

HUMAN RIGHTS AND THE ADMINISTRATION OF **JUVENILE JUSTICE**

**SUHAKAM'S CONFERENCE IN CONJUNCTION WITH
MALAYSIAN HUMAN RIGHTS DAY 2008**



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EXECUTIVE SUMMARY



EXECUTIVE SUMMARY

INTRODUCTION

The theme for the Malaysian Human Rights Day 2008 is “Human Rights and the Administration of Juvenile Justice”. The objectives of the Conference are:

1. To examine the existing mechanisms governing juvenile justice in Malaysia and whether it complies with international human rights standard.
2. To identify the strengths and weaknesses of the protection mechanism and support system for the reintegration of children in conflict with the law.
3. To improve laws and procedures applicable to juvenile offenders and child victim.

PROGRAMME

SPEAKERS	DESIGNATION	TOPIC
Tan Sri Abu Talib Othman	Chairman of SUHAKAM	Welcoming Address
Datuk Mohd. Zaid Ibrahim	Former Minister in the Prime Minister's Department	Opening Address
KEYNOTE ADDRESS		
Professor Sedfrey M Candalaria	Associate Dean for Student Affairs at the Ateneo de Manila Law School	Restorative Justice and Diversion for Children in Conflict with the Law
PANEL DISCUSSION: Human Rights and the Administration of Juvenile Justice		
* Dato' Meme Zainal Rashid	Director General of the Department of Social Welfare	Juvenile Justice in Malaysia – The Role of the Social Welfare Department
Dr Farah Nini Dusuki	Senior lecturer, University of Malaya	Convention on the Rights of the Child and the Administration of Juvenile Justice in Malaysia: An Overview on the Legal Framework

* Dato' Meme's paper was read by Puan Nor Hajah Amni who is the Director of Children Division Department of Social Welfare

Mr. James Nayagam	Executive Director, Shelter Homes for Children	Strengths and Weaknesses of the Protection Mechanism and Support System for Reintegration of Children in Conflict with the Law
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WELCOMING ADDRESS

Tan Sri Abu Talib Othman's speech touched on ways of renewing how we approach juvenile offenders. Perception of them being inherently prone to crime has to be changed as they are more likely to be products of their environment than being born with criminal instinct. Therefore he urged for a more comprehensive system to be put in place to implement a more restorative form of justice than what is currently practiced.

OPENING ADDRESS

According to Datuk Zaid Ibrahim public perception and stakeholders' attitude are critical to influence effective change in the current Juvenile Justice System. Without first having stakeholder's commitment to change, all the laws and conventions would be meaningless. He also urged the public to see juvenile offenders as victims of situation rather than hopeless youth born with criminal instinct. Only then a true restorative form of justice can be implemented.

KEYNOTE ADDRESS

Restorative Justice and Diversion for Children in Conflict with the Law

In his keynote address, Professor Sedfrey focuses on the developments of the restorative justice system. It came about with the shift of public opinion and thus a rehabilitative system was introduced that highlights the good qualities of an offender. The system utilizes three basic process repentance, rehabilitation and reacceptance- with each process intertwining with one another so that if one is not functioning well, then the whole system will become useless.

Another method that is used when dealing with child offenders is diversion; by using this method, offender will be channeled from the normal justice system into alternative procedures and rehabilitation programmes. Examples of the alternatives are: police warning, written or verbal apology, counselling and restitution to the victim. In the Philippines, sentences also have been suspended in cases involving children recruited by rebel armies.

Change, according to him, will certainly take some time to be realized. What is important is the commitment to advocate for reforms.

PANEL DISCUSSION

a) Juvenile Justice in Malaysia: Role of the Social Welfare Department

Puan Nor Hajah Amni began her presentation by relating the history of the Welfare Department and presented statistical data that indicates juvenile delinquency in Malaysia is not at an alarming stage, contrary to what has been portrayed in the public sphere. She then explained that the main function of the Department was to ensure that the overall purpose of the Child Act 2001 is fulfilled. The Department takes charge of rehabilitation and prevention programmes provided under the Act.

She concluded by informing that the Department will include several items for future improvement. They are:

- Gender policies into rehabilitation programmes.
- Intensive supervision probation.
- Community services in place for compensation or fines.
- Law- related education to schools.
- Family group conferencing.

b) Convention on the Rights of the Child and the Administration of Juvenile Justice in Malaysia: An Overview of the Legal Framework

Dr Farah Nini argued that children in conflict with the law must not lose their right to be treated as children as enshrined in the Convention on the Rights of the Child (CRC) and the Child Act 2001. There are several international non binding texts in place to help protect children under the age of 18. These texts help to draw basic guidelines for the state and the basic spirit of those texts was adopted by the CRC.

In Malaysia, the Child Act is the prime legislation used in the juvenile justice system. In her presentation, which used a backdrop of the Act and International documents, Dr Farah discussed issues familiar to the juvenile justice system such as age of criminal responsibility, arrest and pre-trial disposition, the court and alternative procedures and disposal orders.

c) Strengths and Weaknesses of the Protection Mechanism and Support System for Reintegration of Children in Conflict with the Law

Mr James reiterated the importance of understanding that children in conflict with the law should be viewed as victims. They are mostly from broken families and due to their situation and environment they develop anti-social behaviors. What they need is a system that will give them guidance to re-enter society and not a system that will only punish them for their crime and abandon them afterwards.

SPECIAL SESSION WITH INVITED GUESTS

After the Conference, SUHAKAM hosted a special meeting session at SUHAKAM's office with the keynote speaker, panelists and some Conference participants who are involved with juvenile justice. During the meeting many issues, such as early prevention, special court for children, experience from the Philippines, the Children Act 2001 and detention centres for juvenile offenders, were discussed.

SUHAKAM'S RECOMMENDATIONS

The following are the recommendations:

1. ROLE OF GOVERNMENT

a) Special Court for Children

The Government has to provide a special court for children. The court must be in a different premise and be attended by magistrates who are specially trained in the field of children's rights and are knowledgeable of international standards of juvenile justice. The premise must be accommodative and friendly to children.

b) Separate Facility for Juvenile Offenders

Apart from having a special court for children, the Government must also build detention centres specially to hold young offenders. The detention centre should be equipped with facilities to accommodate the children's age and development.

c) Alternative Sentencing

The Government must institute alternatives to punishment for juvenile offenders, especially for petty crimes. Imprisonment for petty crimes should no longer be acceptable. Instead a rehabilitative or restorative system, such as a community service and restitution, must be introduced.

d) Early Prevention

The Government must take early steps to forestall juveniles from committing crimes. Hence, an early prevention mechanism is needed. A thorough situational analysis must be conducted to obtain a precise picture of the contributing factors of anti-social behaviour of young children. The study will enable the Government to take appropriate measures to address the problem which will be financially less costly to the Government as well as less costly to the youngsters in term of personal development and wastage of their potential.

2. ROLE OF THE JUDICIARY

a) Observe Children Needs

The court has the responsibility to be sensitive towards children in conflict with the law and also towards child victims and child witnesses. To ensure justice, it is highly essential for the court system to accommodate the children's level of maturity and other special needs such as their background and history. The justice system must be child friendly and the trauma experienced by them should be kept to the minimum. Thus they must be accompanied by appropriate adults throughout the process.

b) Special Training

A special training on handling children in the justice system must be conducted for all magistrates who preside over children's cases. The training also should be provided to all those who work directly with juvenile offenders such as the police, social workers and volunteers.

c) Proactive Initiatives

Delays and prolonged remand periods must be addressed expeditiously. The court must be proactive and current in making improvements to existing guidelines. It should not wait for the Parliament to legislate bills to make changes that provide children with greater justice and help them reintegrate into society effectively.

3. ROLE OF CIVIL SOCIETY

a) Involvement in Rehabilitative Programmes

Civil society has to work in complement with the Government to ensure young offenders are given the best opportunities to rehabilitate and resume a constructive role in society. Since they are closer to communities and are better in working with them than the Government, the Government should involve them in rehabilitation programmes, especially in community service. They can play a vital role in enabling communities to accept juvenile offenders.

b) Probation Officers

The shortage of manpower, especially that of probation officers, in the Department of Social Welfare can affect the wellbeing and justice of juvenile offenders. To overcome this problem, the Child Act 2001 can be amended to enable volunteers, especially community leaders and retirees, with law and social work background to be appointed as volunteered probation officers.

4. ROLE OF THE MEDIA

SUHAKAM is concerned that the media has frequently violated the children's right to privacy as provided under Section 15 of the Child Act 2001 when covering cases of juvenile offenders and victims. The media has intentionally or unintentionally been revealing their identity by reporting the names of their parents or family members and their residence. When journalists or the electronic media commit this offence, they should be charged.

5. SUHAKAM's Role

SUHAKAM conduct a study to identify the gaps between the laws pertaining to juvenile justice and the implementation.

CONFERENCE PROCEEDINGS



WELCOMING ADDRESS

By

**TAN SRI ABU TALIB OTHMAN
CHAIRMAN OF SUHAKAM**

Y.B. Senator Datuk Mohd. Zaid Ibrahim
Minister in the Prime Minister's Department,

Your Excellencies,
Distinguished guests,
Ladies and gentlemen,

Good morning and welcome to Malaysian Human Rights Day 2008.

On behalf of the Human Rights Commission of Malaysia (SUHAKAM), it is my pleasure and privilege to welcome Y.B. Senator Datuk Mohd. Zaid Ibrahim, Minister in the Prime Minister's Department to this Conference. We are delighted that he has graciously consented to officiate the opening of this Conference. We are equally honoured and delighted by the presence of your Excellencies, Distinguished Guests and everyone in this hall, and for your continuous support for human rights.

Ladies and gentlemen,

Every year on this date we celebrate the Malaysian Human Rights Day since 2001. The theme of this year's Human Rights Day is "Human Rights and the Administration of Juvenile Justice".

Forty two percent or 10.5 million Malaysian are children. Malaysia has ratified the Convention of the Rights of Children and thus committed to comply with the Convention. Children's hope and expectations demand that the state fulfill its obligations to children as rights holders. Not only the Government but individual adult must accept that no injustice against girls and boys is justified, and that all forms of injustices against them is preventable. Children would want more than being told that they are the future. They would want to see us fulfil our promises in the present, and enjoy their right to be protected from injustice and violence today. For this reason we have chosen "Human Rights and the Administration of Juvenile Justice" as the topic of the 2008 Human Rights Day Conference.

Ladies and gentlemen,

Few children if any, are born with criminal tendencies. Their character and behaviour are shaped by the environment which includes the home, the school, peers and society at large. Thus, children in conflict with the law need to be provided with rehabilitative care which

includes counselling, education, vocational training, guidance, supervision and foster care to enable them to be remorseful of their misdeeds, learn to respond appropriately and positively to the environment and acquire vocational skills so that they can assume socially constructive and productive roles in society.

To see the future of a nation is to see the behaviour of the children today. They should be loved and nurtured and be given opportunities to realize their potential to the highest level possible. They are what we have made of them, for as Ronald Russells says,

If a child lives with criticism, he learns to condemn.
If a child lives with hostility, he learns to fight.
If a child lives with ridicule, he learns to be shy.
If a child learns to feel shame, he learns to be guilty.
If a child lives with tolerance, he learns to be patient.
If a child lives with encouragement, he learns confidence.
If he lives with praise, he learns to appreciate.
If a child lives with fairness, he learns justice.
If a child lives with security, he learns to have faith.
If a child lives with approval, he learns to like himself.
If a child lives with acceptance and friendship, he learns to find love in the world.

Ladies and gentlemen,

Juvenile delinquency and the victimization of children are issues that have a direct impact on the wellbeing of society and the nation. From juveniles who are in conflict with the law and a child who has been victimised are the concerns of society as a whole. Juvenile justice covers the fair treatment of youth under the law and the process refers to a distinct procedure established to assure fair administration of justice in general and juvenile justice in particular, which is managed by institutions like the police, juvenile courts, juvenile corrections and community based agencies and programmes. This includes the philosophy of recognising the rights of young people to due process protection when they are in trouble either for having committed a crime or become victim of a crime.

Historically these obligations were undertaken within the context of rehabilitation. However, within the late 20th century this approach was complimented by a new philosophy of punishment directed towards violence. In this regard the modern system of fighting crime is made applicable to both adults and juveniles, and thus results in many juvenile offenders being tried and punished as adults. The issue is: how can justice be fairly dispensed to young people? Which institutions best serve the needs of youths and the community? Can the needs of juveniles and society ever be balanced and at the same time preserve justice for the children and human rights for all?

In our view punitive punishment is not the best approach to rehabilitate young offenders to prevent recidivism and to reintegrate them into society. Alternative and educative measures that do not compromise laws and human rights, such as restorative justice, should be adopted. Measures for dealing with juvenile offenders without resorting to formal trial should also be

considered if appropriate and desirable. Instead of imprisonment or deprivation of liberty for petty and non-violent crimes such as *curi ayam*, mediation for restitution, compensation of victims and community programmes would be more appropriate. During the adolescent years, crimes may be committed out of rebellion, dare and ignorance (such as statutory rape which often occurs with the consent of both parties). For offences such as these, imprisonment will inflict more harm to the children as they will be stigmatized and their development be jeopardized. Instead of being rehabilitated, their experience while in prison can make them become more hardened criminals. It is the responsibility of the state to ensure that juvenile offenders are given treatment that rehabilitates to enable them to assume a constructive role in society. It is also imperative to remember that though they are in conflict with the law, they have the right to human dignity and all the rights due to them as human beings. Subjecting them to inhuman and cruel treatment, unjustifiable detention or long detention and deprivation of their liberty, protection and development is totally unacceptable. Disposition in juvenile cases tends to influence the offender's life much more and for a longer period of time than adults. Decisions of adjudicators and measures for rehabilitation should always be based on the best interest of the child and should be determined by a competent authority.

