



Juvenile Justice System in Pakistan: An Islamic Perspective “O you who believe! Stand out firmly for justice...”¹

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Abstract- This paper attempts to discuss the Islamic conception of Juvenile Justice and cites the references from Qur’ān and Sunnah, which are the basic and arch sources of Islamic Jurisprudence and law. Islam focuses upon compassion and mercy while dealing with the children in the justice system, albeit, Juvenile Justice is considered to be a modern concept in the contemporary legal theory, but Islam deliberates on such punishments for the juveniles, which are not commensurate with the nature of offence, that is what modern day justice system for juveniles emphasizes. Moreover, Islam also focuses on reformation, rehabilitation and social re-integration of the children into the society, which are considered as the modern day concepts in the juvenile justice lexicon, notwithstanding, some of the concepts transpired from Islamic laws, inter alia, the issue of juvenility appears to be in derogation with the modern day Juvenile Justice conception. Pakistan, being an Islamic Republic, follows the Islamic laws, which override all other laws. All laws passed by the parliament are reviewed in terms of Islamic injunctions and any law in conflict with the Islamic provisions is discarded ab initio but still legal regime dealing juveniles is inconsistent to provide uniformity, which culminates in ambiguity. Some special trepidations upon which the whole edifice of Juvenile Justice System anchors have been discussed in this paper with special reference to Pakistan & Islam. Its findings aim to assist policy and law makers to establish practicable strategies, translating Juvenile Justice System ‘on paper’ to ‘in practice’. For conduct of research doctrinal method has been employed with analytical and comparative approach.

Key Words: Juvenile, Juvenile Delinquency, Juvenile Justice System, Islam, Pakistan

I. INTRODUCTION

Islamic law is the supreme law of the land in Pakistan. All the laws passed from the parliament are assessed upon Islamic parameters. There is an Islamic Ideology Council whose sole mandate is to evaluate the existing laws in terms of Islamic Provisions.² Pakistan ratified United Nations Conventions on the Rights of the Child (UNCRC)³ in 1990 with the condition that those provisions of UNCRC, which are in derogation with Islamic legal regime will not be complied with but later on, Pakistan withdrew this condition. UNCRC is considered as the Magna Carta of child rights, in which first time, the child has been defined as “*a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*”⁴. UNCRC is the most widely ratified treaty in the history on human rights. This document provides an array of articles on all aspects and dimensions of child rights and protection. UNCRC legally binds the State parties for submission of periodic reports on the state and situation of child rights in their respective countries. Article 37, 39, and 40⁵ of the UNCRC specifically deal with the rights of the juveniles who come in contact and in conflict with the law.

In Pakistan, Juvenile Justice System Ordinance, 2000 was the first-ever national legislation, which was promulgated to safeguard the rights of the children coming in dispute with law. It mandated the provincial and national assemblies to devise the rules in compliance with the provisions of this law. Regrettably, it lacked an ‘overriding effect clause’, hence, allowed other laws to dominate it. Whereas the newly enacted law namely, Juvenile Justice System Act, 2018 is more comprehensive law and has removed many lacunas of the earlier legislation in protecting the rights of the juveniles. Though it contains the overriding effect clause but it is yet to be decided and interpreted by the apex courts whether this special law will override

¹ Qur’ān, 4:135.

² See for its functions on <http://www.cii.gov.pk/aboutcii/function.aspx>

³ United Nations Conventions on the Rights of the Children, 1990 available on <https://www.unicef.org/child-rights-convention>

⁴ Article 1, Part 1. Convention on the Rights of the Children, 1990.

⁵ Articles 37, 39, 40 of UNCRC specifically touch the subject of the children who are in conflict with the law and require the special treatment for such children. https://www.unicef.org/crc/files/Rights_overview.pdf.

the other laws i.e., Ḥudūd laws, blasphemy laws and anti-terrorism laws. Islamic laws are the supreme laws of the Pakistan and override all other laws but some of the provisions of these laws are in conflict with the standards of the international treaties and conventions, which creates a duality as both the laws run parallel to each other hence creating an ambiguity in the sphere of Juvenile Justice. Following is a brief mention of the treatment of juveniles in the justice system as per Islamic teachings and laws. A doctrinal method has been employed with analytical and comparative approach in this paper.

