan*. Islamabad: The Network for Consumer Protection. P.8

²⁷ Ibid.

During the year 2009 the disposal of cases in District Courts of Khyber Pakhtunkhwa province was 79,963 while 19,723 were still under trial at the end of 2009 (See Table 5.1 for details). As per these statistics, the disposal is higher than the institutions of cases, however, the pendency slows the justice process of the courts.

Table 6.1:- Judicial Statistics for District Court of Khyber Pakhtunkhwa-2009

Pending as on 01.01.2009	Institutions from 01.01.2009 to 31.12.2009	Total for Disposal	Disposal from 01.01.2009 to 31.12.2009	Balance as on 31.12.2009
23681	76005	99686	79963	19723

Source: Judicial Statistics of Pakistan 2009. Published by the Secretariat of Law & Justice Commission of Pakistan, Supreme Court Building, Islamabad.

Analyzing the impacts of the criminal Justice system of the country, an official report on the crime situation in Pakistan is, the nature of the criminal justice system is comprehensible as;

“ The Criminal justice System of Pakistan has suffered a lot in the past and unfortunately people’s confidence has been on the lowest ebb due to hundreds and thousands of criminal cases stuck-up` at lower level and piled –up at higher level in form of appeals. Millions of people are running around criminal courts as accused prosecution/defense witnesses ... Not only the slow Police Investigations but also the delayed services of Courts summons, neglect of government prosecutors (and their assistants), absence of Police evidence and prosecution witness, abscondance of accused (on Court bails), delaying tactics of Courts clerks, uneven deals of defense counsels, absence of medico-legal expert and the neglect of the Magistrates are responsible for such delays²⁸”.

6.4 Issues Faced by Courts in Juvenile Cases in Khyber Pakhtunkhwa

The courts face numerous issues in juvenile cases including frequent miss representation of age in First Information Report (FIR), no information to parents or guardians by police²⁹, no information to probation officer by the police³⁰, no timely submission of

²⁸ Choudhry Abdul Hameed Aoulak (1986), *Criminal Justice: Crime, Punishment and Treatment in Islamic Republic of Pakistan* (Lahore: Pak-Muslim Academy), Pp.22-26.

²⁹ Legal requirement by JJSO 2000 Article 10 (1) (a)

Chalan(Charge sheet) by the police³¹, issue of handcuffs³², issues related to granting bail, issues of juvenile detention, handling of cases of minor offence within the police station, legal aid and pro-bono lawyers, lapses in the *Chalan* by the police, role of prosecution department, issues in joint trial, issues of separate trial, issue of separate courts, issues in *bakhshi khana*, and probation officer's unclear role.

Since there is no remand home in the entire country, one of the most widely used pretrial arrangements in Pakistan is bail. Bail is granted in almost all cases involving juveniles. "Where bail is granted, the court may nevertheless impose specific conditions, such as residing at a particular address (usually the parental home), not associating with other known offenders, not contacting witnesses, and regularly reporting to the police station etc."³³

In cases, when bail is not granted, the juvenile is referred to the '*munda khana*' an exclusive chamber for juvenile and young offenders within the prison proximity. Nevertheless, in Peshawar, the police established a Police Child Protection Center (PCPC) with the help of Ministry of Human Rights and Save the Children, Sweden.³⁴ It worked as a remand facility for juvenile offenders as well as a missing children center for the entire province. Unfortunately, the center has been shut down after ¾ years due to lack of sustainability by the donors.

Some of the major issues in courts in Khyber Pakhtunkhwa are discussed as below.

³¹ Legal requirement by JJSO 2000 Article 10 (1) (b)

³² National Judicial Policy 2009. (5)(A)(x)

³³ Legally not allowed under JJSO 2000 Article 12 (1)

³⁴ J. Graham and C. Moore. (2006). *Beyond Welfare versus Justice: Juvenile Justice in England and Wales*. In Junger-Tas, J., and Decker S.H. (edited). *International Handbook of Juvenile Justice*. Dordrecht, The Netherlands: Springer. Pp.65-92

³⁵ See the details in the REPORT ON New Data Collection System For Child Victims and Juvenile Offenders in Khyber Pakhtunkhwa, Pakistan. (2010). Peshawar: Pakistan Society of Criminology.

6.4.1 Age determination and Juvenile

Age is one of the most important factors in the juvenile justice system. No facility of the juvenile justice can be awarded to anyone unless his age is proved to be as per the legal requirements. A normal offender is treated as juvenile only if it is proved that the accused has an age that is below 18 years³⁵. It may seem pretty obvious that whosoever is found to be below 18 years, shall be treated as juvenile and in the juvenile court. However, the field interviews revealed that it is this *age determination* that is one of the biggest issues facing the juvenile justice system.

First, in juvenile cases, it is essential to determine the exact age of a seemingly juvenile accused of an offence. The biggest problem in determination of age is that mostly the juveniles who come in contact with law are illiterate. Police may not be caring for the provision of the law that as long as the age of the accused is not determined to be above 18 years, he/she should not be hand-cuffed. No matter the importance of proper age determination, the police do not bother in doing so. As Judicial Magistrate Khorshid Gohar (not original name) revealed that;

"The first problem we faced with the hands of police is that the police keep this fact suppressed that the accused is a juvenile and he be treated on the bases of JJSO 200. They hide the fact that the accused is a juvenile and needs to be treated differently. The police submit the report and show that Mr. so and so has been arrested under this and that law and permission may be granted for his remand etc. They treat him just like an adult criminal. This is the first problem we face, suppression of the fact by the police³⁶."

This is not the impression of a single judge only. Invariably, all the judges at lower level have these observations. Likewise, Mansoor-ul-Islam (not original name) revealed that

"My experience is that police don't exert much effort for the determination of the age of an accused juvenile. What is my opinion, I

³⁵ under JJSO 2000 any person below 18 years is considered a child

³⁶ Interview with Khorshid Gohar (not original name) Civil Judge cum Judicial Magistrate, Nov 2012. Peshawar

might be wrong from the police point of view, but my experience is that they intentionally write age more than 18 years even when they know that the age is 17 or 16 years or below. Mere pass bohot case asy aya karte the (many cases of such nature have come to me)³⁷."

The behaviour of police is explainable. When the police show the age above 18 years, they get the benefit to treat a juvenile as an adult offender. But when the police write the age less than 18 years (i.e. showing the accused as juvenile), in such a case, some benefits go to the accused child or minor. In such case, the police have to take some extra pain in handling the case. The police have to be careful about all the provisions of the law related to juvenile.

There is another side of this picture as well. The literacy level of the police investigation officers was found to be very low during field study. One investigation officer, an old one, was not even matriculate. In such a scenario, the knowledge and information of the police officers regarding the provisions of law is questionable. This is not only true in case of JJSO but for other jurisdictions as well. One reason the police do not exert much effort in age-determination is the lack of awareness and/or knowledge regarding legal provisions. A Magistrate Munawwar Ghufuran (not original name) stated that;

"....., when I would ask the Investigation Officers whether they studied the JJSO? They would reply that they didn't read it. They would say, we don't know its provisions "hamy nahi pata osmh kiya provisions hyn." Most of the IOs said that to me³⁸."

It is generally believed that the police in Pakistan are motivated to get every accused convicted. It is the effort of the police that no accused should get any form of relaxation (e.g. bail) from the court. The same mind-set goes in juvenile cases. In this regard, Magistrate Musawir Shah (not original name) stated;

³⁷ Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013. Mardan

³⁸ Interview with Munawwar Ghufuran (not original name) Civil Judge cum Judicial Magistrate, Nov 2013. Bannu

"They [the police officers] write [the age] above 18 [years] because they know that when they write the age below 18 years, the court may grant bail to the accused. Their effort is not to let the Bail happen and to take the Remand of the accused and to treat him as an adult offender. They do not care about the psychological condition of the juvenile. Once he is handcuffed, the personality of the juvenile gets severely damaged (jub osko hathkari lag gai, adults ke tara treat kia gya tov personality tov damage ho gai na phir). This is a very big issue³⁹."

Briefly, the first issue that the courts face is that the juveniles are brought to the court as adults. It is the job of the police to determine the proper age of the accused. However, the police, either due to lack of awareness or due to the notorious police culture, don't usually determine the proper age, or show it as adult.

6.4.2 Age determination and the Prosecution

The role of the prosecutors is not quite promising here. The police collects all the evidence and presents the case in the court through a Prosecutor (Assistant Public Prosecutor, APP or Public Prosecutor, PP). Isn't it the duty of the prosecutorial officer to ensure that the facts have been properly collected by the police? This is a very strong question. When Magistrate Khorshid Gohar (not original name) was asked about this question he said;

"yes it is the duty of the prosecutor. However, I would say it is the negligence of the prosecutor. When I ask the prosecutor that the accused seems juvenile but it is shown as adult in the court, why is that so? Their response is that "we are over-burdened." Likewise, it is the mind-set of the prosecutors that if someone commits a crime, he/she is an adult. Or his physical makeup is that of an adult⁴⁰."

These are presumptions by the prosecutors. The job of the prosecutor is to ensure all the facts are correct. They are not supposed to presume things of their own. If the accused seems adult, then they have to attach a proof with the final report to the court. The

³⁹ Interview with Musawir Shah (not original name) Civil Judge cum Judicial Magistrate, Jan 2013. Kohat

⁴⁰ Interview with Khorshid Gohar (not original name) Civil Judge cum Judicial Magistrate, Nov 2012.

prosecutors have to ensure and verify the facts. They make haste and in the haste the prosecutors also make mistakes in the cases. Mansoor-ul-Islam (not original name) said;

"Justice hurried is justice buried"⁴¹.

Besides the prosecutors, usually the courts also seem to ignore this fact. If the family of the juvenile does not make efforts for his juvenility (very simply to bribe the Police to write a favorable FIR) the judges also ignore it because of caseloads. The police and prosecutor both put their burden over the court's shoulders. This situation is comprehensible when a Chief Justice of the country says that:

" I should state that the performance of Judiciary in Pakistan might not be ideal. I know there are complaints against Courts, particularly the delays caused in disposal of cases. But we have to understand the fact that the Courts, particularly subordinate Courts, have to operate under dismal conditions"⁴².

Prosecution services are an integral component of the juvenile justice system. Whatever evidence is brought by the police, its quality is assessed by the Prosecution. The loopholes in a particular case are found out by the Prosecution. The legal gaps in a particular case are identified by the Prosecution. On the basis of that vital evidence, the prosecution can send the file back to the investigation officers. It has a key role.

Now, what happens is that when the files go to the court, the court refers back the case and orders to complete this and that things in the case. Why should the entire burden be on the court? If we can do all this before a case goes to the court, it would be the proper due diligence. The work of prosecution is to evaluate the evidence provided by the police. If the prosecution found that there is a flaw, for example the age as 17/18, it should not go to the court.

⁴¹ Interview with Mansoor ul Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013. Mardan

⁴² Saeeeduzzaman Siddiqui, (chief Justice of Pakistan), "Judiciary in Pakistan : An Overview" in *PLD 2000*(Lahore: PLD Publishers: 2000),p.61.

However, the prosecution is not aware of its due role⁴³. The prosecutors are not trained in that. They are not properly aware what they should be doing? What is their job? Mirza stated;

"Before 2005, Prosecution department was part of the Police in Pakistan. It is still being run on the same system without any improvement. They couldn't come out of their old jacket yet. Now they are independent but they don't know how to go about. The rules have been formulated...But they haven't got training as an independent prosecutor. Therefore they are not able to assert themselves in proper and effective way⁴⁴."

Police use significant discretionary powers in determining age. It is evident from the following case study which was reported as following;

"On July 4, 2006 a juvenile named Jan Muhammad (at the time of arrest he showed his name to be Zahid Gul) was arrested by the Police team of Police Station Bhana Manri, Peshawar for selling narcotics. He was charged with under Arms Ordinance, 1965 (Section 13) and Control of Narcotic Substance Act (CNSA,1997, Section 9).

Finding that the accused lied to the police by giving fake name, the police further charged him with Pakistan Penal Code Section 419 and 420 (Fraud and forgery). With these charges, the accused was presented before the Judicial Magistrate, as an adult offender. In the FIR and Chalan, the police never mentioned the age of the juvenile. The police used the term "Jawan-ul-umarlarka" (a male youth) in FIR and Case Diary. However, in the arrest card, the age of 18/19 years was written by the police.

All these documents went through the prosecution officer. However, the court pointed out that the accused is a juvenile and its proper age must be determined. Once the court order that and the juvenile appealed for a bail, a separate case was launched against the accused showing him a juvenile. In the process, the juvenile denied all the charges and claimed a trial. In the trial process, the juvenile was proven guilty. Finally, the case was concluded on July 17, 2009, i.e. three (3) years after the initiation of the case⁴⁵."

⁴³ Mashood Ahmad Mirza. (2010). Role and Responsibilities of the Public Prosecution A Case Study of Khyber - Pakhtunkhwa Province. In *Pakistan Journal of Criminology*. Volume 2/ Number 2/ July 2010.pp.1-14

⁴⁴ Interview with Mashood Mirza, April 2013.

⁴⁵ Training Material on Juvenile Justice Information System for NWFP Police.(2009). Unpublished training material by Pakistan Society of Criminology.

Jan Muhammad's case speaks volumes for the juvenile justice system in Pakistan. The following conclusions can be drawn from this case:

1. Juvenile accused are presented as adults in the court.
2. The Police have no soft corner for juvenility of an offender.
3. SHO does not point out the lacunae in the *Chalan* of his Investigation Officer.
4. The Prosecution presents the police information to the court without questioning.
5. Both the police and the prosecution put their burden upon the shoulders of the court.
6. A normal case, e.g. of narcotics, takes more than three (3) years in the courts to get concluded.
7. Juvenile offenders deny charges against them even when all the evidences are against them.

6.4.3 No Information to Parents or Guardians By Police

Besides the issue of age, there are other grave issues in the juvenile justice system. There is a provision in the law⁴⁶ that when a juvenile is arrested by the police, they must inform the parent or guardian of the accused as well as the probation officer. This has to be done either verbally, through telephones or in writing. The juvenile has to be interrogated in front of the guardian or the probation officer. However, it is seldom practiced. As Magistrate Imran Junaid (not original name) informed;

"Again, this is my experience that police never inform the parents or guardian of the accused child in writing. They don't inform in-writing. This is a very big flaw⁴⁷."

Further, the parents or a guardian of the juvenile must also be informed in case a juvenile is arrested by the police. This is a legal provision⁴⁸. Astonishingly, the police are at odds

⁴⁶ JJSO 2000, Article 10 (1) (a) & (b)

⁴⁷ Interview with Imran Junaid (not original name) Civil Judge cum Judicial Magistrate, Aug 2013. Hazara

with the idea of letting probation officer interfere in the matters of a police station.

Magistrat Mansoor-ul-Islam (not original name) informed that

"I have invariably experienced that the police don't inform the Probation Officer⁴⁹."

He hypothesized that

First [reason is that] the IOs don't know what the requirements of JJSO are? Mostly they say we don't know the provision⁵⁰."

One reason is information and education problem of the police officers. The next reason for not informing the probation officer is that in most of the districts there is only one probation officer (See Chapter VII). However, there are about 10, 15 criminal courts in each district. The Probation Officer cannot be present in all the courts at the same time.

Mansoor-ul-Islam (not original name) continued

"I had a meeting with the probation officers. They complained that the Government didn't give them any office accommodation or proper staff. Even they did not had any conveyance nor travelling allowance. It is a fact that they have to travel a lot. They have to take-up new cases as well as to monitor the previous cases and to report to the court⁵¹."

From this, it can be concluded that there is no or very little liaison between police, probation officer and even the court where all the components of the criminal justice system are combined.

Why is it necessary to inform the parent/guardian and the probation officer by the police?

The role of parents is obvious. When the parent or guardian is with the child, he gets a psychological confidence. Secondly, the guardian gets convenience if want to hire a

⁴⁹ JJSO 2000, Article 10 (1) (a) & (b)

⁵⁰ Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013.

Wahidam

⁵¹ Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013.

Wahidam

⁵² Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013.

Wahidam

lawyer, attorney, etc. Third, when the guardian is informed, maybe they bring a School Certificate or Birth Certificate that shows the accused is a juvenile.

However, the role of probation officer seems anomalous in the juvenile justice system, at least at the point where the law said that the police officer will inform the probation officer upon the arrest of any juvenile. Why is it necessary to inform the probation officer? Isn't the parent/guardian enough here? This question was put to Imran Junaid (not original name) who responded that

".....why the Law said to inform the Probation Officer? The Police Officer will inform the Probation Officerthat "I am going to take this child to such a court at such a time on such a day. You should come to the court as well." (as it is the legal provision to produce any accused before the court within 24 hours of arrest). it assists the probation officer in compiling his report (Social Investigation Report, SIR)⁵²."

In the above interview, it was also shared by the judicial magistrate that the investigation officers don't have the knowledge, information or awareness about this provision of the law. It is surprising that a protector of the law is ignorant of such an important law he is supposed to protect. This is the characteristic of most of the third world countries where access to laws is often very difficult⁵³. From this finding, one question that needs an answer is that Is it the incompetence of the law-officer or the system is flawed? Is ignorance of law by a police officer in particular is an excuse?

6.4.4 No Timely Submission of Final Report (*Challan*) by the Police

The next issue in the system that courts face is related to *Chalan* charge sheet. *Chalan* is a final investigation report by the police. It is a legal requirement that the police have to complete all the investigation etc. and submit the final report to the concerned court within 14 days period. However, the problem is that the Police don't submit the *Challan*

⁵² Interview with Imran Junaid (not original name) Civil Judge cum Judicial Magistrate, Aug 2013. Hazara

⁵³ Danial Poulin. (2004). Open access to law in developing countries. In *First Monday: Peer Reviewed Journal of the Internet*, 9(12). URL: <http://ojphi.org/ojs/index.php/fm/article/view/1193/1113>

within the specified time (14 days). This problem occurs due to at least two reasons; (i) administrative reason, i.e. the police are overburdened, and (ii) lack of trainings and awareness regarding the provisions of the law. It was put forward by Magistrate Imran Junaid (not original name) that

"I don't want to give all the blame to the Police Institution. Some problems are from them. I will talk about what are their legal and administrative problems. Administrative problem is that the police officers are all over-burdened. Number two, they are under-trained. This isn't in my knowledge whether the IOs get any intensive training on juvenile law or not⁵⁴."

Some critics, including the higher judiciary, argue that the delay in *Chalan* submission is a tactic by the police to let a particular accused suffer. In a case, Muhammad Ishfaq vs State, the petitioner's lawyer Zeeshan Ali Kiyani submitted that "my client was arrested by the Hayatabad Police Station Peshawar, and the police claimed to have recovered 15 KG of Hashish from his possession. The police are employing delaying tactics in submission of *Chalan*, making his client suffer".

