



KONAKA

KONFERENSI AKADEMIK 2015

Pelestarian Warisan Melayu Mencetus Penambahan Ilmu

4 NOVEMBER 2015
AL-BIRUNI, UiTM CAW. PAHANG



9 789832 607465

ISBN- 978-983-2607-46-5

UiTM Sentiasa
Di  Ku



Semai Children in Cameron Highland and Understanding the Indigenous Childrens Rights in International Law

Mohamad Sabri Yusof^{1*}, Dr. Mohd Kamal Azman Jusoh²

¹ Faculty of Accountancy, Universiti Teknologi MARA Cawangan Pahang, Kampus Jengka, 26400 Bandar Tun Abdul Razak, Jengka, Pahang, Malaysia
arifnazihah@yahoo.com

²Academy of Contemporary Islamic Studies (ACIS), Universiti Teknologi MARA Cawangan Pahang Kampus Jengka, 26400, Bandar Tun Abdul Razak, Jengka, Pahang, Malaysia
mkamalazman@pahang.uitm.edu.my

*Corresponding Author

Abstract: Adults and parents perceive that under the law they are having full authority to decide what is best for the children without realising that the children themselves also have rights to decide what is best for them. The same perception appears in the family circle of the Semai and other indigenous people in general. This paper tries to help adult and parents to understand the terms of some of the minimum rights provided to the children around the world including the indigenous children under International Law so that one is not caught unaware and help secure the very basic needs of children of today.

Keywords: Children Rights, Indigenous Children, International Law

1. Introduction

The Semai people are one of the clans of the peninsular Malaysia indigenous people. The indigenous people can be generally defined as a very distinctive people which parent are also indigenous practicing indigenous culture, language and ways of life. These groups of indigenous people include inter alia the Batik, Mah Meri, Negrito and Melayu Proto. They mostly live scattered in the forest area of the Cameron Highland. Most of them are pagan which believe in the existence of the 'spirit roaming the forest' and the spirit of their ancestors. Most of their children are reluctant to go to school provided the fact of the distance and also for failure to understand the need for it. This to certain degree affects their future for not having the ability to accommodate the changes surrounding the lives nowadays.

2. Historical Account

The issues on protection of children at international level first came into focus in 1919 with the adoption of the Minimum Age (Industry Convention by the International Labour Conference. Later, in 1924 the international community appreciating the need to protect and promote child welfare and have the children's economic, social and psychological needs, adopted in Geneva a Declaration of the Right of the Child.

The 1924 Declaration recognized that "mankind owes to the child the best that it has to give beyond and above all considerations of race, nationality or creed". It reflects the then unquestioned assumption that protection and exercise of children right are dependent on those people categorize as 'adults'. Accordingly, children are perceived as vulnerable objects who are not capable of standing by themselves, and for their very existence are dependent on International Law protection. This same assumption persist and is reflected in the 1959 Declaration of the Right of the Child as well as in many international treaties adopted throughout the 1960s and 1970s.

In 1979, the United Nation proclaimed that year as the “International Year of the Child”. It opened up a new international approach in matter of protection of children including the indigenous children, this time through a more liberal lens. International community begins examining the international laws on children from the child rights perspective.

This perspective has been accepted stages by stages both at regional and international level. The child rights perspective approach was adopted at regional level in the European Convention on the Legal Status of Children born out of Wedlock 1975 and in the Declaration on the Right and Welfare of the African Child 1979. At international level, this approach was adopted in the United Nation Minimum Rules for the Administration of Juvenile Justice 1985. From the early 1980s, reevaluation on the international law on children from a child rights perspective takes place in a number of specific areas including adoption, fostering and child justice. In the area of child adoption, for example, The United Nation Declaration on Fostering and Adoption approach is to place both fostering and adoption within the context of the welfare of the child as opposed to the interest of the parent. Here the Declaration States that a child needs to be cared for by his or her own parents; and the need of the child for affection, security and continuing care should be the paramount consideration. It also set out in detail as to how the best interests of the child are to be met. This approach was later incorporated into Articles 20 and 21 of the Convention on the Right of the Child.

3. Child Rights Perspective in Area of Child Justice

The re-evaluation on the international law on children from a child rights perspective in the area of child justice only started to take place in 1966 when the International Covenant on Civil and Political Rights was adopted. The International Covenant provides for the regulation of administration of child justice focusing mainly on the separation of juveniles and adults, and providing that trial procedures for juveniles should take account of the age of the offender and the desirability of promoting rehabilitation.

From this background, in 1985, the United Nation General Assembly adopted the United Nation Standard Minimum Rules for the Administration of Juveniles Justice. The United Nation Standard Minimum Rules for the Administration of Juvenile Justice is known also as the Beijing Rules. This United Nation Standard Minimum Rules provided for a human response to juveniles who may find themselves in conflict with the law and has become a model for states domestic rules. Some of the rules have been incorporated into Articles 37 and 40 of the Convention on the Rights of the Child.

