The Administration of Juvenile Justice System in Malaysia: Moving Towards Restorative Justice Process?

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Abstract—**This article analyzes pertinent issues surrounding administration of juvenile justice system in Malaysia and examine whether restorative justice process should be incorporated into the system to make it in line with the Convention on the Rights of the Child 1989 and other international instruments.**

Keywords-Convention n the Rights of the Child 1989, Human Rights, Administration of Juvenile Justice System, Restorative Justice System, Rehabilitative.

I. INTRODUCTION

Malaysia has acceded to the Convention on the Rights of the Child 1989 [hereafter referred as the Convention] on the 17th February 1995 in order to uphold the legal protection afforded to children in Malaysia [1].This is the first legal international human rights instrument which recognized a child as a subject of international law and is endowed with legal rights. Central to the underlying principles in the Convention is the right afforded to children in conflict with the law by virtue of Articles 37 and 40 of the Convention. In essence, the former emphasizes the protection afforded to children deprived of liberty and the latter provides fundamental guarantees to a fair trial to children in conflict with the law. However, Malaysia expressed reservation to Article 37 of the Convention has greatly undermined the legal protection afforded to children in conflict with the law [2].This article analyzes pertinent issues surrounding the administration of juvenile justice in Malaysia and examine whether restorative justice process should be incorporated in the administration of juvenile justice system in Malaysia to make it in line with the Convention and other international instruments. Examples of international instruments governing the administration of juvenile justice are United Nations Standard Minimum Rules for the Administration of Juvenile Justice [hereafter referred as the Beijing Rules], United Nations Rules for the Protection of Juveniles Deprived of their Liberty [hereafter referred as the Havana Rules] and United Nations Guidelines for the Prevention of Juveniles Delinquency [hereafter referred as the Riyadh Guidelines] [3].Qualitative study is undertaken through library research and semi structured interviews in order to examine whether children in conflict with the law are adequately protected within the legal framework available in Malaysia.

II. ISSUES SURROUNDING THE ADMINISTRATION OF JUVENILE JUSTICE SYSTEM IN MALAYSIA

A. Introduction

The administration of juvenile justice in Malaysia is governed by Part X and XIII of the Child Act 2001 [hereafter referred as Child Act] [4]. The Child Act has repealed three other set of laws embodied in the Women and Girls Protection Act 1973, Child Protection Act 1991 and Juveniles Court Act 1947 [5]. There are many issues which have been identified in the administration of juvenile justice system in Malaysia and it encompassed every stage of the criminal justice system, beginning from pre trial to trial and until it reaches the disposal stage. At the pre-trial stage, issues surrounding arrest, detention, right to have access to legal assistance and separation from adult offenders have denied children in conflict with the law from being fully protected. Similarly, in the trial stage, the exclusion of the Court of Children in hearing certain cases and the non observance of the restrictions on media reporting and publications as provided in Section 15 of the Child Act in certain circumstances are not in conformity with the principle of best interest of the child enunciated in Article 2 of the Convention [6]. Further, at the disposal stage, even though the Court for Children is empowered to make various orders by virtue of Section 91 of the Child Act, recent court decisions reflect the inclination to impose imprisonment orders and placed children in conflict with the law in institutions [7]. However, in the following discussion, this paper attempts to examine the issues surrounding pre trial stage in greater detail. Special emphasis is placed on the pre trial stage because this is the stage where a child in conflict with the law will have his first contact with the enforcement officers and a child in conflict with the law is also most vulnerable at this stage. The importance of this stage is given particular importance in Rule 10 of the Beijing Rules which provides that "contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him with due regard to the circumstances of the

case". Commentary to Article 10 of the Beijing Rules provides that enforcement officers must avoid harsh language, physical violence or exposure to the environment which can be harmful to juveniles. This position is affirmed by the Committee of the Rights of the Child [hereafter referred as the Committee] in its General Comment 10 entitled Children's Rights in Juvenile Justice [hereafter referred as General Comment 10] which provides that the preamble of the Convention makes explicit reference that children in conflict with the law is entitled to inherent right of dignity and worth and these rights must be respected and protected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies and all the way to the implementation of all measures in dealing with children in conflict with the law [8]. This is imperative because initial contact with law enforcement agencies may have long lasting effect and influence the child's attitude towards the state and society.