Who will ensure timely submission of *Chalans* in the court? This question is very important and can be answered through a remark of the Chief Justice of Peshawar High Court on Feb 14, 2012. It was reported that the Chief Justice Peshawar High Court, "Mr. Justice Dost Muhammad Khan warned the Director General (DG) Prosecution Khyber Pakhtunkhwa to ensure submission of *Chalans* within 15 days or else face the action⁵⁵. Nonetheless, Prosecution has yet to fulfill this duty. Mr. Mirza's argument is relevant here who said

⁵⁴ Interview with Imran Junaid (not original name) Civil Judge cum Judicial Magistrate, Aug 2013. Hazara
⁵⁵ PHC asks DG Prosecution to submit Chalans within 15 days. (Feb 14, 2012). In *Legal Advice PK: Online Legal Advice Pakistan*. Retrieved November 05, 2013 from <http://legaladvicepk.com/phc-asks-dg-prosecution-to-submit-challans-within-15-days-2460.html>.

“Before 2005, Prosecution department was part of the Police in Pakistan. It is still being run on the same pattern without any improvement. They couldn’t come out of their old jacket yet⁵⁶.”

6.4.5 Handcuffs in the court

As mentioned in Chapter IV (on Police), the police do handcuff the juveniles. It was also revealed by the police that the courts very rarely ask for not handcuffing the juvenile. Legally, it is forbidden to handcuff a juvenile⁵⁷. The courts do face this issue. This fact is supplemented by this comment of Magistrate Mansoor-ul-Islam (not original name);

“I have seen invariably in the courts and I have been frequently discussing with my colleagues, usually if a juvenile is handcuffed, no one asks why he has been handcuffed as such. (agr kesi juvenile ko hathkari lagi ho tov oska koi puchta nahi hy). Neither courts nor do the IOs (Investigation Officers) take care of such matters⁵⁸.”

In like manner, Magistrate Imran Junaid (not original name) proclaimed;

“It was my order to all my staff and the IOs that if the case of a juvenile comes to my court, they shall not be in condition of hand-cuff. At the beginning, the IOs would bring the hand-cuffed juveniles. However, after sometimes, they started to wear off the chains of the juveniles at least in front of my court. My staff would tell me that “sir, they wore off the chains before coming into your court room. They have again handcuffed the juvenile out-side the court room.⁵⁹”

A cursory look at the court’s working in any district reveals that it is explainable why the courts do not care about handcuffing of juvenile by the police, even when it is forbidden by the court. First, there is no separate juvenile court in any part of Khyber Pakhtunkhwa or the entire country. The juveniles’ cases are dealt with by the adult courts with the power to handle juvenile cases. All the courts of magistrate and session judges are legally

⁵⁶ Interview with Mashood Mirza, July 2013.

⁵⁷ JJSO 2000 Article (12). Orders that shall not be passed with respect to a child... Notwithstanding anything to the contrary contained in any law for the time being in force no child shall be:

(b) Handcuffed, put in fetters or given any corporal punishment at any time.

Provided that where there is reasonable apprehension of the escape of the child from custody, he may be handcuffed.

⁵⁸ Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013. Mardan

⁵⁹ Interview with Imran Junaid (not original name) Civil Judge cum Judicial Magistrate, Aug 2013. Hazara

the juvenile courts as well. A magisterial court, where most of the criminal cases are dealt with, on average, deals with around 100 cases per day.⁶⁰ There is a hustle in the courts' workings and proceedings. Magistrate Khorshid Gohar (not original name) reckoned;

"If you go to a magisterial court, you will feel if some auction is taking place in a market (asa lagta hy jese neelam lagi hui hy)⁶¹."

The courts are not a private places. The judge, the accused, the prosecutor, the victim, the advocate, and the concerned stakeholders from both the parties along with the police officers are present at the same time. The focal person is the judge. All the documents and the communication pass through the judge. He is over-stressed and in such a situation, it seems quite right that the judge will miss to take care of this provision of the law regarding a juvenile case (as it is an adult criminal court as well).

Secondly, the police behaviour is a bit below the standard. Khorshid Gohar (not original name) informed;

"I personally asked each and every IO in such a case why he has handcuffed the juvenile? The response is "it is my duty to handcuff criminal when he is in our custody"⁶²."

He wondered;

"[why] they forget that under Section 12 of JJSO, if there are no special circumstances, a juvenile shall not be handcuffed"⁶³."

He further testified;

"I always order for release of the handcuffs of such juveniles and write that if the IO considers that the accused is desperate of running away, he may handcuff the juvenile. BUT this should be mentioned in the report of the IO in a separate paragraph"⁶⁴."

⁶⁰ It ranged from court to court. District / additional district judges may have cause list of up-to 50 cases on average. Magisterial courts and civil judges may have more than 100 cases or around [M. Amir Munir, Civil Judge cum Judicial Magistrate and Research Officer, Lahore High Court, Personal Communication November 05, 2013]

⁶¹ Interview with Khorshid Gohar (not original name) Civil Judge cum Judicial Magistrate, Nov 2012. Peshawar

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

It is generally believed that from the police perspective the accused is a criminal, at least at the police station level. Further, it is a common police practice that the accused should not get any relaxation and there should be very harsh treatment. With this mind-set, the police handle a juvenile and goes to the court. With such a mind-set, it is not surprising that the police handcuff the juvenile. This is one aspect needs further objective solution.

6.5. Issues in the Court

6.5.1 Issues related to granting Bail

It is usually not very difficult to obtain a bail from the court. In juvenile cases, the law states that every crime that has a penalty of 10 years or less, is bail able if committed by a juvenile. When a juvenile's case is presented before the court, shown as adult, the court is in no position to grant bail unless and until the age is properly determined to be lower than 18 years. Khorshid Gohar (not original name) worried that

"The main issue in bail to a juvenile is that, until the age of the offender is determined, the bail will remain a controversial issue⁶⁵."

Unfortunately, as mentioned in the Chapter 4 (on Police), the police investigation officers revealed that sometime age determination takes about a month. Similarly, it was revealed that the doctors are usually not free. They have to constitute a board for this purpose. Only the constitution of the board takes about a week. When they finally give the report back to the court, it takes 15 or 20 days. Moreover, it was also told that the X-ray etc. costs about Rs. 3000/- on a single case. But not a single penny is paid to them for the said purpose. (It is strange that the police hospital is a public hospital, there are an 'A' category hospital at each district headquarters with all facilities of X-rays and laboratories, a medical board under the supervision of a Medical Superintendent, mostly a

⁶⁵ Interview with Khorshid Gohar (not original name) Civil Judge cum Judicial Magistrate, Nov 2012. Peshawar

specialist in his field etc. then how a test cost money and how the constitution of a medical board takes weeks ? Every Medical Superintendent as well as Senior Medical officer of a DHQ public hospital is authorized to issue such a certificate determining the age of an accused). Such tactics are tactics to mend illegal money.

In case of delay in age determination by the medical report, the juvenile suffers and his status remains unclear at the mercy of the police. The courts are not sure whether to grant or not to grant bail and send the accused on judicial remand instead. Puzzled by this, Magistrate Jamal-ud-Din (not original name) added

“The time taken during age determination (at least initial two days) that time is very painful for the institutions. Nobody knows where to keep the juvenile (juvenile ko rakhna kaha per hy, q k abi age determine nahi hui)⁶⁶.”

There is no institution in the entire Khyber Pakhtunkhwa province to keep the child in during this period. So the juvenile lives with the police officer for as long as the age is not determined. In Peshawar, a Police Child Protection Center (PCPC) was established in 2009. It had a child friendly environment and was meant to be a remand home for the children. However, this was closed down in 2012 owing to issues such as sustainability and donors’ stingy attitude.

6.5.2 Legal Aid to the Juvenile and the Courts

In July 2012, the UN Commission on Crime Prevention and Criminal Justice passed a resolution approving draft Principles and Guidelines on Access to Legal Aid in Criminal Justice System. This resolution paves way for the adoption of a series of standards in the UN General Assembly to ensure access to legal aid for all those who come into contact with the criminal justice system, including children. The draft Principles and Guidelines include the following points that are relevant to children:

⁶⁶ Interview with Jamal-ud-Din (not original name) Civil Judge cum Judicial Magistrate, July 2013. Swat

- Children should have access to legal aid under the same or more lenient conditions as adults;
- Legal aid provided to children should be prioritized within the best interests of the child; accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children; and
- States should ensure special measures for children to promote children's effective access to justice and to prevent stigmatization and other adverse effects as a result of being involved in the criminal justice system⁶⁷.

Moreover, at national level, the JJSO 2000 grants every child whether accused or a victim of an offence, with the right to legal assistance (Section 3). Furthermore, it obligates the State to appoint a legal practitioner for the child at the State's expense. For this purpose Session Judges have been empowered under the provincial the Juvenile Justice System Rules to constitute panels of lawyers to provide legal assistance to juvenile offenders.

One of the biggest problems facing the courts in juvenile cases is that most often the juveniles who are produced before the court, they do not have any lawyer. In such a case, the judges look for *pro-bono* lawyers⁶⁸. In *Pro-bono* cases, the lawyers do not charge any fee from the client. Amir Munir, a Research Officer at Lahore High Court, confessed that

*"But the issue in pro-bono cases is that it is usually requested by the court, therefore, the lawyers do not take serious interest in these cases"*⁶⁹.

Besides the state, it is usually believed by many that the children's rights are protected by the NGOs in Pakistan and Khyber Pakhtunkhwa as well. The name of SPARC and

⁶⁷ Children in Court. (10th July, 2012). Issue 15. *C.f.* Situation of Child Rights in Pakistan. (2013). SPARK. pp 124-25

⁶⁸ Pro-Bono Public is that work which is carried out freely in the public interest. You offer your services freely.

⁶⁹ Interview with Amir Munir, Research Officer Lahore High Court, April 2013.

SAHIL NGOs are commonly there in discussions over the child rights or the juvenile justice. When the issue of free legal aid comes in front, the NGOs claim to provide free legal aid to as much juveniles as they can. In a report of 2013, the SPARC NGO claimed to have provided free legal aid to 2590 juveniles over the past seven years i.e. since 2006.⁷⁰ The Courts speak of a different picture, however. Judge Amir Munir informed,

"When I was in Islamabad, seven police stations were under my jurisdiction. Unfortunately, during my three years period there, no NGO representatives visit my court in any of the juvenile case, except one or two that I don't remember. (mh ne nahi dekha k kesi bachy k pichy koi NGO aee ho)"⁷¹.

He continued,

"I am sorry to say that but this is reality. I attended many seminars by the NGOs, without naming any one. I have been in their seminars but I didn't see their appearance in the courts. May be they are working in another way but not in the court"⁷².

6.5.3 Issues in Juvenile Trials

Once the *Chalan* is presented before the court either in time or not, the biggest issue is that of a joint trial.

Under JJSO 2000 (Section 5), there cannot be a joint trial of an adult and juvenile. If all the accused in the *Chalan* are juveniles then there is no big problem for the judge. He has to keep in view JJSO, Cr. PC and Probation Ordinance and decide the case. If the case is not serious, the judge can go to admonition, discharge, whether to try or not to try the case. This is what the judge will do in court. Khorshid Gohar (not original name) declared;

"If there is only juvenile in the case, then the process is a bit easy. Now the situation number two. Chalan is in front of the court. There is one juvenile accused and one adult accused. In such situation, law is not clear. Law bilkol

⁷⁰SPARC.(2013). State of Pakistan's Children 2013. Islamabad: SPARC. Chapter 5.p.126.

⁷¹ Interview with Amir Munir Research Officer, Lahore High Court, April 2013.

⁷² Interview with Amir Munir Research Officer, Lahore High Court, April 2013.

clear nahihyes per (Law is totally not clear). This is one of the biggest problems we face in the courts⁷³."

Law only states to conduct separate trial. Now separate trial has its own issues. How will a separate trial be conducted?

For a juvenile, the police have to record the evidence against him. The same evidence has to be recorded separately for the major accused. Mansoor-ul-Islam (not original name) argued;

"There is a significant chance that the evidence produced in separate cases might not match-up each other. A witness has to be presented in one case and he has to be presented in another case as well. Let suppose the witness lapses on either of the sides, either in juvenile case or adult case, and the judge states that I am acquitting the major accused but convicting the juvenile, (wouldn't it be a conflict). For example, if we look at the statements and evidence in juvenile case, we come to conclusion that the juvenile should be acquitted and the adult should be convicted. But when we look at the evidence of adult, we come to conclusion that the adult should be acquitted and the juvenile should be convicted. This is a very important issue⁷⁴."

To this researcher's knowledge, there is no comprehensive research on this specific issue nor is there any such training programme in the judicial academies.

"I also didn't see any training programme in the judicial academy over this matter⁷⁵", Mansoor-ul-Islam said.

6.5.4 Separate Courts

Besides separate trial, the most highlighted and burning issue in the juvenile justice is the issue of separate juvenile court. As such there is not a single exclusive juvenile court in the country. This is a very right of juveniles under the JJSO which is a requirement of fair trial that they must have a separate juvenile court. By fair trial we mean the things that are

⁷³ Interview with Khorshid Gohar (not original name) Civil Judge cum Judicial Magistrate, Nov 2012. Peshawar

⁷⁴ Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013. Mardan

⁷⁵ Ibid

mentioned in the law shall be done in accordance with the law and in a way that the law has specified. Then it can be said that it's a fair trial. If the law states to conduct a separate trial of the juvenile and the state conduct it jointly, it means the state is not conducting a fair trial and the right of a juvenile is compromised. Khorshid Gohar (not original name) admitted;

"The law requires separate courts but till day I know we don't have any such courts. The prevalent practice is that we declared every magisterial court and even Anti-Terrorism Courts (ATC) as a juvenile court. If you have provided a special provision for some powers and then you delegate those powers to the same people, in such a case the purpose of the law is defeated⁷⁶."

Keeping in view the financial condition of the country, it can be argued that declaring magisterial courts as juvenile courts is advantageous in some respects. Mansoor-ul-Islam (not original name) hypothesized;

"One advantage of this practice is that if you want to take the work of a juvenile judge from any judge, the judge already has those powers. (e.g. I am a juvenile judge as well being a magistrate). Giving juvenile and adult both cases to a judge is infringing the rights of the juveniles in my opinion. Other trials are also affected because of this⁷⁷."

However, why there is no exclusive court for the juvenile offenders despite its legal provision? According to one judge, there are administrative issues. First, an inadequate number of judges is required. A Session Judge cannot spare his magistrates for only a few juveniles *"There is a very low frequency of juveniles in a district (juveniles her district mh bohut kam hoty hyn)"* (as there is a very low frequency of juvenile cases in the courts compared to adults)⁷⁸.

⁷⁶ Interview with Khorshid Gohar (not original name) Civil Judge cum Judicial Magistrate, Nov 2012. Peshawar

⁷⁷ Interview with Mansoor-ul-Islam (not original name) Civil Judge cum Judicial Magistrate, April 2013. Mardan

⁷⁸ Interview with Imran Junaid (not original name) Civil Judge cum Judicial Magistrate, Aug 2013. Hazara

For example if there are only 10 cases of juveniles in a district and a judge can handle 1000 cases in a year. It would be unfair to spare that judge for only 10 cases. The low rate of juvenile cases in districts cannot be considered a reason for non-appointment of judges.

6.5.5 Misuse of JJSO Provisions

As mentioned in Chapter II, the juvenile laws are frequently misused. Here, three cases from Supreme Court of Pakistan and Lahore High Court are produced as an evidence.

In *Faisal Aleem vs the State*⁷⁹, the Supreme Court of Pakistan dismissed the appeal of Faisal Aleem against the capital punishment awarded by the Trial Court on 20-10-2003. In the Trial Court record, his age was mentioned 22 years at the time of occurrence. It was subsequently converted to 20 years by interpolation. The responsibility, however, could not be fixed that by whom this interpolation was made. It is pertinent to note that the issue of age was never raised in Trial Court by the accused. The decision took place on 20-10-2003 (i.e. after JJSO 2000 was introduced).

In the Supreme Court, Faisal Aleem took the plea that at time of his crime, 11-2-1995, the accused was below 18 years of age. His defence counsel produced School Leaving Certificate, Birth Certificate, and Registration Form issued by DG Registrations, Ministry of Interior, showing his date of birth as 6-4-1977. According to these documents, the accused was of 17 years, 9 months and 5 days at the time when the crime occurred.

However, the Supreme Court found his documents to be unreasonable and incorrect. The Supreme Court found that his another brother was born on 4-1-1978, i.e. about 8 months younger than him, while another brother was born in the same year on 2-11-1978.

⁷⁹ *Faisal Aleem vs The State* (2010). All Pakistan Legal Decisions. Vol.LXII. Supreme Court 1080

In *Sultan Ahmed vs Additional Session Judge-I*⁸⁰, the Supreme Court remanded the matter to the Trial Court for a fresh decision. Sultan Ahmed seriously questioned the claim of minority by the complainant through documentary evidence. In this case, Tahir Hasan Khan was the accused with the murder of Fahim. Fahim was murdered by inflicting knife blows on him on 1-08-2002. After the submission of Challan in the Trail Court and after Tahir Hassan Khan was summoned to face the trail, he submitted an application before the Trail judge on 16-11-2002 claiming that he was a 'Child' in terms of JJSO 200 and praying consequently that he be tried as such.

Sultan Ahmed, complainant, who is the father of Fahim deceased, submitted a reply stating that the said application of the accused was based on incorrect and forged documents. The accused initially placed reliance on a School Leaving Certificate wherein his date of birth had been mentioned as 14-12-1986 where after he produced a copy of his birth entry issued by Union Council wherein his date of birth had been recorded as 27-12-1984. According to both the records, he falls below 18 years (the legal definition of a 'child'). Still both the certificates were disclosing contradictory dates of birth. Upon further investigation, it was found that the father of Tahir Hasan Khan accused was a High School teacher while his uncle was District Education Officer. His father and uncle used their influence to produce false school leaving certificate. Thus, it was disclosed that the documents produced were dubious and fictitious.