Under Article 37(a) and (b) for example, emphasis is given to ensure that detention or imprisonment of children is only for the shortest appropriate period of time, and only as a measure of last resort. Here states parties are also prohibited from subjecting a child to torture or other cruelty, inhuman or degrading treatment or punishment nor are they allowed place a child under capital punishment of life imprisonment without possibility of release.

The recognition of the child rights perspective has led international community to call for the Rights of the Child. By 1989 the Final Draft of the Convention was completed. So far, for the first time, children were acknowledged by the international community as the holders of a specific body of identifiable rights.

The United Nation General Assembly adopted the Convention on the Rights of the Child on the 20th of November 1989. Later, on the 2nd of September 1999 it came into force. As of January 1994, 155 nations have become states parties to this convention. The United States is the only major state remaining outside the treaty regime.

4. Support and Reservation

Cohen had credited the convention as a very comprehensive treaty, covering the full range of human rights –Cohen (1990). However, there are some who think that despite of its enormous scope, it is still sufficient because the issues relating to the children protection are very broad and intricate.

There were some states, which registered reservation about provisions of the Convention on the Rights of the Child 1989. These states are also the very same states which decline to accept some provisions of the Convention on the Rights of the Child. These states include Bangladesh, Egypt and Iraq. This reservation is certainly incompatible with the spirit and support given to the Conventions. However their reservations are not without any valid reason due to their religious and customary belief – Alston and Steiner (1996).

To the writer this treaty is quite comprehensive and important as it not only extensively covers a wide spectrum of rights given to children all over the world without limiting to any geographical boundaries, but cover also children of all races, colours, belief, creed and background including the displace children and the indigenous children.

5. Overview of the Provisions of the Convention on the Rights of the Child

The Convention on the Rights of the Child 1989 can be said to be a recent internationally binding treaty. It came into force on the 2nd of September 1990. A year after it comes into force, a total of ninety-four countries have becomes states parties to the convention and by January 1994, 155 states entered. It also includes Malaysia. Nowadays the numbers have grown further. The Rights of the Child is a convention that have been ratified by so many states, so quickly gaining a very wide support and enjoy a strong international community commitment. This shows that the issue on children's protection and their rights were accorded the very utmost attention and paramount consideration from the entire international community. Unfortunately, however despite the very greatest response it received, and despite its apparent commonality, there were clear divisions in the application of its provisions; especially in relation to the 'best interest' of the child principle and in area concerning the indigenous children.

6. Spectrum of Rights of Child

As a whole, there are fifty-four articles in the convention. It provides for duties of States Parties in relation to a child, ranging from economic, social and cultural rights to civil, political and humanitarian rights. It includes matters such as a child inherent right to life; right from birth to a name; right to acquire a nationality; a right to know and be cared for by his or her preserve his or her own identity (which has becomes very important aspects in relation to the indigenous children's rights); right of a child who is separated from one or both parents to maintain personal relationship and direct contact with both parents on a regular basis; right to be protected from illicit transfer and non-return of children abroad; right to express their own views freely and right to freedom of thought, conscience and religion; right to freedom of association and to freedom of peaceful assembly; right to the protection of law against unlawful interference and attack on his or her honor and reputation; right to free access to information; right to be protected from all form of physical or metal violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse; right of a child who is seeking refugee status or who is considered a refugee to receive appropriate protection and humanitarian assistance; right of a mentally or physically disabled child to enjoy a full and decent life and to special care; right to enjoy the highest attainable standard of health; right to benefit from social security; right to a standard of living adequate for the

child's physical, mental, spiritual, moral and social development; right to education; right to a child belonging to ethnic, religious or linguistic minorities or having indigenous origin to be in community with members of the group and to enjoy his or her own religion or to use his or her own language; right to rest and leisure and to engage in play and recreational activities; right to be protected from economic exploitation, all from of sexual exploitation and sexual abuse; right of a child not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment and right of every child alleged as, accused for a recognized as having infringed the penal law to be treated in a manner consistent with the child's sense of dignity and worth.

7. Practical Analysis

One should appreciate that not all of these rights are entirely absolute. Some of them are subjective and its application are to a certain extent, qualified, so as to balance them with other specific rights given to the parents and other individuals and entities within society and those rights listed in the municipal laws but some of these rights are accorded only to certain classes of children. For example the displace children, disable children and the indigenous children.

The enormous right in the Convention on the Rights of the Child again shows that the issues relating to protection of children do enjoy the greatest of international community attention. The Convention did not only provide for the rights of child but also imposes obligations on states parties to safeguard and promote those very rights listed through enactment of municipal law and procedures in accordance with international laws.

One can also see that there is to a certain extent some form of adaptation of the family law ideas of child protection in the Convention. However it only occurs in the certain matters and in the context of 'best interest of the child' principle.