Juvenile Justice in Islam

Qur'ān and Ḥadīth⁶ are the basic sources of Islamic Law and jurisprudence. Islamic principles of jurisprudence clearly direct a justice for the juvenile offenders different from adults. Islamic Shari'ah does not consider the children responsible for any offence until they reach the age of puberty (Bulūgh). Allāh (S.W.T) says *"And when the children among you come of age (puberty), then let them (also) ask for permission, as do those senior to them (in age): Thus Allāh makes clear His Signs to you (commandments & legal obligations): for Allāh is full of knowledge and wisdom"*⁸.

The Holy Prophet (P.B.U.H) also said, *"Three persons are not accountable, a child until he reaches the age of puberty, a sleeping person until he awakes and an insane person until he becomes sane"*⁹.

This Ḥadīth not only excludes the juveniles but also the insane and sleeping person out of criminal responsibility. Allāh has given a detailed description of the punishments in the Qur'ān for the safety and protection of the human beings. The paramount aim of these punishments in Islamic criminal law is the deterrence of the occurrence of crime and to meet the needs of the justice for a peaceful society. Moreover, reformation and rehabilitation of the criminal is another key purpose of these penalties (Anwarullah 1997).

Juveniles are considered immature and their acts are taken as mistakes not the crimes because of their lack of knowledge about crime or their involvement in crime with proper intent (M. S. Islam, Fundamental Human Rights Towards Childhood: Islamic Guidelines Are Unique to Protect the Child 2015). Therefore, criminal responsibility cannot be put on a person who does not understand the nature of the act and not fully aware of the consequences and seriousness of the crime. Allāh says in Qur'ān, *"But if one is forced by necessity, without willful obedience, nor transgressing due limits, then he is guiltless"*¹⁰. The Holy Prophet (P.B.U.H) also said *"My Ummah is exempted from mistake, forgetfulness and the act done under coercion"*¹¹.

In Islamic Jurisprudence, minor is considered to be a person who has not attained the age of maturity and this is enshrined in the Article 1 of the Covenant of Organization of Islamic Countries on the Rights of the Children in Islam as, *"Every human being who, according to the law applicable to him/her, has not attained maturity."*¹² Therefore Islamic Sharia unequivocally reiterates that a person cannot be held for legal accountability if he has not attained the sufficient maturity or reached puberty (M. S. Islam, Fundamental Human Rights Towards Childhood: Islamic Guidelines Are Unique to Protect the Child 2015).

Moreover, childhood in Islam is not mentioned by age because the puberty reaches to different persons at different age. The discourses on, when a juvenile becomes an adult or the concept of attainment of majority, differ in Islamic schools of thought. Imām Shāfi, Imām Ahmed bin Hanbal and Imām Mālik schools of thought consider a person as an adult who reaches 15 years of age, whether male or female. But according to Imām Abū Hanīfah a male child who reaches 18 years of age becomes an adult and a female child who reaches 17 years of age becomes an adult (M. S. Islam 2015).

Islamic law or jurisprudence heavily depends upon the concept of puberty or bulūgh for criminal responsibility. The stress is on physical maturity and not on mental maturity. People who are biologically mature or have attained puberty can be held liable for any criminal act; however, the mental faculties of a person are kept in view while extending the punishment (Ende and Steinbach 2010).

⁶ Sayings of the Holy Prophet Muhammad (P.B.U.H)

⁷ Subhanahuwata'ālā (May He be glorified & Exalted)

⁸ Qur'ān, 24:59.

⁹ I, Hanbal. (1999). Musnad Ahmad bin Hanbal: Jilid I, III, IV-VI. Beirut: Dār-ul-fiker, t. th.

¹⁰ Qur'ān, 2:173.

¹¹ I, Tirmidī. (1980). Sunan Al-Tirmidī: Beirut: Dār-ul-fiker.

¹² See on

[https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/3CovenantontheRightsoftheChildinIslam\(2005\).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/3CovenantontheRightsoftheChildinIslam(2005).aspx)

The Prophet of Islam (P.B.U.H) treated children with mercy, love and compassion. He said *“He is not one of us who does not have mercy on our young and does not respect our elders”*¹³.

He said in another Ḥadīth, *“The one who does not demonstrate sympathy to human beings he will not be shown sympathy by Allah”*¹⁴.

Following are some of the fundamental guidelines of Islamic Criminal Justice System, which are equally applicable in Juvenile Justice System:

- No crime without a proper provision of law;
- No punishment without proper provision of law;
- Conception of *“Innocent until proven guilty”*;
- Right of fair trial (Munir 2014).

