

A Discussion of the Right to Defence of The Accused Juvenile during Trial in Iraqi Law

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In this paper, we discuss the guarantees that the juvenile defendant should have in trial proceedings, and discuss the right of defence: that the juvenile defendant should be given sufficient opportunity to express his or her personal views on the charges against him if he/she is able to do so. A social defender took up the task of defending the juvenile, and then drew a conclusion that included several conclusions and recommendations. One of the most important conclusions is that the legislation pertaining to international and domestic juveniles in general does not reach the guarantees it should contain.

Key words: *Juvenile, Defence, Trial.*

Introduction

What is the Right of Defence?

a) The Concept of the Right of Defence

The right of defence is an inherent and sacred right that has arisen with the emergence of life on earth and exists in the depths of the soul that show the components of that right when influenced by the danger surrounding the self or money (*Abd al-Sattar, 1981*). The truth is, individuals often lose their rights only to the extent that they did not have enough power to defend themselves. But man began to think carefully about how to use his mind to defend himself and his money in an orderly manner that protects his rights in the simplest way and at the lowest costs, helped by the invention of reading and writing and then the emergence of a

new philosophy of life, which I learned by various means of defence can exercise even the weak, who cannot use force to preserve their rights. (*Mohammed, 2002*) Thus, the right of defence is the second equation in which the balance of justice is equal, since the first is the state's indictment of a defendant for a specific crime for the purpose of punishment while possessing wide powers and great potential through specialised agencies to administer justice, through enacting laws and implementing procedures that are planned and not left to individuals. (*Hussein, 1955*)

b) The Exercise of the Right of Defence

Justifying the defence as a right requires that the defendant have the complete freedom and will to use it whenever he wants and in the way he deems appropriate and consistent with his circumstances and possibilities, but it is beyond that is to refrain from using it or to give up, and this is what some of the legislation on adult (*Omar, 2000*). However, due to the specificity of the juvenile trial and the need for them to have special procedures that distinguish them from adults, it was in their interests that juveniles should not waive the right to (judicial aid), i.e., the delegation of a court to defend the accused if they are not able to do so. If the waiver is issued, in addition to the involvement of the juvenile with the community in achieving justice, which is the supreme purpose of providing judicial aid, the juvenile is unable to waive such aid, because he has not acted with a pure right (*Mohammed, 1980*). Before the juvenile defendant chooses the optimal defence method, observing that guarantee and ensuring effective and productive justice requires that the juvenile or the person in charge be informed of the charges against him and the date of the trial is legally and unequivocally clear. This allows that the juvenile or the person responsible for managing the matter is able to handle the preparation of the defence by collecting the necessary documents and other evidence to strengthen their position in the case (*Mohammad, 2013*). If the defence is truly adapted, it also imposes an obligation on the State to provide legal aid, namely, the assignment of a lawyer to the accused who is unable to defend himself or to appoint a lawyer before him, in all cases where the interest of justice so requires, or at least in the case of crimes. Dangerous crimes such as felonies and some misdemeanours are important due to the difficulty of completing that task in all crimes (*Abd al-Rahman, 2012*).

c) Legal Basis

The right to defend a juvenile is not confined to the State's domestic juvenile laws, but also to numerous declarations and international rules concerning the category of juveniles, including the 1989 Convention on the Rights of the Child and the Beijing Rules. The first convention had indicated that every child had the right to freely express his or her views on all matters concerning him (*Khalafi, 2015*). They should also be given the opportunity to speak in any court case affecting him/her, either directly or through a representative, and their views must,

of course, be respected according to age and to his maturity. It also stipulates that every child alleged to have violated the Penal Code or charged with shall have at least the following guarantees: notify them immediately or directly of the charges against them, through the parents or legal guardians if necessary; obtain legal or other appropriate assistance to prepare and present the defence (*Huzayt, 2014*); a competent, independent and impartial judicial authority or tribunal to adjudicate the claim in accordance with the law in the presence of a legal adviser or with other appropriate assistance. Thus, it is understood from the provisions of the Convention on the Rights of the Child on the rights of juveniles that States involved in the Convention and through juvenile courts are obliged to ensure that the juvenile defendant has the opportunity to defend in all matters affecting him or her, after being informed as soon as possible of the charges against them (*Abdul Basit, 2000*). Thus, the defence of the juvenile is allowed by several persons or bodies, including the juvenile, if the competent court considers that he/she is capable of administering that defence and that they can freely form their own opinions regarding the judicial proceedings against them. The second convention provided that “fundamental procedural guarantees, such as the 000 right to counsel, shall be ensured at all stages of the proceedings” (*Hassan, 1983*). Elsewhere, the juvenile has the right to be represented throughout the proceedings by the legal counsel or to request that they be assigned a lawyer free of charge, where the law of the country provides that it is permissible, and the parents or guardian have the right to participate in the proceedings. Thus, the Beijing rules confirm the above mentioned in the previous agreement that the juvenile can be defended by the juvenile them self or by an experienced lawyer or social defender like a parent or guardian, although the latter doesn’t have a degree of jurisdiction in law (*Mohammad, 2013*).

