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## THE NECESSITY OF DIVERSION OF JUVENILE OFFENDERS FROM THE CRIMINAL JUSTICE SYSTEM IN MALAYSIA

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**ABSTRACT:** The dealing of juvenile offenders through formal court process has caused problems of stigmatization and further development of deviant behavior due to the absorption into the criminal justice system. The absence of legislation providing for diversionary measures is a challenge faced by our country. This article aims to discuss and analyze the necessity of diverting juvenile offenders from the criminal justice system in Malaysia. This article also discuss the strengths and weaknesses of the current legislation which is the Criminal Procedure Code and consequently aims to seek reform to the current law in reference to the diversionary measures embedded in the law of New South Wales, specifically the Young Offenders Act 1997 (New South Wales).

**KEYWORDS:** *juvenile offender, diversion, criminal justice system*

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## **INTRODUCTION**

The right given towards children in Malaysia is very well protected under various statutes in order to provide the future generation of the country with ample protections and rights. Nevertheless, the coverage of special legal treatment towards child does not extend to the aspect of criminal procedures. As for this aspect, there is no special treatment is given to the children making them vulnerable to legal punishments.

## **DIVERSION**

Diversion is commonly defined in the legal understanding of the term as the diverting away of a case from the criminal or juvenile justice system. It provides the offender a chance to avoid trial before a judge and avoid a criminal record if the terms of a diversion program are met. If the offender committed a minor offence and is a first time offender, he may be eligible for diversion. A low misdemeanour or petty offense is generally recognized as minor offence. The opportunity for a diversion is an available option in both adult and juvenile court, but only for offences, which are not felonies. The method and process of diversion differs in every jurisdiction of not only countries, but territorial jurisdictions within a country as well.

In general practice, there are a few steps in the diversion process. Upon hearing the charge, the offender will meet with a probation officer who will explain the process to him. The officer will inform him of the diversion program and its availability to the offender. If it is available, and the offender admits to the charge, he may participate in the program. There are varieties of diversion program available depending on the law and practice of the jurisdiction. The most common ones are community service, fine, restitution to the victim, attending an educational class or even drug or personal counselling if appropriate to the circumstances of the offender's case.

Once all the terms of the program is agreed upon by the offender, the case will be considered as coming to the end and will be closed for proceedings. There is no need for appearance before a judge and the offender will not have a criminal record for the offence committed. The absence of criminal record part is made possible simply because the offender had been 'diverted' away from the formal process that could leave the offender with a criminal record in the legal system. Even though the opportunity to divert from the legal system is granted once, that does not mean that it is available for the second time. The court still maintains a record of the offender completing a diversion program in the event he returns on another offence, as diversion is an opportunity rarely given to repeat offenders for a second crime.

The process of diversion is not necessarily termed as diversion. The said process might also be referred as "deferred judgment" or "deferred prosecution" in different jurisdictions. This is mainly due to the fact that once the diversion terms are completed; the court will not enter a judgment in its record, but enters a dismissal of the charge instead. As stated earlier, the diversion program would only be made available to the offender if the admission to the charge were made. So if the offender maintains the innocence stand, the case will be set for trial, following the normal procedures for trial. Thus, by having such stand, the offender will lose the opportunity to participate in a diversion program since an admission of the crime is a requirement.

## **DIVERSION THEORIES**

The theoretical stage of the literature indicates that there are four theories which led to the development of diversionary measures, namely the labelling theory, the social learning theory, the differential association theory, and the social control theory.

The labelling theory, developed by Frank Tannenbaum, contends that if a juvenile offender is processed through the juvenile justice system, it will stigmatize the person for the commission of a relatively minor crime, which would do him more harm than good.<sup>1</sup> People who have been labelled as deviant are likely to take on a deviant identity and become more deviant than if they have not been labelled as such. According to Tannenbaum, deviant label would influence the future behaviour of a youth and affect the way he comes to define himself and the social roles he is allowed to assume.

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<sup>1</sup> Tannenbaum (1938), explains the definition of the labelling theory in his book "Crime and Community", which was referred by John Hamlin in Labelling Theory (Societal Reaction Theory).

