

**The Right of an Accused to a Fair Trial in Criminal Administration of Justice: Testing the Fairness of a Murder Trial in Sessions Court in District Shangla of Khyber Pakhtunkhwa.**

Sara Qayum<sup>1</sup> & Hussain Ahmad<sup>2</sup>

**Abstract.**

The notion of the right to a fair trial is designed to guarantee that every accused is entitled to due process of law through fair trial proceedings irrespective of the innocence or guilt. It also aims to save an innocent accused from the abuses of the criminal law and to avoid injustice. In Pakistan, this basic right of the accused is expressly protected under the newly inserted Article 10-A of Pakistani Constitution. This research study investigates whether an accused is practically provided the right to a fair trial in trial courts in Pakistan in compliance with the internationally accepted minimum fair trial standards? For this purpose, as a case study, a murder trial in Sessions Court of district Shangla of KPK province was monitored right from the registration of First Information Report (FIR) until the conclusion of the trial. The study has found that the monitored trial was mostly conducted in accord with the fair trial standards. Nevertheless, there are some areas, where the monitored trial falls short of the international fair trial standards. Finally, this study suggested various recommendations to meaningfully guarantee an accused the right to a fair trial in trial courts in Pakistan in line with the international fair trial standards.

**Keywords:** Right to a Fair Trial, Fair Trial Standards, International Law, Shangla.

**Introduction**

“Tribunal will not be judged by the number of convictions which it enters...but by the fairness of its trials.” (Judge David Hunt of the ICTY)

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<sup>1</sup>The author Dr. Sara Qayum is an Assistant Professor at the Department of Law, Hazara University, Mansehra. She is HEC Approved Supervisor. Her areas of interest are human rights, criminal law, international humanitarian law and constitutional law. She can be reached at [saraqayum@gmail.com](mailto:saraqayum@gmail.com)

<sup>2</sup>The author Mr. Hussain Ahmad, District Public Prosecutor is doctoral candidate at the Department of Law in Hazara University, Mansehra. This study is based on his PhD research in Law thesis. He is interested in criminal law and procedure, human rights law and Islamic criminal law. He can be reached at [hussainiui@gmail.com](mailto:hussainiui@gmail.com)

The concept of the right to a fair trial (R2FT) in criminal administration of justice is fundamentally designed to guarantee fair proceedings to a criminal suspect or accused in order that he or she does not become the victim of the abuses of the criminal law and miscarriage of justice (United Nations, 2003; Weissbrodt and Wolfrum, 2011; Webb & Clooney, 2020). The legal provisions regarding an accused's R2FT is expressly found in Pakistan's domestic legal framework (Karim, 2003). For instance, Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution) provides for the 'due process' right. Furthermore, Article 10-A of the Constitution clearly stipulates that every individual is guaranteed the right to a 'fair trial and due process' of law. The term right to 'a fair trial' is not defined anywhere in the Constitution or any other statute. Therefore, a genuine question may pop up in mind what is the R2FT in criminal administration of justice. In other words, what are the constituent elements of the R2FT? For this, we have to make recourse to the various international and regional human rights instruments, stipulating some minimum 'fair trial rights', which legal scholars collectively termed as international fair trial standards (IFTS). In fact, IFTSs are the several constituent elements of the R2FT, which aimed to guarantee fair trial in criminal cases and avoid injustice within the domestic criminal justice systems of the member countries. In other words, they constitute an international legal structure of basic guarantees against unfair trials and injustice (Harby & Mole, 2006; Goss, 2014). These IFTSs are also used as a litmus test to test and measure the R2FT mechanisms of the state parties (Webb & Clooney, 2020).

There is a wide spread allegation that Pakistan's CJS is not proving an accused with the R2FT (Asian Human Rights Commission [AHRC], 2000). This research study is aimed to investigate whether an accused is practically provided with the R2FT in trial court in Pakistan. This study will attempt to answer the question whether an accused blamed of capital crime is practically provided with the R2FT in Sessions court in line with the minimum IFTSs? The main argument of this study is that although Constitution doesn't define the term R2FT; however, trial courts are expected to guarantee fair trial to criminal suspects and accused in line with the internationally accepted minimum fair trial standards.