Guarantees of the Accused Juvenile in the Trial

a) The Defence of the Juvenile

In accordance with the general rules of international declarations and covenants, procedural and juvenile laws, a juvenile has the right to defend themselves as a party and to inform the public of the circumstances of the accusation, even if he is not at large. But you must be aware of this important matter that it is not worth the juvenile to take the order to defend themselves at all times. This requires that the juvenile court have wide authority in assessing the matter from its basis and allows it to do so if you are a rational instructor (*Hassan, 1979*). This is after holding them accountable to the results of taking up defending themselves in view of the possibility of losing the case because they were not familiar with what is going on in the trial and lacked the intelligence and skill needed of how to present evidence and cross-examine witnesses and refute the arguments of the opponent. It also allows the juvenile to speak freely and feels safe in their actions towards them and to display all ideas and opinions that they want to say without a previous presumption of conviction even if there is sufficient evidence to convict and not to boycott them even if there is a repetition in their words, but must listen to each stray and

incoming mentioned by the same juvenile Importance (*Abdul Rahman, 1998*). The juvenile should be understood from the outset to say everything they know about the case and not hide anything from the court. The court should ask what they would like to add to earlier statements because that opportunity may not be given again when the court closes the hearing (*Raouf, 1960*). The court shall also provide the juvenile with an interpreter free of charge if they speak a language other than the language of the court and are unable to understand or speak the language used, in order to increase the effectiveness of the right to defence and to ensure a fair and impartial trial. It should be noted in this regard the need for the judge to stay away from some important things in dealing with juveniles, namely to avoid taking deception and manoeuvring as a basis for dealing such as leading the words of the accused juvenile as to the existence of false and disguised arguments against them in order to obtain a false confession of committing the crime (*May, 1974*).

b) Hiring or Assigning a Lawyer

If the necessity of having a lawyer beside the juvenile at the stage of the preliminary investigation is not approved and agreed upon by all the comparative juvenile legislation, we find that the majority of them did not do so but made it optional for the accused juvenile and their family, except for a trend represented by (formerly) Soviet legislation according to which judicial aid is provided from the moment of the preliminary investigation of certain cases where the accused is a juvenile or mute (*Mohammed, 1980*). This legislative approach is no different from that of adult legislation. However, the presence of counsel alongside the juvenile defendant at the trial stage has been taken for granted and cannot be questioned or diminished even if there is sufficient evidence against the juvenile on the grounds that this right of aid is one of the simplest rights of the accused from the State, which should seek to achieve the principle of justice (*Hassan, 1983*).

There is no doubt that juvenile delinquents are in a vulnerable position when charged with a particular offence, and therefore the guardian must provide those who defend them if they are not able to do it themselves. The requirement of the law for the necessity of having a lawyer beside the juvenile at the trial shall not be free from the benefits that justify the report and whether the lawyer is assigned by the accused or relatives or assigned by the court of first instance, in order for the lawyer to take over unless the juvenile can do it, especially if he is a prisoner of arrest. He cannot collect and arrange his own defence evidence (*Akram, 1996*). The presence of a lawyer with the juvenile will also help to ensure the stability and psychological balance of the juvenile and help them to understand some terms that may seem strange and not familiar before, such as crime, witnesses or denial. (*Abdul Rahman, 1998*). Added to this is the optimism of a well-seasoned lawyer with judicial experience beside the juvenile who is able to keep up with the adversary, preventing the forced recognition of the juvenile. (*Mohammed, 1980*). Thus, the presence of a lawyer next to the juvenile is necessary and