To consider an act as an act of crime, there should be a clear legal provision to declare it an unlawful act. The Holy Qur’ān says *“As to the thief, male or female, cut off his or her hands”*¹⁵. And *“The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes”*¹⁶.

Conventional law and Islamic law both opine that just omission or commission of a deed is not taken as crime until there is no clear law present on crime which envisages it as crime and which is also punishable (M. S. Islam, Criminal Accountability and Juvenile Offenders: A Study under Islamic Principles, International Law and the Children Act, 2013 2015).

Presumption of Innocence is an important principle of Islamic criminal law. Everyone should be considered as innocent, pure and righteous until the dissimilar is proved. The liability of proof should be on prosecution and not on the accused. The Holy Prophet said, *“The burden of proof is on him who makes the claim, whereas the oath is on him who denies”* (Kamali 2008).

The Holy Prophet (P.B.U.H) said, *“Repeal the hudūd punishments¹⁷ from Muslims as far as you can, so if there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him”*¹⁸.

This principle of innocence is also applicable on other crimes such as qisās¹⁹ and ta’zīr²⁰. Islamic Criminal Law lays great emphasis on the need of strong and concrete evidence to prove the accusation and not merely on the basis of just a claim or complaint. The accuser’s complaint cannot be the sole basis to substantiate a criminal conviction. He is supposed to bring competent witness and an unimpeachable evidence to assert his claim (Bassiouni 1997).

Islamic criminal law also lays great emphasis on the principle of the right of fair trial and impartiality of the judge. The Qur’ān says *“O ye who believe! Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor”*²¹. And Allāh (SWT) also says, *“And if you judge, judge between them with justice. Indeed, Allāh loves who act justly”*²².

All these injunctions of Qur’ān momentarily stress on the provision of justice to everybody including the children. Three types of punishments based on the nature of crime are there in Islamic Criminal Law such as; hudūd, qisās and ta’zīr. First two are solely recommended by Allāh in the Qur’ān but the third type of punishments are rendered by the ruler or judge or by their delegates but bound to the teachings and principles of Islam (Tellenbach 2004).

Hadd, the strictest penalty is extended to the persons who have attained the age of majority (bulūgh) in Islamic Criminal Law. In case of qisās, crime committed by a juvenile is not considered as an act with

¹³ Ḥadīth no 1919 & 1920. I, Tirmidī. I. M. a. (1980). Sunan Al-Tirmidī: Beirut: Dār-ul-fiker.

¹⁴ Ḥadīth no 1922. Ibid.

¹⁵ Qur’ān, 5:38.

¹⁶ Qur’ān, 24:2.

¹⁷ In Islam, fixed punishment ordained by Allah are called “Ḥudūd”.

¹⁸ I, Tirmidī. (1980). Sunan Al-Tirmidī: Beirut: Dār-ul-fiker.

¹⁹ Qisās mean extension of similar punishment to the criminal.

²⁰ Court’s discretion to grant a quantum of punishment.

²¹ Qur’ān, 4:135.

²² Qur’ān, 5:42.

intent because of the immaturity of the mind and age. Therefore penalty is not exercised against a juvenile. In case of blood money that is paid is not the responsibility of the juvenile but it has to pay by the whole kinship. There are no fixed rules in ta'zīr punishment but again while extending such penalties to a juvenile, age and other factors are also always taken into account (Tellenbach 2004).

The major principle of Islamic Criminal Law is that the intent of the juvenile is not involved in the commission of a crime rather it will be taken as a mistake. In case of murder, his family or whole kinship is supposed to pay the blood money. If many people have committed the act of theft or robbery but one of them is a juvenile then 'hadd' will not be framed on him as a penalty (al-Qurtubi 2013).

Islam is a complete code of life, which sets ideal standards for justice. Because of physical, psychological and mental immaturity, juveniles are totally different from adults and Islam emphasizes the need of showing mercy, kindness and compassion while dealing with juveniles who are in conflict with law. Hadd and qisās, which are the strict punishments, cannot be imposed on juveniles (M. S. Islam, Fundamental Human Rights Towards Childhood: Islamic Guidelines Are Unique to Protect the Child 2015).

Islamic law prohibits capital punishment, corporal punishment and treatment like adults for juveniles in conflict with law and provides many divine rights that should be confirmed by the competent authority. Allāh says, *"Those who do not judge by what Allāh has sent down are the disbelievers. They are the wrong-doers (Zālimūn) and evil-livers (Fāsiqūn)"*²³.