B. Issues Surrounding the Pre Trial Stage

Section 83 (1) of the Child Act provides that a child who is alleged to have committed an offence shall not be arrested, detained or tried except in accordance with the Child Act. Thus, the above provision prohibits the arrest, detention or trial of a child except in accordance with the Child Act and this position is affirmed in the Court of Appeal decision in *PP v N (A Child)* [9]. Even though the above section imposes the prohibition, the section itself does not provide for the arrest, detention or trial of a child. The unsatisfactory position of the present law is prejudicial to children in conflict with the law because they would be more vulnerable to abuse once they come into contact with enforcement officers who are dealing with them in the administration of juvenile justice system.

C. Arrest

As mentioned above, Section 83 (1) of the Child Act does not stipulate the mode of arrest in dealing with children in conflict with the law. It can be argued that in the absence of this provision, the Child Act is not in line with the requirement of Article 37 (b) of the Convention which provides that arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and in the shortest appropriate period of time. This position is affirmed by the Committee at para 10 in its General Comment 10.

It is submitted that the provisions of the Child Act also does not stipulate the provisions for mode of investigation in the first twenty fours of arrest. Section 87 (1) (a) of the Child Act only provides that the police officer or other person shall immediately inform a probation officer and the child's parent or guardian of the arrest. Whilst this provision may be in line with Rule 10 of the Beijing Rules, there are possibilities that police officer or other person may inform a probation officer or the child's parents late or they may also not be located immediately upon arrest.

D. Grounds of Arrest and Access to Legal Counsel Upon Arrest

Article 5 (3) of the Federal Constitution provides the rights of a person arrested in two circumstances. Firstly, a person arrested shall be informed *as soon as maybe* of the grounds of his arrest and secondly, a person shall be allowed to *consult and be defended by a legal practitioner of his own choice*. It is submitted that in the absence of similar provisions in the Child Act, the Child Act is not in line with the principles embodied in the Federal Constitution. Consideration must now be given to the term "as soon as maybe" found in the Federal Constitution. Since the Federal Constitution does not define the term "as soon as maybe" the Courts have decided that upon arrest, a person arrested "should be informed as soon as possible or in the shortest practicable time" of his grounds of arrest [10]. It is argued that in relation to children in conflict with law, a specific provision should be incorporated in the Child Act which provides that upon arrest, children in conflict with the law should be informed of their grounds of arrest as soon as possible in order to minimize the trauma they may face especially if it is their first time having contact with enforcement officers.

The second limb of the Federal Constitution provides that a person shall be allowed to consult and be defended by a legal practitioner of his own choice. The right to have access to legal practitioner of his own choice is embodied in Article 40 (2) (b) (ii) of the Convention which guaranteed that a child in conflict with the law must be given appropriate assistance in the preparation and presentation of his defence. It is submitted that while Section 90 (2) of the Child Act provides that a defence counsel may render assistance to a child before the Court for Children, the Child Act does not stipulate the right of a child in conflict with the law to be assisted by a legal counsel of his own choice upon arrest and this is not in accordance with the right vested in the Federal Constitution. In *Hashim bin Saud v Yahaya bin Hasim & Anor,* the Court held that Article 5 (3) of the Federal Constitution merely prescribe the right of a person arrested to be allowed access to his counsel but there is no need to inform him of his right to counsel [11]. However, after the amendment made to the Criminal Procedure Code, Section 28A of the Criminal Procedure Code now requires that a police officer, before commencing any form of questioning or recording of any statement, inform the person that he may; (i) communicate or attempt to communicate with a relative or friend to inform of his whereabouts; (ii) communicate or attempt to communicate and consult with a legal practitioner of his choice. It is submitted that this safeguards should be incorporated in the Child Act in order to bring it in line with Article 37 (d) of the Convention which provides a child shall have the right to prompt access to legal and other appropriate assistance. Further, Article 40 (2) (b) (ii) of the Convention guaranteed that a child in conflict with the law must be given appropriate assistance in the preparation and presentation of his defence.