In *Muhammad Azam vs Muhammad Ikram*⁸¹, the Lahore High Court found that the accused Muhammad Ikram has produced forged documents to claim himself a 'child' within the meaning of JJSO 2000. A Medical Board was called upon which found him to be of 20 years at the time of occurrence. When the court itself summoned the records, it

⁸⁰ Sultan Ahmed vs Additional Session Judge-I (7-4-2004), Pakistan Legal Decisions, Supreme Court 758

⁸¹ Muhammad Azam vs Muhammad Ikram (2-4-2003). All Pakistan Legal Decisions, Vol LV. Lahore High Court 457

found that the birth record of Muhammad Ikram in Column Nos.9,10 and 11 on the same page are with a different handwriting and of recent origin. The court found that there was no mention of the informer of the birth. Another unusual feature found by the court was that the pages were loose and not in the binding of the main register whereas other pages were duly bound up. Similarly, the record of the *Nikahnama* produced as an evidence of the marriage of Muhammad Ikram's parents, was not found anywhere in the registers. The court decided that the case be decided in ordinary courts.

The above case studies show that forgeries and producing fake documents is common to avail facilities of JJSO.

Summary

Based on the above discussions, it can be established that Police suppress the fact that the accused is a juvenile. First reason for not determining proper age is lack of awareness and knowledge by the police. The police culture is not to let any accused get any form of relaxation from the court (e.g. bail). Police and Prosecutors make haste and in the haste they ignore many facts, e.g. proper age determination and showing juvenile as adult.

Prosecution is unaware of its due role. It is still under the influence of the police. It lets the lacunae unresolved. Police do not submit *Chalan* on time. It may be a delaying tactic by the police or administrative lacuna. It is generally believed that from the police's perspective, at least at the police station level, the accused is a criminal. Both Courts and the police ignore about the handcuffs of a juvenile.

The major issue in granting bail is the determination of age. Unless the age is determined, bail cannot be granted. *Nobody knows where to keep the juvenile*. Age determination takes a very long period in common cases. Solution is CJCC (see below). If age is properly determined, the issue of bail is resolved immediately.

Usually the juveniles don't have a lawyer. The Pro-Bono lawyers don't take interest in the case. There is no or very low presence of NGOs in the courts for juvenile cases.

Juvenile accused are presented as adults in the court. The Police have no soft corner for juvenility of an offender. SHO does not point out the lacunae in the *Chalan* of his Investigation Officer. The Prosecution presents the police information to the court without questioning. Both the police and the prosecution put their burden on the shoulders of the court. A normal case, e.g. of narcotics, takes more than three (3) years in the courts to get concluded. Juvenile offenders deny charges against them even when all the evidence are against them. Law is not clear on matters related to joint trial. No one is clear on the issue of separate trial. There is no juvenile court. Magisterial courts and ATC courts have been declared as juvenile courts as well. The abuse of JJSO provisions is common.

In final analysis, there is no difference in juvenile an adult courts in Pakistan.

CHAPTER VII:

Correctional Services' Perspective on the Juvenile Justice in Khyber Pakhtunkhwa

CHAPTER VII: CORRECTIONAL SERVICES' PERSPECTIVE ON THE JUVENILE JUSTICE IN KHYBER PAKHTUNKHWA\

The previous chapters discussed the issue of the juvenile justice from police, prosecution and court's perspective. This is the last chapter of analysis. It combines two components of the juvenile justice system namely prison and probation. This chapter discusses institutional treatment of juvenile in Khyber Pakhtunkhwa. This chapter describes the historical background of the probation system in Pakistan along with its present structure and functions. It specifically explores the problems faced by probation officers in juvenile cases. In doing so, the chapter provides qualitative data collected through in-depth interviews during data collection phase of this research.

7.1 Introduction

Every society in the world prohibits a wide array of behaviours. Such behaviours are termed deviant behaviours. For prohibiting such behaviours, society establishes laws. Society expects its members to follow those laws and not indulge in "unlawful" activities. The laws define behaviours which are prohibited and the response (penalty) associated/attached with those kinds of behaviours¹. Imprisonment and Probation are some of the responses towards such a deviant or unlawful behaviour².

The philosophy of punishment underlies an attempt by the society to reform the criminal and prohibit such behaviors in the future. However, when to punish an offender and how to punish them is a complicated task to practice. The most common forms of punishment are imprisonment, fine, corporal punishment, community services and the extreme

¹ Basharat Hussain. (2009). *Social Reintegration of Offenders: The Role of Probation Service in North West Frontier Province, Pakistan*. PhD Thesis. University of Hull, UK. P.12.

² Other forms of punishment in Pakistan includes Death penalty, Life imprisonment, Imprisonment : imprisonment with hard labour (upto 14 years maximum, imprisonment without hard labour, Banishment: imprisonment in maximum security prison for 7 years, Fine, Probation, Hadood punishments: Stoning, lashing, amputation of hands

punishment—the death penalty. When it comes to punishment of juvenile offenders, the matter of sentencing becomes more complicated. It is, simultaneously, a matter of child protection and criminal justice. On the one hand, the efforts are made for the welfare and protection of juvenile while on the other hand it is also ensured to prohibit his/her future offending behaviour.

In Pakistan, there are no clear guidelines for juvenile sentencing in the law. However, it is clearly mentioned that the juveniles cannot be sentenced to death in any case. While deciding on sentence, the judges consider the seriousness of the offence and the age of the juvenile offender into consideration. These two are the most significant factors influencing the decision of the judges. The two major forms of punishment are imprisonment and probation. In the section that follows, I will discuss both of them separately.

7.2 Juveniles in Prison

The concept of prison that prevails in the modern world was absent in ancient India (including the present day Pakistan). The early prisons were only a place of detention until trial and judgment. The most frequently used forms of punishment were corporal punishment including branding, hanging, mutilation, and death. Overall, imprisonment occupied an ordinary place in ancient Indian penal system. There were few, if any, prisons at the time³. According to Amarendra Mohanty and Narayan Hazary⁴, the penal system in medieval period remained much the same. The Muslim rulers very rarely tempted with day to day administration of justice. Most frequently used forms of punishment were *had*, *tazir*, *qisas*, and *tashir*. These punishments include fines and confiscations, forfeiture of rank and title, subjecting to humiliation, banishment,

³ Amarendra Mohanty and Narayan Hazary. (1990). Indian Prison Systems. New Delhi: APH Publishers.p21.

⁴ Ibid

whipping, mutilation of offending limb, and execution etc. Imprisonment, again, was not a regular form of punishment. During Muslim period in Indian subcontinent, there were three 'noble' prisons. One was at Gawalyar, second at Rathombore, and the third was at Rohtas. Usually, the prisoners would get released on some 'happy occasion', e.g. birth of a prince, or getting healthy from a disease by a king, prince, or princess etc. For example, upon the birth of Prince Saleem, Emperor Akbar ordered that all the prisoners in the imperial dominions to be released⁵.

In sum, it can be said that in pre-British India, there were no prisons in the modern sense. Likewise, there was no separate prison service. Lastly, there were no rules for prison administration.

The present system of prisons was introduced by Britons in 18th century, 1st in Calcutta in 1779⁶. Later on, it was uniformly applied to the entire India from 1860s onward. Pakistan inherited 41 prisons from British colonials. Currently, there are 99 prisons in Pakistan⁷. During colonial period, the prisoners were put to in fetters as well as hard labour. They were frequently whipped. There were strict dietary restrictions. Prisons were operated under a military style administration. Despite many reform movements, the picture did not changed since independence.

The prison conditions throughout Pakistan seems to have generated a considerable attention and apprehension of reformers. The descriptions are not encouraging though. Some call them 'factories of criminals' while others term them 'a sweltering hell'⁸. Still

⁵ Amarendra Mohanty and Narayan Hazary. (1990). *Op.Cit.*.p22.

⁶ G. R. Madan. (1981). *Indian Social Problems*. Vol.1. New Delhi: Allied.p.126

⁷ Muhammad Masood Khan. (July 2010). Prison System in Pakistan. in *Pakistan Journal of Criminology*, 2(3), pp.35-50

⁸ Abubakar Siddique. (July 30, 2013). Pakistani Prison A 'Sweltering Hell'. in *Radio Free Europe Radio Library*. Retrieved December 12, 2014 from <http://www.rferl.org/content/pakistan-prison-sweltering-hell/25061513.html>

others call them 'filthy'⁹. In sum, it can easily be said that prisons are no good place for anyone, and particularly children.

International and national laws, around the world, set clear guidelines on incarceration of juveniles. Separation of juveniles from adults is becoming a global norm. However, some form of incarceration of children in adult prisons is found to occur internationally¹⁰. In Florida, for example, there were 465 children between age 13 to 17 on October 1, 1999¹¹. In Pakistan, there were 1498 juveniles in prisons as of 2013¹².

Legally, a juvenile can neither be kept in any police/judicial lock-up nor in a jail. As stated in Section 10(3) of JJSO 2000 "[a child] shall not under any circumstances be kept in a police station or jail in such cases." The ground realities are very different. Children of very tender age are regularly being kept in jails.

"Approximately, 150 to 160 juveniles are always present in central jail Peshawar. But there are two kind of juveniles in prison. Under Trial and Convicted. 80% of them are under trial while only 20 % are convicted"¹³.

As Table 7.1 shows more than three thousand children have been to prisons during the last ten years. The alarming fact is that it does not involve only the convicted offenders but a large number of juvenile prison population is of under-trial juveniles. The under-trial are those whose cases are still pending in the court and who have not been convicted

⁹ By Atta-ur-Rehman Tareen. (Feb 08, 2014). Prisoners speak of overcrowded, filthy jail conditions. in *Associated Press of Pakistan*, Retrieved December 12, 2014 from

http://www.app.com.pk/en/_index.php?option=com_content&task=view&id=224719&Itemid=57

¹⁰ K. Tomasevski. (1986). *Children in Adult Prisons - An International Perspective*. New York: National Criminal Justice Reference Services. Retrieved December 12, 2014 from

<https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=101790>

¹¹ Paolo G. Annino. (2001). *Children in Florida Adult Prisons: A Call for a Moratorium*. Retrieved December 12, 2014 from

http://heinonline.org/HOL/LandingPage?handle=hein_journals/flsuir28&div=23&id=&page=

¹² SPARC. (2014). *Juvenile Justice*. in *Situation of Pakistan's Children 2013*. Islamabad: Society for the Protection of the Rights of the Child.

¹³ Interview with Jahanzeb Khan, Programme Manager (Khyber Pakhtunkhwa), SPARC, Aug 2014

as offenders. Still almost 80% juvenile prison population is of under-trial children or on remand¹⁴. One juvenile shared his story and said;

"I was taken to Kohat prison in November and my 1st court appearance was in February, i.e. after five months of being in prison"¹⁵.

Legally, police is bound to present the juvenile before the court within 24 hours of his/her arrest. But in this case, it took five months for the police to present the juvenile before the court.

In cases where the judge decides to place the juvenile in long term detention, such juveniles are sent to such facilities where there are exclusive juvenile sections. These prison facilities include Haripur and Bannu prisons in Khyber Pakhtunkhwa.

Table 7.1: Juvenile Population in Prison of Khyber Pakhtunkhwa from 2002 to 2012¹⁶

Year	Total	Under Trial	Convicted	%age of Under Trail
2002	527	446	81	85%
2003	477	419	58	88%
2004	256	201	55	79%
2005	341	275	66	81%
2006	318	281	37	88%
2007	243	207	36	85%
2008	269	228	41	85%
2009	191	171	20	90%
2010	208	196	12	94%
2011	241	211	30	88%
2012	233	196	37	84%
TOTAL	3304	2831	473	86%

Source: SPARC. (2012). *State of Pakistan's Children 2012*. Islamabad: Society for the Protection of the Rights of the Child

It is no wonder that such a large number of children are in prison. The reason is the lack of institutional facilities or welfare institutions who can keep the child offender away

¹⁴ SPARC. (2014). Juvenile Justice. in *Situation of Pakistan's Children 2013*. Islamabad: Society for the Protection of the Rights of the Child.

¹⁵ Interview with Jahanzeb Khan (not original name) juvenile, July 2013: Kohat

¹⁶ SPARC. (2013). *State of Pakistan's Children 2012*. Islamabad. Society for the Protection of the Rights of the Child.

from prison environment. In Peshawar, the police department established such a facility for children with the collaboration of Ministry of Human Rights and Civil society. It was named Police Child Protection Center (PCPC). PCPC had a child friendly environment. It was run by a Center Manager, an officer from the Ministry of Human Rights, who was assisted by a Legal officer, a Psychologist, police staff including ladies police. All the police stations in the Capital city of Peshawar were in liaison with PCPC. Whenever any child was reported to a police station, the police station would just give a call to PCPC. The PCPC police mobile van would come to the police station and take the juvenile to PCPC. All other matters of the juvenile were to be run from PCPC. It was acknowledged by the court as well. It remained functional for three (3) years (from 2009-2012). However, this facility is also dysfunctional now.

What happens to juveniles in prison is a separate story. In the section to follow, I will discuss probation with respect to juveniles in Pakistan.

7.3 The Juvenile Justice and Probation System in Pakistan

The most widely used sentencing by the juvenile court judges in Khyber Pakhtunkhwa is probation. Imprisonment is used in cases of heinous offences.

The Probation is the 4th essential component of criminal justice system throughout the world. Probation, as the word indicates, is the suspension of sentence with liberty on the conditions of good behaviour under supervision¹⁷. The Probation system has been devised by the society for the rehabilitation of a juvenile offender, as well as an adult offender. The basic philosophy behind probation is diversion.

Diversion is the process of limiting the amount of involvement a juvenile has with the formal organization and procedures of the criminal and the juvenile justice system.

¹⁷ "Probation" (1984). *The Pocket Oxford Dictionary*. New York: Oxford University Press.

Diversion is and has been central objective of the juvenile justice throughout the world. Diversion is based on the belief that if a juvenile is labeled as 'delinquent' or 'bad' he or she will be permanently stigmatized. To avoid long-term negative consequences for juveniles, diversion programmes are designed to avoid labeling and work with juveniles to rehabilitate them¹⁸.

Today, with continuing emphasis on community-based services for juveniles throughout the world, it is recognized that not all juveniles who are adjudicated delinquent belong in institutions. Probation is one method of court disposition that the juvenile justice system may impose when the youth is determined to be delinquent¹⁹.

Probation is a sentence not involving confinement that imposes conditions. The sentencing court retains authority to supervise, modify the conditions, and resentence the offender if conditions are violated. Probation is increasingly being linked with a short sentence to jail, followed by a period of probation.

According to Legal Dictionary, probation is "*A sentence whereby a convict is released from confinement but is still under court supervision; a testing or a trial period. Probation can be given in lieu of a prison term or can suspend a prison sentence if the convict has consistently demonstrated good behavior*"²⁰.

This section is divided into two parts

- Historical background of Probation System in Indo-Pak Sub-continent
- Legal Bases of Probation System in Pakistan

¹⁸Gennaro F. Vito and Julie C. Kunselman.(2012). *Juvenile Justice Today*. New Jersey: Prentice Hall.p.228.

¹⁹ Ibid

²⁰ Probation.(2013). In *The Free Dictionary*. Retrieved July 24, 2013 from <http://legal-dictionary.thefreedictionary.com/probation>

7.3.1 Historical Background of the Probation System in Indo-Pak Sub-continent

Pakistan did not exist on the globe before 1947. It doesn't mean that the people and the land currently constituting Pakistan remained lawless or without history. Before 1947, Pakistan was part of the British India. Pakistan has a shared history with India. However, Pakistan also has significant imprints of Islamic legal and social system. Therefore, while describing the history of probation system, this section talks about probation system in undivided India.

No formal reference to probation can be found in the judgment of the law givers of ancient India, but their approach, while coming to the conclusion on deciding punishment has some essence of probation²¹. Manu, the author of 'Manusmriti' the law-code of ancient India, was of the view that punishment should be awarded after considering tendencies or inclinations of the offender as well as his antecedents²². This view is supported by other contemporary writers like Yajnyawalkya and Kutilya. Vijneshwara has maintained that punishment should be awarded after considering whether the offender is a repeater or a first offender²³. Mitrimisa also remarked that the environment under which the offence was committed should be considered before awarding punishment. If we look at the conditions considered to be important for deciding whether or not an offender be given the benefit of probation in the present criminal justice system, they are not much different. Though there was no formal system of probation in ancient India, differential punishment to different offenders for a particular offence make sense in the modern

²¹A. Madhavi and S. K. Srivastava, 1996).India: Probation System in Asia. Tokyo, Japan: UNAFEI.p.73

²²Ibid

²³Ibid

context of probation²⁴. Despite these vague references to the probation, there is no reference specifically with respect to juveniles.

Likewise, the opportunity for reformation to the offender is also found in Islamic criminal law, which has been in practice in India throughout the Muslim rule from Ghauri to Mughal period. The offences for which punishments are provided in Islamic Criminal Law fall in the category of *Hudud* (Plural of 'had' which means limit) and *Ta'zir*. In *Hudud*²⁵ the punishments are fixed by the Law-Giver (All Mighty Allah). There can be no alleviation of punishment in such offences. But in *Ta'zir*²⁶ the Judges have a wide array of corrective measures at their discretion to apply²⁷.

These are the cases where no 'had' have been provided by *Shariah*²⁸(Islamic Jurisprudence). The Judges may resort to those corrective measures which may be expedient in view of the offender's circumstances, psychology and his moral record. The Judges have been given the authority to impose more than one punishment, to commute or increase a punishment or suspend the execution of a sentence if it may be helpful in the correction of the offender²⁹.

The Judge may admonish or reprimand the offender by any words or acts which may serve the purpose of *Ta'zir*. Besides this, warning (*Al-Tahid*) which is akin to probation also falls in the category of *Ta'zir* punishments. It is given by warning the offender with punishment if the offender repeats the offence he has committed earlier, or it may be

²⁴ A Madhavi and S. K. Srivastava. *Op.Cit.*

²⁵ Hudud offences consist of adultery, fornication, false accusation, apostasy, drinking wine, theft and robbery.

²⁶ Ta'zir or penal punishment aims at correction and reform of the offender.

²⁷ Mohammad Akram. (1996). Probation of Offenders in Malaysia: A Plea. International Islamic University, Malaysia. Retrieved July 12, 2013 from <http://ilms.agc.gov.my:88/online/uploaded/cpc/270312024709frmProbation%20of%20Offenders%20in%20Malaysia%20-%20A%20Plea.pdf>

²⁸ Abdul Qader Oudah Shaheed. (nd.) Criminal Law of Islam, Vol. 1. Lahore: Adam Publishers. p.155

²⁹ Ibid.

carried out by pronouncing the sentence and postponing the execution of sentence³⁰. Since Islam emphasizes on treating minors with mercy, therefore, it can be concluded that the minor offenders may be put on probation by the judges under *tazir*. Despite this conceptual and legal space for juveniles on probation, no formal system could develop in the shape of modern probation system.