### **Research Methodology**

For answering the above raised research question, this study resorts to various legal research methods. Firstly, the study employs doctrinal method to dig out the various fair trial rights available to an accused within the domestic legal framework of Pakistan and international human rights law. By the use of this legal

method, national and international standards of the R2FT and the related case law will be dig out (Bhat, 2019). Secondly, comparative legal method is used to contrast the national fair trial standards with the IFTSs in order to guide and benefit the national legal framework on the R2FT (Burton & Watkins, 2018). Thirdly, by the application of case study method, a murder trial in Sessions court in district Shangla of Khyber Pakhtunkhwa province is monitored in order to evaluate its compliance or non-compliance with the minimum IFTSs. The whole proceedings of the murder trial were monitored right from the registration of First Information Report (FIR) i.e. 09<sup>th</sup> August, 2017 till to the pronouncement of the trial court's judgment i.e. 24<sup>th</sup> July, 2019.

Both primary and secondary sources are used to collect data for this research study. The international and regional human rights documents are studied to find out the various minimum IFTSs in international law. Furthermore, the jurisprudence of the regional and international human rights treaty monitoring bodies on the various elements of the R2FT is examined. In addition, Pakistan's domestic legal framework on the R2FT is thoroughly examined to get a clear idea of what are the various existing fair trial rights available to an accused. Additionally, Pakistan's superior courts jurisprudence on the various elements of the R2FT is also consulted. Moreover, primary data is got from the personal observation of the court proceedings of the murder trial in district Shangla and review of the case file and court transcripts. Qualitative interviews of the different stakeholders of the CJS in district Shangla is used another primary method of data collection. Interviews are conducted in semi-structure way. Finally, secondary materials are got from journals articles, books, official websites of the government departments and newspapers.

### **The Right to Fair trial in International Law**

As mentioned above, an accused is guaranteed various minimum fair trial rights in many international and regional human rights documents (Summers, 2007; Weissbrodt, 2014; Zhang, 2009). They inter alia include right to liberty, right to notification of charges, right to sufficient time and facility to prepare a defence, right to lawyer at the pre-trial stage, right to be presented promptly in front of a judge, right to release on bail pending trial, right to stay silent at the time of police arrest and interrogation, right to protection from self-incrimination, right to safeguard from torture, right to the conduct of trial by an impartial, competent and independent court, affording a fair opportunity of hearing, conducting of an open hearing, right of an accused to be presumed innocent unless established guilty, right to the exclusionary rules of evidence, protection from the retrospective application of penal law, right to speedy trial, right to legal counsel during trial

proceedings, right to confidential communication with lawyer, right of an accused to be present at trial proceedings, right to interpreter and translation, right to cross-examine prosecution witnesses (PW), right to summon and examine defence witnesses, right to equality before the courts, right to a public and reasoned judgment, right to appeal, right to re-trial on the basis of newly discovered evidence, right to prohibition from double jeopardy (Brooks, 2009; Langbert, 2005; Lorenzmeier, 2007; Marasinghe, 1988).

The major legal provisions on fair trial rights in criminal administration of justice are found in Article 6 of the European Convention on Human Rights (ECHR), Article 7 of the African Charter on Human and People's Rights (African Charter), Article 8 of the American Convention on Human Rights (ACHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) (United Nations [UN], 2006; Amnesty International [AI], 2014). In addition, FTRs provisions are also found in the UN Basic Principles of the Role of Lawyers, the UN Guidelines on the Role of Prosecutors, the Statutes of the International Criminal Tribunals for Rwanda and former Yugoslavia, the Statute of the International Criminal Court (ICC), among others important international and regional human rights legal instruments (Office for Democratic Institutions and Human Rights [ODIHR], (2012). Most importantly, over the last few years, the relevant international and regional human rights monitoring mechanisms like European Court of Human Rights (ECTHR), African Commission on Human and People's Rights (African Commission), Inter-American Court of Human Rights (IACTHR) and UN Human Rights Committee (HRC) have progressively interpreted the various constituent elements of the R2FT and produced a rich jurisprudence for the guidance of the CJSs of the members and others countries (Harby & Mole, 2006; Webb & Clooney, 2020). Throughout this study, these IFTSs are used as a touchstone to evaluate the fairness of our selected murder trial in order to form an opinion whether the accused is provided with the R2FT or otherwise. The aim is to draw inspirations from the IFTSs in reforming the CJS of Pakistan.