E. Pre Trial Detention

The provisions governing detention in the Child Act can be found in Section 84 and its application is complemented by Section 86 of the Child Act. Section 84 (1) of the Child Act provides that when a child in conflict with the law is arrested for an offence, he is to be brought within twenty four hours before the Court for Children and the child shall be released on a bond pending the hearing of a charge as provided in Section 84 (3) of the Child Act. However, the Court for Children may deny a child from being released pending the hearing of a

charge in the following circumstances provided in Section 84 (3) of the Child Act; (a) the charge is one of murder or other grave crime; (b) it is necessary in the best interests of the child arrested to remove him from association with any desirable person; or (c) the Court for Children has reason to believe that the release of the child would defeat the ends of justice. If a child is not released pending the hearing of a charge for the above reasons, Section 86 of the Child Act vested the Court for Children with the power to detain a child in the place of detention specified in the Child Act.

However, careful analysis of the entire Section 84 of the Child Act invites discussion of two main issues surrounding detention. Firstly, even though Section 84 (1) provides that an arrested child shall be brought within twenty four hours before the Court of Children, Section 84 (2) of the Child Act stipulates that in the event an arrested child cannot be brought within the stipulated time, the child shall be brought before a Magistrate who may direct a child be remanded in a place of detention until the child can be brought before the Court for Children. Section 84 (2) of the Child Act does not stipulate the period of detention that can be ordered by a Magistrate against a child during a pre trial stage. The Court of Appeal in the case of *PP v N (A Child)* recognized that detention under Section 84 (2) of the Child Act is only applicable when it is not possible to bring a child to the Court for Children within twenty four hours. In addition, the Court of Appeal also provides that Section 84 (2) of the Child Act does not require period of detention to be specified because "it must be understood that the child must be brought before a Court of Children without necessary delay" [12]. However, it is argued in the absence of time limit specified for detention, an arrested child can be detained for an indefinite period of time even before any charge is made against him at a pre trial stage. Further, it can also be argued that in the absence of time limit, the definition provided in Section 54 (2) of the Interpretation Acts 1948 is not very helpful. The abovementioned section merely provides that "where no time is prescribed within which anything shall be done, that thing shall be done with *all convenient speed* and as often as the prescribed occasion arises".

On the basis of the above discussion, it is evident that the pressing issue surrounding Section 84 (2) of the Child Act is that an arrested child can be detained by an order of a Magistrate for an indefinite period of time pending the hearing of a charge even before any charge is made against him at a pre trial stage.

Secondly, the Child Act provides that in the event a child is not released pending the hearing of a charge for reasons provided in Section 84 (3) para (a) to (c) of the Child Act highlighted above, Section 86 (1) of the Child Act vested the Court for Children with the power to detain a child in the place of detention specified in the Child Act. However, the wordings of Section 86 (1) of the Child Act does not specify the period of detention which can be ordered against an arrested child by the Court for Children. This matter was addressed by the Court of Appeal in the case of *PP v N (A Child)* which provides that the detention provided under Section 86 (1) of the Child Act "cannot be limited to a number of day but must be until the charge is fully heard" [13]. However, it can be argued that the non specification of a period of detention in Section 86 (1) of the Child Act also is prejudicial to a child who is detained because a child may be detained for a prolonged period of time.

Detention for the purpose of investigation is also another area which warrants further investigation because the Child Act does not provide any provision for detaining a child in conflict with the law for the purpose of investigation. The Court of Appeal in the case of *PP v N (A Child)* had the opportunity to discuss the application of Sections 84 and 86 of the Child Act concerning detention of a child deprived of liberty. The Court of Appeal recognized that the Child Act does not explicitly provide for any provision empowering the Court for Children to detain a child for the purpose of investigation but only provides for detention pending "the hearing of a charge" under Section 84 (2) of the Child Act [14]. Therefore, for the purpose of investigation, the Court held that Section 117 of the Criminal Procedure Code will be applicable to children in conflict with the law.