The beginning of probation in Indo-Pak Subcontinent is found in Section 562 of Code of Criminal Procedures (Cr. PC) 1898. Under this provision, courts were empowered to release first offenders on probation, if the offender satisfied the requirements regarding antecedents, age, character and extenuating and mitigating circumstances. This was the beginning of probation and led to the acceptance of a suggestion made in 1918 by the Chief Presidency Magistrate of Bombay for the creation of a Police Court (Metropolitan Magistrate Court) for minor offences and the release of offenders on executing a bond on good behaviour. Before trial, the offender was interviewed by a social service institution whose role was to find a surety if required, inquire into difficulties of the offender, to bring to light the extenuating circumstances in relation to the offence, and after trial, to follow up on the offenders who were released on bond of good behaviour. The offenders were to be supervised in such a way that they kept out of trouble. A report was to be submitted to the magistrate if the offender did not cooperate with supervision³¹.

In 1923, section 562 of Cr. PC was substantially amended to provide:

1. Release of first offender after due admonition;
2. Extension of probation period from 1 to 3 years;
3. Extension of applicability to offenders above 21 years of age; and

³⁰ Muhammad Iqbal Siddiqi. (1979). *The Penal Law of Islam*. Lahore. Adam Publishers. pp. 165—p. 166

³¹ A Madhavi and S. K. Srivastava. (1996). *India: Probation System in Asia*. Tokyo, Japan: UNAFEI. p.73-4

4. Extension of applicability to offenders punishable with imprisonment of not more than 7 years for males below 21 years; and to females of any age for all offences except those punishable by death or imprisonment for life³².

The application of these provisions was mainly restricted to first offenders, minors and women. The offenders were required to enter into a bond with or without sureties and to appear for sentence when called upon during the period decided by the court which could not exceed three years³³.

In 1930, the government of British India prepared a draft bill for introduction of probation legislation for adult offenders along the lines of British Probation of Offenders Act, 1907. In 1931 the government circulated it to the provincial governments for their opinion. Owing to many reasons, a central Probation of Offenders Act was not brought into operation at that time³⁴. Qureshi observed that due to political disturbances associated with the division of India that was the main reason why this bill could not be converted into an Act³⁵. States like Bombay, Madras, UP and Central Provinces etc. passed their own local probation offender laws some of which are

1. Punjab: Good Conduct Prisoners Probational Release Act, 1926;
2. Madhya Pradesh: Central Provinces and Berar Probation of Offenders Act, 1936;
3. Madras: Madras Probation of Offenders Act, 1937; and
4. UP: UP First Offender's Probation Act, 1938³⁶.

Out of these four, only part of the first province is in the present day Pakistan. Punjab Good Conduct Prisoners Probational Release Act, 1926 give effect to section 401 of the

³² A Madhavi and S. K. Srivastava. (1996). India: Probation System in Asia. Tokyo, Japan: UNAFEL.p.73-4

³³ Hafeez Ahmad Qureshi. (1996). Pakistan: Probation System in Asia. Tokyo, Japan: UNAFEL.p.160

³⁴ A Madhavi and S. K. Srivastava. (1996). India: Probation System in Asia. Tokyo, Japan: UNAFEL.p.73-4

³⁵ Hafeez Ahmad Qureshi. (1996). Pakistan: Probation System in Asia. Tokyo, Japan: UNAFEL.p.160

³⁶ A Madhavi and S. K. Srivastava. (1996). India: Probation System in Asia. Tokyo, Japan: UNAFEL.p.73-4

Code of Criminal Procedure, 1898. Section 401 of Cr. PC empowered the government to suspend the execution of sentence or remit the whole or any part of the punishment with or without conditions. This enactment did not embody probation methods in their regular form and only comprised of any advanced system of release on parole. It provided a valuable safeguard as well as guidance to the prisoner for his readjustment and rehabilitation³⁷.

The object of the Act was to remove offenders with definite criminal tendencies from other convicts not tainted with the same criminal characteristics and who had successfully served a proportion of their sentence. In pursuance of these objectives, a separate and independent department, the Reclamation Department, later named "Reclamation & Probation Department" was established in 1927 in the old Punjab. But this Act played its role in very limited sphere of offences and offenders, only those confine to jails. However, this experiment gave encouraging and useful results in the field of treatment of offenders and the experience gained in this field paved the way for the introduction of the probation system in independent Pakistan.

Almost thirteen years after gaining independence from Britain in 1947, the Government of Pakistan introduced a legislation on probation, namely, the Probation of Offenders Ordinance 1960/Rules 1961 which was enacted in both wings of Pakistan, i.e. East Pakistan (now known as Bangladesh) and West Pakistan (the present Pakistan) in 1961. The Probation of Offenders Ordinance 1960 is largely an amended version of the 1931 Probation Bill³⁸.

³⁷ Hafceez Ahmad Qureshi. (1996). Pakistan: Probation System in Asia. Tokyo, Japan: UNAFEI.p.160

³⁸ Basharat Hussain. (2009). *Social Reintegration of Offenders: The Role of Probation Service in North West Frontier Province, Pakistan*. PhD Thesis. University of Hull, UK. P.12.

7.3.2 Salient Features of Probation of Offenders Ordinance, 1960

The basic legal framework of the probation system currently enforced in Pakistan vests the courts of the country with the power to place suitable categories of offenders on probation instead of sending them to jail to serve a sentence. The powers of granting probation is found in the Probation of Offenders Ordinance, 1960 which is federal legislation like the Pakistan Penal Code. Under the provisions of this Ordinance, judges of the High Courts, Session Courts, Additional Session Courts and Magistrates 1st Class are empowered to place an offender on probation. Further, a magistrate not empowered to exercise powers under the probation ordinance is required to forward the case and the offender to a Magistrate 1st Class, when probation is proposed for the offender. The salient features of the Probation of Offenders Ordinance, 1960 are as follows:

1. Powers of High Court/Session Court/1st Class Magistrate to put offender on probation.
2. Probation order by court can be in original hearing/appeal/revision.
3. Court can allow conditional discharge to first offender or in offence involving sentence of two years or less under any law where:
 - i. The tenderness of age, character, physical or mental conditions or relevant antecedents of the law violator as casual and first offender;
 - ii. The nature of offence being minor/non-serious or its circumstances should be such to be discharged on probation;
 - iii. Persons involved in the offence as casual offenders due to provocation or social pressures; and
 - iv. Persons who are first offenders to be saved from effects of prison because involved in less serious crime.
4. Conditional discharge:

- i. Admonition only;
- ii. On good conduct bond with sureties up to a specified date;
- iii. Court direction to offender to behave properly;
- iv. If the conditionally discharged offender on surety does not behave then he can be awarded by the court the original sentence; and
- v. On sentence the self- bond conditional discharge to be terminated.

5. Probation Order of Court:

The court may make the probation order, instead of sentencing a person, requiring him/her to be kept under the supervision of a probation officer, in the community and reside with family on certain conditions if;

- i. A male person who commits any offence other than under Chapter VI (of offences against the state) and VII (of offences against army, Navy & Air Force), Section 216-A (penalty for harboring robbers or dacoits), 328 (Causing hurt by means of poison etc.), 312 (causing miscarriage), 386 (extortion by putting a person in fear of death or grievous hurt), 388 (extortion by threat of accusation of an offence punishable with death or imprisonment of life), 389 (putting person in fear of accusation of offence in order to commit extortion), 392 (punishment for robbery) or 397 (Dacoity or dacoity with attempt to cause death or grievous hurt), 398 (attempt to commit robbery or dacoity armed with deadly weapon), 399 (making preparation to commit dacoity³⁹), 401 (punishment for belonging to gang of thieves), 402 (assembling for the purpose of committing dacoity), 455 (lurking house-trespass for hurt, assault or wrongful

³⁹ Dacoity is an armed robbery committed by gangs in India, Pakistan and Burma

restraint), 458 (lurking house-trespass by night for hurt, assault or wrongful restraint).

- ii. A female convicted of any offence except one punishable with death sentence.

6. No probation to

- i. An habitual or professional offender;
- ii. Person involved in heinous / serious / index criminality;
- iii. Person who changes his residence while on probation; and
- iv. Proclaimed offender.

7. Probation order can be issued by a court in favour of an offender:

- i. Under supervision of a probation officer to rehabilitate him/her in a period of one to three years;
- ii. Conditional release on bond of sureties and periodic report to the probation officer and court with other conditions of residence and environmental limitations, prohibited contacts, no use of drugs and restricted social circumstances to make him/ her useful, peaceful and law abiding; and
- iii. With court discretion to order compensation on damages to the injured victim/aggrieved person as well as costs of proceedings, to the limit of fine that a court can impose in similar offence.

8. Court, whether the case comes before it for original hearing or on appeal or in revision, can pass probation order.

9. If a probationer on bond violates probation order he/she may be arrested for judicial custody and court can award original sentence or fine up to Rs. 1,000 with amount of damages/costs.

10. Court can change the terms of discharge order on probation officer's request on own motion to impose more conditions on a person on probation under a fresh bond.
11. A person discharged on admonition or probation order is not to be treated as a convicted person for any disqualification. But if a person being 18 years or above in age again is sentenced under this order he / she shall be treated as convicted.

7.3.3 Structure of Probation Department, Khyber Pakhtunkhwa

The probation services are provided through probation officers in a district. The probation officers have been appointed for 21 districts of Khyber Pakhtunkhwa. There are also separate female probation officers in the major districts like Peshawar, Mardan, Swat, Bannu, D.I. Khan, Kohat and Abbottabad. The probation officer is assisted by other administrative and support staff.

At provincial level, the probation services are administered through the Directorate of Reclamation and Probation. The Directorate is headed by the Director Reclamation and Probation, assisted by a deputy Director and other administrative staff (See Annex I for details).

7.3.4 Probation Statistics

As far August 2013, there were 21 probation officers and 7 female probation officers in Khyber Pakhtunkhwa (See Annex II on Structure and Strength of Probation department in Khyber Pakhtunkhwa). Province wise release of juveniles on probation is given in Table 7.2.

As far as probationers are concerned, there were 1816 probationers in August 2013. It means each probation officer handles almost 86 cases. The cases of juvenile and female probationers are in addition to them. There were 87 juvenile probationers in Khyber

Pakhtunkhwa, mostly in Peshawar (21) and Abbottabad (20) that makes it about 50% of all probationers. There were 47 female probationers and 6 female juvenile probationers (See Annex III for details) mostly in Peshawar and Abbottabad.

Why Peshawar and Abbottabad has a greater representation with respect to juveniles? The phenomenon can be attributed to urbanization. Both Peshawar and Abbottabad are urban places. According to many scholars, juvenile delinquency is an urban phenomenon⁴⁰.

Table 7.2: Province wise Status of Children released on Probation from 2008 to 2012

Year/Province	Punjab		Sindh		KP		Baluchistan		Total		Total
	M	F	M	F	M	F	M	F	M	F	
2008	0	0	64	0	79	0	0	0	143	0	143
2009	0	0	54	0	61	0	0	0	115	0	115
2010	84	2	105	0	52	3	0	1	241	6	247
2011	100	0	72	0	64	3	11	0	247	3	250
2012	155	6	44	0	55	4	3	0	257	10	267
Total	339	8	339	0	311	10	14	1	1003	19	1022

Source: Provincial Reclamation and Probation Departments, Government of Pakistan. c.f. *The State of Pakistan's Children 2012*, p.130

7.4 Problems of Probation Department with respect to Juveniles

7.4.1 Juvenile Arrest and Probation Officer

Before 2000, the probation officers had no role at the police station level in juvenile cases. The enactment of JJSO 2000 provided a special, but ambiguous, role to the probation officers in juvenile cases at the police station level. The law provides that the concerned probation officer shall be informed by the officer in-charge of the police

⁴⁰Douglas Evans and Jeffrey A. Butts.(2013). International Systems of Juvenile and Youth Justice. In *JJCompare: Comparing Juvenile Justice Around the World*. Retrieved November 05, 2013 from <http://jjcompare.org/>; see also Muncie, John (2006). *Repenalisation and rights: Explorations in comparative youth criminology*. *The Howard Journal*, 45(1), 42-70. Retrieved November 05, 2013 from <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2311.2006.00403.x/abstract;jsessionid=114A8EDFBC58CBE9D3F755FBF9425F96.d03t02>; and also see Fact Sheet on Juvenile Justice. (2010). UN Youth Social Policy and Development Division. Retrieved November 05, 2013 from <http://www.un.org/esa/socdev/unyin/documents/wyr11/FactSheetonYouthandJuvenileJustice.pdf>

station in order to “to obtain such information about the child and other material circumstances which may be of assistance to the juvenile Court for making inquiry”⁴¹.

However, the Probation Officers are also considered to divert the juvenile from the formal criminal justice system right from the police station level. The probation officers are well aware of their role as the provider of the soft image of the state to the juvenile offender. In other words, as the agent of diversion at police station level. A Probation Officer, it is assumed, is the protector of the rights of the juvenile on behalf of the state. In other words, the Probation Officer is to show the soft image of the state to the juvenile who breaches a law. The state is not only the *brutal* police, but it is also the *caring* probation officer. The Police show the hard image of the state to a juvenile in conflict with law. At the same time, the Probation Officer is to be informed by the Police in order to show the caring image of the state to the juvenile. Afsar ud Din (not original name) stated that

“Police arrest the juvenile but its behaviour is very harsh, because it is a force. (alak yaraee ao dabao waghera py achai) the juvenile is just frightened and intimidated). Police don’t care about his food, his health, safety, his education, and don’t even care about the future of the juvenile...It is the Probation Officer who is the protector of the Best Interest of the Child at the State Level”⁴².

On the ground, no diversion is performed at the police station level. The reasons are manifold. The police do not seem to be interested in diversion of the juvenile from the criminal justice system. It is *extremely* (emphasis added) rare for the officer in-charge of the police stations to inform the concerned probation officer, as required by the law, so as to enable him to obtain information about the circumstances in which the juvenile committed the offence. Munawar Shah (not original name) accused that

⁴¹ JJSO Section 10 (1) Where a child is arrested for commission of an offence, the officer incharge of the police station in which the child is detained shall, as soon as may be, inform....

(b) the concerned Probation Officer to enable him to obtain such information about the child and other material circumstances which may be of assistance to the juvenile Court for making inquiry.

⁴² Interview with Afsar ur Din (not original name) Probation Officer, April 2013: Mardan

"Look, the Ordinance (JJSO) says that as the police officer calls the parents/guardian upon the arrest of the juvenile, in the same way he has to call the probation officer to the police station... Practically, they don't call the probation officers. It is not in practice⁴³."

He added that

"It is mandatory that when a child is arrested for a breach of law in a police station, one copy of the FIR must be sent to the concerned Probation Officer of the district. But this is not practiced by the Police⁴⁴."

Afsar ud Din (not original name) informed that during his entire tenure, he has never been called to a police station. When the researcher asked him this question, he replied,

"No! never! Not a single call I received during my tenure. We have communicated our officer phone number in 2006 to all the police stations, but not a single call till date⁴⁵."

Here, the question arises why the police do not call the probation officers? One analysis is that the police are not aware about the probation officers. This analysis is rejected on the basis that almost all the Investigation Officers and *Moharrirs/Madad Moharris* of Khyber Pakhtunkhwa have received trainings in the juvenile justice during past 13 years (since 2000).⁴⁶ Time and again they have been informed of the probation officer and the legal provisions. Even the contact numbers were also shared with all the police stations as well.

Another analysis, which is based on probation officers perspective, looks at this behaviour of the police as corruption. From a Probation Officers perspective, the reason why the police do not inform the probation officers is because of corruption. The police are corrupt and they do not let others enter into the system. In this regard a Zia ur Rehman (not original name) accused the police and said

⁴³ Interview with Munawar Shah (not original name) Probation Officer, Dec 2012: Peshawar

⁴⁴ Interview with Munawar Shah (not original name) Probation Officer, Dec 2012: Peshawar

⁴⁵ Interview with Afsar ur Din (not original name) Probation Officer, April 2013: Mardan

⁴⁶ Pakistan Society of Criminology arranged such trainings during 2009-10 for all the Investigation Officers of the police stations along with the Moharrirs and MadadMoharris of all the police stations of the Khyber Pakhtunkhwa province. The researcher remained part of the team of trainers in those trainings. Therefore, he has the first hand knowledge regarding police awareness on probation etc.

"Actually, the police department is extremely corrupt. And you can do more corruption when you have very little number of stakeholders in your system. So, they don't let the probation officer enter the system because when he enters the system, the police won't be able to make deals with the offenders in this way or that way. You know, suppose they arrest a child in a crime, drugs, theft, pick-pocketing, wine etc. they release the child without informing the probation officer by taking bribe from him/or his family (muk muka kr lete hyn). If the probation officer is in the system, then they can't perform this muk muka thing. Therefore, they don't contact the probation officer⁴⁷."

This is interesting situation though. In the previous chapters it was the police who complained that the Probation Officers do not visit the police station. Here, on the contrary, the Probation Officers complain that the police stations do not call them. When the researcher further inquired the probation officers regarding the complaints of the police stations, their answers shed light on some deep rooted complex problems in the probation department. We shall discuss it in next section in detail.

7.4.2 Probation Officers and the Facilities to perform Duties

Lack of facilities and necessary infrastructure is another reason why the diversion cannot be performed effectively, at the police station level and other levels.

The probation department lacks the necessary facilities and infrastructure to perform their duties. Non-availability of vehicles and half-way houses/remand homes under probation officers and non-availability of the offices are three major problems related to infrastructure of the department.

The law states that no juvenile shall be kept at police station in any case (JJSO, S.10.3). The law requires the officer in-charge of the police station to call the probation officer (JJSO, S.10.1.b). It is inferred by some legal scholars that the reason why Probation officer was bound to visit the police station upon the arrest of the juvenile is to take a juvenile in his safe custody. It is the probation officer who has to look for the alternative placement for the juvenile in conflict with law. It is essential for diversion. The problem

⁴⁷ Interview with Zia ur Rehman ((not original name) Probation Officer, January 2013: Kohat

is that, where will the probation officer keep the juvenile? The probation department does not have any remand home, protection center, or halfway house, where they can keep a child under their safe custody, away from criminal justice system. Mashood Mirza, a former Ombudsman of Khyber Pakhtunkhwa and a Masters in Law on Child Rights from Neither Lands, said that

"The biggest problem is that there is no safe-custody of the child. Is there any half-way house or Borstel Institution or a Remand home where you can put that boy in safe custody of a Probation Officer? Does the Probation Officer has a Remand Home? They don't even have their own offices. Their offices have been provided to them by the Session Judges instead of their department"⁴⁸."

Nonetheless, a very good attempt was made at the Capital city of Khyber Pakhtunkhwa, Peshawar in the shape of establishing Police Child Protection Centre in 2009. Unfortunately, the PCPC was closed in 2012⁴⁹.