### **The R2FT in Domestic Legal Framework of Pakistan**

Prior to the insertion of Article 10-A in 2010, the R2FT was not expressly declared as a fundamental right in the Constitution. However, in *Al-Jehad Trust Case*, Supreme Court of Pakistan (SCP) interpreted Articles 4 and 9 of the Constitution and stated, "right to have a fair and proper trial and right to have an impartial court and tribunal" is "a well-recognised inviolable right enshrined in Article 9 of the Constitution". Article 4 of the Constitution contains the principle of the due process of law and declares this right as an "inalienable" one. As

mentioned earlier, in 2010, for the first time in the constitutional history of Pakistan, Article 10-A was inserted in the Constitution, which expressly guaranteed every accused the R2FT and due process right. What is meant by the term “fair trial” is not expressly defined by the Constitution. In *SuoMotu Case No. 4 of 2010*, SCP has beautifully observed that the legislature may have intentionally left this term undefined; perhaps the aim was to give it the internationally accepted definition.

There are some express legal provisions in Constitution of Pakistan, which contain various constituent elements of the R2FT like safeguards from illegal arrest and detention, prohibition against unreasonable searches and seizures, right to legal counsel, independence of the judiciary, bars on self-incrimination, protection against torture, among others various important rights of the accused (Auklah, 2011; Ghias, 2010; Rizvi, 2022). In addition, FTRs like provision of releasing an accused on bail pending trial, right to legal counsel, right to supply of documents to the accused, right of the accused to be present at trial, right to interpretation and translation assistance, right to cross-examine witnesses for the prosecution, right to confronted with incriminating materials, right to defence evidence, right to written judgement, right to pardon, remission and suspension of sentences, right to appeal, right to revision, right to review, among others are also found in CrPC, QSO and other national and provincial legislations (Karim, 2003). Furthermore, superior courts in Pakistan have interpreted and extensively elaborated the various components of the R2FT found in domestic legal framework and consequently produced an excellent case law on this subject (Tajik, 2022).

#### **Brief Case History of *State v Amjad Ali et al.***

This case belongs to Police Station Karora in district Shangla. In the case, principal accused Amjad was criminally charged for the commission of the murder of a young male and female on the name of disgracing family honour. Under Section 302 of the Pakistan Penal Code (PPC), crime of murder is punishable by death or imprisonment for life. Other three accused Shujat Ali, Muhammad Zada and Gul Mina were charged for abetting and aiding the crime of double murder. According to Section 109 of the PPC, the punishment for abetment is the same penalty provided for the main crime i.e. death or imprisonment for life. On August 22, 2017, all three male accused were arrested, who were later on sent to judicial lock-up. On August 24, 2017, female accused obtained pre-arrest bail from the Sessions Court in Shangla, which was later on confirmed. After completion of police investigation, case was sent to DPP for scrutiny and putting in court. After considering the available evidences, DPP decided to prosecute the

accused and sent the case file to court of Sessions Judge Shangla for conducting trial. On March 22, 2018 criminal charge was framed against all the four accused and PWs were summoned. After recording the evidence and hearing of both the prosecution and defence counsels, the trial court acquitted all the accused.

**Table 1: Chronological Details of the Case.**

<i>S. No.</i>	<i>Description</i>	<i>Details</i>
1	Date of the Commission of Offence	09 <sup>th</sup> August 2017
2	Number of the Accused	04
3	Date of the Arrest of the Accused	22 <sup>nd</sup> August 2017
4	Name of the Trial Court	Sessions Judge Shangla
5	Criminal Charges	302, 311, 109 PPC, 15 Arms Act, 2013
6	Number of PWs in Police Final Report	30
7	Number of PWs Testified	14
8	Total Number of Hearings	Thirty Four (34)
9	Date of Final Verdict	24 <sup>th</sup> July 2019
10	Acquitted or Convicted	All accused were acquitted