essential and is considered a justice appointee who works together with the judge in reaching the appropriate solution to the juvenile case based on objective facts in order to fix it and ensure quick rehabilitation. (*Mohammed, 1948*). However, despite the great importance and usefulness of the presence of a lawyer at the juvenile trial stage, there is a dissenting opinion of the aforementioned trend led by the legislation of some of the United States of America in isolation from the legislation of other countries of the world; this stresses the need for a lawyer at the stage of juvenile trial. This legislation reinforced this position with several justifications, including the absence of juvenile courts, originally from a representative of the Public Prosecution and the absence of criminal character of the trial, and this justifies the lack of the need for a lawyer next to the juvenile. (*Mohammed, 1948*).

The legal culture, wide knowledge and specialisation in the field of juveniles, the presence of members of the juvenile court and the persons delegated helps to lead the ship of justice and be the appropriate representative for the interests of juveniles and society. (*Ramadan, 1985*). However, we do not agree with the latter trend, because the judge is in charge of conflicting interests that cannot be combined. Therefore, the judge must be impartial in their judicial work so that his quest for justice is genuine and away from all suspicions that diminish the chances of success. (*Abd al-Rahman, 2012*). As for the reality of comparative juvenile legislation, it had differed on the issue of the assignment or appointment of a lawyer to defend the juvenile at the trial stage. Some legislation did not succeed when it mandated that a lawyer be assigned to a juvenile offender for a felony offence only as is the case in the adult legislation if the accused juvenile or the person in charge does not appoint a lawyer to represent them. (*Huzayt, 2014*). Perhaps the reason for such legislation is the seriousness and difficulty inherent in examining the details and the reasons for the crimes of felony, which makes the juvenile or the person responsible for it insufficient to take over the case, and therefore can only be practised by an experienced lawyer in judicial work. In this direction, juvenile legislation is in place in Bahrain, Lebanon and Iraq. (*Abdul-Amir, 1974*). The decision to delegate by virtue of the power of attorney, and if the lawyer furnished a legitimate excuse for not trusting the President of the Court to delegate others, in this case the lawyer should begin his willingness to defend the accused.

The presence of a lawyer in criminal proceedings for a hearing shall not be sufficient if it continues for several sessions and may not be continued when the lawyer withdraws from it. The solution in such cases is either to defer the case until a new lawyer is appointed by the accused juvenile, or to pass responsibility for filling the vacancy by the court to one of the lawyers registered with it. (*Mohammed, 1980*). Thus, the presence of a lawyer to defend the juvenile in the criminal cases of public order has become contrary to the ruling of the juvenile court and is overturned and invalid for violating a general procedural rule, which was ruled by the Iraqi Court of Cassation in several judicial decisions reinforcing that direction in which it stated (... A lawyer is delegated to defend the defendant accused of a felony ...) (*Mohammad,*

2013). It is notable on the recent decision that the Court of Cassation had merely in its decision to draw the attention of the competent court that it did not assign a lawyer to defend the juvenile in a criminal case and did not overturn the decision in the case, because it was in the interests of the accused juvenile to release them, but if the reverse is derived from the judgment the Court of Cassation had to overturn the judgment and return the case to the Court of First Instance for further consideration, taking the correct procedural formula required by law. (*Raouf, 1960*). In a recent decision of the same court that stated that "upon examination and deliberation ... found that the decision did not mention the name of the lawyer assigned in the case where the place of his name remained empty without dictation, confirming that the court did not assign a lawyer to defend the accused in accordance with the provisions of Article 144 of the Criminal Procedure Code.

This is evidenced by the fact that the lawyer (FZH) was asked to present his defence in the case after that on 7/4/2001, in addition to the fact that the two stamped posters were not dropped on the list, all of which made the decisions to cancel the charge and release the juvenile in violation of the ruling. (*Khalafi, 2015*). The law decided to overturn them and return the case papers to its court for a new trial and issued a decision by agreement). The order to defend an accused juvenile of an offence or when he is displaced or deviated under the legislation of Bahrain, Lebanon and Iraq, is left to the juvenile and the person responsible for the juvenile. If the accused does not do so, the court must listen to the lawyer and give sufficient time to make requests and present the defences. (*Huzayt, 2014*). On the contrary, the court has violated the defendant's right to defence and then presents judgment. If the accused is informed of his right to have a lawyer to defend him legally, but at the specified date of the trial, he shall request the adjournment of the case until his lawyer is present or appoint a new lawyer after the first withdrawal or dismissal; the court shall be free to respond to his request for acceptance or rejection provided that he is not. (*Raouf, 1960*). Italian law had gone, besides stipulating the need for a lawyer to defend the juvenile in all crimes, except for offenses punishable by a fine not exceeding 3000 LBP or by imprisonment for a period not exceeding one month. Juvenile's lawyers should be specialists in juvenile affairs and their problems by having a broad knowledge of, or at least be able to understand the government's disciplinary message towards juveniles. (*Mohamed, 1948*).