In the same manner, to visit a police station, a probation officer needs to travel widely in the district under his/her jurisdiction. None of the probation officers in any of the districts has a vehicle for visits to the police station. The local transport is not less than a curse in Pakistan. In local transport, it is extremely difficult to get even a seat to sit upon. People hang on the sides of the local vans to travel to their destinations. Is the probation officer, who is going to facilitate the court and police work in juvenile cases, and who is going to work in the best interest of the child, is he supposed to visit the police stations by hanging along-side the vans? For each district, the number of probation officers is very limited. It is usually only 1 for each district. However, the numbers of police stations are at odds with the number of probation officers. For example, in Peshawar, there are about 47

⁴⁸ Interview with Mashood Mirza, a former Director Ombudsman of Khyber Pakhtunkhwa and a Masters in Law on Child Rights from Neither Lands, April 2013

⁴⁹ PCPC was established under the MoU signed by the Regional Directorate of Human Rights, Peshawar, Save the Children Sweden, and Khyber Pakhtunkhwa, Police Department on July 13th, 2009. The key role was played by the Directorate of Human Rights, Conflict Resolution, and Peace Keeping, Central Police Office, Khyber Pakhtunkhwa, which was established under Standing Order No.13/2009.

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police stations while there are only three (3) probation officers including one (1) female probation officer⁵⁰. In this respect, Afsar ud Din (not original name) complained that

"If they call the probation officer, tell me how many police stations are there in a district (and how many probation officers (only 1))? For example there are 17 police stations in my district (as it is a small district). One police station is in Sheikh Maltoon (the South side of the district), the other is in Rustam (the East side of the district which is very far from my office about 50 kilometers). If I am called by the City police station, I can go easily as it is very near. However, how can I visit Rustam Police Station? How can I visit Bayzo police station, which is attached to Malakand Agency (very far away)? How can I visit Sarho Shah Police Station? We have to change four to five vehicles to reach. We can't visit these far flung police stations. We don't have any convince for this travelling⁵¹."

Zia ur Rehman (not original name), added that

"....transportation was also a big problem. Suppose one probationer is in Matani, one is in Daudzai, one is in Chamkani, now tell me this poor probation officer, will he perform his duties in the court, in the office or visit the probationers in these far flung areas, that too without transportation all day long?... The law says "to visit" but when he doesn't have his own vehicle (from the department), no driver, and no security how can he visit?⁵²"

This shows that the probation department lacks the basic facilities to function properly. The law is present, but infrastructure is absent. The law binds the police stations to call probation officers. In another way, the law binds the probation officers to visit all the police stations where a juvenile gets arrested. On the other hand, there is only one probation officer in a district. He has no convince for traveling. He has no funds for visiting the police stations. The state provided the law, but did not provide the required facilities for the implementation of the law to be implemented in letter and spirit. Similarly, the law also did not prescribe detailed Terms of Reference (TOR) or Job description of a probation officer in the police station. What does a Probation Officer is supposed to do at the police station?

⁵⁰ See Annex _____

⁵¹ Interview with Afsar ur Din (not original name) Probation Officer, April 2013: Mardan

⁵² Interview with Zia ur Rehman ((not original name) Probation Officer, January 2013: Kohat

In nut-shell, it is inferred that diversion of the juvenile cannot be performed at the police station level because the police stations do not call the probation officers. The reason is corruption. In addition, the probation officers do not visit the police stations. The reason is the lack of facilities on part of probation officers.

The root question, however, is that why the probation officers do not have their own departmental convince/vans for visits? Why the probation department does not have half-way houses? One thing that can be concluded from these observations is that welfare is not in the priority list of the state.

7.4.3 Juvenile Courts and the Probation

Courts play an important role in Probation system. It is the courts that have to decide whether the penalty should be imprisonment, or it should be probation. For probation to be practiced, the courts must be aware of the roles and responsibilities of the probation as a means for institutional treatment and rehabilitation of the offenders. A cursory look at the probation system reveals the fact that it was the justice of the courts who gave recognition to the probation system in history⁵³. In Pakistan, the situation is a little different. Here, from a probation officer's perspective, many of the court judges are very rarely aware about the presence of probation system. This has created a lot of problem for the probation department. As Irfan ullah (not original name) puts it

"Actually our courts are mostly unaware of Probation Laws. In LLB course, they don't teach Probation Law, or even JJSO isn't there in the course. For this reason, they don't know whether probation is something or not⁵⁴."

This claim is not easy to digest as there are 87 (plus 6 female) juveniles on probation in Khyber Pakhtunkhwa.. Nonetheless, the claim cannot be rejected

⁵³Gennaro F. Vito and Julie C. Kunselman.(2012). *Juvenile Justice Today*. New Jersey: Prentice Hall.pp.228-29.

⁵⁴ Interview with Irfan Ullah (not original name) Probation Officer, Nov 2012: Peshawar

at all. The problem of unawareness does prevail as well (as shall be explained in next section).

Above and beyond, there is no coordination between a juvenile court and probation office. Probation Officers has yet to gain their due worth and dignity in the eyes of the court. According to Inaam Ullah (not original name),

"There is mistrust between courts and probation. There is no coordination. The basic purpose of Criminal Justice Coordination Committee (CJCC) was to bring coordination in all the components of criminal justice system. But we lack it. Courts don't give due worth or due respect to the probation officers. Probation officers don't have their own offices. They are at the mercy of the Session Judge. At any time on a very short notices, the Session Judge can vacate their offices. This situation prevails throughout Pakistan. In this situation, how do you expect the courts to take Probation Officers on equal terms? (sawal he peda nahi hota)⁵⁵."

It is easy to infer that the probation department has a very little weight in the criminal justice system in Pakistan.

The lack of awareness of the courts about the probation system is evident from the fact that a juvenile court is required to request a probation officer for a Social Investigation Report (SIR) of a juvenile accused of an offence⁵⁶. Unfortunately, the courts very rarely ask for an SIR of an accused juvenile. Afsar ud Din (not original name) said he never received an order from the court to produce an SIR of a juvenile.

"No, I never received such an order from any court till date..... Court never consulted us in any juvenile case⁵⁷."

To analyze these findings, one must take into account the fact that the probation department in Pakistan is not under Courts. The Probation department is under the Home Department. Therefore, it isn't considered a part of the court rather it remains an ignored

⁵⁵ Interview with Irfan Ullah (not original name) Probation Officer, Nov 2012: Peshawar

⁵⁶ Ibid

⁵⁷ Interview with Afsar ur Din (not original name) Probation Officer, April 2013: Mardan

department struggling for its recognition. There is no ownership of Probation system by the courts or the police in the criminal justice system in Pakistan.

7.4.4 Probation Officers and the problem of SIR

A probation officer can produce a Social Investigation Report (SIR) of an accused juvenile, if he may wish so. However, usually, it is not practiced.

"They can produce a fabricated one. But usually probation officers don't do it. The reasons are manifold. For SIR, the Probation officer has to go to the community of the child, to his school, meet his friends and others etc. He needs travelling and other budgets. For example, my office is here in judicial complex and a case of juvenile comes from Nahaqai police station. Now to go to the village Nahaqai and produce the SIR, it needs some funding etc."⁵⁸

One of the problems identified in not producing an SIR is the lack of funding for visits etc. Why the probation department does not receive proper funding from the state? The answer can be seen in the least priority by the government to the welfare.

The other reasons include the cultural sensitivity. In Khyber Pakhtunkhwa, majority population is Pukhtun who are very sensitive in family matters. They do not welcome strangers to peep into their family affairs, or enquire about the conduct of a family member in a locality.

"There is lack of trust. When we go to a village, for example I went to a village, Ismaela in Swabi district, those people were extremely astonished (heran they) that why is this person asking regarding that child from the people? So exact and true information is very rarely given to you by the community because our society is a closed society."⁵⁹

People are strongly connected to each other in social ties. In a typical village, an incoming stranger is immediately identified in Khyber Pakhtunkhwa. The people in village

⁵⁸ Interview with Irfan Ullah (not original name) Probation Officer, Nov 2012: Peshawar

⁵⁹ Interview with Zia ur Rehman ((not original name) Probation Officer, July 2013: Buner

are all connected through common lineage etc. Asking someone about his sisters or mother etc. is usually a taboo.

"When I ask how many brothers he has, how many sisters he has, what do they do, what is their education, what is the father's occupation, whether the mother is educated or not, what is the name of the mother? Now in Pukhtun society, asking for the mother's name is considered an extreme insult⁶⁰."

7.4.5 Probation Officers and Probationers

In order to describe the relationship of probation officer and probationers, I present one case study below and will draw conclusions from it.

"When I was in Swabi, about 40 cases were referred to Probation, mostly juvenile. You know, in one case a father was complaining about his son (baap bety se tang tha), that he comes late at night, he is loafer and doesn't go to school, is spendthrift, smokes and sometimes takes chars Hasheesh. That father came to police and asked them to put his child in jail for a few days. Police accepts such a request very happily because they need cases to show their progress. The child was from village Manery (his name was Tahir). His father was working in an INGO in Islamabad. When police caught him, they charged him with 80KG of chars and he was arrested in 9CNSA case. His case moved forward. On every hearing in the court, his father also used to visit frequently. Actually, probation officer's office is within the premises of courts and the people are usually phobic of the courts. I use to bring that child and his father to my office and tried to become friendly with them. But I failed to win their trust. They wouldn't become ready to trust me. They would think that we are the people of courts and we can't be trusted. I tried to create an environment of intimacy, but that wouldn't work.

So, one misperception of probationers is that they consider us as court officials, as Magistrates. This creates a hindrance in rehabilitation⁶¹."

Following conclusions can be drawn from this case study:

1. Some parents themselves put their children into police custody in order to teach them a lesson.
2. Police readily accepts innocents as criminals.

⁶⁰ Interview with Irfan Ullah (not original name) Probation Officer, Nov 2012: Peshawar

⁶¹ Interview with Inaam Ullah (not original name) Probation Officer, April 2013: Mardan

3. Police can accuse anyone of any charge, e.g. put 80KG of Chars on an innocent boy.
4. Juveniles and parents are Phobic of the courts and the offices in such premise.
5. There is a misperception about probation officer in the mind of the accused/offenders and their parent's guardians.

Summary

This chapter discussed institutional treatment mechanism for juveniles. Legally, juveniles cannot be kept in jails but it is a regular practice. More than 80% juveniles in prison are under trial juveniles. No diversion takes place at police station level. It is assumed that the police stations do not inform the probation officers. Police do not inform the probation officer because informing the probation officer reduces the chances of corruption. Probation officers lack the essential facilities to render effective services. Probation officers have no remand home/Borstal to keep the child in safe custody. Probation officers don't have any vehicle for visits etc. Courts do not give due worth to the Probation Officers. Probation Officers are allotted offices by Session Judges who can take it any time. There is a misperception about probation officer in the mind of the accused/offenders and their parent's guardians. The courts very rarely ask the probation officer for a Social Investigation Report. Probation officers do not visit the probationers at their place of residences. Probation officers only receive visits from the probationer. A probation officer gives only 15 to 20 minutes to each probationer on every visit. Courts are mostly unaware of Probation Laws.

CHAPTER VIII:

Institutional Transplantation, Social Policy and Pakistan

CHAPTER VIII

INSTITUTIONAL TRANSPLANTATION, SOCIAL POLICY AND PAKISTAN

The discussion that took place in previous chapters reveals that there is no consensus on the juvenile justice in Khyber Pakhtunkhwa. The previous chapters present a mixed and confusing picture of the juvenile justice system. The concept of the juvenile justice as a formal criminal procedure is perceived differently by the police, prosecutors, courts, probation officers and those involved in prison. For the most part, the juvenile justice to the practitioners means no punishment for a child. This chapter begins with the concept of institutional transplantation. It then moves on to discuss Pakistan's experience of institutional transplantation. It ends with an evaluation of the juvenile justice system in the context of institutional transplantation. The present juvenile justice system in Pakistan is an example of institutional transplantation. Such institutions are promulgated not through the public consent or the parliament but through decrees and presidential ordinances against the public wishes and culture. This chapter argues that JJSO failed because it was only a formal legal institutional transplant. For the success of transplant, both formal and informal institutions need to be transplanted alike.

8.1 Institutional Transplantation

Transferring laws, policies or procedures from one administrative region to another is not a novel phenomenon. It remained prevalent throughout the history. With each conquest, the conquerors would transfer or transplant the laws, policies or other administrative procedures of their population into a new subjugated population. From the Greeks to Islamic and colonial conquests, this practice remained prevalent. However, in the post colonial period, instead of imposing laws, policies, or procedures of one nation onto another nation, borrowing has become a trend. Particularly, the newly independent

nations look towards their former rulers for guidance in the spheres of laws, procedures, and policies. An umbrella term for transfer of laws, policies, procedures or other such phenomena from one country to another country is 'institutional transplantation'.

Martin DeJong, who is a professor of Technology, Policy and Management at Delft University of Technology, Netherlands, popularized the term. 'institutional transplantation.' For him, it "refers to transfer of policies from one setting to the other."¹

For Vaneechoutte, it refers to "the borrowing of foreign institutions especially in the field of law, e.g. legal transplants". She adds that it "deals with organizational models that are introduced into a society from abroad. Be it on a voluntary basis, or imposed from above"².

Prof. Aikaterini (Katerina) Bagiati, who teaches at MIT, explains that

"Institutional transplantation is a process in which a host environment borrows an institution from another environment for the purposes of improving or enhancing the home environment. The institution is borrowed because it is deemed to work well in its native context, and the 'borrowers' believe that the institutional model will result in the desired enhancements in the new host"³.

Other alternatives for institutional transplantation are institution transfer, institutional borrowing⁴, lesson drawing⁵, policy transfer⁶, policy bandwagoning⁷, policy diffusion⁸,

¹ DeJong, M., & Mamadouh, V. (2002). Two Contrasting Perspective on Institutional Transplantation. In Mamadoah, V., DeJong, M., and Lalenis, K. (2003). *The Theory and Practice of Institutional Transplantation*. Netherlands: Kulewar Academic Publishers.

² Vaneechoutte, M.(2002). *A Review of: De Jong, M., Lalenis, K. and Mamadouh, K. (eds.) (2002). The theory and practice of institutional transplantation*. Experiences with transfer of policy institutions. Kluwer Academic Publishers.

³ Aikaterini (Katerina) Bagiati (2012). Institutional Transplantation in Education – Cultural Transfusion to a New Institution. Conference Paper presented in WEEF2012 forum held in Buenos Aires Argentina. Retrieved Sep 12, 2014 from <http://www.weef2012.edu.ar/papersFinal/show.php?doc=80>

⁴ Martin de Jong and Suzan Stoter (2009). Institutional transplantation and the Rule of law: how this interdisciplinary Method can enhance the legitimacy of international organizations. In *Erasmus Law Review*, Volume 02, Issue 03 (2009)

⁵ Rose, R. (1991) What is Lesson-Drawing?, in *Journal of Public Policy*, 11(1): 3-30.

⁶ Westney, E.D. (1987) *Imitation and Innovation: The Transfer of Western Organizational Patterns in Meiji Japan*. Cambridge MA: Harvard University Press

policy borrowing⁹, policy (or social) learning¹⁰, institutional isomorphism¹¹, emulation¹², copying¹³, policy imitation, mimesis or mimicry¹⁴, 'systematically pinching ideas'¹⁵, policy convergence¹⁶, policy mutations, mobilities and assemblages¹⁷, and policy translation¹⁸. Note that transplants can be institutions, policies, programmes, procedures, ideologies, justifications, attitudes and ideas. According to DeJong & Mamadouh, using 'institution' as a container concept for all these possible transplants is convenient¹⁹.

8.2 Conceptual Issues

8.2.1 Institutions

Institution is one of the key concepts in the 'institutional transplantation' literature. Institutions is one of those concepts that are still defined with fuzziness. According to the *Penguin Dictionary of Sociology*, institution refers to

⁹ Ikenberry, J.G. (1990) The international spread of privatisation policies: inducements, learning and policy bandwaggoning. In: E. Suleiman and J. Waterbury, (eds) *The political economy of public sector reform*. Boulder: Westview Press, 88-110.

¹⁰ Majone, G. (1991) Cross-national sources of regulatory policy making in Europe and the United States. In *Journal of public policy*, 11: 79-106.

¹¹ Robertson, D. and Waltman, J.L. (1993) The Politics of Policy Borrowing. In: Finegold, D., McFarland, L. and Richardson, W. (eds) *Something Borrowed, Something Learned?* Washington DC: The Brookings Institution Press: 21-44.

¹² May, P. (1992) Policy learning and failure. In *Journal of public policy*, 12: 331-354.

¹³ DiMaggio, P. J. and Powell, W.W. (1983) The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. In *American Sociological Review*, 48(2): 147-60.

¹⁴ Howlett, M. (2000) Beyond legalism? Policy ideas, implementation styles and emulation-based convergence in Canadian and US environmental policy. in *Journal of public policy*, 20(3): 305- 329.

¹⁵ Waltman, J.L. (1980) *Copying Other Nations' Policies*. Cambridge MA: Schenkman Publishing Company.

¹⁶ DiMaggio, P.J. and Powell, W.W. (eds) (1991) *The new institutionalism in organizational analysis*. Chicago: University of Chicago Press.

¹⁷ Schneider, A. and Ingram, H. (1988) Systematically pinching ideas: A comparative approach to policy design. In *Journal of public policy*, 8(1): 61-80.

¹⁸ Bennett, C. (1991) What is Policy Convergence and What Causes It?. In *British Journal of Political Science*, 21(2): 215-33.

¹⁹ Peck, J. and Theodore, N. (2010) *Mobilizing Policy: Models, Methods, and Mutations*. Geoforum, 41: 169-174.

²⁰ Herbert-Cheshire, L. (2003) Translating policy: Power and action in Australia's country towns. In *Sociologica Ruralis*, 43(4): 454-73.

²¹ DeJong, M., & Mamadouh, V. (2002). Two Contrasting Perspective on Institutional Transplantation. In Mamadoah, V., DeJong, M., and Lalenis, K. (2003). *The Theory and Practice of Institutional Transplantation*. Netherlands: Kulewar Academic Publishers.

"social practices that are regularly and continuously repeated, are sanctioned and maintained by social norms, and have a major significance in the social structure"²⁰."

Another dictionary, *Sage Dictionary of Sociology*, defines that institution refers to

"any pattern of behaviour which by repetition, traditional sanction and legal reinforcement acquires a degree of coercion"²¹."