Islamic Criminal Law does have an overriding aim of reforming the child accused of crime along with mercy and compassion and also lays emphasis on the rehabilitation and reintegration of the juvenile.

Distinctive Trepidations of Juvenile Justice System with Reference to Pakistan & Islam

"Child" Defined

There is a plethora of definitions on child but all are varying and inconsistent. Regrettably, Constitution of Pakistan, which is the supreme law of the land, does not define the child. All other laws contain different definitions of a child. A newly enacted law Juvenile Justice System Act 2018²⁴ defines the child as, *"Child means for the purposes of this Act a person who has not attained the age of eighteen years"*²⁵. Juvenile Justice System Act, 2018 is aligned with the UNCRC and other international instruments. Juvenile Justice System Ordinance, 2000 was also in compliance with international standards and it was the first national law enacted for the protection of children who come in dispute with law. There is a range of definitions provided in other laws, but the definitions vary each other. Hudūd Ordinance defines an adult as, *"Adult" means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty"*.²⁶ These laws have an overriding effect on all other laws.

Criminal Liability

There is no criterion defined in Islamic criminal law regarding the minimum age of criminal responsibility. The minimum age for criminal responsibility was seven in Pakistan until 2015 but it has been raised to 10 years²⁷ in 2016. Article 82 of Pakistan Penal Code (PPC) states, *"Nothing is an offence, which is done by a child under ten years of age"*²⁸. Different countries have different criteria for this age. But children are brought under criminal justice system when they attain enough mental capacity and competence to understand the nature and gravity of their offence. United Nations Committee on the Rights of the Children has set a standard age of 12 years and recommends the State Parties to comply it²⁹.

Jurisprudence behind Minimum age of Criminal Responsibility

'Actus Reus', commission of a prohibited offence, and 'Mens Reus', guilty mind or the knowledge of crime, are the two vital ingredients of a crime. Though there is no consensus of global community regarding the minimum age in which a child is deemed to have such intention³⁰. But there is a consensus on the fact that

²³ Qur'ān, 5: 44-45.

²⁴ This law has repealed the earlier law Juvenile Justice System Ordinance.

²⁵ Section 2(b), JISA 2108.

²⁶ Section 2, the Offence of Zina (Enforcement of Hudūd) Ordinance, 1979.

²⁷ The Criminal Law (Amendment) (Offences Relating to Rape) Act 2016.

²⁸ Subs. By Act X of 2016.

²⁹ 32nd comment, Committee on the Rights of the Child, General Comments No. 10, Forty Fourth Session, Geneva, 15 Jan-2 Feb, 2007.

³⁰ <https://www.economist.com/graphic-detail/2017/03/15/the-minimum-age-of-criminal-responsibility-continues-to-divide-opinion> (Accessed on 10 October 2017)

there is a certain age where a child does not understand the nature and seriousness of the crime. When a child commits a crime up to a certain age, his intent is supposed to be not involved, hence, crucial element of crime '*Mens Reus*', is not involved. Therefore, a child should not be held for this act or commission of an offence up to a certain age limit. After many deliberations, United Nations Committee on the Child Rights recommended twelve years of age as absolute minimum but still it varies in different countries including Pakistan despite being signatory and ratifier of UNCRC.

Issue of Juvenility

Whether a person is juvenile or not, is a pertinent question in any Juvenile Justice System. Islam's legal regime straightly focuses on the option of puberty for the determination of juvenility. But this has become a complex issue in modern times as most of the children attain puberty even at very early ages due to many factors but medically and psychologically they are considered not competent enough to comprehend the nature of their acts. Therefore, determination of age becomes a pertinent issue without which juveniles in justice system cannot be separated from adults until and unless their age is not determined (Iqbal 2009).

For age determination in Pakistan, documentary evidence i.e., computerized national identity card, Form B, Birth registration form, school entrance and leaving certificate etc. are taken as an objective assessment. In the absence of these documents, it is the discretion of the court to refer such juveniles who appear to be below 18 years of age for a medical diagnosis for the determination of his age. The opinion of the medical board for the determination of juvenile's age is taken as subjective assessment. Unfortunately, when the plea of age is not raised by the juvenile, he is taken as adult and is tried in traditional criminal justice system (Sajid 2009).