Ladies and gentlemen,

To effectively prevent and address violence against children in care and justice system, it is essential that action plans be formulated focusing on ways to reduce violence within the juvenile justice system and children at large. I would like to suggest, amongst others, the following:-

- i) Children need to be treated with humanity.
The Convention on the Rights of the Child (CRC) forbids torture, capital punishment and life imprisonment without the possibility of release for all persons below 18 years. Detention should only be used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing.
- ii) Ensure institutionalisation is a last resort and priorities alternatives. The Government should ensure the placement in an institutional setting is avoided whenever possible, and a full range of alternatives should be available for both care and justice system. Child offenders should be brought as speedily as possible for adjudication, unless delays are in the juvenile's best interest.
- iii) The Juvenile justice system for all children under the age of 18 should be comprehensive, child-focused and have rehabilitation and social reintegration as their paramount aims. Such system should adhere to international standard, ensuring children's right to due process, legal counsel and access to family and friends.
- iv) A maximum time limit should be set for remand juveniles which should be different from adults since it involves violation on the right of education.

- v) Juveniles should at all times be separated from adult detainees.
- vi) Ensure that court systems are sensitive to the needs of children and their families. Child victims and witnesses should not be re-victimised during justice process. They should be treated with compassion and respect for their dignity. They should not also be subjected to extended or drawn out cross-examination or other legal process. All investigations, law enforcement, prosecution and judicial processes should take into account the needs of the children in terms of their age, gender, disability and level of maturity, and fully respect their physical, mental and moral integrity. If it is in their best interests, children should be accompanied by a trusted adult throughout their involvement in the justice process. The child's privacy should be protected, his or her identity and confidentiality respected, and he or she should not be subjected to excessive interviews, statements, hearings and unnecessary contact with justice process. Unnecessary contact with the alleged perpetrators or defence counsel should be eliminated.
- vii) Consideration should always be given to the child's best interest when formulating policies, procedures and programmes that are respectful of the rights, needs and interest of the victims, offenders, communities and all other parties.

Ladies and gentlemen,

The Convention on the Rights of the Child and other treaties guarantee girls and boys everywhere the right to live their lives free from violence. There must therefore be action in all sectors - from health and education to labour and justice - and at all levels. Our commitment towards enhancing juvenile justice and redeeming child's right must be translated into unity and proper co-ordination in facing the challenges in this issue. I sincerely hope this Conference will result in greater understanding of the needs of juvenile offenders, child victims and witnesses and lead to a review of the administration of juvenile justice in Malaysia.

Once again I would like to thank the Honourable Minister, Your Excellencies, all our guests and participants for your commitment to human rights in general and your support for SUHAKAM in particular.

It is now my pleasure to invite Y.B. Senator Datuk Mohd. Zaid Ibrahim, Minister in the Prime Minister's Department to deliver his opening address and declare open this Conference.

Thank you.

OPENING ADDRESS: SUMMARY

By
DATUK MOHD ZAID IBRAHIM

In his Opening Address, YB Senator Datuk Mohd Zaid Ibrahim, stressed the importance of recognizing the need for a country to be peaceful and safe before human rights can be practised and promoted. Therefore, stability plays a pivotal role for the rule of law and human rights to prevail. A country torn in conflict cannot guarantee its citizen even with the most basic rights. For this reason, reaffirming our commitment to the values of the democratic process and institution is important. He also informed that there are those in the political world that are creating divisions in society by highlighting the ill-will in the country instead of the good things.

With regards to juvenile justice he said that first, change has to come from the way we view our youngsters. There is a tendency nowadays to focus all the attention on those who are high achievers in society instead of giving a much greater focus on those with problems, especially those who are deprived of certain privileges. This should not be so because juvenile offenders are not born with criminal instinct but instead are victims of situation and circumstances. One of the central ingredients in addressing juvenile justice is that we must care enough. When magistrates are sending young offenders to prison for minor offences such as stealing chicken as reported by SUHAKAM, this is then a perfect example of not caring enough. We are not willing to train our magistrates on other aspects of justice such as rehabilitative and restorative justice.

In order to address the issue more effectively we need to educate all those involved in the system so that they are more cognizant of juvenile justice. We can have all the laws and ratify all the conventions but if the people like the magistrates, social workers, enforcement officers, people from the Social Welfare Department and the Ministry of Education do not care enough then it is useless.

He hoped that the Conference will also address the attitude of society at large with regards to issues concerning juvenile justice, and that a more robust system can be developed. Finally, he called upon all government agencies involved in administering juvenile justice to take heed of the recommendations made by SUHAKAM at the end of this Conference, and to reflect on their respective role so as to make the recommendations a reality.

**KEYNOTE ADDRESS:
RESTORATIVE JUSTICE AND DIVERSION FOR CHILDREN
IN CONFLICT WITH THE LAW**

**By
PROFESSOR SEDFREY M. CANDELARIA**

Good morning ladies and gentlemen.

Allow me to thank the Malaysian Human Rights Commission (SUHAKAM) for this opportunity to share my views on the theme of this year's human rights day. It is a subject that is of great interest to me on account of my involvement in the advocacy for juvenile justice reforms in the Philippines and within the region.

I would like to develop this subject along four main headings: (a) historical context; (b) characteristics of a restorative justice approach; (c) its application to the Philippine setting; and, (d) some regional best practices.

HISTORICAL VIEWS ON “RETRIBUTIVE” v. “RESTORATIVE” JUSTICE

In an extensive treatment of the administration of justice, Mr. Gerry Johnstone states that in most parts of the world the justice system has been traditionally characterized as retributive in character. In the pre-modern era, the western concept of criminal justice drew from the perspective that primitive societies were “lawless” due to the assumption that there is no strong central power in society. Unregulated private vengeance became increasingly problematic as societies developed.

Alternative ways of dealing with wrongs emerged, such as the practice of “buying off vengeance.” An offender could buy back the peace he had injured by a system of fines. This however brought forth the problem of making one law for the rich and one for the poor. It was aggravated by the fact that the gravity of the offence and hence the amount of compensation due were determined mainly by the social status of the victim.

As societies developed, a strong central power emerged and gave way to state punishment. However, in the hands of the state the practice of punishment remained violent. Besides, the severity of the punishment came to be based on the wrongdoer's guilt, rather than on the status of the injured party or on the degree of anger provoked. Gradually state punishment became less violent with use of legal principles. At about the 12th century onwards European princes began to think of public displays of power as a useful way of symbolizing their political power.

CHARACTERISTICS OF RESTORATIVE JUSTICE APPROACH

A fundamental change in the manner of viewing and responding to criminal acts and associated forms of troublesome behaviour began to emerge through the restorative justice approach. The new approach emphasizes the good which exists in all offenders and refrains from inflicting pain upon offenders. It is not, however, a substitute to therapy. Restorative justice assumes that the offender will be allowed and encouraged to take personal responsibility for the harm they have caused. Furthermore, restorative justice attends to the need to change the community's attitude towards the offender. The method may be outlined as follows: repent (reparation), commit (reconciliation) and reaccept (reintegration).

COMPREHENSIVE JUVENILE JUSTICE AND WELFARE ACT OF 2006

In response to the observation of the Committee on the Rights of the Child on the administration of juvenile justice system in the country, the Philippine Government enacted the Comprehensive Juvenile Justice Welfare Act (CJJWA) specifically applying the restorative approach.

The law is also anchored on the relevant provisions of the Convention on the Rights of the Child:

Article 37

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;
- b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort.
- c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 39

State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that are not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and unless, it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have the decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

- (vi) To have free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused, or recognized as having infringed the penal law, and in particular:
- (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The CRC also derived international principles of juvenile justice from three important United Nations instruments, namely the U.N. Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the U.N. Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the U.N. Standards for the Protection of Juveniles Deprived of their Liberty. These standards have now been adopted by the Philippines in the CJJWA.

The CJJWA was a collaborative effort of various stakeholders to address the gaps of the juvenile justice system. The salient features of the law are as follows:

- Raised the age of criminal responsibility from 9 to above 15 years old
- Promotes diversion at all levels
- Disallows detention of children with adults
- Provides a comprehensive management of the children in conflict with the law (CICL) from prevention to rehabilitation & reintegration
- Creates a Juvenile Justice and Welfare Council (JJWC)
- Institutes an automatic suspension of sentence.

The age of criminal responsibility has been distinguished in the following manner:

<u>AGE</u>	<u>Criminal Responsibility</u>
15 or under	No criminal responsibility but subject to intervention program (S. 20) and for immediate release.

Over 15 but below 18

No criminal responsibility unless he or she acted with discernment.

It is worth noting that there is a presumption of minority (S. 7) and whenever there is a doubt on the exact age of the child, summary proceeding may be instituted to determine the age.

The law has been designed to address the various rights, circumstances and duties arising from initial contact of the child with the justice system until final disposition of the case.

Initial contacts of the child may be with either the police or the local social worker.

Under these situations, the police and the social worker would have the following duties:

1. Police Officer shall:

- a. Inform the child of his rights;
- b. Determine the age of the child;
- c. Immediately but not later than 8 hours after apprehension, turn over the custody of the child to the social welfare and development office or other accredited non- government organizations, and notify the child's parents/guardians and the Public Attorney's Office of the child's apprehension;
- d. Determine where the case of the CICL should be referred.

2. Local Social Worker shall:

- a. Explain to the child and the child's parents/guardians the consequences of the child's act with a view towards counselling and rehabilitation, diversion from the criminal justice system, and reparation, if appropriate; and,
- b. Determine the appropriate program for the CICL.

An important feature of the law is the concept of diversion. Sections 31 to 42 embodies the different diversion measures available even until the case reaches the trial court.

Diversion is the channeling of children away from the normal justice system through alternative procedures and programmes away from criminalization of youth offences detention. The law provides the following diversionary measures:

- Police caution or warning
- Mediation, family conferencing and conciliation
- Written or verbal apology
- Written essays on effects of crime committed
- Restitution to the victim
- Participation in life skills course
- Counseling or therapeutic treatment

Diversion has been made available at the barangay, police, local social worker, prosecution and the court levels:

1. Punong Barangay and Law Enforcement Officer – with the assistance of local social welfare or other members of Local Council for the Protection of Children, shall conduct mediation, family conferencing and conciliation and, where appropriate, adopt indigenous modes of conflict resolution in accordance with the best interest of the child with a view to accomplishing the objectives of restorative justice and the formulation of diversion program (if crime is not punishable with more than 6 years of imprisonment)

2. Local Social Welfare and Development Officer – shall meet with the child and his/her parents or guardians for the development of the appropriate diversion and rehabilitation program, in coordination with the Barangay Council for the Protection of Children (victimless crimes).

3. Prosecutor – in cases where the offense is punishable by more than 6 years imprisonment, or if the child, his/her parents or guardian does not consent to a diversion, the Punong Barangay or the Philippine National Police handling the case, within 3 days from the determination of the absence of jurisdiction, shall forward the case to the prosecutor concerned for the conduct of the inquest or preliminary investigation. There shall be a specially trained prosecutor to conduct inquest, preliminary investigation and prosecution of cases involving CICL. If there is an allegation of torture or ill- treatment of the CICL during arrest or detention, it shall be the duty of the prosecutor to investigate the same.

4. Court – where the maximum penalty is imprisonment of not more than twelve (12) years, and before arraignment, the court shall determine whether or not diversion is appropriate.

Court proceedings have now been reformed to take into account the needs of children. In the grant of bail, for example, the law considers minority as a privileged mitigating circumstance while release on recognizance is also available. Special rules on the examination of a child during trial are now in place. Finally, automatic suspension of sentence is applicable even if the CICL is 18 years of age at the time of pronouncement of guilt. However, the CICL is returned to Court if there has been a failure to comply with disposition measures by the CICL.

The law creates a Juvenile Justice Welfare Council (JJWC) with the following important mandates:

- Coordinate implementation of prevention programs and a juvenile justice system;
- Conduct continuing research in relation to juvenile justice;
- Oversee the implementation of the national juvenile delinquency programs and activities;
- Strengthen the five pillars of the criminal justice system; and,
- Establish diversion programs.

Implementation of the law has been met with serious challenges on account of logistical problems and resistance by some sectors to the increase in the age of criminal responsibility. The success of diversionary measures is dependent on the network of services available to the CICL. Change in public mind-set also takes time.

REGIONAL BEST PRACTICES:

UNICEF has documented selected practices on dealing with CICL in the region. Below are some of the processes and institutional initiatives which may assist us in designing effective measures in the juvenile justice system.