For Samuel Huntington, "Institutions are stable, valued, recurring patterns of behaviour"²². Despite this fuzziness over the definition of the concept, scholars agree that "institutions arestable patterns in social interactions. Institutions are the rules of the game that structure action and signal rational behaviour"²³ Although institutions stand for stability and predictability, institutions also transform with time.

A distinction can be made between formal institutions and informal institutions. *Formal institutions* are legal rules of the game telling who is allowed (or not) or obliged (or not) to undertake what actions and what conditions. *Informal Institutions* are social practices and rituals based on underlying cultural values and norms. Formal institutions are rules according to the book while informal institutions are general patterns of behaviour. Understanding both formal and informal institutions is essential for an understanding the whole of institutional complex. In the context of institutional transplantation, the tension between formal and informal institutions comes into play²⁴.

²⁰ Nicholas Abercrombie, Stephen Hill and Bryan S. Turner (1994). *Penguin Dictionary of Sociology*. [3rd Edition]. London: Penguin Books.

²¹ Steve Bruce and Steven Yearley. (2006). *The Sage Dictionary of Sociology*. London: Sage Publications.

²² Samuel Huntington. (1965). Political Development and Political Decay. In *World Politics*. 17 (3), 386–430.

²³ North, D.C. (1990). *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press

²⁴ De Jong, W.M. (1999). *Institutional transplantation; How to adopt good transport infrastructure decision-making ideas from other countries?* Delft: Eburon.

8.2.2 Transplantation

Transplantation is very common in medical sciences. The *Encarta Dictionary 2008* defines 'transplant' to refer to "to transfer an organ or tissue from one body to another or from one place in somebody's body to another"²⁵. Usually, such transfer involves a living tissue or an organ, which is installed into another injured or ill person in order to restore its health or reduce the chances of being ill or disabled²⁶. Obviously, this is a very dangerous procedure and involves a delicate understanding of the donating and receiving body. Surgical transplantation often fails because the host body rejects the new organ or new blood.

In the same manner, the term institutional transplantation is a body analogy. It signifies the dangers in and meticulous care needed in such transplantation. It is also to be taken into consideration whether the transplant is compatible with the new host.

Still body analogies are of limited value. There is significant difference in transplanting a body organ and transplanting an institution. As DeJong & Mamadouh puts it

*"Institutional transplantation hardly involves the physical removal of persons and organizations from the donor society to the host one." It is more often a story of imitation and emulation. In addition, the borrowed institutions are much more malleable than organs; they can be transformed to fit the local circumstances*²⁷.

History has changed the shape of institutional transplantation. Previously, it was imposed by the winner over the losing nation. However, in the modern world, particularly in the wake of decolonization of the non-European world, institutional borrowing is more and more often set in motion by the people in the host society. Transplantation usually occurs from one model country to countries in need of a model (less developed countries). In

²⁵ Encarta Dictionary DVD (2002). Redmond: Microsoft Corporation.

²⁶ Maugh II, Thomas H. "Medical Transplantation." Microsoft® Encarta® 2009 [DVD]. Redmond, WA: Microsoft Corporation, 2008.

²⁷ Mamadoah, V., DeJong, M., and Lalenis, K. (2003). An Introduction to Institutional Transplantation. In *Discussion Paper Series*, 9(13): 273-292.

recent times, borrowing is very common. Coercion occurs when developing countries feel forced by international agencies, such as the IMF and the World Bank, the UN, and EU, to comply with prescribed economic and financial institutions²⁸.

8.3 Why Institutional Transplantation?

What is the motive for institutional transplantation? According to Mamadouh, DeJong, and Lalenis²⁹ the underlying idea behind transplantation of institutions is to bring improvements to the host society. Borrowing successful institutions is seen as a means to speed up development or achieve it at lower costs. Mamadouh, DeJong, and Lalenis³⁰ argue that imperials used imported institutions as a means to break local resistance. Nevertheless, they are generally also convinced that they are bringing progress (sometimes 'civilization') to the host nation. When the borrowing is locally induced, argue Mamadouh, DeJong, and Lalenis, this sense of acquiring progress is even stronger. Borrowing institutions from a successful country is seen as a means to share in that success. The success is measured in terms of military power, economic prosperity, or cultural rayonnement.

In today's globalized world, the policy makers today cannot avoid making comparisons, or 'benchmarking'. Policy makers have to look at "who is best at what topic" and "who is the most efficient or the most promising etc". Policy transfer is often less costly and less time consuming than innovation proper. It is important because self-improvement comes from looking at others, not by slavishly copying others, but by seeing where your strengths and weaknesses lie and where can one improve itself. It happens at all levels. It

²⁸ Mamadoah, V., DeJong, M., and Lalenis, K. (2003). An Introduction to Institutional Transplantation. In *Discussion Paper Series*, 9(13): 273-292.

²⁹ Mamadoah, V., DeJong, M., and Lalenis, K. (2003). An Introduction to Institutional Transplantation. In *Discussion Paper Series*, 9(13): 273-292.

³⁰ Mamadoah, V., DeJong, M., and Lalenis, K. (2003). An Introduction to Institutional Transplantation. In *Discussion Paper Series*, 9(13): 273-292.

happens for person, for organizations, for a nation. There are at least three levels of institutional transplantation (See Table 8.1):

1. The constitutional level:
2. The level of policy area:
3. The operational level:

Table 8.1 Different Domains of Institutional Transplantation

Level of Action	Formal Relations	Informal Relations
Constitutional Level (Ground Rules)	Legal System	Value Orientations
Level of Policy area (Relations between governmental bodies)	Formal Regulations	Informal Codes
Operational Level (Daily Activities)	Procedures	Roles

Source: DeJong (1999).p.214³¹

The easiest to transplant is daily procedures, the most problematic are value orientations³².

But comparing nations have and drawing lessons should be done in a way that allows for creativity of the receiver, not as a kind of automatic transfer process but one in which the receiving nation allows its own domestic actors to reinterpret input from abroad in their own way and reach their own 'balance of equilibrium.'

One way of looking at institutional development is to follow the mind-set that all nations/societies go from 'not so developed' to 'developed', i.e. there are no 'many roads' but 'one road to Rome'. However, nations have their own traditions and their particular points on which they can draw lessons from each other. In the end, every society has its own path to go. Societies should draw lessons but should not copy.

³¹ DeJong, W.M. (1999). *Institutional Transplantation: How to Adopt good transport infrastructure decision-making ideas from other countries*. Delft: Eburon.p.214

³² Mamadoah, V., DeJong, M., and Lalenis, K. (2002). *An Introduction to Institutional Transplantation*. Springer.p.23

Developing nations like Pakistan want to get a lot from a little. It is the biggest challenge in institutional transplantation to encourage the real decision makers, those who are in power, to do this transplantation process in a structured way. Often they find a general idea—such as the juvenile justice—attractive and look for who is the best in this idea—in this case CRC—and want to copy that. The policy-makers have no time to see into depth what makes these ideas successful there, and how would those ideas fit their own environment. They have no time to ponder on whether it would work here, and if so, how will it work here? The theory of ‘institutional transplantation asserts that,

“In general, institutional transfer processes target formal legal institutions. However, if the informal institutions are not transformed, or if no new body of informal practices develops around a new legal transplant, such transplants will merely be a dead letter and will not enjoy any acceptance or functionality. One could say that, by means of the legal transplant, legality has been formally safeguarded but that it has not been absorbed into the wider social environment and thus ‘institutionalised’. This lack of acceptance causes a serious legitimacy problem, and the new legal transplant and its wider administrative and cultural environment remain incongruent³³”.

Eventually, the transfer process in developing countries like Pakistan is not structured enough. The policy makers do not really know what will make transfer successful. Of course, the adoption of a foreign institution is political and that’s normal. It is not that bad at all. Introduction of JJSO is considered a political move to gain sympathies and acceptance from international institutions by Musharraf. It is normal though. However, the adoption should be done in a structured way.

8.4 Pakistan and Institutional Transplantation

The post independence history of Pakistan is a history of heavy institutional transplantation. Introduction of the juvenile justice system is one of the latest examples of it. This institutional transplantation occurred on all the three levels namely: constitutional,

³³ Martin De Jong, Konstantinos Lalenis, and Virginie Mamadouh. (2003). *The Theory and Practice of Institutional Transplantation*. Netherlands: Kulewar Academic Publishers.

policy and operational. The basic motive behind transplantation of such institutions, nonetheless, was rapid progress and development. However, public policies in the third world countries are not wholly solely determined by the domestic actors. In the section to follow, I discuss the determinants of social policy in the third world countries like Pakistan.

8.4.1 Determinants of Social Policy in the Third World

There is a multiplicity of determinants of social policy like economic factors, national defence, political factors, cultural factors, the family, international aid, international consultants, and the interest of the donors etc³⁴. I will discuss some of these as below, having special relevance to Pakistan.

First, I discuss the economic factors of social policy. Economic factors have a special effect on the nature and standard of policies development in any country and social planning is conditioned by its economic conditions in particular. The economic facts for Pakistan have been very grim since her independence in 1947 until now. A comparison of the past and present reveals that there seems to be very little or no difference in the economic field. It is the second decade of the twenty-first century and since independence, more than six decades have lapsed. The span of sixty six years is a very long time and if we compare ourselves with countries that got independence after Pakistan, a very gloomy situation comes to the fore. The social sector in particular, is in the doldrums. After sixty years, the problem of poverty is the same as it was in 1947: 32.6% population is still below the national poverty level³⁵ or

³⁴ Arthur Livingstone, 1969. *Social Policy in Developing Countries*. London: Rutledge & Kegan Paul. Pp. 66-86.

³⁵ The World Bank, 2004. *World Development Indicators 2004*; see also UNDP, *Human Development Report 2004*.

13.4% population lives below the poverty line³⁶. It is a country that owes a foreign debt to the tune of over 37 billion US dollars³⁷ and a similar amount to the domestic creditors. A sum of Rs. 296 billions, out of a budget of 1.3 trillion went into debt servicing during the year 2006³⁸. Where is all this money gone? Some claim that it is not spent on education, health and other social services rather shifted back to personal off-shore accounts by the politicians and power holders³⁹.

Secondly, Pakistan is an aid dependent country. This claim is supported by the fact that only in the year 2011, Pakistan received an amount of \$4237.5 million USD from many international agencies and developed countries including the World Bank, Japan, United Kingdom, European Union, Germany, Canada and Australia (See Table 8.2).

The international aid to the underdeveloped countries, however, is more influenced by the vested interest than by genuine needs. For many Pakistani researchers and analysts, these vested interests are geostrategic in nature⁴⁰. According to Javid and Qayyum

*"Aid inflow to Pakistan has a strong association with geo-political interest of donors."*⁴¹

³⁶CIRDAP(Center on Integrated Rural Development for Asia and the Pacific), 2006. *Rural Development Report 2005*. Dhaka: CIRDAPP.31.

³⁷ State Bank of Pakistan Report in *Daily Express* Peshawar. November 25, 2006.

³⁸ *Daily TheNews International*. Islamabad: June 6, 2006.p.1

³⁹ Azzeem Ibrahim. (2009, July). *U.S. Aid to Pakistan—U.S. Taxpayers Have Funded Pakistani Corruption*. Discussion Paper 2009-06, Belfer Center for Science and International Affairs, Harvard Kennedy School.

Retrieved August 14, 2015 from

http://belfercenter.hks.harvard.edu/publication/19490/us_aid_to_pakistanus_taxpayers_have_funded_pakistan_corruption.html

⁴⁰ Ali, (April 18, 2014). Flaws in Foreign Aid Provision. In *The Express Tribune*; Haider, M. (Feb 15, 2012). Can Pakistan Survive Without US Aid? In *Daily Dawn*

⁴¹ Javid, M., and Qayyum, A. (2011). *Foreign Aid and Growth Nexus in Pakistan: The Role of Macroeconomic Policies*. PIDE Working Papers 2011: 72. Islamabad: Pakistan Institute of Development Economics.

Table 8.2: Showing donor's share of gross Official Development Assistance (ODA) that flowed into Pakistan in 2011

Donor	Millions of Dollars	Share of Total
United States	\$ 1,276.26	30%
IDA	\$ 879.75	21%
Japan	\$ 573.32	14%
Sum of Other Small Donors (<\$15M each)	\$ 394.00	9%
United Kingdom	\$ 443.01	8%
EU Institutions	\$ 256.59	6%
Germany	\$ 157.96	5%
AsDB Special Funds	\$ 94.44	2%
Canada	\$ 87.49	2%
Australia	\$ 74.34	2%
United Arab Emirates	\$ 71.34	2%

Source: OECD Creditor Reporting System, Table DAC2a, accessed July 2013. Total includes Gross Disbursements of Official Development Assistance, All Sectors and Aid Types, and Channels, denominated in 2011 constant US \$. Note these OECD CRS figures exclude major non-DAC donors except for Kuwait and the United Arab Emirates, which are included. According to reports from the State Bank of Pakistan, in 2012 China pledged assistance (largely loans) to the amount of \$850 million.

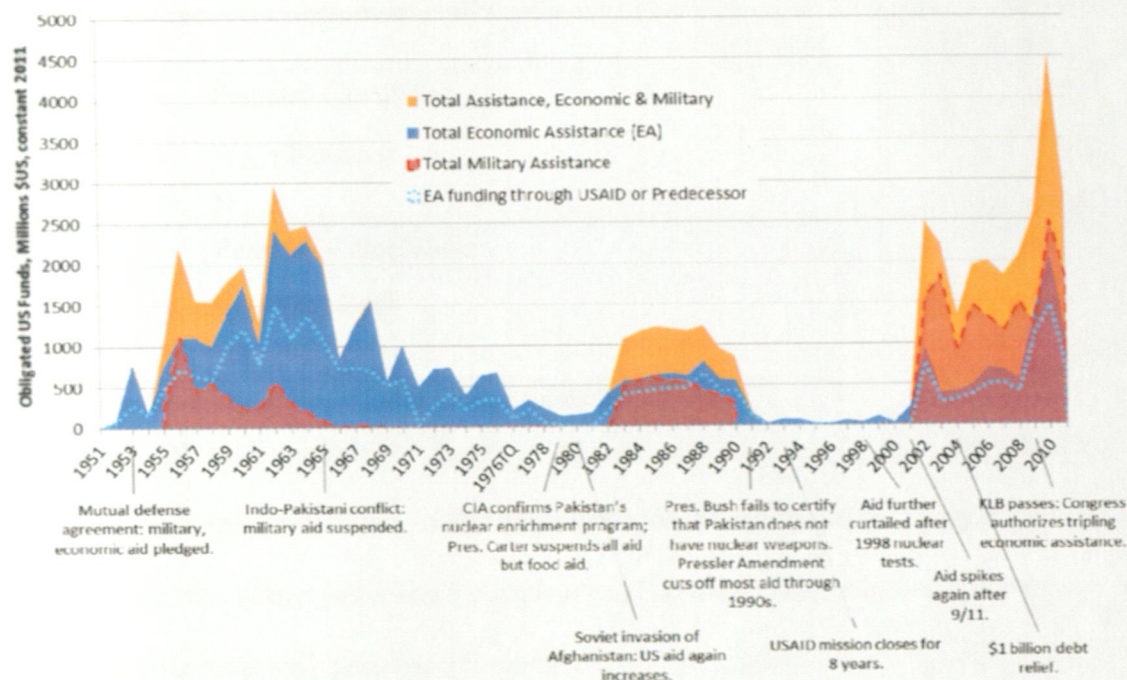
This claim is supported through analyzing US aid history to Pakistan. Wren (2011) collected the data on the aid flow of US to Pakistan since 1948. Pakistan received its first funding of \$27.2 million dollar from the World Bank (IBRD at the time) on March 27, 1952 for Railway project while the US provided \$74.25 million economic assistance⁴².

The aid is given for economic development as well as in the form of military assistance. The data trends show that there is a significant correlation between the military and economic assistance. US financial aid to Pakistan increased in 60s, decreased in 70s, increased again in 80s and decreasing in 90s. It has significantly increased since 2000s (See Figure 8.1)⁴³.

⁴²<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20035658~menuPK:56315~pagePK:36726~piPK:437378~theSitePK:29506,00.html>

⁴³ Elhai, W. (2011). Center for Global Development, 2011. *C.f.* Sixty years of US aid to Pakistan: Get the data (July 11, 2011). in *The Guardian*, Retrieved August 14, 2014 from <http://www.theguardian.com/global-development/poverty-matters/2011/jul/11/us-aid-to-pakistan#data>

Figure 8.1: History of US Economic and Military Assistance to Pakistan



Source: Elhai, W. (2011). Center for Global Development, 2011. C.f. *Sixty years of US aid to Pakistan: Get the data.* (July 11, 2011). in *The Guardian*, Retrieved August 14, 2014 from <http://www.theguardian.com/global-development/poverty-matters/2011/jul/11/us-aid-to-pakistan#data>

It is claimed by many that the aid flow in Pakistan has a strong association with geo-political interest of donating institutions⁴⁴. The amount of the aid flow is not determined by the economic needs of the people of Pakistan, but, rather, by the geostrategic policies and priorities of the donating institutions.

Table 8.3 shows that there has been, and is, a significant correlation between the US military and economic aid to Pakistan.

⁴⁴ Abbas, H. (May 18, 2014). Boon or Bane? Historical Analysis of Pakistan's Foreign Aid Inflow. In *The Express Tribune*: See Also Anwar, and Michaelowa, M.K. (2007). *The Political Economy of Foreign Aid to Pakistan*. Hamburgisches Welt-Wirtschafts-Archiv (HWWA) Hamburg Institute of International Economics. Retrieved Jan 12, 2014 from <http://ageconsearch.umn.edu/bitstream/26202/1/dp040302.pdf>

Table 8.3: showing Correlation between US Economic and Military Assistance to Pakistan Correlations

		Economic	Military
Economic	Pearson Correlation	1	.335**
	Sig. (2-tailed)		.007
	N	63	63
Military	Pearson Correlation	.335**	1
	Sig. (2-tailed)	.007	
	N	63	63

** Correlation is significant at the 0.01 level (2-tailed).

International aid in a variety of forms – capital grants, loans, food, equipment, consultative services, study tours of the bureaucrats and their travel allowances, study fellowships etc. for many years has become an indispensable, irreversible element in our national planning and politics. Increasingly, the provision of aid is always with some strings, often as a condition for seeking assistance.

The juvenile justice system that is now being practiced in Pakistan, is an example of how poor countries succumb to the lucrative aid and political pressure of the western countries. The UN Committee on the Rights of the Child continuously puts pressures on Pakistan to take “measures to bring domestic legislation into conformity with the Convention”⁴⁵.