The social learning theory, developed by Albert Bandura, revolves around the belief that people within a society would develop their behaviour pattern by observation of actions and behaviours of others within their social circle.<sup>2</sup> The development of behaviour pattern is believed to be by observational learning. People, in seeking acceptance from those surrounding him within a society, would observe and imitate the action of others. Bandura also believes that the reward or punishment for certain actions can be a factor of influence in developing a behaviour pattern.

Another theory, which forms part of the development of diversionary measures, is the differential association theory, which was developed by Edwin Sutherland. The underlying principle of the differential association theory is the belief that criminal behaviour is learned through communications as well as interactions with others within a person's society.<sup>3</sup> Sutherland believes that the learning process is not only by way of imitation of the act of committing crimes, but also the development of attitudes and the capability of rationalizing and adding motives to the crimes committed.

In addition, the social control theory, developed by Ivan Nye, is a theory which also forms the basis for diversionary measures. Nye explains in his theory that a person's self-control can be developed through the process of socialization and social learning, which would in turn reduce the probability of developing antisocial behaviour.<sup>4</sup> A direct control would be by threat of punishment for a wrongdoing or a reward for good behaviour, an indirect control would be through anticipation of disapproval by person in authority, and an internal control would be through the development of conscience or an internal constraint on behaviour.

## **MALAYSIA LEGAL SCENARIO**

In Malaysia, the principal Act governing the protection of juvenile offenders is the Juvenile offender Act 2001, which came into force on 1 August 2002. This Act consolidated three former Acts, namely, the Juvenile Courts Act 1947; Juvenile offender Protection Act 1991 and Women and Girls' Protection Act 1973. Part X and XIII of the Juvenile offender Act (CA) deals with juvenile offenders with the former being about Criminal Procedures and the latter about investigation, arrest, search and inspections of offenders.

Relating to the procedures, the law for purposes of regulating the procedures within the stages of arrest and pre-trial disposition are laid down in the Juvenile offender Act 2001. The provisions governing detention in the Juvenile offender Act can be found in Section 84 and its application is complemented by Section 86 of the Juvenile offender Act.<sup>5</sup>

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<sup>2</sup> Bandura, A. (1977). "Social Learning Theory", General Learning Press.

<sup>3</sup> "Edwin H Sutherland: Differential Association Theory".

<sup>4</sup> F. Ivan Nye (1958), explains the definition of social control theory in his book titled "[Family Relationships and Delinquent Behavior](#)"

<sup>5</sup> Section 84 (1) and (3) of the Juvenile offender Act provides that when a juvenile offender in conflict with the law is arrested for an offence, he is to be brought within twenty four hours before the Court for Juvenile offenders; and the latter provides that a juvenile offender shall be released on a bond pending the hearing of a charge.

The law suggests that the Act is silent of other specific procedures in respect to mode of arrest and investigation in the first 24 hours as opposed to what is mentioned in Section 87.<sup>6</sup> According to Farah Nini Dusuki, specific statutory provisions outlining the special procedures applicable to juvenile offenders ought to be clearly spelt out in the Juvenile offender Act 2001 itself thus it 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.

This is further supported in Malaysian cases which suggest that where there is disagreement with the maximum period of remand which is not stipulated in the Juvenile offender Act 2001, resulting in a court dispute between the periods allocated in the Criminal Procedure Code and the presumption in favour of the juvenile offender under the Juvenile offender Act 2001. On that point of disagreement, the Court of Appeal decided in *Public Prosecutor v N (A Juvenile offender)*<sup>7</sup> that in absence of a specific period for remand under section 84(2) of the Juvenile offender Act 2001, section 117 on remand under the CPC is applicable to the juvenile offenders. Hence, Nadzriah Ahmad noted that in the light of the issues surrounding during pre-trial period, it is submitted that Malaysia should adopt alternative measures in order to ensure that juvenile offenders in conflict with the law are being detained in the shortest possible period.