In the light of the preceding analysis, it is evident that the present unsatisfactory position is contrary to Article 37 (b) of the Convention which provides that arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and in the shortest appropriate period of time. The principle enunciated in Article 37 (b) of the Convention is supported by Rule 13 of the Beijing Rules which provides that detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. Further, Rule 13 of the Beijing Rules advocates that whenever possible, state shall adopt alternative measures such as close supervision, intensive care or placement with a family or in an educational setting or home.

The same view is reinforced by Rule 17 of the Havana Rules which emphasized that juveniles who are detained, under arrest or awaiting trial shall be avoided to the extent possible and limited to exceptional circumstances only. It follows that the provisions in the Child Act with regards to detention is also not in line with the international documents mentioned above. The Committee in its General Comment 10 at para 81 notes in particular, that a State Party must ensure a child in pre trial detention to be released as soon as possible and if necessary under certain conditions. The Committee also recommended that the duration for the detention should be made by a competent, independent and impartial authority or a judicial body. Hence, to address the issues surrounding pre trial detention, Malaysia is urged to amend the laws in order to incorporate a specific time frame for detention in order to ensure that children in conflict with the law are deprived of their liberty in the shortest time possible.

F. Separation From Adult Offenders

Section 85 (a) of the Child Act provides that appropriate arrangements shall be made to ensure that a child being detained in a police station or being conveyed to or from any Court or waiting before or after attendance in any Court to be separated from adult offenders. This provision seems to be in line with Article 37 (c) of the Convention which provides that a child deprived of liberty must be separated from adult offenders. However employment officers need to take cautious measures to ensure that a child who falls outside the protection afforded by Section 85 (a) (for example, when a child is

waiting to be transported and same vehicle is used for both child and adult offender) is separated from adult offenders. Further, it is argued that Section 85 (a) of the Child Act may be overridden by Section 86 (2) of the Child Act which explains that a child who cannot be detained in places of detention provided by the Child Act shall be detained in a police station, police cell, police lock up, separated from adult offenders or in a mental hospital. It is submitted that Section 86 (2) of the Child Act has reduced the safeguards afforded in Section 85 (a) of the Child Act and this is not in line with Rule 13 of the Beijing Rule which encourage states to take measures to prevent the negative influence of adult offenders on a child detained. Further, it can also be submitted that lack of training or awareness on the part of enforcement officers may lead to weak enforcement of the implementation that children in conflict with the law must be separated from adult offenders.

The preceding paragraphs above discussed the problems surrounding pre trial and the importance of protecting children in conflict with the law in the administration of juvenile justice. It is submitted that it is of utmost important for Malaysia to consider withdrawing the expressed reservation on Article 37 of the Convention because Article 37 of the Convention upholds the legal protection afforded to children deprived of liberty. It can be said that the expressed reservation on Article 37 is not compatible with the object and purpose of the Convention and it is also not in line with the international instruments discussed above. The discussion below attempts to analyze other alternatives measures which may be available in order to better protect children in conflict with the law in the administration of juvenile justice system in Malaysia.

III. MOVING TOWARDS RESTORATIVE JUSTICE PROCESS

The Committee in its General Comment 10 at para 3 highlights that the administration of juvenile justice should promote the use of alternative measures such as restorative justice in order to better serve the needs of children in conflict with the law. The use of alternative measures not only uphold the best interest of the child but also serve both short and long term interest of the society at large.

Article 40 (1) of the Convention provides that one of the aims of juvenile justice is to reintegrate and assist a child to assume a constructive role in a society. This position is reinforced by Article 37 (b) of the Convention which imposes a duty on a state to arrest, detain or imprison a child as a measure of last resort. It follows that a State Party must take alternative measures to intervene in dealing with children in conflict with the law in order to ensure that the legal protection afforded to them is fully implemented. The two types of intervention that can be undertaken by a State Party are interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings.