This is not the only case of political and economic subservience. The recent examples are the stoppage of death penalty by the European Union who threatened to stop aid if Pakistan continued with it. An official of the European Union Parliament said:

⁴⁵ UN Committee on the Rights of the Child (CRC), *Consideration of reports submitted by States parties under article 44 of the Convention : Convention on the Rights of the Child : 3rd and 4th periodic reports of States parties due in 2007 : Pakistan*, 19 March 2009, CRC/C/PAK/3-4, Retrieved March 12, 2014 from <http://www.refworld.org/docid/4d6f69ab2.html>

“If Pakistan wants to qualify for the GSP plus plan then it will have to stop the execution of prisoners on death row⁴⁶.”

In the same manner, Head of European Parliament Sub-Committee on Human Rights Ana Gomes said:

“What we want is that the capital punishment should not be awarded⁴⁷.”

Consequently, since 2006, no death penalty is awarded to any killer and as a result, the murderers are languishing in the prisons while the courts do not accept the government pleas. Though the present government announced that it would not extend the moratorium but it was reported in *the Express Tribune* that before presenting a formal request for seeking duty free access to EU, Prime Minister Nawaz Sharif directed the interior ministry to halt all executions till further orders⁴⁸.

The contracting of the educational curriculum in Khyber Pukhtunkhwa is the latest example. The provincial government, without taking in confidence the public or even the sitting provincial parliament, assigned the task to DFID of UK which sublet it to some unknown Non-Government Organisations (NGOs) which has created a law and order situation in the province. The literacy rate is already the lowest in the province particularly in the terrorism affected tribal areas, the new situation will further add fuel to the fire and people will not send their children for schooling as the very name NGO is considered as anti-Islam and anti-Pakistan phenomenon. The main reason of this was that

⁴⁶ Gishkori, Z. & Rana, S. (August 28, 2013). Capital punishment: EU cautions against lifting moratorium Published. In *Daily Express Tribune*. Retrieved Oct 18, 2014 from <http://tribune.com.pk/story/596285/capital-punishment-eu-cautions-against-lifting-moratorium/>

⁴⁷ Ibid

⁴⁸ Ibid

the UK government will bear the cost of the project which means the bread and butter of the politicians.

Lastly, the interest of the donor also counts a lot in determining social policies in Pakistani context. There is extreme interference from the donors in various welfare fields notably in education, women health, social welfare and training of the officers etc. Should aid donors be considered as legitimately involved in determination of the social policies? What are the risks of interference in decisions that rightly belong to, and indeed may only endure if made by, the people of the country concerned? Again, the donors send their own consultants. The consultant is a person who has a triple allegiance; to the agency he is serving, to the country he is advising and to the country which has nurtured his ideas and experience. In many cases the consultant is a person whose educational accomplishment, social conditioning and professional or technical expertise has stemmed from a highly industrialized, technologically advanced and highly urbanized society. How far such a person is capable of examining his own culture of social and professional preoccupations in determining what part of his experience may be relevant to the needs of a very different type of society? The answer can be that he can never achieve this high degree of perception about himself and his mission⁴⁹.

The three components of policy determination as discussed above have close relevance to Pakistani contemporary conditions and as such, the laws are also altered for a very cheap or no return.

The above discussion presents a puzzled picture. Whether the social policies are domestically induced or they are imposed by the donors? A usual answer is that the policies in the third world are donor imposed policies. The third world countries like

⁴⁹ Arthur Livingston (1969) *Social policy in Developing Countries* 9(London: Routledge and Kegan Paul),pp.66-82.

Pakistan initiates new institutions by transplanting or borrowing the institutions from donor countries. Still, does this mean institutional borrowing should be stopped at all? The theory of institutional transplantation asserts that something still can be done about these problems. Legitimacy issues of international organizations/donor countries and congruence between the policies can be brought between the donating and the receiving country. The next section identifies how juvenile justice system fared as a transplant in Pakistan.

8.5 Evaluating the Juvenile Justice System in Pakistan

The concept and philosophy of juvenile justice did not emerge in the same family of nations from which Pakistan belong. Pakistan belongs to less developed Asian countries that include Pakistan, Taiwan, Thailand, Hong Kong, India, Philippines, Singapore⁵⁰. Legally, Pakistan is a hybrid nation. Culturally, Pakistan also belongs to endogamic community family of nations that include Arab/Ottoman/Islamic cluster including Turkey, Middle East, North Africa and Islamic republics of former Soviet Union⁵¹.

Resultantly, the idea of juvenile justice system, as understood and practiced in other parts of the world including USA, UK, Australia and Nordic world, did not gain the same ground in Pakistan. There is a significant gap in the juvenile justice system in theory and in Practice in Pakistan.

This research found that the law-in-the-books did not have any real relationship with what presently happens in police stations, the courts, probation services, and prison settings. The problems of the juvenile justice system, basically, represent a failure in the institutional transplantation of ideas and systems that have not worked in the Pakistani

⁵⁰ Geert Hofstede. (1995) [1991]: *Allemaal andersdenkenden. Omgaan met cultuurverschillen*, Amsterdam: Contact.

⁵¹ Todd, E. (1998). *L'illusion économique; Essai sur la stagnation des sociétés développées*. Paris: Gallimard. In Lalinis, K., DeJong, M., and Mamadouh, V. (2002). *Op.Cit.*

context. This failure in the institutional transplantation of the juvenile justice created many gaps in theory and practice of the juvenile justice system in Pakistan. In the list to follow, I identify twelve (12) gaps that resulted in theory and practice of the juvenile justice system in Pakistan.

1. In theory, a child cannot be handcuff or put in fetters. In practice, it is very common. The police regularly handcuff the juvenile even in the premise of the courts (See Chapter IV, V, & VI).
2. In theory, the juvenile court shall ensure that the juvenile trial is not a public trial, i.e. there should be no irrelevant persons in the court. In practice, however, the court cannot ensure privacy (See Chapter VI).
3. In theory, the child is a person who is below 18 years of age. In practice, a child is a person who does not look, from physical appearance, an adult. Social class also plays a significant role whether a person of tender age will get benefited from the juvenile justice system. Police suppress the fact that the accused is a juvenile unless the accused is from the upper ladder of social class (See Chapter IV).
4. In theory, the court shall be proactive in determining the exact age of the child. In practice, the court usually does not bother to determine the age of the child who has not taken the plea. It is the child or his lawyer who applies for being a juvenile (See Chapter V).
5. In theory, state shall provide legal aid to the child. In practice, there is no lawyer for providing legal aid to the child by the state. Usually the juveniles do not have a lawyer. The Pro-Bono lawyers don't take interest in the case. Similarly, there is no or very low presence of NGOs in the courts for juvenile cases (See Chapter V&VI).

6. In theory, a child cannot be kept in prison/jail. In practice, there is a significant majority of juveniles in the prison (See Chapter VI).
7. In theory, an under-trial juvenile shall not be kept in jail/prison. In practice, however, 60 to 70% juveniles in prison are under trial (See Chapter VI).
8. In theory, police shall not use physical force or corporal punishment in juvenile cases. In practice, beating is regularly employed. Although, Police deny allegation regarding beating the juveniles, in practice, police use brutal beating very frequently (See Chapter IV).
9. In theory, the police shall move every case to the prosecution and courts. In practice, Police usually resolve a juvenile's case within the police station informally (See Chapter IV).
10. In theory, police shall inform the probation officer upon the arrest of a juvenile. In addition, the probation officer has to visit the police station if informed. In practice, however, the police rarely informs the probation officer and the probation officer also rarely visit the police station (See Chapter IV).
11. In theory, prosecution plays the key role in the juvenile justice system. There is a significant difference in the trial of adult and juvenile. In practice, on the other hand, there is no difference in juvenile and adult trial. Prosecutor has no role in juvenile diversion (See Chapter V).
12. In theory, the accused is innocent unless proven guilty. In practice, from the police's perspective, at least at the police station level, the accused is a criminal (See Chapter VI).

In the case of juvenile justice, the formal legal institution was transplanted through JJSO 2000. However, a new body of informal practices, values and norms—that are essential

elements for a successful transplant⁵²—did not develop around this new legal transplant. With the promulgation of JJSO 2000, the legality of the juvenile justice was formally safeguarded but it has not been absorbed into the wider social environment and the criminal justice system. In short, it could not be ‘institutionalized’ in Pakistan. This lack of acceptance in the wider social structure created legitimacy problem, thus juvenile justice system and its administrative and cultural environment remained incongruent.

Summary

This chapter explained why the juvenile justice evolved in its present shape in Pakistan. It tried to answer why there is a mis-match in theory and practice of the juvenile justice. The chapter was based upon the concept of institutional transformation which is transfer of institutions from one place to another. The underlying motive in institutional transformation is progress. International aid for welfare and child protection including the juvenile justice are seen as a source of corruption and personal gains in Pakistan. For the most part, welfare policies are not domestically induced. The philosophical base of such policies is often international documents or standards that leaves a significant gap in theory and practice of welfare policies. The juvenile justice system represents a failure in institutional transplantation. It is because it was only a formal legal institutional transplant while the informal institutional transplant was not taken care of. It leaves a significant gap for interpretation and internalization of the system by the stakeholders.

⁵² Martin De Jong, Konstantinos Lalenis, and Virginie Mamadouh. (2003). *Op.Cit.*

CHAPTER IX:
SUMMARY AND WAY FORWARD

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In the previous chapter, it was discussed that the juvenile justice system represents a failure in the institutional transplantation or policy transfer. This is the last chapter that summarizes the entire thesis. It also presents a way forward for Pakistan.

9.1 Summary

I started this journey with the idea of the juvenile justice system in mind and was very much optimistic about the role the JJSO plays in the protection of the child right who are in conflict with law. I was of the opinion that JJSO is the panacea which is the cure of all the ills the children commit or made to commit to annoy the elders as well as the laws of any state. This was just a mist of glories and soon realized that what JJSO is meant for, is not applied in Pakistan. The juvenile justice is part of the larger criminal justice system and social welfare/child welfare institutions have little say, if any, in this matter. The existing institutional structures are unable to adapt to the requirements of JJSO. There is a huge gap between the law in books and the ground realities. It is also abused by some for their heinous motives.

The focus was on the children in the juvenile justice system. The objective was also to find out the problems in the implementation of the Law for juveniles, i.e. the Juvenile Justice System Ordinance, 2000. In addition to this, it was also targeted to find out the strategies adopted by the criminal justice community for dealing with juvenile cases in the absence of proper institutional-structural arrangements. This research provides qualitative answers to major questions asked in Chapter II (see Annex—1).

The Juvenile justice system ordinance 2000 is least effective in protecting the rights of children involved in criminal justice process. The system is of little utility in rehabilitation of juvenile offenders. A juvenile, to police, means a child who has committed a crime but won't get any punishment. To prosecution, juvenile means just a separate trial. There is no difference in juvenile and adult trial. Juvenile case means different things for different judges. Some are concerned more while others least. For the most part, definition of a child does not go beyond 16 years at maximum.

After a thorough analysis of the field data collected through interview with five components of the juvenile justice system in Khyber Pakhtunkhwa namely police, prosecution, courts, probation, and prison officials (and juveniles who have been to prison), it is concluded that there is a significant gap between the juvenile justice theory and practices in Pakistan. It means different things to different components of the criminal justice process. Police is confused where to keep a juvenile accused of an offence. Age determination is one of the most significant and most controversial issues in the juvenile justice system in Pakistan. Social class plays a significant role in determining one's age whether juvenile or not juvenile. Police is regularly blamed for its harsher treatment of juveniles. The Police however deny allegation regarding beating the juveniles. In practice, police use brutal beating very frequently.

In the same manner, legally, every case must be forwarded to prosecution and courts. In case of juveniles, police however, use significant discretionary powers. Police usually resolve a juvenile's case within the police station informally. Police practices verbal warning in most of juvenile cases. This warning needs a legal status. Further, the police practice of deciding the juvenile case at police station level is not a bad practice in its nature. This practice does

not need to be abolished. Rather, it can also be streamlined with proper criminal justice system.

As far as the probation is concerned, the Probation officer has been given a key role in rehabilitation of juvenile and protection of the rights of the juvenile in the process. Probation officer's role begins right at the police station level and moves on throughout the process. However, Probation Officers don't often visit the police station owing to an extremely low number of Probation Officers in a district.

Age determination is one of the most significant and the most controversial factors in the juvenile justice. The entire system rests upon the definition of whether a person is a child or not. There is no immediate mechanism to determine the age on the spot or on the same day. Police usually use physical appearance as a measure of age. Medical Report takes more than 10 days to complete. Status of accused remains undefined during that period.

If police do not determine the exact age, it is the responsibility of the court magistrates to raise the question of age. The fact is, Magistrates rarely, if ever, raise the question of age of an accused who is shown as adult by the police.

Prosecution Institution is considered to be the key to the juvenile justice system in Pakistan. Prosecutor has no role in juvenile diversion. This component does not have updated awareness regarding provisions of JJSO. The work of prosecution is to evaluate the evidence provided by the police. Contrary to this reality, prosecution department is still under the heavy influence of police department.

It is obvious from Chapters IV, V, VI and VIII that the juvenile justice system is in troubles in Pakistan. It is neither understood nor practiced in its true letter and spirit. Chapter VIII

suggests the reason for this is that the idea of the juvenile justice did not emerge in the same family of nations from which Pakistan belongs. Therefore, this institutional transplant is so problematic. What should be done then?

9.2 What is the Way Forward?

What is the way forward for Pakistan? Should Pakistan leave the children caught in the process of criminal justice as they are? Should the system be abolished at once? What can Pakistan do?

One answer to these questions is that donors make us succumb to their demands through such policy transfers; that donors have their own interests; that donors want to *westernize* Pakistan; that donors want to implement their own agenda over poor countries including Pakistan; and that one should not succumb to donor countries. In short, the logical way forward would be to quite succumbing to the hegemonic policies of international agencies and abolish the existing juvenile justice system at all. Let us try an indigenous system based on our cultural practices and traditions. "Back to the tradition" is the slogan of this way forward. But, moving backward is not the trend today. Is it the right response to move 'back to the tradition'? How will the core issues of bribery, corruption, injustice and incompetence be addressed by this recommended path of action?

Another, more viable option would be to let's try transplant differently. As discussed in previous chapter, in today's globalized world, policy makers cannot avoid policy transfer or benchmarking. Policy transfer is often more cost effective and less time consuming than innovation proper. This way forward ask that in a global political, social and economic environment, is turning back the clock the answer, or is forging a new synthesis of 'old' and

'new' ideas and practices? In the area of juvenile justice, this is precisely what 'restorative justice' has done in some jurisdictions.

There is a stronger need for indigenous legislation on the juvenile justice. For it is through the law that we can affect all the components of criminal justice. Pakistan can draw lessons from best practices of successful nations in the juvenile justice—try another transplant. Introducing best practices in a structured way, so that they fit this society, can improve the success rate of the juvenile justice system. The restorative justice model (see Chapter II) is the more viable option for Pakistan. The restorative justice model in Pakistan might draw lessons from *Jargah* practices (see Chapter III) and include them into the new juvenile justice system.

As this research showed, transplanting the idea of the juvenile justice system without considering the cultural context is extremely problematic to implement and is of very little practical utility. Such forced "westernisation" (to use the words of W. Easterly, a former World Bank economist) often has negative rather than positive consequences, since the formal and informal rules of the game are *incongruent*.¹

¹ W. Easterly, *The White Man's Burden: Why The West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (London/New York, Penguin Books 2006). In Martin de Jong and Suzan Stoter (2009). Institutional transplantation and the Rule of law: how this interdisciplinary Method can enhance the legitimacy of international organizations. In *Erasmus Law Review*, Volume 02, Issue 03 (2009)

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Chapter—IX

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MAJOR QUESTIONS OF IN-DEPTH INTERVIEW

Are the rights of the interviewee as outlined in the protocol as provided by the IRB
in Kijana fulfilled?

Is the research being done in the province of Ontario as outlined in the protocol
and not being done back home in the researcher's country?

Annexure

What is the purpose of the research and how is it being conducted?

What are the objectives of the research and how are they being achieved?

What are the risks and benefits of the research and how are they being managed?

What are the procedures for the research and how are they being followed?

What are the results of the research and how are they being used?

What are the conclusions of the research and how are they being drawn?

What are the recommendations of the research and how are they being implemented?

What are the acknowledgements of the research and how are they being given?

ANNEX—I

MAJOR QUESTIONS OF IN-DEPTH INTERVIEW

The major questions about the system were:

1. Are the rights of the juvenile in conflict with law protected as provided by the law in Khyber Pakhtunkhwa?
2. Is the juvenile justice system in the province effective in rehabilitating offenders and re-integrating them back into their communities?
3. What is the meaning of juvenile in the criminal justice system?
4. Who should be considered a juvenile in the criminal justice system?
5. What are the problems faced by various Stakeholders of the criminal justice system (Police, Prosecution, Court, Probation, and Prison) in juvenile cases in the province?
6. What are the reasons—political, historical, legal or socio-cultural—why juvenile justice system in Khyber Pakhtunkhwa, has taken the present form?

The major questions regarding police were the following:

1. How police deal with juvenile offender at police station level?
2. What are the legal issues for the police at police station level?
3. How does the police determine the age of the juvenile?
4. What is the police perception of juvenile criminals?
5. How strong is the link/Coordination between police, prosecution and probation?
6. What is the police perspective on the lack of effectiveness of the juvenile justice system in Khyber Pakhtunkhwa?

Likewise, the research attempts to find out answer to the following questions regarding Prosecution:

1. Is there any difference between juvenile and adult prosecution process?
2. Do the prosecutors scrutinize the age of the juvenile properly?
3. What is the role of prosecution in juvenile diversion?
4. What is the prosecution's perspective on the lack of effectiveness of the juvenile justice system in Khyber Pakhtunkhwa?