Juvenile Courts

There is no single juvenile court in whole Pakistan even after the promulgation of Juvenile Justice Ordinance in 2000 and JJSA in 2018. JJSO and JJSA authorize the Provincial Governments to set up one or more juvenile courts in consultation with the Chief Justice of the respective High Court within its jurisdiction. High Courts have conferred the status of juvenile courts to the existing courts, which are already over-burdened but there is a great need of specialized and exclusive juvenile courts to be established all over the Pakistan to hear the cases of juveniles only as rest of the courts are already have a backlog of cases to adjudicate upon (Shujaat 2015).

Suspension of Juvenile Justice System Ordinance, 2000

On December 6, 2004, a full bench of Lahore High Court passed a judgment to strike down the JJSO being unconstitutional, irrational, unrealistic and comprised of many legal incongruities to create a disaster in the already limping criminal justice system of Pakistan. Through this judgment they ordered the closure of juvenile courts and transfer of all criminal cases falling in same purview to the normal courts of capable jurisdiction. The logic behind this judgment was to curb these concessions, as there are many articles in the constitution of Pakistan, which provide safety and protection to the vulnerable and ostracized people. Besides, a plethora of laws is already available which sufficiently safeguard the rights of the children, hence the introduction of a special law for children is unnecessary, impractical and had produced confusion in the legal arena. This ordinance is also in derogation with some of the articles of constitution especially Article 4, 9 and 25.³¹

Besides, this Juvenile Justice Ordinance 2000 has promoted falsehood among society at large, every other case coming to the courts with procurement of fake birth certificates, false medical opinions, and interpolation in the birth certificates by the Union Council registers, incorrect '*Nikahnama*', to show the lesser age of the accused. Many anomalies have created havoc especially the age factor, which is different in different statutes i.e., Federal or Provincial. Furthermore, this Ordinance is violative of the Islamic law where girls attain the puberty in lesser age. Another point that was raised in this judgment was that there was no parliament when this Ordinance was promulgated and it is a blind following of the western notions, while ignoring the socio-economic conditions in this part of the world are quite different. Therefore, despite providing relief to the children, it is facilitating the criminal elements. In many

³¹ Article 4 of the Constitution of the Islamic Republic of Pakistan deals with the right of individuals to be dealt with in accordance of law. Article 9 is about the security of person and Article 25 is about the equality of the citizens.

instances adults use the young ones to settle their enmities. So, this Ordinance has created a great mess and confusion in the already fragile criminal justice system³².

Later on Supreme Court of Pakistan suspended the Lahore H.C judgment on 11 February 2005 in which Lahore H.C struck down the Juvenile Justice System Ordinance, 2000 being impractical and unreasonable. A bench comprising of three members including Chief Justice heard the appeals filed by the federation and SPARC NGO against the L.H.C judgment. SC bench issued a short order in which impugned judgment was suspended till the further order and Juvenile Justice Ordinance 2000 was restored.

Advocate who represented SPARC highlighted the aspect of moral obligation of Pakistan to safeguard and protect the children being the signatory of United Nations Convention on the Rights of the Children. He also highlighted the point of lifting of moratorium from death penalty which has cruelest ramifications particularly for children and this practice has been abolished all over the world except some countries and Pakistan is among one of those countries.

Besides, he raised the point that the observation of L.H.C regarding Juvenile Justice System as it was passed during Musharraf Era where there was no parliament existed in real sense of the term and without proper parliamentary and public policy debate, is not a plausible observation as this Ordinance was subsequently affirmed and validated by the two third majority of the parliament. Juvenile Justice System Ordinance 2000 was given legal cover under 17th Constitutional Amendment. Furthermore, he argued that it is not the job of judiciary to evaluate the quality of the decision-making by the legislators, as the eventualities of relationship between judiciary and executive and between judiciary and parliament are quite different.

Attorney General of Pakistan also argued that striking down of said Ordinance was not sustainable in law as its recommendation base on extra-legal considerations. To call this Ordinance as impractical, unreasonable and unnecessary are unsupported sociological deliberations and do not provide the core to strike down a legislation passed by the two third majority of parliament. Moreover, the honorable court has erred and failed to interpret the real spirit of the Constitutional Articles 4, 9, and 25³³. Many rulings of apex court held that these articles actually mean to protect the vulnerable, weak and disadvantaged segments of the society and children are one such vulnerable segment³⁴.

After these two landmark judgments on suspension and restoration of juvenile justice system ordinance 2000, juvenile courts started paying heed to the many factors so that the juvenile couldn't become the scapegoat or shield in the hands of adult hardened criminals to settle their scores and old enmities or for the furtherance of any other ulterior motive.