Philippines

1. Court Appointed Special Advocate/Guardian Ad Litem : CASA/GAL Volunteers
 - Provides a mechanism for skilled & trained child advocates to assist CICL
 - Interviews everyone involved with the case
 - Ascertains how the needs of the children can be met
 - Identifies available resources & services
 - Represents the child and pleads the case and/or make recommendations to the Court
2. Community-based Prevention and Diversion Programme – FREE LAVA Cebu City
 - Serves as a prevention measure
 - Serves in providing support to the reintegration process of CICL
 - Peer facilitators provide an opportunity for CICL to share experiences, circumstance and difficulties – exchange of ideas on how to help one another and how to be useful to the community
3. Alalay ng Bayan Foundation, Inc. (ABAY) – Quezon City
 - Church-based initiative
 - Promotes restorative justice through community-based alternative programmes and services
 - Envisioned to restore broken personal and social relationships
 - Promotes the ideals of human development

Thailand

Child-sensitive Procedures for Children

- Innovative use of video-linked television systems for taking depositions of children - victims, witnesses or offenders
- Training of key actors in the juvenile justice system
- Mandatory attendance of child counsels, psychologists or social workers during proceedings

Cambodia

Legal Representation for Children in Need of Special Protection -

- Situation: juvenile arrest and detention rate have increased, children suffer from violations of basic rights in detention, violence and abuse, poor health services and food supplies, contract HIV/AIDS and/or other STDs

- Child Protection Unit of the Cambodia Bar Association provides legal assistance for juveniles resulting in release from custody or acquittal
- Important services are being made available including education

Palau

The Restorative Justice Programme -

- Based on practices from the traditional systems of Palau
- Provides means of reconciliation and healing for both the victim and the accused
- Fosters problem resolution and settlement of disputes
- Provides a degree of restoration to victims of crime

New Zealand

Police “Youth Aid Diversion” Project -

- Goal: to reduce the number of youth repeat offenders and children dealt by the Youth Court
- Police interventions involve the youth’s family
- Prevention -risk factors are addressed
- Diversion and Family Group Conferences - services and programmes are available for youth offenders and their families
- Interventions based on good practices, teaching way, addressing the “four corners”

Keynote Address: Question and Answer Session

Experiences in the Philippines

A participant wanted to know the state of juvenile delinquency in the Philippines and if the reintegration process has worked and if there is any report to indicate this.

Professor Sedfrey responded by stating that they are 2678 number of offenders in the Philippines. The number has actually dropped from the past. He added that the prevalent crimes among juveniles are property related offences, theft, and robbery. However there is an increase over the years in drug and sexual related offences.

On the success of the reintegration program, Professor Sedfrey said that there was no clear picture to indicate that the program has been successful but a strong reliance is placed on civil society groups for it to be successful.



PANEL DISCUSSION



JUVENILE JUSTICE IN MALAYSIA ROLE OF THE DEPARTMENT OF SOCIAL WELFARE

By
DATO' MEME ZAINAL RASHID
(Read by Puan Nor Hajah Amni)

Introduction

Juvenile Justice in Malaysia refers to the situation of children under the age of 18, who come into contact with the justice system as a result of being suspected or accused of committing an offence, and also those who are deemed to be beyond parental control. Its starting point is the moment of arrest or referral. It goes through to the time when a decision is made, within or outside the formal justice system, on how they are dealt with, and looks at the implications of sentencing options, with particular attention to those involving deprivation of liberty. It also makes reference to the prevention of juvenile offending and the social reintegration of offenders, as well as to the special problem of children incarcerated in prisons.

The Department of Social Welfare is one of the many specialised components of the juvenile justice system together with the Police, Courts and Prison Department. The role played by the Department dates back to 1947 with the introduction of the Juvenile Courts Act, now repealed and replaced by the Child Act 2001.

Delinquency in Malaysia

There is a general perception, sometimes correct and sometimes unjustified, that juvenile offending rates are increasing constantly and significantly, and that ever more serious and violent crimes are being committed by ever-younger children. Such a perception needs to be examined more closely. In light of recent controversies on juvenile offending, it is imperative to assess whether there is a 'juvenile crime wave' that is happening at our doors.

What do we know about delinquent behaviour in the country? Data from the Department of Social Welfare for the ten-year period between 1997 - 2006, revealed that children involved in crime and who are deemed beyond parental control (cases handled by the Department), remained fairly constant, as can be seen from the table below:

DELINQUENT CASES BY CATEGORY AND GENDER, 1997 - 2006

YEAR	CRIMINAL OFFENCE			BEYOND PARENTAL CONTROL			GRAND TOTAL
	Male	Female	TOTAL	Male	Female	TOTAL	
1997	4,467	123	4,590	268	149	417	5,007
1998	6,160	178	6,338	193	138	331	6,669
1999	5,555	145	5,700	238	148	386	6,086
2000	5,121	163	5,284	196	102	298	5,582
2001	5,041	141	5,182	260	136	396	5,578
2002	5,181	138	5,319	267	176	443	5,762
2003	4,819	179	4,998	362	202	564	5,562
2004	5,676	380	6,056	80	135	215	6,271
2005	6,687	514	7,201	113	109	222	7,423
2006	5,432	523	5,955	111	175	286	6,241
TOTAL	54,139	2,484	56,623	2,088	1,470	3,558	60,181

Boys are more likely than girls to commit offences, 95.6 % are boys and 4.4% girls. The majority are from the age group of 16 – 17 years and the majority of the offences are for crimes against property. The propensity of boys to commit more criminal offences, at a particular age group, and with majority of the crimes against property, is similar with delinquency patterns around the world.

Girls are arrested more for status offences because of the tendency to sexualise their offences and attempts to control their behaviour. The situation in Malaysia is also similar, where, for the same ten-year period, 41.3% of cases of beyond control referred to the system are females. Girls are also more likely to run away from home than boys, data from the Police Department(1999) showed that out of 2,460 children below the age of 18 who ran away from home, 66.5% were girls and 34.5% boys.

As can be seen, delinquency among male and female adolescents is relatively different as girls tend to be brought into contact with the justice system for minor, non-violent and non-criminal offences as compared to boys.

On the basis of the above analysis, it would not be wrong to surmise that the data on general trends in juvenile delinquency in the country do not portray a very alarming picture, contrary to what we have been led to believe by the mass media. The number of juveniles arrested in the year 2000, for example, represented only 0.14% of all those aged 10 - 18 years in Malaysia (The population of those aged 10 - 18 years in the year 2000 is 4,229,400, Source: Statistic Department Malaysia).

It cannot be denied that over the years, there has been an increase in the number of reports requested by the courts, from 2,480 in 1970 to 3,087 in 1980; 3,876 in 1990 and 5,284 in the year 2000. A comparison of offences committed in 1990 to that committed in the year 2000,

showed that sexual offences increased by 151.3% (39 cases in 1990); offences against people increased by 65% (283 cases in 1990); and offences against property increased by 20.1% (2,831 cases in 1990).

Children come into conflict with the law as a result of several factors. A review of cases handled by the DSW shows that environment in the family has been a major contributory factor leading to juvenile delinquency in this country. Many young offenders come from homes where parental support and guidance is lacking. Parents were reported to be hostile, indifferent, permissive or indulgent. It is clear that in many cases young people can lead a busy nightlife without their parents caring or noticing. These adolescents have a lot of free time which is not spent in useful activities. They identify themselves strongly with peer groups. In the absence of parental role models, they turn to other adults or their contemporaries for emotional support or rebuild their lives on the fantasies presented by the electronic or print media. In a recent survey conducted by the National Population and Family Planning Board, 67% of juveniles in approved schools cited peer influence as a major factor for their involvement in criminal activities.

Creation of a Separate Justice System for Children

In Malaysia, the basic provision of law governing juvenile justice dates from 1947. The Juvenile Courts Act 1947 (JCA) was premised on the concept of prevention, treatment and rehabilitation. The creation of the juvenile court allows a juvenile who break the law to be dealt with by the state not as a criminal, but as a child or young person needing care and protection. The juvenile court's rehabilitative ideal rested on several sets of assumptions about youthfulness and criminal responsibility.

The JCA has since been repealed and replaced by the Child Act 2001 (CA). The new Act standardises the definition of a 'child': defined as a person under the age of eighteen years. In relation to criminal proceedings, a child means a person who has attained the age of criminal responsibility (maintained at ten years) and there is no more reference to young person or juvenile, as contained in the JCA. This new definition points to a neutral and non-stigmatising terminology of children in the criminal justice system.

The Juvenile Court has been renamed the Court for Children but the basic framework created by the first juvenile court remains largely intact. Although the powers of the Court for Children are broadly unchanged when compared to the JCA, the new provisions reflect a legislative movement toward balancing the court's traditional rehabilitative orientation with concerns for public welfare and sanctions for chronic offenders:

- i. Whipping of not more than ten strokes of a light cane for a male child is introduced as a new dispositional option; and
- ii. A probation order is not permitted if a child is found guilty of any grave crime.

This shift in the purpose of juvenile law is to include 'protection of the community' and 'imposition of accountability'.

The role of the family continues to take centre stage in current efforts to manage delinquency. The Court for Children's powers and duties under the new Act also extend to the parents of the offender. The Court is required to order parents or guardians to attend court during all stages of the proceedings if their child is being prosecuted, unless it would be unreasonable to require this. Non-compliance with such a mandatory requirement is construed as a miscarriage of justice. The CA now makes it an offence for parents or guardians who fail to attend as required and on conviction, they shall be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both. The Court may however require the withdrawal of parents and guardians from the Court if their attendances are undesirable and not in the best interest of the child.

A new provision makes it mandatory now for the Court to bind over the parents of a child to exercise proper care and control in addition to any other punishment it may imposed. The bond may be with or without security and with one or more of the conditions outlined in the Act and other necessary conditions to be specified by the Court. The conditions of the bond clearly indicate legislature's intention to encourage greater parental responsibility, in so far as family units are critical to social behaviour. The parents or guardians risk the penalty of a fine not exceeding five thousand ringgit if there is a contravention of any of the conditions of the bond apart from the forfeiture of the security imposed. Such provisions have expanded the authority of Courts for Children over parents who can now be directed to participate in their children's treatment.

At the same time that the new legislation has become more punitive, innovative approaches to providing services within the children justice system have been introduced. Efforts are made to divert children from institutionalisation and incarceration by raising the threshold for custody still further. Custodial sentences should only be imposed on the recommendation of the Probation Officer, and when no other method of dealing with the offender is appropriate because either the offender is unable or unwilling to respond to non-custodial alternatives; the custodial sentence is necessary for the protection of the public; or the offence is so serious that a non-custodial punishment could not be justified.

In lieu of the death penalty, child offenders will be detained at the pleasure of the Yang di-Pertuan Agong, the Ruler or the Yang di-Pertua Negeri, as the case may be. A new provision introduced makes it compulsory for the Board of Visiting Justice for the prison to make a review of every such case at least once a year and to make recommendation to the relevant authorities on the early release or further detention of that particular case. With this new provision, a person who is fit to be considered for early release may have such opportunity and do not remain forever the 'forgotten prisoners'. This new provision re-emphasises the underlying philosophy of the original juvenile justice system. The labelling and tracking of child offenders deserving of incarceration in maximum-security institution does not end with their imprisonment. Rather it continues in the form of the system's education and control in preparation of the child's reintegration into society. The failure of the system to document the progress of the child's rehabilitation undermines the very existence of a separate children justice system and is contrary to the principle of the best interest of the child.

Role of the Department of Social Welfare

Currently in Malaysia, the Children Justice System is in place to handle cases of delinquent children and the system allows for the protection of children who are already in conflict with the law from human rights violations, focusing on their development in order to deter them from re-offending and to promote their rehabilitation and smooth their reintegration back into society.

In this respect, the Department of Social Welfare will continue to play a central role in ensuring that the philosophy and aim of the CA in the rehabilitation and prevention of children who come into conflict with the law are fulfilled. Social Welfare Officers, gazetted as Probation Officers under the said Act, has the responsibility towards the child from the time of arrest or referral right till the reintegration of the child back into society. From the preparation of the mandatory probation report, to the tendering of the report in Court, the Probation Officer is also responsible for ensuring that the orders of the Court are carried out when the child is put under probation order or institutionalized in Reform Schools or Probation Hostels. Currently, the Department administers 8 Reform Schools (Sekolah Tunas Bakti) and 10 Probation Hostels (Asrama).

With greater influence being placed on parental responsibility under the new CA, the Department is tasked with ensuring that interactive workshops are conducted from time to time to bring both parents/guardians and child together in the form of family group therapy. These workshops are conducted by trained counsellors and psychologists attached to the Department.

Prevention strategy has already been written into the law, where the Child Act provides for the setting up of Child Welfare Committees, Child Protection Teams and Board of Visitors for institutions gazetted under the Act, to embark on programmes and activities that can deal with delinquency based on a risk-factor approach. Such a strategy is to ensure that boys and girls do not come into conflict with the law in the first place and therefore do not come into contact with the formal criminal justice system. Community participation in the children justice system provided under the law also comes under the purview of the Department of Social Welfare.

Future Directions

1. Introduce **gender policies into rehabilitation programme**. Data shows that girls' pathway to delinquency are different from that of boys. Due to the high incidence of runaway among girls, many programmes tend to emphasise on control rather than addressing the problems which lead them into delinquency – physical, emotional and sexual abuse which have long lasting effects on their emotional adjustment, self-esteem, trust and future sexuality and lead them to other delinquent behaviour such as substance abuse, school dropouts, unsafe sexual activities, teen pregnancies and prostitution. Services for girls need to focus on placements and parenting programmes for girls with babies as well as programmes to address sexual victimization. Vocational training and education need to go beyond gender stereotypes and there is also the need for mental health services and therapeutic programming.
2. Introduce **intensive supervision probation** – emphasize the use of various surveillance techniques like random drug testing, more face-to face meetings with Probation Officers,

greater scrutiny of the adolescent's outside activities like home, school and environment and more frequent assessment of his progress. This approach is especially suitable for chronic, high-risk delinquents. Probation is the most common disposition ordered by the Children Courts and represents an alternative to institutional confinement. Standard probation supervision as practised now includes contact with the Probation Officer once a month depending on the work load of the officer and this does not allow for proper monitoring of the offender's behaviour.