Detention for the purpose of investigation is another area which warrants further research because the Juvenile Offenders Act does not provide any provision for detaining a juvenile offender in conflict with the law for the purpose of investigation. This is further illustrated in the case of *Prosecutor v N (A Juvenile offender)* where Court of Appeal in this case had discussed on the application of Sections 84 and 86 of the Juvenile offender Act concerning detention of a juvenile offender being deprived of liberty. The Court of Appeal recognized that the Juvenile offender Act does not explicitly provide for any provision empowering the Court for Juvenile Offenders to detain a juvenile offender for the purpose of investigation but only provides for detention pending "the hearing of a charge" under Section 84 (2) of the Juvenile offender Act.

Nadzriah Ahmad has pointed out that the enforcement officers should take careful measures to ensure that a juvenile offender who falls outside the protection under Section 85 (a)<sup>8</sup> is to be separated from adult offenders (for example, when a juvenile offender is waiting to be transported and same vehicle is used for both juvenile offender and adult offender). At this juncture, she argues that Section 85 (a) of the Juvenile offender Act may be overridden by Section 86 (2)<sup>9</sup>. It is submitted that Section 86 (2) of the Juvenile offender Act has reduce the safeguards afforded in Section 85 (a) of the Juvenile offender Act which the juvenile offenders may be exposed to the negative influence of adult offenders.

In the light of the preceding paragraphs above, Nadzriah Ahmad has indicated that there is scarce literature and study in Malaysia on the problems surrounding pre-trial and the importance of protecting juvenile offenders in conflict with the law in the administration of juvenile justice.

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<sup>6</sup> Section 87 states that upon arrest, the police officer is oblige to immediately inform the parent or guardian and secondly to the probation officer for the arrest of such juvenile offender.

<sup>7</sup> [2004] 2 MLJ 299.

<sup>8</sup> Appropriate arrangements shall be made to ensure that a juvenile offender 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.

<sup>9</sup> A juvenile offender who cannot be detained in places of detention provided by the Juvenile offender Act shall be detained in a police station, police cell, police lock up, separated from adult offenders or in a mental hospital.

Further, she asserts that no research has been undertaken on the adoption of alternative measures without resorting to judicial proceedings which are particularly important because it will avoid juvenile offenders in conflict with the law from being stigmatized. In addition, the advocates note that restorative justice benefits both juvenile offenders and the public and it is also cost effective.

## NEW SOUTH WALES APPROACH

In New South Wales, the parliaments have been very supportive of police discretion. The South Australian diversionary system, which incorporates police gatekeeping, began in 1994. For example, the Young Offenders Act (NSW) 1997 legislates for great discretionary powers for police, vis-à-vis young people, especially in cases of minor offending. According to Parker and Sarre in their article, they have stated that these powers are made to provide police with the opportunity of dealing with young people on a case-by case basis according to situational and individual circumstances. Therefore, this method would prevent the stigmatisation and criminalisation of offenders that is usually bestowed upon an offender who is drawn into the formal processes of law.<sup>10</sup> Research has shown that after the increase in the use of police cautions and youth justice conferences in the first four years of the new legislation, there has been a decline in use of court procedures.<sup>11</sup> Based on the decline occurring at the said period, the evaluation of the research would suggest that the alternatives are effective interventions.<sup>12</sup>

A research which has been conducted by Wundersitz has compared the total number of formal interventions (formal caution, community conference and court) in the period prior to the new system (1992–1993) with the period after the implementation of the new system (1994–1995). She found an overall reduction in the number of young people having contact with the system in the 1994–1995 period.<sup>13</sup> The diversionary modalities is based on the New Zealand model of family group conferencing and John Braithwaite's (1989) model of reintegrative shaming, what became known as the 'Wagga Wagga' (NSW) model of 'conferencing' started a revolution in juvenile justice practice within Australia.<sup>14</sup> The NSW legislation simply formalised what had been operating informally, and it only came into operation in late 1998.

Generally, formal cautions are conducted by police officers, usually at police stations. They are generally a simple format involving the youth, an officer and a guardian or responsible adult and in some jurisdictions the victim is invited to attend.<sup>15</sup> Jeremy Prichard indicates in his writing that the purpose of the caution is to explain to the offender the impact of their offence and the possible consequences of future offending behaviour. If a caution is issued the young person is

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<sup>10</sup> Ann L. Parker and Rick Sarre (2007), "Policing young offenders: what role discretion?", *International Journal of Police Science & Management* Volume 10 Number 4.