On the plea of juvenility the Peshawar High Court held in the case of Naseebullah vs. the State:

"Contention of counsel for the accused was that accused who at the time of incident was below the age of 18 years, being a juvenile, was entitled to be dealt with under S.11 of the Juvenile Justice System Ordinance, 2000. Court held that accused though at the commission of an offence was a juvenile, but at the time of arrest and conclusion of his trial, and passing the impugned judgment of conviction, he had attained the age of 19/20 years, mere minority or juvenile-ship of accused was not the criteria for grant of relief under S.11 of Juvenile Justice System Ordinance, 2000, in matter of conviction. There could be some minor differences, in which sentence could be normally short, and if the court passed an order of conviction, the beneficial provisions could be exercised in this favor. If, however, accused was charged for a heinous offence and sentenced to life imprisonment, this case could not be treated at par with minor offences..."

Further, *"...Age, seriousness of the offence, and past record of criminal activities of accused, at the time of conviction, would also be a relevant factor; which would also be adhered to. Juvenile Justice System, which was meant to treat a child accused with care and sensitivity, offering him a chance to reform and settle into the mainstream of society, same could not be allowed to be used as a ploy to dupe the course of justice, while conducting trial; and treatment of heinous offences, Court must be sensitive in dealing with the juveniles, who were involved in cases of serious nature like drug lord, murder, gang rape, terrorism, sexual molestation and host of other offences. Minor/Juvenile accused could never be allowed to abuse the statutory protection and concession rather involvement in a*

³² <https://www.dawn.com/news/376301> (accessed on 10 July 2018)

³³ Article 4 of the Constitution of the Islamic Republic of Pakistan deals with the right of individuals to be dealt with in accordance of law. Article 9 is about the security of person and Article 25 is about the equality of the citizens.

³⁴ <https://www.dawn.com/news/402002> (accessed on 17 January 2018)

flagitious crime, must be meted out stringent punishment to discourage the involvement of minors by the people for settling their score through them (Juveniles)³⁵”.

The ante-mentioned judgment and many other judgments³⁶ address the same issue and curb such practices while keeping the nature of offence, circumstances and all related factors so that adults may not be able to use the children as a shield to further their interests, settle the old scores and further ulterior motives. But in certain instances influential people take the advantage of this legal protection for children despite their involvement in gruesome crimes and courts fail to assess all the factors and release a juvenile involved in a serious crime.

Mitigating & Aggravating Circumstances

Mitigating and Aggravating Circumstances play an essential job in deciding any case in criminal justice system or juvenile justice system. When a competent judge declares an offender as guilty at the culmination of a trial, then court determines the punishment of the offender. Federal and provincial statutes set the punishments keeping in view the nature of offence and punishments are extended respectively. However, sometimes judges do have the discretion with regard to the quantum of the punishment keeping in view the circumstances in which a certain offence was committed. These circumstances can be aggravating or mitigating. Aggravating circumstances or factors result in harsh and strictest punishments and mitigating circumstances and factors result in lesser punishments or bit lenient punishments. Previous conviction that was proved beyond a reasonable doubt, habitual offending, victim's non-vulnerability (disability, age, illness etc.), main role or a leader's role in a crime, nature of crime etc. are some of the aggravating factors in deciding the quantum of punishment³⁷. Similarly, mitigating factors include: absence of past convictions or criminal records, absence of main role in offence, the nature of offence, victim's vulnerability, mental illness, true repentance, criminal mind/*mens rea* and the circumstances at the commission of an offence, i.e., provocation, mental or emotional issues, stress etc.

Islamic criminal justice system also focuses upon these mitigating and aggravating factors while extending any punishment to the offender and in cases of juveniles, juvenility, itself is a mitigating factor. Still in some of the Pakistani courts judges ignore these factors and punishments are rendered as per the traditional methods.

Application of Restorative Justice

Restorative justice is a new approach to examine the facts of crime and its impact on the society and devising a mechanism of justice to heal the societal wounds; the impact on victim, offender and the community.

The pivotal focus of the restorative justice is to repair the harm caused by the crime and take appropriate measures for the reparation of the community and the victim and an attempt to rehabilitate the offender in the community as a productive citizen. For real restoration of justice, all injured affectees need to be healed and the stakeholders need to play active roles to achieve this.