8. The Convention of the Rights of the Child 1989 and the 'best interest of the child' principle

The 'best interests of the child' principle has along standing in the municipal family law. It has been applied largely in relation to family affairs in areas concerning custody, maintenance, adoption and intra-family abuse. The principle was later developed and interpreted in human rights law. Some international lawyers and observers advocated that state intervention to protect the 'best interests of the child' should only be permitted in specific cases where there is clear evidence of family failure to protect the most basic interests of the child. However, there are others who find this observation very disturbing as it has a tendency to reduce the legal issues virtually to a case-by-case determination of an individual child's 'best interests'. This group argues that the sheer survival prospects for children in many countries, as well as the deteriorating state of living and learning conditions of millions of children worldwide, call for an urgent reassessment of the traditional relationships between family, the state and civil society in matters relating to children's health, nutrition, education and general well-being.

In the international arena, the principle of 'best interests of the child' was first introduced in Principle 2 of the Declaration of the Rights of the Child 1959. The principle was later adopted in the text of the Convention on the Rights of the Child 1989. The crux of the text of the Convention on the Rights of the Child is article 3, in which its paragraph one states that 'In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative, authoritative or legislative bodies, best interest of the child shall be a primary consideration'. Alston expands the importance of that article 3(1) as it underlines the fact that the principles apply not only in the context of legal and administrative proceedings or in other narrowly defined contexts, but in relation to all action concerning children'. He argues that this represents

very significant extension of a principal which was originally little more than a way of ensuring that the interest of any children involved would be taken into account in divorce or custody cases.

Within the Convention, the phrase 'best interest of the child' also appears in relation to the separation of the child from the family setting with reference to parental responsibility for upbringing and development of the child; in relation to adoption and comparable practices – Art 9 Convention on The Rights of The Child (1989); and in the context of the child's involvement with the police and the justice system – Art 18 Convention on Rights of The Child (1989).

9. The Best Interests of the Child Principle and its diverse interpretations

The 'best interests of the child' principle has been accepted, adopted and reflected in one form or another in many municipal legal systems. Unfortunately its application differs accordingly with the diverse interpretation that may be given to the principle in different settings. This diverse interpretation is not without valid reason. It is clearly course by the diversity of cultural, religious, way of life and traditions that dominates the east ad west. Thus what may be in the best interests of the child in a third world state and developing countries may not be acceptable as being in the best interests of the child in developed or highly industrialized countries.

In a more traditional society especially in Asia, the link to family and the local community might be considered very important and the principle may therefore be interpreted as requiring the sublimation of the individual child in preference to the interest of the family rather by policies that emphasize the child's individuality.

10. Concluding Remarks

From an over view of the historical account on the rights of the child and its protection one can see that there has been a major shift in its approach, that is from the traditional views that child protection and matters regarding child are best left in the hands of the parent or the adult to that of a more liberal approach in which consideration as to what is best for the child is taken from the child own perspective. On the questions as to whether the existing human rights documents are comprehensive enough to tackle all the existing human rights issues, the answer would be in the negative. In the area of children protection and rights of the child, for example, despite of the enormous scope of the Convention on the Rights of the Child not all the issues regarding children protection and their rights due to its breath can still be solved. This is evident, for example, from the existence of additional optional protocol and from the reports of the special rapporteur on the sale of the children, child prostitution and child phonography under the auspice of the Commission on Human Rights - UNSG (1997).

11. References

- Alston, P., & Steiner H. J. (1996). *International Human Rights in Context: Law, Politics, Moral*, Clarendon Pres, Oxford.
- Alston, P., & Steiner H. J. (1996). Reservation of Parties to CEDAW. *International Human Rights in Context*, 920-922.
- Alston, P. (ed). (1994). *The best interest of the Child: Reconciling Culture and Human Rights*, Clarendon Press. Oxford.
- Article 9 of the Convention on the Rights of the Child 1989.
- Article 18 of the Convention on the Rights of the Child 1989.
- Bayefsky Aif & Ebert, M. (1995). *Equality Rights and the Charter of Rights*, Crowell Vancouver.

- Blackburn, R., & Busuttil, J. (ed). (1997). *Human Rights for the 21st Century*, Pinter. London.
- Bueren, G. V. (ed). (1993). *International Documents on Children*, Martinus Nijhoff Publishers, Netherlands.
- Cohen, C. P. (1990). Introductory Note, "United Nations Convention on the Rights of the Child," *The Review*, 36.
- Mnookin, R. H. (1998). *Child, Family and State*, Little, Brown and Company. Boston and Toronto,
- Spiro. E. (1971). *Law of Parent and Child*, 3rd ed. Rustica Press, South Africa.
- Sullivan, J. (1992). *Sexual Abuse and the Rights of Children*. University of Toronto Press.
- United Nation Secretary – General. (1997). *E/ Cn.4/ 1997 / 95*. February 7th 1997; *E/ CN.4/ 1997/95/Add.2*, February 7th 1997. See also note by the: *CRC/C/40/rev. 6* 13 March 1997.