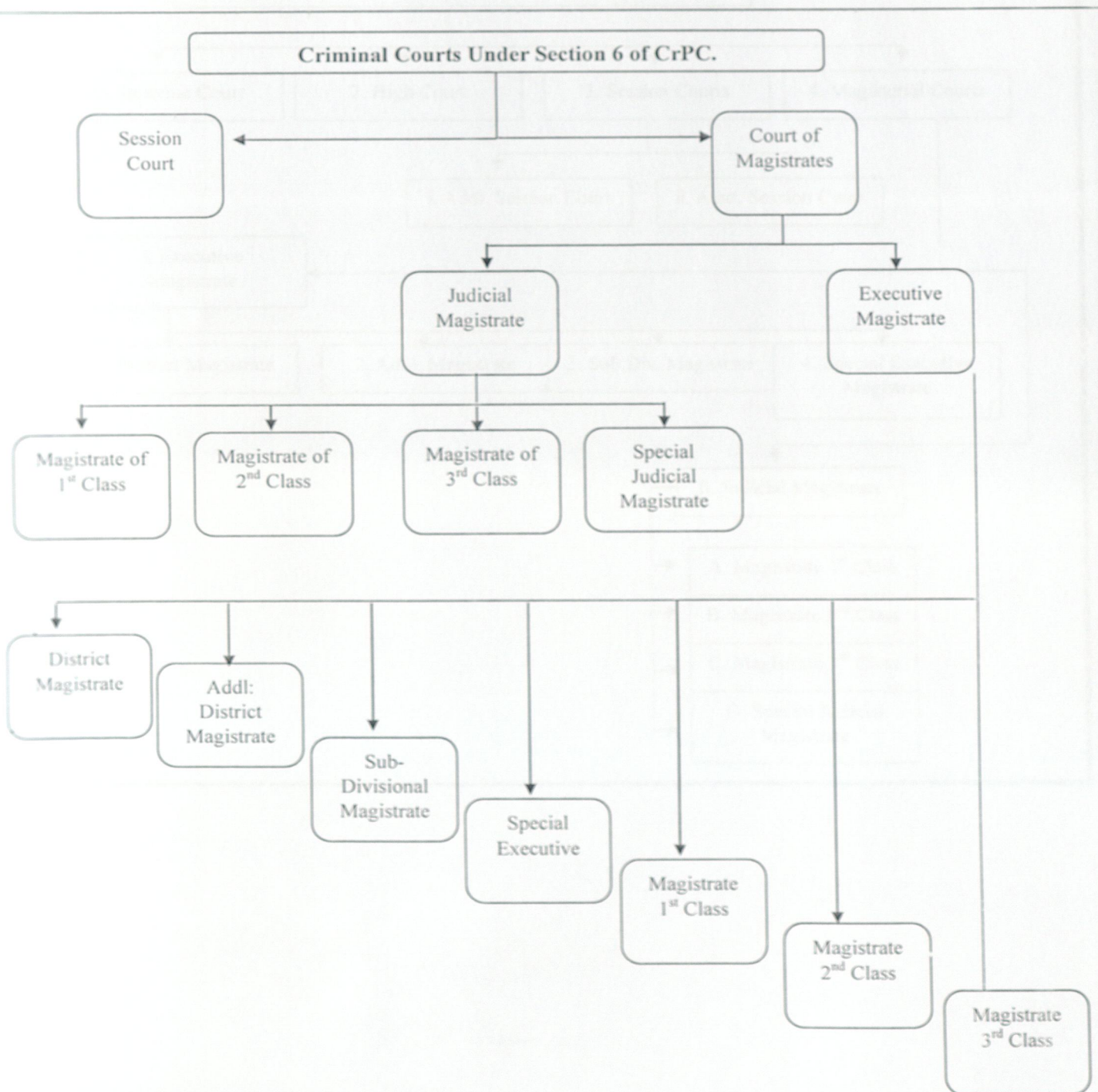
For the courts, the research attempts to find out answer to the following questions:

1. What philosophy, if any, guides the courts in juvenile cases?
2. What is the courts' perspective on the lack of effectiveness of the juvenile justice system in Khyber Pakhtunkhwa?
3. What issues are faced by the courts from police and prosecution?
4. Are the legal requirements, as given in JJSO, fulfilled by the juvenile courts?
5. For Correction Institutions (Probation and Prison), the research seeks to answer the following questions:
 6. How strong is the link between police, probation and the courts?
 7. Is the probation (officer and the department) properly equipped for dealing with juvenile cases?
 8. What is the probation officers' perspective on the lack of effectiveness of the juvenile justice system in Khyber Pakhtunkhwa?
 9. How are juveniles treated in prisons? (prison officials perspective and juvenile perspective)

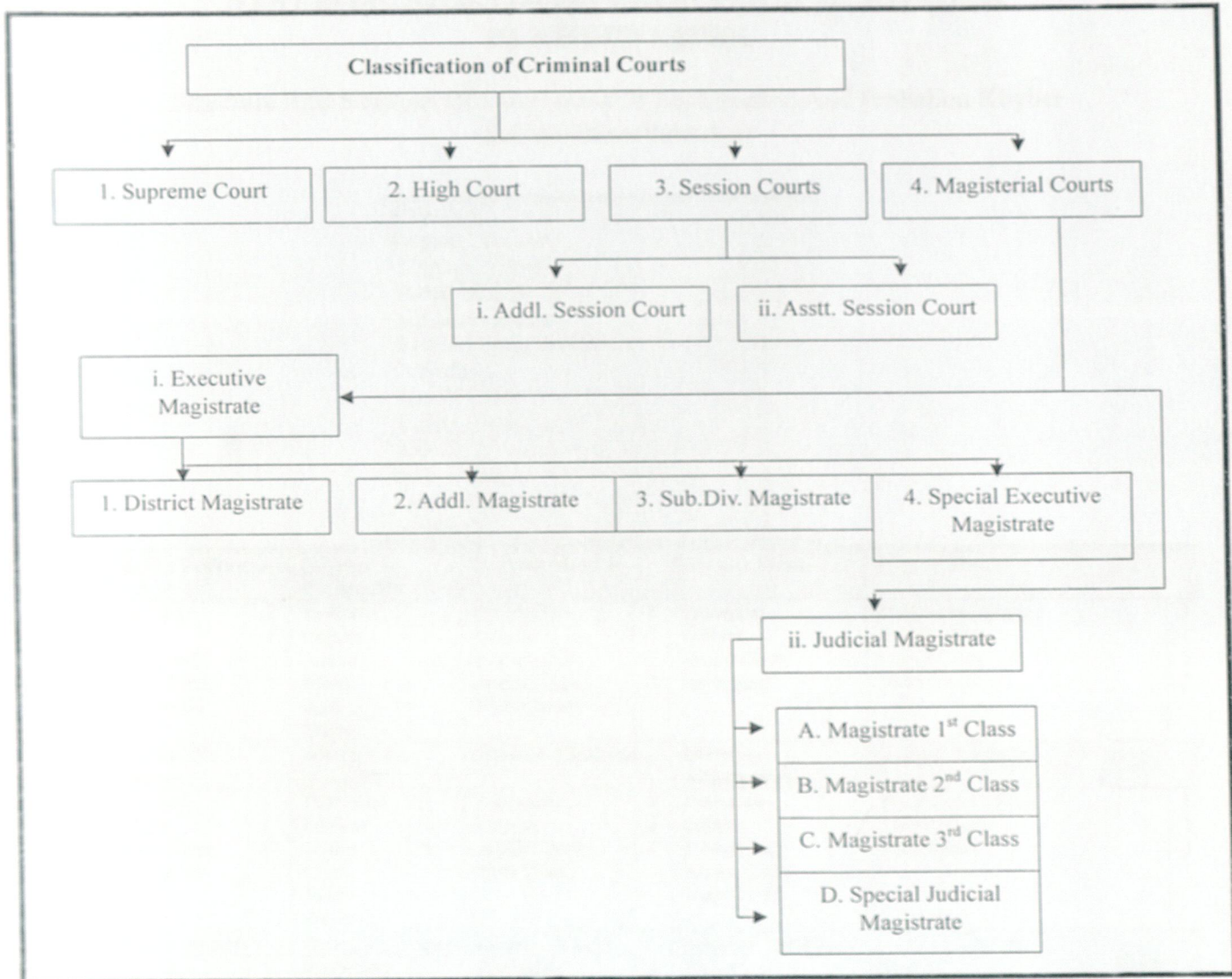
ANNEX—II

Courts Structure in Pakistan

Figure 5.1: Classification of Criminal Courts Under Section 6 of Cr. PC



Source: Barakatullah (2010). *Judicial System of Pakistan: Pakistan Journal of Criminology* Vol. 2, No. 3, July 2010.

Figure 5.2: Classification of Courts in Pakistan¹

¹Barakatullah (2010) "Judicial System of Pakistan" in *Pakistan Journal of Criminology* Vol. 2. No.3.July 2010

Annex II (A): statement showing district wise statistics/ progress of adult probationers for the month of 08/2013.

S.No	Name of Probation Officer	District	No. of Probationers on strength on last day of the previous month.	No. of Probationers taken during the month.	Total	Finally released during the month.	Balance.
1.	Probation Officer-I	Peshawar.	162	1	163	1	162
2.	Probation Officer-II	Peshawar.	166	-	166	-	166
3.	Probation Officer	Nowshera.	105	4	109	2	107
4.	Probation Officer	Charsadda.	216		216	-	216
5.	Probation Officer	D.I.Khan.	255	-	255	-	255
		Tank.	47	-	47	-	47
6.	Probation Officer	Swat	90	-	90	-	90
7.	Probation Officer	Buneer	08	1	9	-	9
		Shangla.	11	-	11	-	11
8.	Probation Officer	Dir Lower.	25	3	28	-	28
		Dir Upper (vacant)	27	-	27	-	27
		Chitral.	06	-	6	-	6
9.	Probation Officer	Malakand.	36	6	42	-	42
10.	Probation Officer-I	Mardan-II.	23	-	23	7	16
11.	Probation Officer	Mardan-I.	60	1	61	-	61
12.	Probation Officer	Swabi	13	-	13	-	13
13.	Probation Officer	Abbottabad.	185	-	185	-	185
		Haripur	14	-	14	-	14
14.	Probation Officer	Mansehra.	30	-	30	-	30
		Kohistan.	2	-	2	-	2
		Batagram.	-	-	-	-	-
15.	Probation Officer	Kohat.	196	1	197	-	197
16.	Probation Officer	Karak.	31	-	31	-	31
		Hungu.	19	1	20	-	20
17.	Probation Officer	Bannu.	104	-	104	-	104
18.	Probation Officer	Lakki.	22	-	22	-	22
	TOTAL		1853	18	1871	10	1861

Saving Rs. 1861x2700=5024700/-Per Month.

Annex II (B): District Wise Proforma Showing Statistics Of Juvenile Probationers For The Month Of 08/2013.

S.No.	Name of Probation Officers.	Districts.	No; of Juvenile Probationers on strength on the last day of previous month.	No; of Juvenile Probationers taken during the month.	Total.	Finally released during the month.	Total number of Juvenile Probationers of the end of the month.
1.	Probation Officer-I	Peshawar	10	-	10	-	10
2.	Probation Officer-II	Peshawar	11	-	11	-	11
3.	Probation Officer	Nowshera	-	-	-	-	-
4.	Probation Officer	Charsadda	1	-	1	-	1
5.	Probation Officer	D.I.Khan	4	-	4	-	4
	Probation Officer	Tank	9	-	9	-	9
6.	Probation Officer	Swat	3	-	3	-	3
7.	Probation Officer	Buner	-	-	-	-	-
		Shangla	-	-	-	-	-
8.	Probation Officer	Dir Lower	3	-	3	-	3
		Dir Upper (vacant)	2	-	2	-	2
		Chitral	-	-	-	-	-
9.	Probation Officer	Malakand	5	-	5	-	5
10.	Probation Officer-II	Mardan-I	1	-	1	-	1
11.	Probation Officer	Mardan-II	5	-	5	-	5
12.	Probation Officer	Swabi	-	-	-	-	-
13.	Probation Officer	Abbottabad	20	-	20	-	20
		Haripur	3	-	3	-	3
14.	Probation Officer	Manshra	2	-	2	-	2
		Kohistan.	-	-	-	-	-
		Batagram.	-	-	-	-	-
15.	Probation Officer	Kohat	5	-	5	-	5
16.	Probation Officer	Karak	1	-	1	-	1
		Hangu	-	-	-	-	-
17.	Probation Officer	Bannu	1	-	1	-	1
18.	Probation Officer	Lakki	1	-	1	-	1
	Total		87	-	87	-	87

Saving Rs. 87x2700=234900/-Per Month.

Annex II (C):Statement Showing District Wise Parole Work For The Month
Of 08/2013.

S.No.	Name of Parole/ Probation Officer.	District.	No. of Jail Visits.	No. of Prisoners Selected.	No. of Inquiry Litter issued.	No. of cases Submitted to Govt.	No. of Prisoners Released on Parole.	No; of Parolees finally released.	Total.	No. of Parolees at the end of the month.
1.	Parole Officer	Peshawar.	1	-	-	-	-	-	-	-
2.	Probation Officer	Charsadda.	-	-	-	-	-	-	-	-
3.	Parole Officer	D.I.Khan.	3	-	-	2	-	-	-	-
4.	Probation Officer	Swat.	1	-	-	-	-	-	-	-
5.	Probation Officer	Buner.	-	-	-	-	-	-	-	-
		Shangla.	1	-	-	-	-	-	-	-
6.	Probation Officer	Dir Upper.	2	-	-	-	-	-	-	-
7.	Probation Officer	Dir Lower.	2	-	-	-	-	-	-	-
8.	Probation Officer	Malakand .	1	-	-	-	-	-	-	-
9.	Probation Officer	Chatral.	-	-	-	-	-	-	-	-
10.	Probation Officer	Mardan-I.	2	-	-	-	-	-	-	-
11.	Probation Officer	Mardan-II	2	-	-	-	-	-	-	-
12.	Probation Officer	Abbottabad.	1	-	-	-	-	-	-	-
		Haripur.	1	-	-	-	-	-	-	-
13.	Probation Officer	Mansehra .	2	-	-	-	-	-	-	-
		Kohistan.	-	-	-	-	-	-	-	-
		Batagram.	-	-	-	-	-	-	-	-
14.	Probation Officer	Kohat .	-	-	-	-	-	-	-	-
15.	Probation Officer	Karak.	-	-	-	-	-	-	-	-
		Hangu.	-	-	-	-	-	-	-	-
16.	Probation Officer	Bannu .	1	-	1	-	-	-	-	-
17.	Probation Officer	Swabi.	-	-	-	-	-	-	-	-
18.	Probation Officer	Nowshera .	-	-	-	-	-	-	-	-
		Total	20	-	1	2	-	-	-	-

Annex II (D):Statement Showing District Wise Parole Work For The Month
Of 08/2013.

S.No.	Name of Parole/ Probation Officer.	District.	No. of Jail Visits.	No. of Prisoners Selected.	No. of Inquiry Litter issued.	No. of cases Submitted to Govt.	No. of Prisoners Released on Parole.	No; of Parolees finally released.	Total.	No. of Parolees at the end of the month.
1	Probation Officer(F)	Peshawar.	-	-	-	-	-	-	-	-
		Charsadda	-	-	-	-	-	-	-	-
		Nowshera	-	-	-	-	-	-	-	-
2	Probation Officer (F)	D.I.Khan	-	-	-	-	-	-	-	-
		Tank	-	-	-	-	-	-	-	-
3	Probation Officer (F)	Swat	-	-	-	-	-	-	-	-
		Buner	-	-	-	-	-	-	-	-
		Shangla	-	-	-	-	-	-	-	-
		Dir Upper	-	-	-	-	-	-	-	-
		Dir Lower	-	-	-	-	-	-	-	-
		Malakand	-	-	-	-	-	-	-	-
		Chatral	-	-	-	-	-	-	-	-
4	Probation Officer (F)	Mardan	1	-	-	-	-	-	-	-
		Swabi	-	-	-	-	-	-	-	-
5	Probation Officer (F)	Abbottabad	1	-	-	-	-	-	-	-
		Haripur	-	-	-	-	-	-	-	-
		Mansehra	-	-	-	-	-	-	-	-
		Kohastan	-	-	-	-	-	-	-	-
6	Probation Officer (F)	Batagram	-	-	-	-	-	-	-	-
		Kohat	-	-	-	-	-	-	-	-
		Karak	-	-	-	-	-	-	-	-
7	Probation Officer (F)	Hangu	-	-	-	-	-	-	-	-
		Bannu	-	-	-	-	-	-	-	-
		Total	2	-	-	-	-	-	-	-

Annex II (E): Statement Showing District Wise Statistics/ Progress Adult
Female Probationers For The Month Of 08/2013.

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S.No	Name of Female Probation Officer	District	No. of Female Probationers on strength on last day of the previous month.	No. of Female Probationers taken during the month.	Total	Finally released during the month.	Balance.
1.	Probation Officer	Peshawar.	24	-	24	-	24
		Charsadda.	2	-	2	-	2
		Nowshera.	4	-	4	-	4
	Probation Officer	D.I.Khan.	-	-	-	-	-
		Tank	-	-	-	-	-
2.	Probation Officer	Swat.	-	-	-	-	-
		Buner	-	-	-	-	-
		Shangla	-	-	-	-	-
		Dir Lower	2	-	2	-	2
		Dir Upper	-	-	-	-	-
3.	Probation Officer	Mardan.	1	-	1	-	1
		Swabi	-	-	-	-	-
4.	Probation Officer	Abbottabad.	4	-	4	-	4
		Haripur.	-	-	-	-	-
		Manshra	-	-	-	-	-
		Kohistan	-	-	-	-	-
		Batagram	-	-	-	-	-
5.	Probation Officer	Kohat.	9	-	9	-	9
		Karak	-	-	-	-	-
		Hangu	-	-	-	-	-
6.	Probation Officer	Bannu.	1	-	1	-	1
		TOTAL	47	-	47	-	47

Saving Rs. 47x2700=126900/-Per Month

Annex II (F):Statement Showing District Wise Statistics/ Juvenile female
Progress Of Probationers For The Month Of 08/2013.

S.No	Name of Female Probation Officer	District	No. of Female Probationers on strength on last day of the previous month.	No. of Female Probationers taken during the month.	Total	Finally released during the month.	Balance.
1.	Probation Officer	Peshawar.	4	-	4	-	4
		Charsadda.	-	-	-	-	-
		Nowshera.	-	-	-	-	-
	Probation Officer	D.I.Khan.	-	-	-	-	-
		Tank	-	-	-	-	-
2.	Probation Officer	Swat.	1	-	1	-	1
		Buner	-	-	-	-	-
		Shangla	-	-	-	-	-
		Dir Lower	-	-	-	-	-
		Dir Upper	-	-	-	-	-
3.	Probation Officer	Mardan.	-	-	-	-	-
		Swabi	-	-	-	-	-
4.	Probation Officer	Abbottabad.	1	-	1	-	1
		Haripur.	-	-	-	-	-
		Mansehra	-	-	-	-	-
		Kohistan	-	-	-	-	-
5.	Probation Officer	Batagram	-	-	-	-	-
		Kohat.	-	-	-	-	-
		Karak	-	-	-	-	-
6.	Probation Officer	Hangu	-	-	-	-	-
		Bannu.	-	-	-	-	-
TOTAL			6	-	6	-	6

Saving Rs.6x2700=16200/-Per Month.