3. Introduce **community service** in place of compensation or fines. Such programmes hold them accountable for their conduct and make them take responsibility for their actions.

An **in-depth research** in this particular area should be a sound investment before establishing a comprehensive strategy to encourage a range of preventive measures that can effectively address the issue rather than to rely on a particular programme to reduce delinquent behaviour. Such an approach should bring together all of the primary institutions that serve adolescents, e.g. families, health agencies, schools, employment, and justice, in an integrated, coordinated effort to develop an effective neighbourhood organization and deliver the full range of needed services at a single site under a single administrative structure. Such programmes should include family support programmes, community development corporations, and school-based programmes. Theoretically, if sustained over five years or more, this approach should have the greatest payoff in reducing delinquent behaviour and facilitating a successful course of adolescent development.

There is a need to use **risk-focussed prevention** as an approach to redirect available community resources through partnerships among agencies. Child Welfare Committees should begin with a needs assessment to identify those risk factors within families, schools and neighbourhood and then tailor programmes to respond to such factors. Programs should be to build up resiliency and protective shields in delinquents against delinquent behaviour. The key to developing such a community, wide approach is to forge long-term collaborative relationships across institutional borders and co-ordinate resources with government and non-governmental organizations. The issue of moral decadence needs a multi-disciplinary approach to resolve.

4. **Law-related education** should be introduced in schools by inviting lawyers, judges, law students, welfare officers and police officers to the classrooms to teach students about legal issues – what is and what is not against the law and the consequences of breaking the law. Parent-Teacher Associations (PTAs) can be fully involved.

Perhaps the system would be greatly enhanced through diversion programs to ensure that at all possible stages, children are diverted away from the formal justice system and into community-based and restorative processes that address effectively the causes of their behaviours and identify strategies at the community level to effectively prevent re-offending - especially for cases of status offences.

5. **Family Group Conferencing** should be another area worth contemplating as practised in New Zealand. Those involved include not only the offender and the victim, but the families and supporters of both, and any other adults who can voice the community's concerns about

the offence and speak for the reintegration of the offender. The primary purpose is to make young people accountable for their lawbreaking behaviour by encouraging them to take responsibility for their actions, to make good the damage done, or to accept a penalty. This programme fits into the policy of diversion, and the victim's involvement in the process is an important element of promoting accountability. This approach has also been practised in Australia. The conferences also provide a means of ensuring that families take more responsibility and are held accountable for their children's behaviour.

Conclusion

To reduce delinquent behaviour and improve societal wellbeing, it is essential to develop effective intervention programs. In turn, effective programmes depend on a firm, scientific understanding of the origins of delinquency. The first step in solving any problem is to determine its causes. The most obvious solution may not be the best. When the problem is juvenile delinquency, the cost - in terms of human potential, public safety, and tax expenditures - is especially high. Research that assesses how and why children become delinquent is a sound investment because it can provide the foundation for effective intervention.

THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE ADMINISTRATION OF JUVENILE JUSTICE IN MALAYSIA: AN OVERVIEW ON THE LEGAL FRAMEWORK

**By
DR FARAH NINI DUSUKI**

Introduction

Children who become involved in crime do not and should not lose their right to be treated as children. As has been wisely observed, young offenders are of less immediate danger to society than adult law-breakers, they are less responsible for their actions, and are more amenable to training and education.¹ In practice however, governments currently infringe international instruments designed to safeguard the rights of children who offend, including their right to a form of trial adjusted to their juvenile status and to humane treatment once found guilty.² To a certain extent, Malaysia is no exception, despite having ratified the UN Convention on the Rights of the Child (CRC) on the 17 February 1995 and submitted its first report on 25 January 2007.³ Initially, there were reservations made to 12 of the Articles, generally on the grounds of inconsistencies with the Country's Constitution, national laws and national policies. Subsequently, four of those reservations were removed leaving eight reservations altogether. This paper examines the administration of juvenile justice in Malaysia vis-a-viz the requirements of the CRC.

International Standards

Relevant international norms seeking to protect those below 18 have existed for decades. The principle of separation of "young prisoners" from adults in custodial facilities existed in the 1955 Standard Minimum Rules for the Treatment of Prisoners. The 1966 International Covenant on Civil and Political Rights (CCPR) reiterates these principles in the form of "hard law" as well as prohibiting the death penalty for persons found guilty of a crime committed when they were under the age of 18.⁴ The CCPR also contains many safeguards applicable to all persons brought to trial and detained and specifically states that "in the case of juvenile persons, the [court] procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."⁵ These principles were adopted and adapted in

¹ Ingleby Committee Report, Home Office, 1960, para 106.

² The British Government, for instance, received scathing criticisms on the state of juvenile justice particularly on issue of criminal responsibility of children from the Committee on the UNCRC upon submission of their periodic reports. See Bainham, A., *Children: the Modern Law*, Jordan Publishing Ltd., 1995, pp 633-635.

³ There were some concerns raised by the Committee on the UNCRC upon Malaysia's submission of the first report last year, notably on Malaysia's current reservations of the CRC.

⁴ Art. 6.5.

⁵ Art. 14.4.

many legislation affecting juveniles, including those in England and Wales, which had direct bearings upon the first legislation in Malaysia on juvenile justice, the Juvenile Courts Act 1947.⁶

Currently, the main child-focused norms regulating this field are contained in the following non-binding texts:⁷

- United Nations Standard minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules);
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 (JDLs);
- United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Rules).

The CRC, not surprisingly reflects the basic principles and enhances the force of many standards contained in these rules and guidelines. In ratifying or acceding to a treaty, CRC inclusive, the State Parties may notify reservations regarding any provisions by which they are unwilling to be bound, provided that the content is not deemed to go against the basic spirit and purpose of the treaty and that the majority of other State Parties makes no objection to these reservations. Some State Parties have registered reservations in connection with Articles 37 and 40 of the CRC, the relevant Articles on the administration of juvenile justice. Malaysia has however reserved only the former, principally due to the existence of domestic laws directly in conflict with the principles of Article 37. For ease of reference, both Articles are reproduced as follows:

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

⁶ The Juvenile Courts Act 1947 was passed to combat the problem of juvenile delinquency, a social phenomenon that arose in the aftermath of the Japanese Occupation in Malaysia. This Act is instrumental in the establishment of the first court specifically to cater for children, the Juvenile Court, which is currently known as the Court for Children, renamed by virtue of the Child Act 2001, which repealed the earlier 1947 Act. For details on the background of this Court, see Farah Nini Dusuki, 'Perkembangan Mahkamah bagi Kanak-Kanak,' in Farid Sufian Shuaib, *Perkembangan Perundangan Malaysia: Artikel Terpilih*, Jilid 2, 2007 at p 125.

⁷ Although not binding per se, these documents provide a blueprint for the various processes which should be applied to children caught up in youth crime.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any

measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Subsequent discussions will be largely based on these two Articles.

The Law in Malaysia – The Child Act 2001

The relevant legislation in Malaysia in respect to juvenile justice is the Child Act 2001⁸ which came into force in August 2002. This Act is a direct response to Malaysia's commitment in compliance to the CRC⁹ and seeks to regulate not just children who come into conflict with the law but also to afford protective measures for children in the following categories:

- who are in need of protection and care;
- who are in need of protection and rehabilitation;
- who are beyond control and
- who are abducted.

This paper examines some aspects of the administration of juvenile justice according to the following issues commonly associated within juvenile justice framework.

⁸ Act 611.

⁹ The Preamble to the Act clearly adopts the explicit principles in the CRC.

Age of Criminal Responsibility

Whilst it is accepted almost worldwide that eighteen is the benchmark between childhood and adulthood,¹⁰ well in accordance to Article 1 of the United Nation's Convention of the Rights of the Child (UNCRC), there is no such general consensus in specifying the age of criminal liability for children. The UNCRC simply enjoins State Parties to establish "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."¹¹ Similarly, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules)¹² do not set out any particular minimum age of criminal responsibility but states that the age shall not be fixed at too low an age bearing in mind factors of emotional, mental and intellectual immaturity.¹³ In absence of such general consensus, there exist astounding disparities from one country to another, ranging from as low as seven to 18 years old.¹⁴ In England and Wales for instance, a child below ten is said to be completely immune from culpability¹⁵ but in Bangladesh for instance, the equivalent age is seven.

The United Nations Committee responsible for monitoring state parties' compliance with the UNCRC has criticized jurisdictions in which the age is set at 10 or below. The official commentary to the Beijing Rules explains the general philosophy behind this approach:

"The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is too low or if there is no age limit at all, the notion of responsibility would become meaningless."

In Malaysia, for purposes of criminal liability, there are three different stages of children involved namely, complete immunity when a child is below 10,¹⁶ partial immunity when the child is between ten to 12 years old¹⁷ and children above 12. Children of this last category are treated as adults for the purposes of criminal liability, regardless the nature of the crime although treated differently in terms of criminal procedure¹⁸ and the disposals available to the court.¹⁹ Nevertheless, whilst they could be held equally liable as adults, they might not

¹⁰ The UN CRC has been ratified by all countries in worldwide save for the USA and Somalia, making it the most ratified Convention in history.

¹¹ Article 40.3.a.

¹² Rule 4.1.

¹³ Both provide some guidance as to the grounds for deciding the age: the findings of medical and psycho-social research as opposed to tradition or public demand.

¹⁴ See Innocenti Digest 3 on Juvenile Justice, UNICEF, p 5, for a comprehensive (though not recently updated) Table of Countries and their respective official age of criminal responsibility.

¹⁵ Section 16(1), Children and Young Persons Act 1963. Previously, from seven it was raised to eight by section 50, Children and Young Persons Act 1933.

¹⁶ Section 82, Penal Code.

¹⁷ Section 83, Penal Code.

¹⁸ See generally Child Act 2001, particularly Part X and XIII on criminal procedure for children.

¹⁹ Part X, Chapter 3, sections 91-97. See also Chapter 4 on probation; Part XI for order in the care of fit and proper person and Part XII for the duty of parent or guardian to make contribution orders.

be subjected to equal mode of punishment. To illustrate, any child charged and subsequently convicted for offences punishable with mandatory death for instance cannot be sentenced to death. Instead, in lieu of the death sentence the child shall be detained at the pleasure of the Ruler, depending on which state the crime was purported to have been committed.²⁰ Such was the case in *Koh Wah Koon v PP*²¹ where despite been convicted with the murder of his tuition teacher's 9-year-old daughter, the boy, aged 11 at the time of commission, was ordered to be detained at the Kajang Prison at the pleasure of the Yang di-Pertuan Agong since the crime took place in Wangsa Maju, Wilayah Persekutuan.²² Similar decision was meted out upon the eight students of a religious school in Seremban, all aged 17 years old at the time of commission, upon conviction of murder of their fellow student, Muhammad Farid.²³ An exception however, took place in *Lim Hang Seoh v PP*²⁴ where a 14 year old boy was sentenced to death by the High Court for possession of firearms, an offence under section 57, Internal Security Act 1960 which is also a security offence by virtue of Regulation 2, Essential (Security Cases) Regulations 1975 (ESCAR). Regulation 3(3) expressly excludes the then Juvenile Courts Act 1947 to be applied to juveniles charged with security offences. Due to the explicit wordings of Regulation 3, his appeal to the Federal Court subsequently failed. Fortunately, on his final appeal to the Yang di-Pertuan Agong his death sentence was commuted to detention at the Henry Gurney School until the age of 21. It would be interesting to see how a similar case would fare with the current Child Act 2001, which although provides for alternating a death sentence to that of indeterminate period of detention, it does not expressly exclude the application of Regulation 3(3) of ESCAR.

Arrest and Pre-Trial Disposition

Of all phases of the juvenile justice process, it is on arrest and immediately thereafter while in police custody that an accused juvenile is most likely to become the victim of torture and other forms of cruel treatment. It is also at this stage that the juvenile is likely to be denied the presence of those parents, social worker, legal representative who might be in the position to provide protection against such acts. In Bangladesh for instance, it is alleged that "*some of the worst violations of human rights committed against children take place.... When the children are in the custody of the police.. One boy said that he was held for 15 days during which he was beaten and tortured with electric shocks until he 'admitted' his crime.*"²⁵ Although fortunately we have not heard of (at least officially) extreme torturous incidents taking place within police custody in Malaysia, there exist some concerns in respect of treatment of children during these stages.²⁶

²⁰ Section 97, Child Act 2001.

²¹ [2004] 5 MLJ 193.

²² Although it was disputed that sending the boy to prison was not the best available option, the Judge was bound by the terms "detained in prison" in section 97, Child Act 2001 as opposed to just "detained" in the previously repealed Juvenile Courts Act 1947. The boy was however isolated from the older inmates and was given regular education to prepare him for his impending government examination (PMR) the following year.

²³ This case was highly-publicised by the media in late December 2003.

²⁴ [1978] 1 MLJ 68.

²⁵ Radda Barnen, *Children in Conflict with the Law: A survey of the Situation in Bangladesh*, Radda Barnen, Stockholm, 1995.

²⁶ There have been allegations made in the mainstream newspapers but until now there have not been any confirmations on their veracity.