This is achieved through the organisation of the Bar Association where the Juvenile Court is located and in agreement with the President of the Juvenile Court and the Prosecutor General. The attorney must also be included in a special schedule prepared by the Bar Association. At least every three months, an alphabetical list of registered lawyers who meet the conditions required for pleading before the juvenile courts shall be renewed and handed over to the President of the Juvenile Court. (*Khalafi, 2015*). The lawyer who is allowed to defend a juvenile defendant shall have passed a course organised by the union or have practised such cases before. Noteworthy in this regard is the lack of the Iraqi Bar Association's interest in these

courses which limits what the Association does to extend the courses of competence in that they do not include any topics related to juvenile delinquency and how to deal with it and methods of prevention. The Bar should open specialised courses annually or biannually for lawyers working in juvenile justice, due to the success factors of these courses of professors and judges who are able to give lectures explaining the curricula prepared for that task consisting of theoretical and practical lessons on how to deal with the category of juvenile delinquents and methods of reform (*Mohammad, 2013*), as well as the fact that a large base of graduating lawyers has fled, and is growing in number every year. Perhaps these possibilities will entice the legislator and encourage them to open these specialised courses and involve lawyers in it, leaving ample room for juvenile courts to choose the most competent of them to take up the defence of the juveniles before them and not to confine the defence to certain names that are always repeated in the courts Provided that this is done according to a deliberate plan and an encouraging incentive system for lecturers in those courses so that the implementation will bear fruit by gaining a new selection of lawyers who are able to understand the problem of juveniles and know their impact on the future of our country – which seeks a conscious and healthy relief from the disease of delinquency, or those exposed to it. (*Abd al-Rahman, 2012*). Provide the best solutions to overcome them, and this alone promotes the best interests of juveniles in all judicial proceedings against them and in all trial roles. However, this idealistic picture of lawyers dealing with juvenile lawsuits is often shaken on the grounds of some writings. It was also noted that the trial of juveniles was sometimes completed in the presence of a lawyer to defend the juvenile. The presence of the lawyer in the trial proceedings is ineffective, simply because the trial has fulfilled its formal procedures required by law to avoid its lack. (*Steven, 1998*).

c) The Social Defender

Due to the desire of juvenile legislation to make the social work of juvenile courts different from the rest of the courts, some of them are authorised and explicitly provided for by the defence of the juvenile by persons of interest to the juvenile who have a relationship either to him/her personally, or to the subject of the crime. In fact, such an exception in the way of defending a juvenile defendant is a departure from the general rules that the accused's attorney must be a lawyer. (*Abdul-Amir, 1973*). However, although the law does not require the social defender to be a professional or acquainted with the legal profession before, the basic principles of the role of lawyers in showing the truth apply to him as required, knowing that the social defender does not have such legal status similar to lawyers. We believe that the reason for this exception and justification is an expression that the juvenile defendant is not considered a criminal to be punished, but several young deviants can be evaluated and rehabilitated with the community: to reach this noble goal requires the court to determine the causes of delinquency of the juvenile by his parents or a relative or a representative of social institutions, which is the original source of experience in knowing the causes of delinquency of juveniles and the way

to evaluate them because of their proximity to the event. (*Abdul Basit, 2000*). Amongst the juvenile legislation that provided for the possibility of the social defender taking over the defence of the juvenile is the Jordanian Juvenile Law, which asserted the right of the guardian to defend or assist the juvenile by discussing witnesses of evidence or the report of the probation officer. The Iraqi Juvenile Welfare Law stipulates the Juvenile Court may accept the defence of the juvenile, a relative, or a representative of social institutions without the need for a written agency, subject to the provisions of Article 144 of the Code of Criminal Procedure (*Huzayt, 2014*).