### **Testing Fairness of the Trial Proceedings**

#### **Pre-Trial Processes**

In Pakistan, CrPC is the principal criminal law, which describes the procedure for the investigation and prosecution of cases (Khan, 1995; Sahito, 2009). In addition, chapter 25 of the Police Rules, 1934 also sets out the procedure regarding investigation of criminal cases. In case under observation, police registered FIR against the accused as mandated under Section 154 CrPC. In cognizable cases like murder, police are mandatorily required to register FIR. Rule 24.1 of the Police Rules sets out the form and contents of the FIR, which is composed of six columns. The researcher has observed that the police, which sometimes cannot be easily read and may prejudice the accused, write FIRs in handwriting. Moreover, the present system of circulating copies of FIR is limited and accused or their counsels cannot easily access it. It is, therefore, suggested that the system of registering FIRs be digitalised, where online access should be provided to all the stakeholders of the CJS including the District and Tehsil Bar Associations. In this regard, Mr. Muhammad Iqbal advocate has remarked that sometimes police register weak and faulty cases, which later on prosecution cannot prove in courts. He suggested that amendments might be made in CrPC to

require each SHO to seek legal opinion from DPP before the registration of FIR in order to curb out registration of fake and bogus FIRs.

Section 26 (1) of the newly enacted KPK Police Act, 2017 bifurcates investigation wing of the police from the operation. The wisdom was to establish an independent investigation branch in each police station, which is tasked to exclusively investigate registered cases to the exclusion of any other operation-related duties. (International Crisis Group [ICG], 2010). However, the researcher has observed that IOs are still frequently transferred to other branches of the police because of which the ongoing criminal investigation negatively effects. Furthermore, IOs are extremely under-educated and not properly trained in modern techniques of criminal investigation (Fasihuddin, 2013). It is suggested that the investigation wing of each police station should be made fully functional and IOs should not be transferred to other branches of the police. IOs should be regularly imparted trainings in modern techniques of investigation. In this regard, Imran Khan Assistant Public Prosecutor has stated that graduation in law should be made the minimum qualification for the recruitment of IOs and the selection process should be made through KPK Public Service Commission.

Section 8 (2) of the KPK Prosecution Act, 2005 obligates every SHO to send copy of the FIR to DPP who is required go through it and issue investigative guidelines to the IO. Law also requires DPP to supervise the whole investigation process. Our observation showed that IOs are mostly reluctant to seek guidance from the DPP. Moreover, IOs are not sharing daily case diaries with the DPP. Mr. Rafiullah Deputy Public Prosecutor has remarked that strong coordination is needed between the police and prosecution during the pre-trial stage in order screen weak and fraudulent cases. He suggested that during the investigation phase, strong coordinations should be established between police and prosecution as it will save innocent accused from undue harassment and abuse of the process of the criminal law. He further suggested that amendment should be made in law to require every IO to share daily case diaries of the ongoing criminal investigation with the DPP.

The researcher has observed that there is a common misconception among the police that every person who is nominated in an FIR should be arrested. Further, neither the arresting police officer issue Maranda warning to the suspect nor inform the arrestee about his or her legal rights. IFTS requires that warnings be given to suspects at the time of taking into custody in order not to be compelled to testify against oneself. In *Ibrahim v United Kingdom*, the ECTHR has stressed that failure on the part of the arresting authority not to notify the arrested of rights cannot be justified and it will be examined "the proceedings as a whole fairer" in cases where the suspect is not informed of the rights. It is suggested that

amendment should be made in CrPC to require every arresting police officer to issue Maranda warning to the suspect and notify him/her of the available rights. It is further suggested that amendment may be made in CrPC expressly barring police from arresting a nominated accused unless there are sufficient incriminating materials.

In *Rehan v State*, SCP has held that remanding Magistrates should keep in mind Articles 9 (Right to Liberty) and 10 (Safeguards as to detention) prior to handing over a suspect in police custody. Most importantly, in *Ghulam Shabir* case, it has been held that instead of handing over a suspect in police custody, a remanding Magistrate can discharge a suspect within the meaning of Section 63 CrPC in cases, where it appears that the collected evidence is deficient or suspicion is not grounded on valid reason which justify the remand. In *Noor Nawaz Khan* case, PHC has held that during remanding phase, a suspect can also seek his or her discharge under Section 63 CrPC by showing that the allegations are groundless. Mr. Muhammad Iqbal advocate has stated that unfortunately sometimes remanding Magistrates mechanically hand over a suspect in police custody without the application of the guiding principles. He added that due to the non-engagement of lawyers, suspects are also not seeking their release during the remand proceedings. He suggested that remanding Magistrates should strictly adhere to the guiding principles and jurisprudence developed by the super courts in this regard.