The law for purposes of regulating the procedures within these stages are laid down in the Child Act 2001 albeit in absence of certain details.²⁷ A glaring absence lies within the first 24 hours upon a child being apprehended by the police. Apart from one provision, section 87 that states that upon arrest, the police officer is duty bound to inform first, the parents or guardian and secondly, the probation officer of the arrest of such child, the Act is silent of other specific procedures in respect to mode of arrest and investigation in the first 24 hours. In practice, due to practical difficulties in locating the probation officer, only the parents or guardian would be informed by the police.²⁸ Thus the protective element which section 87 seeks to secure is not achieved. Though the police have some guidelines in way of Administrative Orders in view of respecting the position of children,²⁹ these Orders are administrative in effect and may not be observed strictly. Specific statutory provisions outlining the special procedures applicable to children ought to be clearly spelt out in the Child Act 2001 itself. This would prevent the court from having to justify the police's actions when they resort to the procedures in the general Criminal Procedure Code in view of the lacuna in the 2001 Act.

For instance, the maximum period of remand is not stipulated in the Child Act 2001, resulting in a court dispute between the period allocated in the Criminal Procedure Code and the presumption in favour of the child under the Child Act 2001. Unfortunately, the Court of Appeal decided in *Public Prosecutor v N (A Child)*³⁰ that in absence of a specific period for remand under section 84(2) of the Child Act 2001, section 117 on remand under the Criminal Procedure Code is applicable to the child who in actual fact was detained for four days in police custody upon being suspected of using the name and identity card number of the complainant to subscribe for Celcom cellular phone services. Before the end of the remand period no charge was preferred against her but the Deputy Public Prosecutor sought a revision of the case to ascertain the conflict between both legislation.

Other common concerns respecting children during the periods of remand and pre-trial disposition hinge on the issue of respecting the general rights of the child as an accused person. This would include the right to legal representation and the right to be released as soon as possible with detention being only the last resort. It is submitted that at ground level, officers need to be sensitised of all these rights clearly enshrined in Articles 37 and 40 so that the children will be treated with dignity despite the possibility of them being in conflict with the law.

It is also submitted that separation with adult offenders is usually observed at the police lock-ups but what is usually missing are the necessary facilities to accommodate children being detained there such as the providing reading materials suitable to their age.³¹ An issue of grave concern recently is the detention of children in prison under remand awaiting trial for minor offences such as not having identification cards for significant period of time.

²⁷ It is believed that amendments will be duly made in respect to these lacunae.

²⁸ This information is obtained from consultations with police and social welfare officers.

²⁹ For example, if the child is taken away from school then the police should not be in uniform and must not use the police car.

³⁰ [2004] 2 MLJ 299.

³¹ SUHAKAM, *Report on the Roundtable Consultation*, 2004.

The Court and Alternative Procedures

As stated earlier, the need to have a separate court for children in Malaysia existed since 1947 and reinforced by the Child Act 2001, which specifically provide details on the infrastructure of the intended Court for Children. Ideally it should be housed in a separate building from the other courts but if not practicable, then it should have different entrance and exit ways so that the child offenders would not come into contact with the adult offenders. Most importantly, the Court ought to have child-friendly features, befitting the intention not to stigmatise children who come into contact with the law, regardless as ‘victims or villains’. Sadly, it is only in Kuala Lumpur that exists one specialized Court for Children which sits daily to hear cases involving children. In other states and districts, similar court is shared by the adult Magistrate’s Court and the Court for Children, with the same Magistrate ‘changing hats’ when required. In better scenarios, one day in a week is allocated specially to cater for proceedings involving children but in smaller districts, there is even a case whereby proceedings involving children are only relegated to Friday afternoons. The implications of this situation are many. First, the Magistrate is not a specially trained Magistrate as he or she handles both adults and children alike. Thus there are chances of not delivering the right orders. Two, children are therefore not adequately protected during proceedings as envisaged by the law. Thirdly, limited hearing days may result in children not having access to a speedy trial as they need to wait for the Magistrate to preside in the Court for Children.

The Court for Children is instituted to hear any charge against a child and also other jurisdiction conferred to by the 2001 Act or any other written law that includes issuing protective orders for children in need of such protection. In terms of criminal jurisdiction, the Court for Children is entitled to try all offences other than those punishable with death.³² Unfortunately, when a child is jointly charged with an adult offender, the case will be tried in the adult court where the offence is charged. Similarly if the child has attained the age of 18 when he is eventually charged in court he too will not be entitled to be tried in the Court for Children. Consequently, in these two situations the protective measures allocated for child offenders given by the 2001 Act are generally inapplicable, apart from the former situation where the Court is obliged to consider the probation report.³³

In terms of court proceedings, the Child Act 2001 retains many of the previous procedures in the repealed Juvenile Courts Act 1947 and adapts the principles laid down by Article 40 of the CRC, hence the reason for not reserving this particular Article. In practice however, the general rights of the child offender is court is currently not satisfactorily respected. For example, the child is usually not represented by a legal counsel unless the family provides for one. In worse cases, the parents or guardians are not present and hence orders may be passed not taking into considerations the wishes of the child. This is in direct contravention to Article 12 on the right to be heard. Where the Court Advisors are well-informed and trained, this problem may be minimized and efforts are currently underway in ensuring all the Court Advisors in the country to obtain adequate training, particularly in understanding the 2001 Act. Where parents choose not to be present legal action can actually be taken against them but sadly, this sanction has never been enforced.³⁴

³² Section 11(5).

³³ Section 83(4)(b).

³⁴ Section 88.

Another common incident taking place in cases involving child offender is lack of respect for the child's privacy. The law provides restrictions on media reporting and publication³⁵ but there have been instances whereby cases involving children were reported in the media and although the actual name was not revealed but other particulars would be stated thus exposing the child to shame among those within his community who could actually pick up these details and identify their identity.

Due to these difficulties and complexities in both resources and infrastructure, it is worth to seriously consider other alternatives than court proceedings, preferably, avoiding contact with the legal system altogether. Some of the recognized practices include screening and diversion, and alternative measures to courts in the form of children's hearing system as practiced in Scotland. A similarly-motivated initiative has been developed in New Zealand for 10 to 13 year-olds: a family group conference system, referral to which can be made, inter alia, when there is serious concern about a child's welfare by virtue of the number, nature and magnitude of offences committed. In 1991, a successful 'Juvenile Cautioning Programme' was set up in Australia whereby the police refer most young offenders to a mediation conference involving the victim, the offender and his or her family, social workers and law enforcement officials. A coordinator seeks to reach a consensual decision as to outcome and reparation, formalizes the agreement and sets out follow-up measures to ensure that it is respected.³⁶

Disposal Orders

The main reason why Malaysia chooses to reserve Article 37 of the CRC is mainly due to the existence of 'torture or other cruel, inhuman or degrading treatment or punishment' including that of capital punishment. Currently section 91(g) provides for possibility of the child being given the order for 'whipping with a light cane'. Arguably although this provision has hardly been invoked in practice, its existence in statutory form does not augur well with the explicit prohibition in Article 37. Fortunately, it has been reported that this will be one of some of the provisions considered to be removed in the upcoming amendment Bill of the Child Act 2001. In line with the Committee on the CRC's Report insisting the same, there is no reason why this amendment will not be passed.

As stated earlier, the 2001 Act provides for indeterminate sentence for child offenders found guilty of offences punishable with death³⁷ and this has been invoked several times whenever the child is charged with offences that carry the mandatory punishment of death. This too does not augur well with the spirit of Article 37 in that a child's life is left hanging indeterminately and the situation worsens when he attains the age of 18 as then he would be released from the secluded area for child offenders and be mingling with the other offenders under the age of 21. If he is not released by the time he is 21 then he will be moved into older adults' facility as after 21 there is no special seclusions anymore.

³⁵ Section 15.

³⁶ O'connell, T. Wagga Wagga Juvenile Cautioning Program: It may be the Way to Go,' in Atkinson, L. and Gerull, S (eds), *National Conference on Juvenile Justice*, New South Wales, 1993.

³⁷ Section 97.

Where the Court is doubtful of the offender's age at the time of commission, the practice has mostly been to opt for that of below 18. This is evident from the line of authorities since 1963.³⁸

Conclusion

As Cantwell once said:

It would be clearly Utopian to seek the realization of a crime-free society. Yet it is this goal that is the logical projection of the most frequent attitudes and policies towards offending, a two-pronged approach of 'stamping out juvenile crime' and 'protecting them from society. This is our legacy today, and it creates a very hostile environment in which to promote a mindset where the 'rule of law' does not just mean bringing individuals who violate it to book, but also ensuring that the human rights of those same individuals are fully respected.

Certainly the problems to be tackled in the realm of juvenile justice are manifold and often complex. All are crucially important from the child's perspective. However, mindsets need to be changed, to move from solely punitive to mostly reformative. For the main players in the system, police, magistrates, social workers to name a few, developed and concerted trainings ought to be put in place to heighten awareness on the intrinsic rights of children. Then only the law will be interpreted in the spirit in which they were passed.

What counts most for juvenile justice is whether or not the rights of children are fully respected when they come into conflict with the law and that accepted international norms guide the reaction to their situation. It is timely that efforts move towards other internationally recognized practices such as restorative justice and diversions particularly when the wrongdoings are not significantly serious in nature.

³⁸ See for instance, *Deng Anak Ekom v Regina* [1963] 1 MLJ 343 where the death sentence was quashed as the court was doubtful of the accused's age. In *PP v Nur Hassan b Salib* [1993] MLJU 241; *PP v Ben Ismail* [1993] MLJU 25 and *PP v Boy bin Islais* [1993] MLJU 25, the offenders were detained under the pleasure of the Ruler under the previous Juvenile Courts Act 1947, section 16 when found guilty of the offence of drug trafficking, section 39B(1)(a), punishable with death under section 39B(2) DDA 1952.

STRENGTHS AND WEAKNESSES OF THE PROTECTION MECHANISM AND SUPPORT SYSTEM FOR REINTEGRATION OF CHILDREN IN CONFLICT WITH THE LAW

Introduction

Children and crime has always been a sensitive subject. No one likes to think of a child as a perpetrator of crime nor can we tolerate or fully understand the apparatus that contributes to the formation of delinquency among youth. Historically, children were treated faultily, depending on their place within the structure of society and the family. Discipline and maltreatment for the sake of correcting astray children were imposed. Whippings, floggings, spankings and other forms of physical punishment have been the way of disciplining troubled children.

Therefore, in dealing with juvenile delinquents, one must treat a juvenile as a person and should try to penetrate into the juvenile's mind rather than keeping them behind cold walls. For a juvenile who committed a crime at a very tender age, the time spent in a cell will eventually mold his/her behavior later in the future.

This paper will examine the present system in the light of the existence of the Article 40 of the Convention of The Rights of The Child which states that "a child in conflict with the law has the right to treatment which promotes the child's sense of dignity and worth, takes into account the child's age into account and his or hers reintegration into society". The child is entitled to basic guarantees as well as legal or other assistance for his or her defense. Judicial proceedings and institutional placements shall be avoided wherever possible.

Definitions of Child

The (UN) Convention on the Rights of the Child 1989 defines children as:

"All human beings under the age of 18, unless the relevant national law recognizes an earlier age of majority" (Article 1)

According to rule 2.2(a) of the Standard Minimum Rules for the Administration of Juvenile Justice [Beijing Rules] (UN), 1985,

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

In Malaysia there are a number of statutes, which have provisions on this issue. They are however; vary slightly from statute to the other as each of the statutes is meant for specific needs and purposes. The most relevant provision defining the word "child" is section 2 of the Malaysian Child Act 2001(Act 611), which states that a "child" is:

- (a) a person under the age of eighteen years; and
- (b) in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 penal Code[Act 574].

There are also provisions pertaining to this matter in Evidence Act 1950 and Age of Majority Act 1971(Act21).

From the above provision, it can be said that anybody who is below eighteen years old will be treated differently from an adult, particularly in respect of procedure and punishment.

In criminal proceedings as mentioned in Child Act 2001, the age of criminal responsibility of a child is prescribed in section 82 of the Penal Code [Act 574].

Malaysia, in following the CRC defines a child to be any person below 18 and by the time the Child Act 2001 was passed, there should no longer be any reference to the word ‘juvenile’ or ‘young offender’, both implying negative connotations. Nonetheless, such terminologies still exist in corresponding statute, namely the Criminal Procedure Code, which is applicable to children in the event of any lacuna in the Child Act 2001.

Age of Criminal Responsibility

Age is a relatively unexplored topic in the theoretical literature on criminal responsibility.

The term ‘criminal justice system’ describes the legal processes applied to those who commit an offence or fail to comply with the criminal law. ‘Juvenile justice’ is the term used to describe a criminal justice system developed for children. It covers a vast and complex range of issues from prevention through first contact with the police, judicial process, conditions of detention and social reintegration, and involves a wide range of actors.

The primary instrument guiding the development of juvenile justice is the United Nations Convention on the Rights of the Child (CRC), of 1989, which has been ratified by every country in South Asia. State parties are obliged to give effect to the Convention by means of laws, policies and practices designed to further its goals. The CRC is complemented by relevant international standards such as the UN Guidelines for the Prevention of Juvenile Delinquency (the ‘Riyadh Guidelines’), the UN Standard Minimum Rules for the Administration of Juvenile Justice (the ‘Beijing Rules’) and the UN Rules for the Protection of Juveniles Deprived of their Liberty. Under these instruments, children should be treated by the justice system in a manner consistent with their rights, their inherent dignity as human beings and which takes into account their needs and targets their reform. The administration of juvenile justice should be directed towards their rehabilitation and reintegration into society and not their punishment.