Undoubtedly, when a person commits an offence, the society as a whole is affected. Conventional Justice System focuses on retribution that fails to address the issue that led the offender to fall in this situation and commit a crime. Unlike conventional criminal justice, which promotes the concept of justice, restorative justice promotes the concept of compensation and rehabilitation. The overriding aim of the restorative justice is to resolve the conflict and heal the damage by encouraging those who have done this and making them realize the gravity of the loss and providing them with an opportunity to make reparations. Similarly, satisfying the victims of harm and providing them an opportunity that satisfactorily restitutions/amends have been made and to their fullest satisfaction. This system heals the damage caused by the offender by healing the victim and community but at the same time ensuring the reintegration of the offender back into the social life (Johnstone 2002).

This system is particularly effective while dealing with children in the justice system. Due to child's growing mental, physical and psychological development, restorative justice has an increased impact on a

³⁵Naseebullah vs. The State:PLD 2014 Pesh. 69

³⁶ 2013 PCr.LJ 1490.

³⁷ See further <https://www.justia.com/criminal/aggravating-mitigating-factors/> (Accessed on 15 August 2018)

child who commits a crime and provides him or her an opportunity to realize the nature and gravity of the loss he has caused. This concept is exercised at many phases of the justice process; pre-trial, pre-sentencing and after conviction and even in non-judicial situations. Family group conferencing, victim-offender mediation, community circles etc. are some of the measures of the restorative justice (Johnstone 2002).

Though this approach is in evolutionary process but it is highly recommended in juvenile justice systems for the rehabilitation of juveniles and unfortunately it is not exercised in Pakistan.

Therapeutic Jurisprudence and Mental Health

Therapeutic Jurisprudence mainly refers to the methods and ways in which the individuals are treated in a court of law. All the individuals who come into contact with law are treated with dignity and fairness that results in more productive and positive outcome on their mental, emotional and spiritual wellbeing. The rights of the individuals are observed with dignity and respect and all the legal actors treat these individuals with respect and courtesy keeping in view their prospective rehabilitation. TJ was initially practiced in court but later on expanded in whole criminal justice process for the best outcomes. This concept not only focuses on the rights of the defendants but also of the victims. This concept proved very successful in the courts i.e., drug courts, where focus is on rehabilitation and problem solving. This concept does not coddle the offenders who break the law or hampers any legal proceeding but is used to represent the legal system as a change agent (Small 1993).

This system is not functional in Pakistan's legal settings and even in courts. Juveniles are treated with traditional practices that do not leave any positive impact on juvenile minds. Free mixing with adult criminals especially during transportation for court proceeding is a serious concern.

Diversion

Juvenile Justice greatly focuses to divert the children coming into dispute with law from traditional confrontation with criminal justice system. Probation and parole are the arch measures in this connection to save such children who infringe or violate prevalent law of the state. The underlying contention behind the concept of diversion is to divert the children from formal criminal justice system as it does protect the rights and best interests of the children. Through diversion mild or less severe punitive measures are taken which does not cast adverse impact on their immature persona and thus paving the way for future rehabilitation and reintegration of children into the society as a productive citizen.

Outlawed Punishments

International instruments negate the extension of capital punishment to the children. The CRC states, "*Neither capital punishment nor life imprisonment without the possibility of release shall be imposed on children under the age of 18.*" Islam also emphasizes on treating children with mercy, care and compassion and prohibits severe punishments, which are extended to the adults (M. S. Islam, Fundamental Human Rights Towards Childhood: Islamic Guidelines Are Unique to Protect the Child 2015).

There was a moratorium before 2014 but the tragic incident of Peshawar Army Public School where 132 children were martyred by the terrorists triggered the reinstatement of moratorium. In the wake of this tragic incident many executions were took place including the execution of juveniles. It was a sheer violation of international norms and standards and international community and organizations working in the same realm showed great resentment (Shujaat 2015).

Children coming under the rubric of Islamic laws especially Hudud Ordinance, Blasphemy Laws and Anti-terrorism Laws are treated as adults and are extended the same punishments, inter alia, corporal punishment, life imprisonment and death sentence which is a violation of UNCRC and other international instruments which Pakistan has ratified. Though Islam negates the extension of severe punishments of qisas and hadd to children but there is an ambiguity in the age and concept of puberty as per Islamic and secular laws (SPARC 2003).