Section 497 CrPC provides for the release on bail in non-bailable offences, where case of the accused is one of further inquiry. According to the jurisprudence of the super courts, bail in non-bailable crimes is a rule and refusal is exception. Case law shows that bail can only be refused to the accused in “exceptional and extraordinary” circumstances. For example, when the accused may temper with the prosecution evidence or the accused may repeat the crime, the accused is previous convict, or the accused may run away. However, contrary to the generous jurisprudence of the superior courts on releasing of the accused on bail in non-bailable crimes, in Pakistan including KPK province the number of under-trial prisoners (UTP) is much higher than the number of convicts (Hussain, 2018). Legally speaking, UTPs are presumed to be innocent, as they are not yet convicted of the crimes.

### **In-Trial Processes**

Chapter 22-A of the CrPC provides the procedure to follow by the Sessions Court in conducting trial of Sessions cases. Section 265-C CrPC requires Sessions Judge to provide to the accused all documents i.e. Challan, recovery memos, site plan of the crime scene, statements of the prosecution witnesses and



FIR at least 7-day prior to the formal initiation of the trial proceedings. IFTS like Articles 14(3) of the Covenant, 6(3) of the ECHR, 8(2) of the ACHR also requires that accused should be provided with the details of the charges and further sufficient time and facility should be afforded to the accused for the preparation of the defence. The purpose is to afford an accused with the opportunity to know in advance what evidence the prosecution will present to enable him to prepare a defence plea prior to the commencement of the formal trial. In Muhammad Siddique case, it was held that violation of mandatory provisions of Section 265-C CrPC is a clear violation of an accused's R2FT. The researcher has observed that the trial court has supplied all the documents to the counsels of the accused and accordingly formal trial proceedings were commenced.

Section 540-A CrPC permits the trial court to dispense the personal appearance of an accused in cases where there are more than two accused are jointly tried and allow such accused to be represented through counsel. In Haji Aurangzeb case, SCP has held that the provisions of Section 540-A CrPC must be interpreted with compassion and not to punish an indictee. Consequently, in preceding case, the Court has concluded that trial court should allow exemption from personal appearance to an individual who went overseas to earn livelihood and it was not possible for him to wait till the disposal of the case due to the protracted proceedings.

Article 117 of the QSO places the burden on the prosecution to establish the guilt of an indictee. In Safdar Ali case, the then Federal Court of Pakistan has beautifully observed that an accused is presumed to be innocent and the burden always lie on the prosecution to prove the charge on the standard of beyond reasonable doubt. Section 265-F CrPC requires a Court of Sessions to summon witnesses for the prosecution to record their statements. The manner and mode to record the statements of PWs is mentioned in chapter 10, Articles 130 to 137 of the QSO and chapter 25 of the CrPC. Article 133 of the QSO provides three phases for the recording of evidence. First phase is examination-in-chief, second phase is cross-examination and the final phase is re-examination. Accordingly, where the prosecution produces a witness, the prosecutor will examine him for the first phase of examination-in-chief and then the defence counsel will cross-examine her/him. Re-examination is allowed for the purpose of clarification of any ambiguity in the cross-examination or if anything is left out in the examination-in-chief. Article 137 of the QSO bars asking of the leading questions in examination-in-chief or re-examination but with the approval of the court. Trial court is empowered under Section 161 CrPC to ask court-question from a witness to reach to the truth. Section 363 CrPC requires a trial court to record its observation regarding the demeanour of a witness. Section 353 CrPC stipulates

that trial court should record all evidence in attendance of the accused or defence counsel. After closing of the prosecution evidence, trial court is required under Section 342 CrPC to confront the accused with all the incriminating materials appeared in the prosecution evidence so that he or she can provide an explanation, if any. Case law shows that under Section 342 CrPC, trial judge is required to put every piece of incriminating materials to indictee to seek an explanation, otherwise the same cannot be made a basis for the conviction.