Setting appropriate minimum age of criminal responsibility

In most countries, only those who are old enough to understand the significance of their behaviour can be brought before a juvenile court. Legislation in most countries limits the discretion of the court by establishing a lower age limit (the ‘minimum age of criminal responsibility’), below which it has no competence to hold a child responsible for his or her conduct. The minimum age of criminal responsibility varies between countries. However, in most South Asian countries the low age of criminal responsibility remains a serious cause for concern. The Committee on the Rights of the Child has concluded that the minimum age of criminal responsibility at below 12 years is not internationally acceptable

Need to differentiate children in conflict with the law and children in need of protection

According to international standards, deprivation of liberty means placement in any kind of establishment - penal, correctional, educational or protective - from which a child cannot leave at will. It affects not only children who have been sentenced after being convicted but also children in need of protection. It is used excessively in pretrial detention (including in police lock-ups), which may last many months. It is used abusively against vagrants or street children who have committed no criminal offence, and as welfare or re-educational measures on the decision of an administrative body without a judicial decision or review.

What is diversion?

Diversion means referring cases away from formal criminal justice proceedings towards community support to avoid the negative effects of being implicated in such proceedings. Diversionary measures can come into play at any stage - at the time of the arrest or immediately before the foreseen court hearing - either as a generally applicable procedure or on the decision of the police, prosecutor, court or similar body. The alternative to formal adjudication must be compatible with the rights of the child which preclude measures such as corporal punishment. Diversion may involve a restorative justice component.

Restorative justice is an approach that recognises how crime affects the victim, the community and the offender. Its primary focus is to repair the damage caused by the offence, to make reparation to the community and to the victim, and to return the offender to a productive place in the community. For justice to be truly restorative, the community, the victim and the offender must take active roles.

Although there is no clear international standard regarding the age at which criminal responsibility can be reasonably imputed to a child, Article 40.3.a of the CRC enjoins State Parties to establish 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.' Beijing Rules further advise that "the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." The Digest suggests that this at least provide some guidance on some grounds for deciding of the age: emphasising on 'findings of medical and psycho-social research rather than tradition or public demand.'

Malaysian Penal Code stipulates 10 to be the age of attainment of criminal responsibility but children between 10 and below 12 who have not shown sufficient maturity may be absolved from criminality as well. Evidence Act 1950 provides an additional protection for boys below 13 where they are presumed to be incapable of committing the offence of rape. Children within these categories, if 'arrested' on ground of any particular omission or commission of any criminal acts should be dealt by the other arm of the Court for Children, that is in the issuance of any of the protective orders available under section 30. Alternatively, if the offence is petty, diversion, in a form of a caution from the police may be undertaken upon consultation with the family and social worker. Such procedure blends well within the principle of 'restorative justice'. On another extreme, should a child between 10 and 12 is charged; he may invoke 'infancy' as a defence. In conclusion, children from 10 to 18 may be liable for any criminal

charges in the Court for Children unless the offence is punishable with death whereupon the trial will then be conducted in the High Court.

Children's Court

Previously known as the Juvenile Court, a Court for Children was established under the Child Act 2001. Section 2 of the Act defines "Child" as a person under the age of eighteen years, and for the purposes of criminal proceedings, means a person who has attained the age of ten. The Court shall consist of a magistrate and shall, as the case may require, be assisted by two advisors.

Proceedings

Only members and officers of the court and the children who are parties to the case including their parents or guardians are allowed to attend the hearing.

Sentence or Orders

If a child is found guilty of an offence, he shall not be imprisoned, but among others, may either be sent to an approved school or released on bail. For capital offences, the child shall be detained in prison at the pleasure of the Ruler.

Article 40 of Convention on the Rights of the Child (CRC)

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

- (i) To be presumed innocent until proven guilty according to law;
- (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense;
- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best

- interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The article makes mention of the requirements where it concerns institutional placements that it should safe guard the child's legal and human rights. To rehabilitate or redeem the children to ensure their rights to development are not denied. The State parties are obligated to provide a variety of dispositions such as education, vocational training and alternatives to institutional care.

To consider the role of the judiciary in dealing with cases involving children in conflict with the law. To consider the question, whether the present system is effective, taking into account that a Child's Welfare is Paramount? According to restorative theory, justice is best served when the needs of victim, community, and offender are met and each is involved in the process to the greatest extent possible. An essential and important insight of the restorative approach is that the practices, programs, and processes that best address the needs of the victim and the community are often the same ones that ultimately serve the "best interest of the child."

According to advocates, the restorative justice perspective has the potential to elevate the status of reparative programs and practices and victim needs. *Hence, the practical importance of the movement in juvenile justice toward a restorative justice framework and a "balanced" intervention model is that it appears to place the victim squarely within a restructured mission for juvenile justice (Bazemore and Umbreit 1995b).*

Malaysian Legislation

The principal Act governing protection of children is the Child Act 2001, which came into force on 1 August 2002. This Act consolidated three former Acts, namely, the Juvenile Courts Act 1947 (Act to establish the Juvenile Court and deal with child offenders); Child Protection Act 1991 (Act to provide care and protection to children) and Women and Girls' Protection Act 1973 (Act to protect women and children exposed and involved in immoral vices). Children accordingly, regardless whether they are victims or offenders are all governed by a single Act. There are also other Acts and State Enactments governing other aspects of children, particularly in proceedings which are private in nature for instance in custody and adoption matters.

The former govern the Non-Muslim population in Malaysia whereas Muslims are subject to the various Enactments of the respective States. This duality of application takes place owing to legal pluralism concept underlying multi-racial and multi-religious Malaysia. Accordingly, in matters of private interest, proceedings will either be conducted at the High Court (Non-Muslims) or the Syari'ah Court (Muslims) of various levels – Low, High and Appeal. Senior judges preside in High Court as opposed to Court for Children which is presided by a Magistrate.

CURRENT STATUS OF JUVENILE CRIMINAL PROCEEDINGS IN MALAYSIA

Criminal proceedings involving children in the following categories are principally governed by the Child Act 2001.

i) Children beyond control

Unlike previous categories mentioned earlier, there is no definition accorded in the Act, or the previous repealed Acts for this particular category. Section 46(1) however provides that in the event any parent or guardian is unable to exercise proper control over the child then application may be made to the Court for Children for the State to assume control over the child. Such application would entail either committing the child to a custodial institution (an approved school, place of refuge, probation hostel or centre) or to place the child under the supervision of a probation officer. Experience from the implementation of similar provisions of previously repealed Acts indicate that being beyond control can be manifested by acts such as running away from home, involvement with drugs and/or being habitually disobedient and incorrigible. A more recent 'misbehaviour' falling within the category of beyond control is that of motorbike racers or locally known as "*Mat Rempit*". Anecdotal evidence indicates that this form of beyond control behaviour, committed usually by teenagers is becoming a common ground for parent/guardian seeking for a court order for alternative care for their offspring.

ii) Child offenders

Clearly this refers to children who, in one way or the other have been charged with a criminal offence. This category will be dealt separately later owing to its nature being different from the previous ones.

Proceeding(s) involving children in all of the above categories are dealt with by the Court for Children. There is no express provision in the Child Act 2001 providing for separate representation of children in such proceedings. Therefore in practice, should any dispute takes place in categories (i) – (iii), the Protector (Social Services) would be seeking for a protection order from the Court and the parent or guardian may challenge such an order. It is respectfully submitted that such challenges from parents or guardian are not common in Malaysia, unlike in other western jurisdiction where care proceedings are frequently contested in courts. In any case, whether contested or otherwise, the child concerned is not represented by an independent advocate, presumably because the Protector is acting in his best interests. Whether the child's views are sought or otherwise would totally depend upon the Magistrate's sole discretion as the Child Act 2001 is silent on this. What is legally sanctioned however is for the Court for Children to consider and take into account any report prepared by the Protector which –

- (a) shall contain such information as to the family background, general conduct, home surrounding, school record and medical history of a child as may enable the Court for Children to deal with the case in the best interests of the child; and*
- (b) may include any written report of a Social Welfare Officer, a registered medical practitioner or any other person whom the Court for Children thinks fit to provide a report on the child."*

Again, this stipulation does not amount to independent representation of the child as the officer in charge of preparing such report is technically the same party requesting for a particular protective order from the Court.

In cases under category (i), namely, the 'beyond control child,' it is the parent or guardian who would be seeking for a court order as against the child and the Court is considering the application shall immediately inquire into the circumstances of the child's case and shall direct the probation officer to submit a probation report to the Court to determine the type of order that should be made against the child. Similarly as in the other categories discussed above there is no provision for separate representation of the child before the Court. The child's views may of course be inquired and duly considered by the Court but again, this does not provide a separate representation by an independent advocate promoting the child's best interests.

Representation of children in criminal proceedings is similar to that of adults, namely, being highly dependent on the financial competency of the parent/guardian in providing such service. Where the child comes from a higher income bracket family, then the likelihood of representation is greater. In reality, as juvenile delinquency takes place more rampantly among lower income families, chances of being legally represented are slim. On a brighter note, Government's Legal Aid Bureau may be sought by those under 21 but they would only qualify for legal aid if their guardians or nearest kin have an annual income of less than RM25, 000 a year. People in this category need to pay a minimal registration fee of only RM2. But again, this service is limited to minor criminal offences such as theft, dishonestly obtaining stolen property or, as one relatively recent high-profile case of a child dodging the call for National Service and was punished to imprisonment as he was too poor to pay the fine. In addition to this Government funded service, the Bar Council does offer free legal aid but application is limited due to scarcity in manpower.

Criminal process involving children takes place in three distinctive stages, namely, pre-trial, trial and post-trial.

a. Arrest and Pre-Trial Process

It is during the process of arrest and the immediate possible detention in police custody that may predispose the child to possible harm or torture. Few incidents that took place recently bear testimony to this.

To consider as to who and how the child is handled when taken into custody.

Case 1: Ahmad aged 15 years, presently detained in the Kajang Prison for the offence of in possession of stolen goods (Sect 411 KK – simpan barang curi). The trial has been postponed a number of times due to certain persons each time being unable to attend the court hearing.

Case 2: – Ah Meng (not his real name) – 16 years old from Malacca. Both his parents are divorced. He himself is a school dropout. He came to Kuala Lumpur in search of work. He ends up selling pirated VCDs at the pasar malam (night market) in Cheras. One night there was a raid and he was arrested by the police. He thought that his boss would bail him out. But sadly the boss absconded. Ah Meng had to six months in the Kajang prison awaiting trial. A letter was written by SHELTER to the magistrate in Putra Jaya. The magistrate in turn expressed deep concern over the delay and went ahead to hear the case and Ah Meng was released from prison that day. When we collected Ah Meng that day, he had no money and no change of clothes. He didn't have a place to go to for the night.

Case 3: – Jeffery 18 years old – came from Sabah to Kuala Lumpur to look for work. He had been working in Kuala Lumpur for about two years. One day he was questioned by the police and was further detained for not carrying his My Card. He was then remanded for six months in the Kajang prison awaiting trial. During this times Shelter made numerous attempts to have his case heard but there was no response from persons concerned and the court kept postponing his case as the police had not completed their investigation. His case was highlighted in the local press and an appeal was made to the courts. Jeffery's case was finally heard and he was released.

Case 4: – Hassan – 16 years old sent a prank ransom via a SMS threat to a family of a kidnapped child. He was arrested and detained in the Kajang prison for a period of five months. Firstly upon arrest, the child was probably detained in the police station and could have been kept in the police lock up as there is yet a child friendly lock up facility available. The parents would have been informed. The child is then produced before a magistrate who is assisted by two court advisors. The child is sent to the Kajang Prison to await the date of trial. Usually bail is set at RM1000 but the parents are too poor to post bail. It is interesting to note the absence of the officer from the Department of Social Welfare. In the present system the welfare officer is only required to be in court to present the report just before sentencing. There is no law in place as to state how long a child may be detained in prison. The child is at the mercy of the court and has to endure the various postponements of the court hearing. The question arises as to how a magistrate being assisted by two advisors could have sent a child to be detained in prison even before the child has been convicted?

What about when the boy is finally released from prison? The present situation suggests that the child has limited or no choice left in life. Firstly the child carries with him a stigma that he has been in prison. He would be the talk of the neighbourhood. Lacking skills he would not be able to get a decent job. With such a background and due to the long period in detention going back to school is out of the question. In most cases the child returns back to his friends to see acceptance and support as the present system does not have a proper follow up process upon release.

b. Trial Process

Section 90(1-18) of the Child Act 2001 provides comprehensive trial procedure in respect to children. It is submitted that by conforming to both the letter and spirit of these provisions would be adequate in safeguarding the interests of children in court.