<sup>11</sup> G Luke and B Lind (2002), "Reducing Juvenile Crime: Conferencing versus Court", New South Wales Bureau of Crime Statistics and Research, Sydney.

<sup>12</sup> Dennison, S., Stewart, A. & Hurren, E. (2006) 'Police Cautioning in Queensland: The Impact on Juvenile Offending Pathways', *Trends and Issues* No 306, Australian Institute of Criminology, Canberra.

<sup>13</sup> Wundersitz, J. (1996). *The South Australian juvenile justice system: A review of its operation*. Adelaide, Australia: Graphic Print Group.

<sup>14</sup> O'Connell, T. (1993), "Wagga Wagga Juvenile Cautioning Program: 'It may be the way to go!'", In L. Atkinson & S. Gerull (Eds.), *National Conference on Juvenile Justice: Proceedings of a conference held 22-24 September 1992* (pp. 221–232). Canberra: Australian Institute of Criminology.

<sup>15</sup> Jeremy Prichard, "Net-Widening and the Diversion of Young People From Court: A Longitudinal Analysis With Implications for Restorative Justice", *Australian & New Zealand Journal of Criminology* 2010 43: 112.

not prosecuted and the matter does not proceed to court and this is provided by s14<sup>16</sup> of the *Young Offenders Act 1997 (NSW)*.<sup>17</sup> Conversely, s31 of the same Act provides that certain offences may also be excluded from cautioning such as serious indictable offences. The underlying rationale for this is to restrict the applications of the cautioning scheme to the less serious offences.<sup>18</sup> The investigating police will retain the discretion to determine whether a juvenile offender will receive a caution or face a charge. A juvenile offender can receive more than one caution and all the cautions are recorded in the Police Central Names Index computer system and the police can consult these records for the purpose of criminal investigation.

Further, a report made by Youth Justice Coalition has shown that prior to the introduction of *Young Offender Act 1997 (NSW)*, police decisions in relation to the cautioning of young offenders were uneven and inconsistent. The literature has also documented instances of police stereotyping, harassment and breaches of basic human rights of young people.<sup>19</sup> According to Plenary Speaker, she contends that studies have raised the legitimate question of whether police discretion had been properly exercised.<sup>20</sup> In this regards, the NSW Standing Committee on Social Issues, in their review of the NSW juvenile justice system, suggested that police were reluctant to use cautions because they regarded cautions as ineffective.<sup>21</sup> Thus, to overcome these barriers, the Youth Justice Coalition recommended that diversion should be promoted through 'statutory recognition, policy endorsement, training, stricter management and state wide monitoring'.

In addition to the above modality scheme, various studies have shown that youth justice conferencing has developed as a significant option for diversion of young people from the courts over the last decade. In addition, Maxwell and Morris contend that there is now a substantial amount of evidence from several Australian and overseas jurisdictions, which shows that offenders and, to a lesser degree, their victims view restorative justice conferences as fair and are generally satisfied with outcomes.<sup>22</sup> According to them, conferences are intended to bring together young offenders and their support persons with the victim and their supporters to develop a sense of responsibility on the part of the offender for the offence. They are also intended to reach a mutually agreeable resolution (often referred to as an 'outcome plan') for the harm that has been caused by the offence and to reintegrate the offender back into the community. The proponents of this modality advanced the arguments that, a successful conference is an alternative to a Children's Court appearance and referral to a conference can be made by police and in some jurisdictions also by the Director of Public Prosecutions and Children's Court. Most importantly, research in New South Wales found that the young people

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<sup>16</sup> Allows that a young person can be dealt with by way of a warning for minor summary offences which do not involve violence

<sup>17</sup> Chris Cunneen, "Changing the Neo-Colonial Impacts of Juvenile Justice", 20 *Current Issues Crim. Just.* 43 2008-2009.