### **Fair Trial Analysis**

In this case, many fair trial rights of the accused were respected. In particular, the accused were presented within 24-hour before the remanding Magistrate, accused were tried by impartial court, accused were provided with the counsel of choice, accused were informed of the charges, accused were given the opportunity to be present at the trial, accused were given enough time and facility to prepare their defence, accused were supplied with all the incriminating materials, accused were practically provided with the opportunity to be presumed innocent unless proven guilty, trial proceedings were public, accused were given the opportunity to cross-examine the witnesses for prosecution, accused were confronted with all the incriminating materials, accused were afforded an opportunity to present defence evidence and last but not the least, accused were provided a reasoned and public judgement. However, certain FTRs of the accused were not respected, which inter alia include right of the accused to remain silent at the time of arrest, non-availability of defence counsel at the pre-trial investigation stage, non-supply of the documents to the accused at the pre-trial stage, non-availability of lawyer at the time of police interrogation of the accused, police use of custodial torture as an interrogation technique, violation of the right of an accused not to be held generally in detention, non-collection of exculpatory evidence by the police and the right of an accused to be tried without unnecessary delay. Needless to mention that these few FTRs violations have no major negative impact on the overall fairness of the proceedings and Sessions Judge Shangla did practically provided all the accused with the R2FT.

### **Conclusion**

This study concludes that there are considerable number of fair trial rights available in domestic legal framework of Pakistan. In particular, Pakistan's superior courts have played a significant role in producing a rich national jurisprudence on fair trial rights. Moreover, the observed murder trial before the Sessions Judge Shangla was mostly conducted in line with the national and international standards of fairness. There were no major procedural irregularities or fair trial violations

during the conduct of the trial proceedings. Nonetheless, there were some minor fair trial violations, which are discussed above. Overall, the nominated accused's R2FT was respected. The recommendations of this study will play a significant role in setting highest national standards of fairness in criminal trials and ultimately meaningfully realising the R2FT of an accused. In the words of Andul Majeed Auklah: "...out-lived procedures, out-moded laws and out-dated rules and regulations visualized in 1837 and got implemented in 1860 by Lord Macaulay's so-called reforms are now redundant." (Auklah, 2011) Therefore, it is high time that the national criminal justice system should embrace the minimum standards of fairness and best practices to bring the national legal framework at par with the international standards and vision of Article 10-A of the Constitution.

### **Recommendations**

In light of the above discussion, this study recommends certain reforms in the CJS for the meaningful realisation of an accused's R2FT in Pakistan generally and in KPK particularly. Followings are the recommendations of this study:

- The process of the registration of FIR is required to be automated, wherein online access should be provided to the accused or his counsel.
- CrPC may be amended to expressly guarantee an accused's right to counsel at the pre-trial investigation stage particularly at the time of police interrogation.
- Arresting police officer should clearly inform a criminal suspect of the allegations at the time of arrest and further Miranda warnings should be issued to him.
- Under-graduate degree in criminology or CJS should be made a minimum qualification for the appointment of police investigators and further they should be constantly given trainings on latest techniques of criminal investigation.
- Police should not be reluctant to recommend weak, evidence deficient cases for discharge under Section 169 CrPC.
- Custodial torture should be made a criminal offence, and preferably, CCTV cameras should be installed in every police station.
- The District Prosecution should straightaway discharge weak and deficient cases. The prosecutors should be imparted trainings on prosecutorial skills. Prosecution and police should establish a good working relationship.
- A cognizance Magistrate should discharge evidence deficient cases within the purview of Sections 63 and 190 CrPC.
- Bail granting courts should follow the generous jurisprudence of the

- superior courts on grant of bail to accused pending trial.
- Trial court should grant exemption from personal appearance to a deserved accused under the provisions of Section 540-A CrPC.
- Trial judge is required to personally supervise the whole process of recording evidence.
- In cases, where there is no probability of the conviction of the accused, trial judge should exercise the powers under Section 265-B CrPC and acquit the accused to save him from the lengthy trial proceedings.
- Inordinate delays in the disposal of criminal cases should be eliminated and an accused should be ensured speedy justice.
- Police, prosecutors and judges should be specifically given trainings on national and international standards of fairness in criminal administration of justice.
- Pakistan's superior courts are strongly advised to take wisdoms from the international standards of fairness and jurisprudence to develop the national jurisprudence on the R2FT.
- Last but not the least, researchers may be encouraged to conduct such like trial monitoring in other parts of the country.

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