Problems in trial process normally centres on administration rather than legal. For example, although provisions are in place mandating for the Court for Children to sit in a different building or room from that of normal sittings for the purpose of separating child 'offenders' from adults, currently it is difficult to comply due to infrastructure limitations. It is only in Kuala Lumpur the capital city that a room has been exclusively consigned as the Court for Children. In other states, the Court for Children sits on one specially allotted day and on other days this same room is used as an adult Magistrate Court. The setback to this situation is that the spirit of the Court for Children which is geared towards rehabilitative over and above punitive cannot be effectively discharged as the room is 'shared.' Secondly, the same Magistrate operates in both Courts thus implying that she is not a special adjudicator in cases involving children as most days of the week she is effectively a Magistrate manning adult offences! It is suggested that Malaysia ought to move along the practice in most other developed jurisdiction, notably New Zealand and Australia where in both of these legal systems, only an experienced barrister of a minimum of 16 years of practice in family law will be appointed to become the judge for the Youth Court or Family Court for obvious reasons.

c. Post-Trial

There is a variety of orders which may be ordered on a child upon the finding of guilt. Section 91 outlines these orders, ranging from the most lenient, namely, admonish and discharge; execution of bond on good behaviour; a fit person order; issuance of fine; probation order; sending the child to an approved school of if older, to Henry Gurney School (a rehabilitative institution); whipping of not more than 10 strokes of light cane and if above 14, a sentence of imprisonment of period allowed by the Sessions Court. The latter two infringe Article 37 as it amount to degrading treatment. It is submitted that in-depth studies are warranted to look into the various types of disposal of cases and to gauge the effectiveness in rehabilitating and reforming children. Representation of children is particularly warranted at this stage as in most cases, children opt to plead guilty rather than to claim for trial and it takes a legally qualified person to properly adduce mitigating factors to be considered by the Magistrate. Currently, the Bar Council provide some assistance at this stage by allowing law graduates undergoing their pupillage (legal internship) to prepare for their mitigating pleas and this goes some way in ensuring the voices of child offenders are heard prior to the case being finally disposed.

The weakness of the present system may be summarized as follows:-

- That the child kept in an adult prison facility may suffer permanent psychological damage.
- That there is no proper case management where it involves a child in conflict with the law. It is proposed that the officer of The Department of Social Welfare be present at first reporting of the offence in the police station.
- That there is no legal representation made available to the child and the child's right to be heard nor is there a system in place to assist the child to testify in court. Instead the child is transported to court in a prison vehicle accompanied by prison wardens.
- The present situation suggests that whole system has to be revamped. It appears that the interest and well being of the children is neglected. We must bear in mind that a child cannot be punished as an adult but rather a child needs rehabilitation so as to be developed into a useful citizen in society. That most of the children dropped out of school as they were slow learners and had learning disabilities and as a means of survival got involved in juvenile crime. *Educators, parents and law enforcement recognize the link between learning disabilities and juvenile delinquency and "suggest that the critical concern must be with identifying learning disabled delinquents so that appropriate remediation can be offered"* (Wilgosh and Paitich, 2001, p. 278). That they are mostly victims of dysfunctional families where there was lack of love and affection and probably the child himself was a victim of child abuse.

We always will have the hope that the system will be put right for the sake of the children.

The incarceration of children is a matter of grave concern not only because liberty is a fundamental human right but because incarceration has inherent risks to the physical and mental integrity of children and may expose them to negative influences rather than promoting their rehabilitation. The harm that children suffer as a consequence of incarceration may be permanent.(Amnesty Int. 2007)

Recommendations

State and local governments should review their legislation, policies and practices to ensure that children who are accused or convicted of violating the law are not deprived of their liberty except as a last resort. In particular, all authorities should:

- Undertake periodic reviews to assess whether children are being placed in custody only when no alternative is appropriate; if the reviews find cases where alternatives were appropriate, authorities should take action to change the policies or practices that cause the excessive use of incarceration;
- Provide an adequate range and number of community-based detention and correctional programs;
- Provide adequate mental health services in the community so that children whose violation of the law is a reflection of significant mental health problems can be treated in therapeutic rather than correctional environments.

Conclusion

The juvenile justice system is separate and different from the adult criminal justice system. Adults are held fully responsible for their behavior. They can be arrested, charged with a specific crime, tried before a jury of their peers, found guilty or not guilty, and, if found guilty, sentenced according to the seriousness of the crime and the interest of the state. Young people are treated differently, having many, but not all, the rights of adults. Juveniles are not arrested, but rather are taken into temporary custody. Juveniles have no right to a trial by jury but instead are subject to a hearing before a judge, at which time the juvenile may be adjudicated as undisciplined or delinquent.

The judge's decision on the disposition (or sentence) is based on meeting the juvenile's needs and interests and the interests of the state. The court attempts to do what is best for the juvenile to help make sure he/she is not brought into the juvenile justice system again or the adult system later. (Youth Rights and Responsibilities-Kenneth 2008)

Juvenile justice systems should as a matter of course assess children to determine whether they should receive specialized care and rather than be placed in a detention or correctional facility.

APPENDIX

SIGNIFICANCE FINDINGS OF A SURVEY CONDUCTED IN KAJANG PRISON

A total number of 150 young prisoners took part in the study. They were divided into a control and experimental groups. The experimental group comprised of the Kajang Prison with age ranging from 15-20 years. The average age of the young prisoner is 18 years old. The youngest being 15 and the oldest being 20 years old. Most of the juvenile offenders interviewed came from an unstable family background. Considering that most of these prisoners served some months awaiting trial, it becomes clearer that they were younger at the time of committing their offence and when they were formally removed from their families and communities.

1. Family Structure

	Frequency	Percent
Died	5	3.3
Divorced	19	12.7
Living Together	78	52.0
Separated	48	32.0
Total	150	100.0

2. Location of offences committed

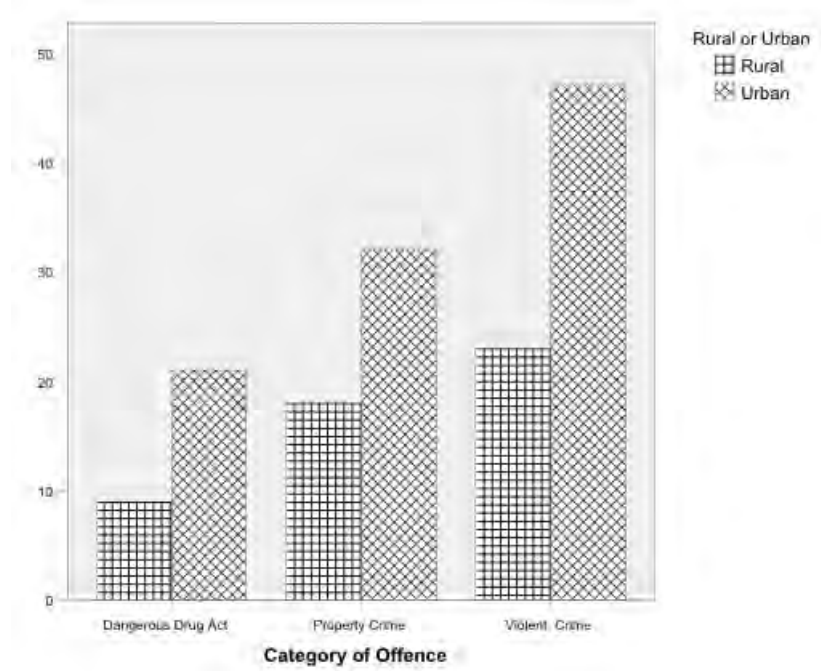
The study shows that most of the offences have been committed in urban areas. The significant note is on the major crimes. Drug related offences numbered 22 in urban area and 9 in rural areas. Number rank high is urban area as compared to 4 in rural areas.

The most common offences committed in the urban areas are robbery (12 cases) and theft (30 cases).

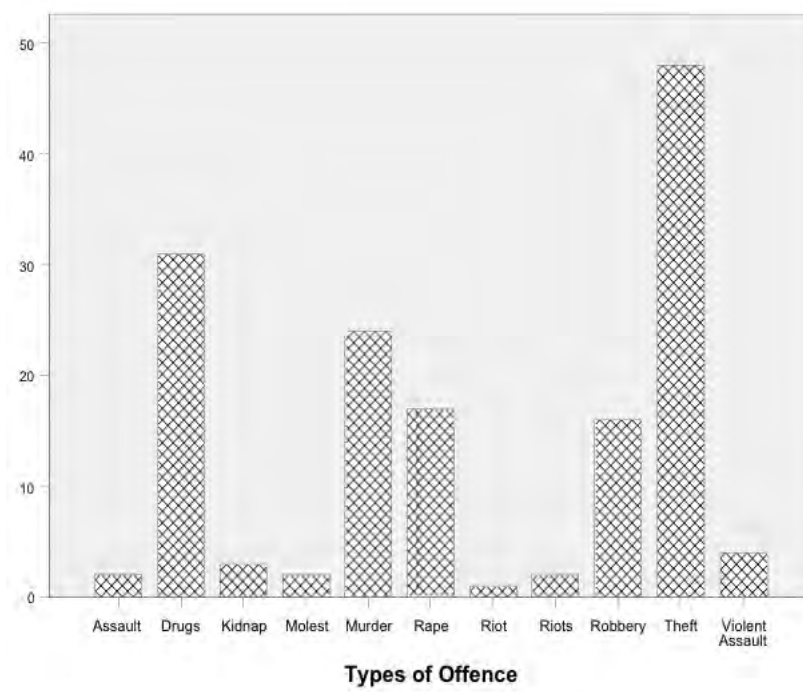
3. Figures & Percentage of Offences

In examining the offences it is observed that the young prisoners were remanded for a range of offences ranging from property crime such as theft, shoplifting, to serious crimes such as murder, rape and robbery. Among the 150 young prisoners 24 (16.0%) were remanded for murder, 17 persons for rape (11.3%) armed robbery 25 (16.7%), kidnap 3 (2.0%), injury to persons to persons 2 (1.3%) and outraging modesty 1 (0.7%).

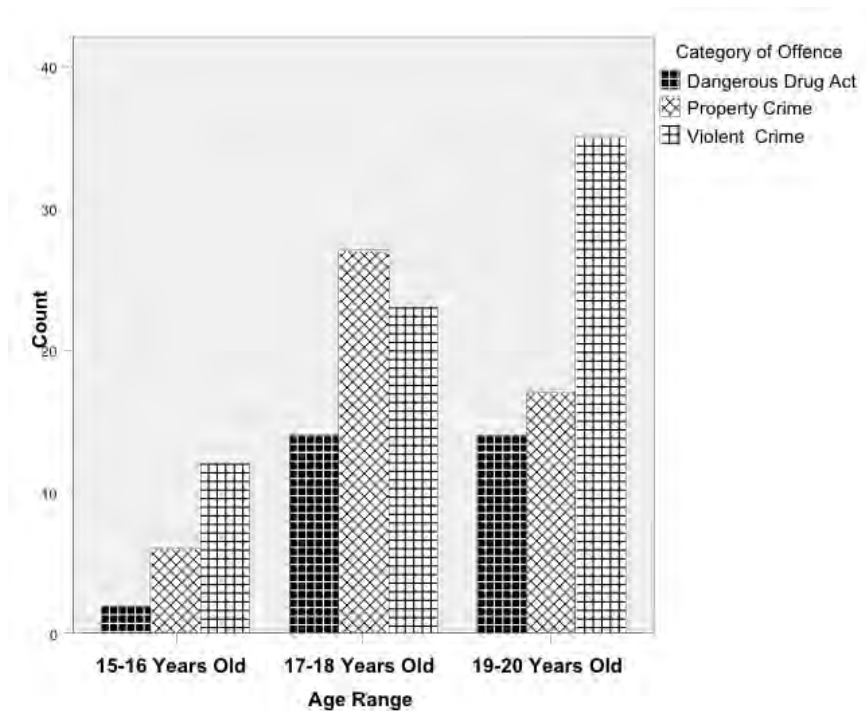
The majority of the offences were theft including 47 persons (31.3%). Drug related offences 31 (20.7%).



4. Types of Offences



Comparison of the age group and the categories of crime committed by remand juveniles



Cases according to the Court

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	TMR	96	64.0	64.0	64.0
	TMS	24	16.0	16.0	80.0
	TMT	30	20.0	20.0	100.0
	Total	150	100.0	100.0	

TMR – Magistrate Court

TMS – Session Court.

TMT – High Court

The study shows that most people were charged in the Magistrates Court. 96 persons (64%) will have their case heard in this court. If they were below the age of 18 then the case will be heard in the same court except that the court room will be cleared and the hearing will now be called a Court for Children.

30 persons were charged at the High Court. They amount to 20%. The cases were serious crimes such as murder and where the Child Act has no jurisdiction. The young person will be trialed as an adult.

The study also shows that 24 persons (16%) were charged in the Session Courts. The penalty may be higher than the other Courts.