The Committee advocates that interventions in the context of judicial proceedings imposes a duty on a State Party to strictly limit the use of deprivation of liberty, in particular pre-trial detention as a measure of last resort. In the light of the issues surrounding pre trial discussed above, it is submitted that Malaysia should adopt alternative measures in order to ensure that children in conflict with the law are being detained in the shortest possible period.

Interventions without resorting to judicial proceedings are encapsulated in Article 40 (3) (b) of the Convention which emphasizes that a State Party shall promote measures in dealing with children in conflict with the law without resorting to judicial proceedings. Given the fact that the majority of child offenders commit only minor offences, the adoption of alternative measures without resorting to judicial proceedings are particularly important because it will avoid children in conflict with the law from being stigmatized. The Committee notes that restorative justice benefits both children and the public and it is also cost effective. Examples of alternative measures which the Committee recommended are community based programs such as community service, supervision and guidance by social workers or probation officers, family group conferencing and other forms of restorative justice.

A. Defining Restorative Justice

Howard Zehr (Howard, 2002) has explicitly explained that underpinning the concept of restorative justice is the three pillars of restorative justice which can be encapsulated as follows; firstly, restorative justice focuses on repairing harm that is inflicted against the victim and the community. However, it also emphasizes on addressing the root causes of the harm and incidentally, it may also be concerned with the harm experienced by the offenders. Hence, restorative justice gives an opportunity for all offenders, victims and the community a healing experience as a result of the harm caused by the offender. Secondly, restorative justice makes the offender directly accountable and responsible for their action followed by the community and society. The second pillar gives an opportunity to the offenders to make things right as much as possible towards the victims and the community. Finally, the third pillar of restorative justice promotes engagement and participation of all parties affected by crime such as the offenders, victims and the community.

The pillars of restorative justice discussed above are imperative because it leads to the underlying distinctions between the traditional criminal justice and restorative justice. The main distinctions can be elaborated as follows; firstly crime is a violation of the law and the state whilst restorative justice emphasizes that crime is a violation of people and relationships. Secondly, criminal justice provides that violations lead to the imposition of guilt on offender but restorative justice focuses on the accountability of the offender when the offender violated the law. The traditional criminal justice imposes the duty on the state to determine guilt and imposed punishment. In comparison, restorative justice involves the participation of offenders, victims and community to repair the harm [15]. Susan Sharpe (Susan 1998) supported the view expressed by Howard Zher above and has proposed five key principles of restorative justice which are; restorative justice invites full participation and consensus, restorative justice seeks to heal what is broken, restorative justice seeks full and direct accountability, restorative justice seeks to reunite what has been divided and restorative justice seeks to strengthen the community in order to prevent further harm [16].

B. *Restorative Justice in other Jurisdictions*

The advocates of restorative justice are of the opinion that in understanding restorative justice, it is integral to understand that restorative justice has grown out of experience practiced in other jurisdictions. The explanation on restorative justice discussed above has been exercised for thousand of years in informal, customary traditions. However, the modern development of restorative justice has taken place in the mid-1970s in Canada when the first victim offender mediation programs were established as an alternative to probation for young offenders. The programs developed into pre-sentence programs which provide opportunity for both offenders and victims to formulate a sentencing proposal for the judge's consideration. The results of these exercised were multifold; the reduction of recidivism on the part of offenders and the increase of likelihood of restitution being completed. On the other hand, the victims gained higher satisfaction from the process compared to traditional court process where the victims are left out from the system [17].

Since then, the practice of restorative justice process has gained acceptance and practiced in various jurisdictions. Daniel Van Ness, Allison Morris and Gabrielle Maxwell (Daniel, Allison & Gabrielle 2001) have identified the three following programs which became the hallmark for restorative justice programs;