Conclusion

1. It has become clear to us that the international legislator, through many international conventions, declarations and covenants, is interested in the guarantees of the juvenile trial. However, it is noticeable to all these international texts that they are concise in their wording, as their legislators merely emphasised the guidelines for trial guarantees and referred the organisation of detailed issues to the domestic juvenile legislation, according to the circumstances and possibilities of each State, for which the international legislation was followed in all its texts in several respects.
2. Although the texts of most comparative juvenile legislation are distinguished in terms of the guarantees provided for the trial, we found them in their entirety insufficient and have not yet reached the stage where the ambition and the attention of the juvenile defendant should be given attention, given the existence of some deficiencies and legislative lapses in addition to these violations. The process that occurs in the corridors of juvenile courts is the failure to apply some of the provisions of those guarantees or the poor application of them, which can be achieved by a positive act such as detaining the juvenile with the adult defendant, or putting him in the dock at the trial – or with a negative behaviour such as not assigning a lawyer or examining the juvenile when required. This reduces the value and effectiveness of what is already available from trial guarantees.
3. We found that the Juvenile Court, although included in the courts of judicial organisation of any state, is ultimately a social educational institution that does not want to punish juvenile delinquents, but seeks to reform and return them to normal behaviour again, through the adoption of educational procedures and measures. Quickly enforcing the law is not the sole focus of the law, but the various humanities related to the reform of juveniles and their re-education on a sound basis.
4. Given the enormous benefits provided by the safeguards report to the juvenile defendant, especially at the trial stage, being the real appointee to show his innocence if he is innocent or to be sentenced by one of the measures if he is guilty and to preserve his human dignity and personal freedom, it has become clear to us that the juvenile or his responsible defender may not be waived. In those guarantees, because the first has not yet reached a stage where he can determine his interest, while the second because the guarantees were not decided for

him at all, but is a guard against as it is supposed to be honest in the use of the benefit of the event.

Recommendations

1. We call on legislators of comparative juveniles that have taken the single judge as an organisational method in forming juvenile courts to take the formation of such courts from at least one body to consider some serious crimes such as felonies that require the formation of a body composed of more than one member, in order to ensure the discussion of opinion: and not one person in it.
2. We require the Iraqi Juvenile legislator to allocate an independent building for juvenile courts throughout Iraq and not to limit it to a few courts in some provinces. It is preferable that the building be located in an average place of the city, which is easily accessible to all concerned without hardship and trouble, and that it is separate from the courts and other official departments, in order to prevent the mixing of juvenile delinquents with other adult criminals or reviewers of the rest of the districts.
3. We recommend that all juvenile justice personnel, from the judge down to the staff working with them, should be allocated to the extent of their responsibility to understand the personality of the juvenile and issue an effective measure to fix it. This requires the achievement of several things, including passing stages of integrated preparation consisting of the first two theoretical parts and the second applied, as well as continuous judicial development, each according to its competence and the need for personal desire to work in the juvenile justice and the presence of all workers in the qualities that distinguish them from adults in the judiciary.
4. We propose specialised courses to develop all workers in juvenile justice under the supervision of professors specialised in various humanities and legal sciences related to juvenile affairs and in cooperation with international and international organisations, in an attempt to compensate for the lost basic principles they had received in the stages of their academic preparation, and to refine their talents and increase their efficiency and overcome the many obstacles that stand in the way of success in their career.
5. We call for the necessity of mutual cooperation and mutual respect in dealing with all juvenile justice personnel on the one hand and between them and institutions and persons involved in juvenile delinquency such as school administrations, youth centres, people's councils, press and publishing men on the other hand, as this provides an understanding of the problem of delinquency and an exchange of experience available to both sides. And then develop the method and programs of judicial dealing with that offender group.
6. We recommend that the Iraqi Juvenile legislator should introduce an article requiring a juvenile court to assign a lawyer to defend a juvenile accused of a felony or misdemeanour and to give the court discretion to charge a juvenile offender when he is in a situation of homelessness or delinquency.



7. We appeal to the Iraqi legislator to increase the amount of attorney's fees assigned to defend the juvenile accused of a felony crime and to accelerate the payment of that amount before the verdict in the lawsuit becomes definitive. The prevailing pension is to motivation to exert more effort and dedication in reading the case and defending the event.



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