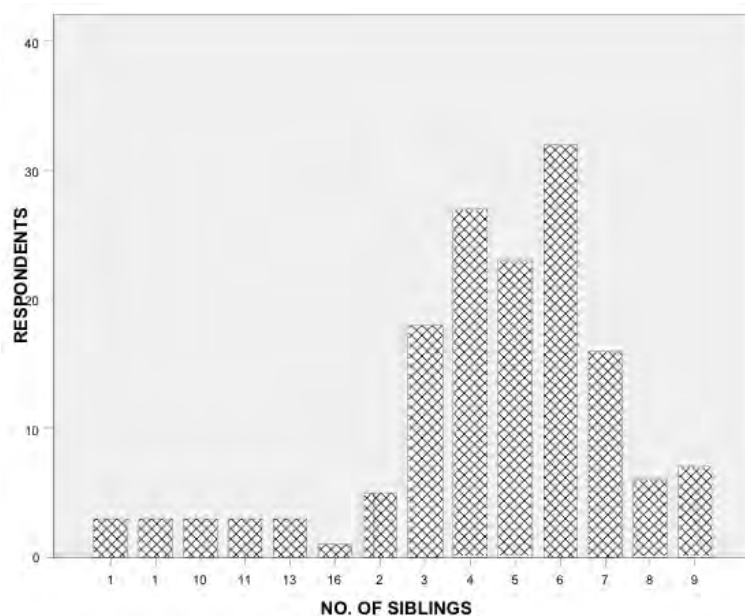
5. Remand Juveniles by Family Income Level

Total Income Per Month	Total	Percentage
Below RM 500	Nil.	Nil
RM 500 – RM 749	66	44.0%
RM 750 – 999	22	14.7%
RM 1000 – RM 1499	38	25.4%
RM 1500 – RM 1999	9	6.0%
RM 2000 – RM 2999	14	9.3%
RM 8000 and above	1	0.7%

The study reveals that 66 persons or 44% came from families where the income per month is below RM750.00. A total of 38 persons or 25.4% had family earning below RM1500.00. The salary shows that 22 persons or 14.7% of their family are earning below RM1500.00 except for 1 person whose family income is above RM8000.00

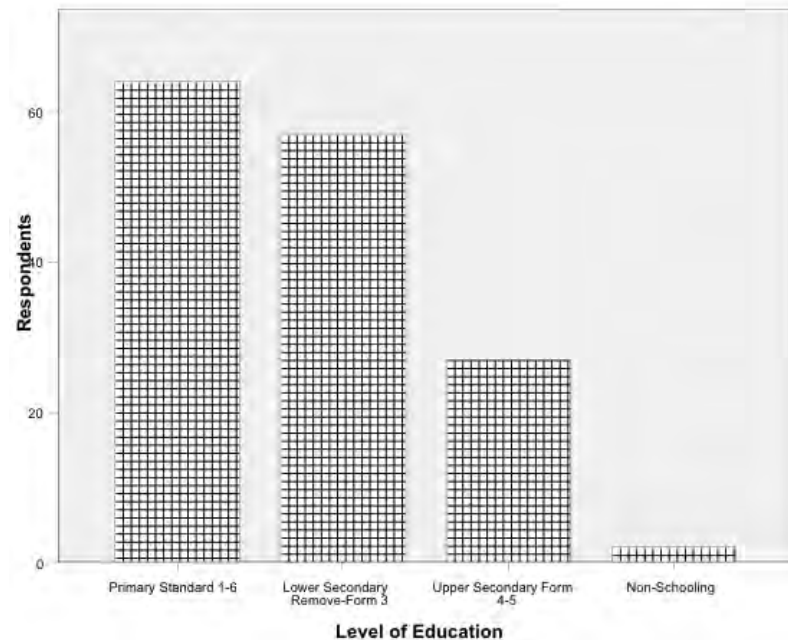
The study shows that a good number i.e. 104 person income is low and this signifies that the majority of the young prisoners are from poor families and only 1 person could be considered coming from a well to do family.

6. Siblings



The study reveals that at least 32 person have 6 siblings, which makes about 21.3%. The following 27 persons have 4 person siblings (18.0%). A total of 23 people (15.3%) have 5 siblings. This is followed by 16 people (10.7%) who have 7 siblings. There is only one person who has 16 siblings.

7. Education



The study reveals that 50 respondents or 33.3% studied up to UPSR level. The next group of respondents of 19 persons studied up to PMR level (19.3%) and sat for the exam. Another 18 persons attended school from Form 1 until Form 2 (12%) 15 persons went up to Form 5 (10%) and sat for the SPM exam.

What the study shows is that 122 persons had only lower secondary school educations. It is of concern as to their worth in obtaining any form of gainful employment outside. The study reveals only 4 boys have gone beyond basic school education. This is a significant result as to show to us why they got involved in criminal activities, that there is a relationship between the offence and a person having lower qualification. It appears to a rare occasion where some one with tertiary education would be involved in crime as the study shows a minimal of only 1 person who was in college to be detained for a crime and 1 person with diploma qualification and 1 person with vocational training.

James Nayagam
SHELTER

PANEL DISCUSSION: QUESTION AND ANSWER SESSION

a. Parents responsibility

A few participants enquired about the parents' role and responsibility with regards to the Child Act 2001 and if they would be held accountable for their children's action. One participant even suggested that parents must practise family planning if they cannot afford to look after their children.

Puan Nor Hajah Amni, informed that the provision in the child act was not meant to punish parents but rather to make them more responsible. For example parents of problematic teens are required to attend an "Interactive Group" which provides counselling will be provided for them and their children.

b. Corporal Punishment.

A participant asked if there were any attempt to reconcile corporal punishment under the law.

Puan Nor Hajah Amni explained that the government has drafted an amendment to the child Act 2001 that seeks to abolish whipping of children in the juvenile justice system.

SPECIAL SESSION

SPECIAL SESSION WITH INVITED GUESTS

A special meeting was held in the afternoon after the Conference in SUHAKAM office to discuss further on juvenile justice. The session was a close door meeting. Invitations were extended to the keynote speaker, panellists and some Conference participants who are involved with juvenile justice.

The issues raised at the discussion were as follows:

- **Database**

There is a need to document the profiles of the juvenile offenders and to look into the contributing factors of their antisocial behaviour.

A representative from the Social Welfare Department informed that such an initiative took place in 1993 when a nationwide research on child abuse, funded by the United Nations Children Fund (UNICEF), was conducted.

Suggestion to collate data on juvenile offenders and for conformity of the data from all agencies is was cautioned by representative from the Bar Council as there is potential abuse of a centralized data system and also the need to respect the offender's privacy.

- **Place of Detention for Juvenile Offenders**

There is a need for juvenile offenders to be separated from adult prisoners and for the facilities to cater to their age and development. Prisons must have an integrated school to provide juvenile offenders with proper education. The school should include psychosocial counseling to help the offenders who invariably have psychological and social problems.

The representative from the prison department informed that the prison department have started the programme known "Sekolah Integriti" with the collaboration of the Ministry of Education. Trained graduate teachers from the Ministry of Education are seconded to *Sekolah Integriti*. The programme started in the Kajang Prison and there are currently six such schools nationwide.

- **Special Court for Children**

The Meeting urged that every district should have a special court for cases involving children as provided in the Child Act 2001.

- **Early prevention**

The Meeting recognized the importance of an early intervention and there was a prolonged discussion on this topic. The members indicated the need to list all stakeholders that are involved in the issue, and to then clearly identify their roles.

Among the stakeholders involved in the early stages of intervention are teachers, schools, the Ministry of Education, the Ministry of Health and hospitals.

From interviews and research conducted, the majority of juvenile offenders come from broken families and thus the Meeting recognized the importance of extending help to such families.

For a more effective intervention process at an earlier stage, there must exist a team of people who will work on the ground close to the communities so that there is continuity.

- **Study**

To better understand the problems that a juvenile offender faced, a situational analysis needs to be conducted. This is to ensure that a precise assessment of the problem in the Malaysian context is documented.

- **Children Act 2001**

The discussion also focuses on Section 87 of the child act 2001 which is about the police's obligations to inform a probation officer or the child's parent and guardian immediately on arrest. Although this provision exists it is not properly implemented as there are many gaps that lead to the problem and one of which is the manpower shortage at the Welfare Department, that is the small numbers of probation officers.

- **Experience from the Philippines**

Apart from discussing issues in Malaysia the Meeting also invited Professor Sedfrey to share some of the Philippines experience in developing its Juvenile Justice Systems.

Firstly, Professor Sedfrey informed that the system uses a multispectral approach that involves every stakeholder. The court can play a big role by becoming proactive. It can start evolving and exercising certain guidelines to address existing problem, without waiting for Parliament to legislate bills. A situational analysis is equally important to help legislator understand the issues and how the systems work.

There is also a need improve media advocacy to push for political will of the cause. A champion of the cause is also needed to push for reforms in the system.

In the Philippines, under the Child Act a Coordinating Council for children protection was set up. The Council is supported by the health, education and also local council, so that any cumbersome processes are avoided.

There is need to develop a broader framework to address the problem instead of dealing with certain problems individually. A suggestion was made for SUHAKAM to monitor a juvenile case randomly in purpose to identify loopholes and gaps in the system. This can be done by coming up with a list of shortcomings and list of improvements that can be provided to overcome those shortcomings.

Professor Sedfrey also emphasised the need to touch base with community groups. They can work to serve notices and help to fill in the gaps in cases of shortage of manpower. This will of course require team work. SUHAKAM is also advised to set up a foundation for volunteers to overcome the shortage of manpower.

In the Philippines there was also an initiative to set up “Justice on Wheels” where magistrates travel in a van to communities disposing long overdue cases.

With regards to data and records, in the Philippines the records are kept highly confidential and there is immunity for children in which they have no obligation to give their status if ask about previous offences or detention. This means that if a child denies his/her involvement in a crime, he/she cannot be prosecuted for lying.

- **Stakeholders’ Responsibility**

Lastly, all members agreed that the most important thing is to change the mindsets of the public especially those who are directly involved in the juvenile justice system. They must be given training to help them understand that children are to be treated differently from adults and that they have special protection provided under law.



SUHAKAM'S RECOMMENDATIONS



SUHAKAM'S RECOMMENDATIONS

SUHAKAM has made the following recommendations:

1. ROLE OF GOVERNMENT

a) Special Court for Children

The Government has to provide a special court for children. The court must be in a different premise and be attended by magistrates who are specially trained in the field of children's rights and are knowledgeable of international standards of juvenile justice. The premise must be accommodative and friendly to children.

b) Separate Facility for Juvenile Offenders

Apart from having a special court for children, the Government must also build detention centres specially to hold young offenders. The detention centre should be equipped with facilities to accommodate the children's age and development.

c) Alternative Sentencing

The Government must institute alternatives to punishment for juvenile offender, especially for petty crimes. Imprisonment for petty crimes should no longer be acceptable. Instead a rehabilitative or restorative system, such as a community service and restitution, must be introduced.

d) Early Prevention

The Government must take early steps to forestall juveniles from committing crimes. Hence, an early prevention mechanism is needed. A thorough situational analysis must be conducted to obtain a precise picture of the contributing factors of anti-social behaviour of young children. The study will enable the Government to take appropriate measures to address the problem which will be financially less costly to the Government as well as less costly to the youngsters in term of personal development and wastage of their potential.

2. ROLE OF THE JUDICIARY

a) Observe Children Needs

The court has the responsibility to be sensitive towards children in conflict with the law and also towards child victims and child witnesses. To ensure justice, it is highly essential for the court system to accommodate the children's level of maturity and other special needs such as their background and history. The justice system must be child friendly and the trauma experienced by them should be kept to the minimum. Thus they must be accompanied by appropriate adults throughout the process.

b) Special Training

A special training on handling children in the justice system must be conducted for all magistrates who preside over children's cases. The training also should also be provided

to all those who work directly with juvenile offenders such as the police, social workers and volunteers.

c) Proactive Initiatives

Delays and prolonged remand periods must be addressed expeditiously. The court must be proactive and current in making improvements to existing guidelines. It should not wait for the Parliament to legislate bills to make changes that provide children with greater justice and help them reintegrate into society effectively.

3. ROLE OF CIVIL SOCIETY

a) Involvement in Rehabilitative Programmes

Civil society has to work in complement with the Government to ensure young offenders are given the best opportunities to rehabilitate and resume a constructive role in society. Since they are closer to communities and are better in working with them than the Government, the Government should involve them in rehabilitation programmes, especially in community service. They can play a vital role in enabling communities to accept juvenile offenders.

b) Probation Officers

The shortage of manpower, especially that of probation officers, in the Department of Social Welfare can affect the wellbeing and justice of juvenile offenders. To overcome this problem, the Child Act 2001 can be amended to enable volunteers, especially community leaders and retirees, with law and social work background to be appointed as volunteered probation officers.

4. ROLE OF THE MEDIA

SUHAKAM is concerned that the media has frequently violated the children's right to privacy as provided under Section 15 of the Child Act 2001 when covering cases of juvenile offenders and victims. The media has intentionally or unintentionally been revealing their identity by reporting the names of their parents or family members and their residence. When journalists or the electronic media commit this offence, they should be charged.

5. SUHAKAM'S ROLE

SUHAKAM conduct a study to identify the gaps between the laws pertaining to juvenile justice and the implementation.

ANNEXURE

PROGRAMME

MALAYSIAN HUMAN RIGHTS DAY 2008

THEME: "HUMAN RIGHTS AND THE ADMINISTRATION OF JUVENILE JUSTICE"

DATE: 9 SEPTEMBER 2008

VENUE: BALLROOM, CROWNE PLAZA MUTIARA HOTEL, KL

PROGRAMME

0800 - 0900

Registration

0900 – 1000

Welcoming Address

Tan Sri Abu Talib Othman

Chairman, Human Rights Commission of Malaysia

Opening Address

Datuk Zaid Ibrahim

Minister, Prime Minister's Department

1000 – 1015

Break

1015 – 1115

Keynote Address

Professor Sedfrey M Candaleria

Associate Dean for Student Affairs at the Ateneo de Manila Law School

1130 – 1330 -

Panel Discussion: Human Rights and the Administration of

Juvenile Justice

Panelist 1: Dato' Meme Zainal Rashid

Director General of the Department of Social Welfare

Panelist 2: Dr Farah Nini Dusuki

Senior lecturer, University of Malaya

Panelist 3: Mr. James Nayagam

Executive Director, Shelter Homes for Children

1330 – 1335

Closing Remarks

Tan Sri Simon Sipaun

Vice Chairman, SUHAKAM

PHOTO GALLERY

Participants registering
for the conference



Participants at the
conference



Participants from the
Police department





SUHAKAM Chairman
Tan Sri Abu Talib Othman
delivering his opening speech



Professor Sedfrey and Dato
Denison Jayasooria



Dr Farah Nini, Datuk Dr
Chiam Hen Keng, Puan Nor
Hajah Amni and Mr James
Nayagam - Panel Discussion

QUESTION AND ANSWER SESSION