- Victim Offender Mediation-This program brings together offenders and their victims and a mediator will play the role as a coordinator to facilitate the meeting. Both offender and victim will express their views and mediator will assist them to consider ways to make things right. The victims involved in this program are reported to being satisfied with both the process and the outcomes reached.
- Conferencing- This program was developed in New Zealand and was derived from the traditional aspects of the Maori, the indigenous population of New Zealand in resolving conflicts. This program has revolutionized the administration of juvenile justice system in New Zealand. It brings together not only the offenders and victims but also family members of both offenders and the victims. This program gives the opportunity for the offenders to explain how they think their actions may affect the victims. In response, the victims will relate their experience and harm resulted from the acts committed against them and this will be followed by the views expressed by victims and offenders' family members. The whole group will then decide and put into written agreement the extent of accountability imposed on the offenders for them to repair the harm and in what way can the offenders be assisted. This agreement will then be sent to the appropriate criminal officials.
- Circles-The success of this program can be traced to the development which has taken place in North American countries. This program is similar to conferencing described above but it involves more participation because in addition to the primary parties (offender and victim) and their families who are affected by the crime, any members of the community who has an interest in the case may also participate in the program. This program enables all the parties to sit in circles and everyone in the circle will be given an opportunity to express their views and will arrive at a resolution. The "keeper of the circle" will act as a mediator and facilitator to ensure that the process is protected.

C. *International Developments in Restorative Justice Process*

International community has recognized the benefits and effectiveness of restorative justice practices. This is evident from the various resolutions issued by the Economic Social Council which noted the positive outcome of restorative justice on all offenders, victims and the community [18]. The General Assembly has also affirmed the importance of developing restorative justice process to fight against juvenile delinquency and encouraged Member States to take measures to incorporate them into policies, programs and procedures [19]. These developments paved way to the establishment of Plan of Action for the Implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty First Century [20]. The importance of restorative justice is further reinforced by the Eleventh and Twelve United Nations Crime Prevention and Criminal Justice [21].

D. *Malaysia:Moving Towards Restorative Justice Process?*

As a State Party to the Convention, Malaysia is under an obligation to undertake and implement the provisions in the Convention. Even though Malaysia expressed its reservation to Article 37 of the Convention, Malaysia does not express reservation to Article 40 of the Convention which promotes the use of restorative justice in the administration of juvenile justice system in Malaysia. In its Concluding Observations on Malaysia, the Committee has expressed its concern, among other things at the long pre-trial detention periods, delays in dealing with cases involving children and children in conflict with the law are often subject to negative publicity in media. In line with the development of restorative justice, the Committee also urged Malaysia to develop a comprehensive system of alternative measures such as probation, community service orders and suspended sentences in order to ensure that deprivation of liberty is used only as a measure of last resort [22]. Further, the Committee also urged Malaysia to adhere to international guidelines governing administration of juvenile justice embodied in the Beijing Rules, Havana Rules and Riyadh Guidelines discussed above.

In 2009, the Human Rights Commission of Malaysia (SUHAKAM), organized Malaysian Human Rights Day 2008 and the focus of discussion was on human rights and the administration of juvenile justice in Malaysia. It recognizes that Malaysia should incorporate restorative justice practices in the administration of juvenile justice system in Malaysia and highlighted the issues surrounding pre trial discussed above [23].

In light of the preceding discussion above, Malaysia should take active measures to incorporate restorative justice process

in the administration of juvenile justice process to bring it in line with the recommendations made by the Committee to safeguard the protection afforded to the children in conflict with the law in Malaysia.

IV. CONCLUSION

The issues surrounding the administration of juvenile justice in Malaysia discussed above reflects the need to re-examine the present legal framework governing administration of juvenile justice in Malaysia. As a State Party to the Convention, Malaysia should consider withdrawing the reservation expressed on Article 37 of the Convention in order to better safeguard the protection afforded to children deprived of liberty. The withdrawal of the expressed reservation will reflect serious attempts by Malaysia to uphold the principle of best interest of children in dealing with children in conflict with the law. Malaysia should also take active measures to incorporate restorative justice process in the administration of juvenile justice system in order to ensure that if possible children in conflict of the law would be dealt with without resorting to judicial proceedings. The incorporation of restorative justice process would be in line with Article 40 of the Convention and the developments which have taken place internationally which recognized restorative justice as a viable alternative to the traditional court process.

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