Detention Arrangements

Lack of exclusive rehabilitative and reformatory institutions in Pakistan leads to very pathetic situation for juveniles; juvenile offenders are sent to the jails in juvenile wards, which lack the amenities necessary for a juvenile's rehabilitation. Two borstal institutions in the largest province of Pakistan, and four institutions in Sindh province are also overcrowded and lack the facilities of education, recreation, vocational training, psychosocial support etc. Juveniles are transported for judicial proceedings along with

the adult criminals and this interaction does not yield positive outcomes. Juveniles become victim of abuse at the hands of not only law enforcement officials but also by the hardcore criminals. Islam focuses upon the provision of a protective environment to the children. The Holy Prophet (P.B.U.H) said, *“Allāh Almighty will (On the Day of Judgment) question person in a position of responsibility about what he (she) were responsible for (in this life).”*³⁸ Provision of a protective environment cannot be translated into reality until everybody dealing with the children does not realize the vulnerability and immaturity inherent in children and doesn't endeavor to save them from abuse, exploitation and neglect.

II. CONCLUSION

Under the backdrop of above study, it is found that there are many issues in the Juvenile Justice System of Pakistan; nonetheless, Pakistan has shown unprecedented determination in the arena of justice designed for the juveniles from past couple of decades, initially by ratifying the UNCRC and then promulgating the Juvenile Justice System Ordinance in 2000 for the protection of children coming into dispute with law. Juvenile Justice System Act, 2018 is more comprehensive document than the earlier legislation, hence, encompasses all the aspects related to juveniles and it is also in compliance with the international standards.

But when it comes to systemic and implementation issues, Juvenile Justice System in Pakistan depicts an abysmal situation. Gross violations of the statutory provisions, abuse and exploitation of the juveniles at the hands of law enforcement officials, dismal detention arrangements, incapacity of the law enforcing personnel, non-availability of exclusive juvenile courts, and traditional system of adjudication are some pertinent concerns in the Juvenile Justice System of Pakistan. Moreover, there are no exclusive juvenile courts doing adjudication only for juveniles, which further compounds the problem as juveniles come in contact with adult hardcore criminals in traditional justice system. Pakistan, being an Islamic Republic, enacts the Islamic law, which override all other laws. Though these law provide protection to the children but some of its provisions do not meet the pre-requisites set by the international standards; determination of juvenility on the basis of puberty is one such concern as most of the children attain puberty in very early age but their mental competence lacks to the extent to understand the gravity of their offence.

Due to enactment of special laws for children, courts passed the judgments to suspend these laws as these laws are creating ambiguities in the existing legal regime. Though these judgments were suspended by the apex court but still these issues are hotly debated as whether to enact these laws or not? Whether these laws will do any good or worsen the situation etc.? There is no effective mechanism in the Juvenile Justice System of Pakistan to provide psychosocial support to the children coming into the criminal justice system. Global community and international instruments greatly emphasize on this inevitable aspect of the Juvenile Justice system and it is a missing link in the Juvenile Justice System of Pakistan. The concept of restorative justice is also not applied which is also considered an integral part of any Juvenile Justice System as it greatly helps all the stakeholders in getting the wound healed.

The problems in the Juvenile Justice System of Pakistan are manifold but these can be addressed and redressed to a great extent by translating some of the following suggestions into reality:

- A uniform definition of the child is very essential and it should be added up in the Constitution of Pakistan as it constitutes the apex law of the land and supersedes all other laws.
- Being a child itself is a mitigating factor which sentencing a child, therefore a lenient approach should always be advocated while dealing juvenile offenders. Moreover, best interests of the child should always be kept in view.
- Exclusive juvenile courts should be set up to try only juveniles.
- Incarceration should be the last resort and for the minimum shortest period as it stops the prospects of a juvenile's rehabilitation. Diversionary measures to incarceration can yield outstanding outcomes for the juveniles, as the sole aim of the Juvenile Justice System should be to rehabilitate and reintegrate the children into the society and not the retribution.
- There should be reformatories and rehabilitation centers for keeping the juveniles where they should be given educational, psychosocial, health and recreational facilities. Furthermore,

³⁸ Reported by Al-Tirmidīn his Sunan; Kitāb Al-Jihād; Chapter “Rules pertaining to the (rights and responsibilities of the) head of state; 4/208 narrated on the authority of Anas bin Malik (May Allah be Pleased with Him)

capacity building of the law enforcing personnel on child protection and rights should be mandatory.

- Last but not the least, application of restorative justice especially in Juvenile Justice System can greatly reduce the juvenile delinquency and also can play an effective role in resolving the conflict among different stakeholders.

Conflict of Interest

There is no conflict of interest concerning publication of this paper.

Funding Source

This paper has no funding provided by any agency.

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