<sup>18</sup> John Heslop, (1991), "Diverting Young Offenders from the formal Justice System".

<sup>19</sup> White R and Alder C (eds), *The Police and Young People in Australia* (Cambridge University Press, 1994).

<sup>20</sup> Plenary Speaker, "Regulating Police Discretion: An Assessment The Impact Of The New South Wales Young Offenders ACT 1997", *Criminal Law Journal*, 2005.

<sup>21</sup> Standing Committee on Social Issues Report No 4 – Juvenile Justice in New South Wales (Parliament of New South Wales Legislative Council, 1992) p 70.

<sup>22</sup> Maxwell, G., & Morris, A. (1993). *Family, victims and culture: Youth justice in New Zealand*. Wellington: Institute of Criminology, Victoria University of New Zealand.

appearing before youth justice conferences for property and violent crime had a lower re-offending rate than similar young people appearing before the courts.

## **RETRIBUTIVE AND REHABILITATIVE THEORY**

Touching on the role of the law in dealing with the juvenile offenders, supposedly, there should be a difference between them and the adult offenders. There are a few approaches adopted for dealing with the juvenile offenders. The underlying theories of the juvenile justice system are retributive and rehabilitative theory. Retributive theory explains that a proportionate punishment to a wrongdoing is the best response to a crime. Meanwhile, the rehabilitative theory states that punishment imposed on a wrongdoer must be to reform him into leading a better life away from crime. The retributive theory has mainly formed the backbone of the juvenile justice system in Malaysia, in which it can be seen that the number of juvenile offenders placed in prison or detention centre is at a rise.<sup>23</sup> This is due to the fact that the theories have prevented juvenile offenders from being diverted away from being detained, as the offence committed, regardless of how minor, will be fully dealt with by the juvenile justice process.

It is suggested that moving towards a restorative justice system and leaving behind a system of retribution would better rehabilitate juvenile offenders and divert them away from the juvenile justice system. Restorative justice is a theory that emphasize on repairing the harm caused by the criminal behaviour. The theory if put into practice would bring together those most affected by the criminal act namely the offender, the victim, and community members in a non-adversarial process. The purpose of such gathering is to procure the involvement of the entire community in repairing the harms resulting from the crime and meet the needs of the victims and hold the offender accountable. A system based on the restorative theory would emphasis on community-based sanctions, a non-adversarial and informal process and decision-making by consensus. Literature suggests that adopting the restorative justice theory would bring benefit to juvenile offenders in not stigmatizing them through formal court proceedings and better rehabilitate them by diversionary measures, which would in turn prevent the placing of juvenile offenders in prison or detention centre.

## **CONCLUSION**

Based on a study, 45.1% of juvenile offenders were mixed with adult offenders while waiting to be transferred to court, 38.4% in the vehicle and 43.8% while waiting in the court. The non-existence of diversionary measures would result in the juvenile offender getting involved with adult offenders and other juvenile offenders that are being detained together from the police station to the court. The juvenile offender will be produced before a Magistrate afterwards, regardless of how small the offence he had committed. He therefore cannot escape from facing formal proceedings for his crime, and a stigmatizing criminal record is definite, which he would carry with him for the rest of his life.

On top of that, in the case of juvenile offenders, the purpose of law could be questioned. Based on the retributive and rehabilitative theory, the law holds two different functions if it is looked into

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<sup>23</sup> Nadzriah Ahmad (2011), "The Administration of Juvenile Justice System in Malaysia: Moving Towards Restorative Justice Process?", *Jurnal Intelek*, Volume 6, No. 1.

from different perspectives. It is either to correct or to punish the offenders. Theoretically, minors should not be sentenced with punishment, which will at the end mix them with the adult offenders. The diversion system could provide them with a better solution in dealing with the offences and at the end of the day, educate them to be better. Punishments would not necessarily be a good answer for juvenile offenders with no serious offences. It is not because of the time that they need to spend, but rather the lifetime psychological torture that will surround them in the later life. For example, literature shows that juvenile offenders that are sent to prison or detention centre may develop anti social behaviour as a result of having to blend in a crowd of detained offenders.<sup>24</sup>

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