

## ORIGINAL ARTICLE

### Legal Issues in Sentencing Child Offenders in Malaysia

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#### ABSTRACT

Malaysia as one of the countries that had signed the Convention of the Rights of the Child (CRC), has now reformed their Juvenile Criminal Justice System by introducing the Child Act 2011 (Act 611). The reformation includes the provision that allocates the orders for juvenile offenders to be issued by Magistrates from the Court for Children. This article aims to discuss the legal problems arising from punishing child offenders in Malaysia. The discussion will focus on the theoretical aspects of the underlying adjudication of each order in Act 611. This preliminary study found that the reform legislation through the Act 611 has not able to protect the best interests of children, particularly among those that conflict with the law. Order based on the theory of rehabilitation should be prioritized by the legislative and judiciary so the children could be given a second chance.

**Key words:** juvenile justice, theory of punishment, Malaysian's juvenile justice system

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#### Introduction

Children that have conflicts with the law, as in those who commit criminal offenses must be penalized under the law. Taking in to consideration the criteria of a certain age range, the history of the human civilization has shown, the law has acted against child offenders by providing various types of orders. Children that have the mental and physical capacity that are different from adults have been recognized by the modern law as the group of people that have to be treated in a different manner. Long ago in the more classic and traditional society, children who commit criminal offenses were treated in the same way as the adult offenders. That had led to many occurrences of injustice and since then various parties have struggled to change that mind set to force the theory of punishment to be changed. Unfortunately, there are still certain aspects of the classical punishment theory that is supported by the modern society in punishing child offenders.

In line with the development of human civilization, the punishment for child offenders has grown from one stage to another, based on the underlying theory of development. It is clear, that the theory of punishment is the real basic framework for the juvenile criminal justice system. The theory of punishment plays a major role in determining the form, manner and approach in punishing child offenders. Interestingly, the theory of special punishment, for child offenders is built with more dynamic, to act as an alternative to the existing justice system at that time and also according to the needs of the community. With the construction of a new theory and a specific punishment for the child, the law is believed to be able to offer better justice to those within this group than ever before. Therefore, this article will debate the extent of the problem and legal issues related to the orders against child offenders in Malaysia. The focus of the discussion will touch on the theory underlying the adjudication order issued.

#### Literature Review

When questioning the theory of punishment for child offenders it reaches back to more than a hundred years, especially since the modern day justice systems' introduction of the special courts for children that also provided punishment which was specific for them. Even though the law in question is not that new, the developments through the course of time has forced the law in question to be evaluated and reviewed continually. There are two theories of the underlying order or sentence on child offenders, which is the theory

of deterrent and rehabilitation. The question is how far the theory of deterrent and rehabilitation are able to do justice to both sides – the child offenders and their victims – as well as protecting the interests of the parties involved? Unfortunately, the historical records stand as such, that both theories of punishment are often at odds with each other, as argued by Heilbrun *et al.* (2005). In the end, most countries would end up altering their justice system from using one theory to another theory to a different theory, before reverting back to square one and use the original theory, just like the swinging sensation of a pendulum.

This means that the discussion of punishments for child offenders is not over yet. The arguments of which, is centered on society's' nature that is constantly changing, especially in terms of how they view the world around them (worldview). For example, a society would push and force the legislator and the judiciary to impose a severe sentence, based on the theory of deterrent, only while the rate of that particular crime is at a high. On the other hand, in the context of current times, the modern day society we have now, would view that in all matters concerning children, the law should prioritize the best interests of the child. This is a very different approach to what was used in the community before. Thus, this view of events has influenced society to enact certain legislation in relation to children that clearly defends the best interests of the child. Unfortunately, the improvement efforts were not made in to a more comprehensive sentencing system and were left completely unaltered. Children who are at conflict with the law will still be punished and subjected to the same system as before, as previously supported by the community aspirations of the modern world. In a clearer context, child offenders are still punished with heavy punishment using the basis of the deterrence theory. Whereas, for leniency based on the theory of rehabilitation is not the choice of the judiciary even though, society has now chosen to believe in the aspiration of 'the best interest' of the child, should be the main priority. Does each sentence or order issued by the court have specific justification? According to the modern criminal justice system, there are four theories of punishment that is commonly used by judges to punish offenders, as decided by the case of *Reg v. Davis* (1978) 67 CrApp R 207, 210. The theory of punishment is deterrence, rehabilitation, incapacitation and retribution. Each theory has its own philosophy and goals as well as a justification for a sentence being carried out. Courts in Malaysia have applied all the theory of punishment in criminal cases (Ho 2007). Problems can arise, as formulated by Altschuler (1994), all these theories conflict with each other as different philosophical framework and built from different historical background.

The effects of the conflict in each theory has seen history proven that legislative and policy makers often change from one theory to another theory of punishment, in order to ensure more effective theory and as well as in response to certain specific circumstances. Mills (1995) and Mack (1997) had detected this. For example, when crime rates are on the high, the theory of deterrence will be the policy in the justice system of a country. Systems and policies may be changed if there was a dire need for it, where policy makers and the law would have no choice but to revert back to the previous theory, which is the theory of rehabilitation. As a result, justice cannot be served to either the offender or their victims. Worse still, this situation gives a greater impact when the child is the accused person, who is awaiting sentencing or an order that will be given by the courts and to wait which theory of punishment would be used towards him.

#### *Result:*

In the modern day criminal justice system for children, there are only two theories that have been used previously in Juvenile Courts in issuing orders or sentencing. Those two theories are, rehabilitation and deterrence, which would often overlap and shift back and forth between each other, in any one time or other and in Malaysia it would be no different. As argued by Samuri and Awal (2009), the judiciary in Malaysia is more likely to use the deterrence theory other than the rehabilitation theory. This fact has a powerful impact as prevention theory would provide capital punishment for child offenders. This explains more about the best punishment theory for child offenders, in the Malaysian context. At the same time, there are also those members among the judiciary, who will tend to lean towards the theory of rehabilitation with a lighter sentence or order.

Orders of prison sentences and the death penalty that are based on the theory of deterrence has been criticized by scholars such as Gershman (2005) and Steiner *et al.* (2008), but they are still applied in some countries on certain justifications. On the other hand, the punishments introduced by the theory of rehabilitation, has also been criticized by many scholars, namely Finley (2007) and Cochrane *et al.* (2004), with the sole reasoning that the punishments given is ineffective and too soft and light in comparison to the seriousness of the crimes committed. The discussion of the theory punishment that is the best fit for child offenders in Malaysia must be based on the Children Act 2001 (known as Act 611) itself. The question is, what is the theory that underlies all the aspirations of Act 611 in its entirety? Basically, Act 611 intends to protect the rights of children and the best interests of children, as argued by Awal (2002). Both aspects are key elements of the theory of rehabilitation, in contrast, the theory prevention is only in the best interests of the society. However, in the context of adjudication in the Juvenile Courts in Malaysia, Act 611 still provides a strong punishment for child offenders. In fact, four of the orders that can be issued by the Juvenile Courts (imprisonment, institutionalization, bond and fines) are orders that are based on the theory of deterrence. What is more

distressing, is that all of the four orders are based on the deterrence theory that is more favored and often used by the courts, as argued by Samuri and Awal (2009).

This was proven again from the point of view of Darussalam (2010), who argued that the lesser order does not have a place in the hearts of the judges in the courts of Malaysia. This is evidence by the reduction of Henry Gurney Schools, from 4 of them in Malaysia, now there are only two, after the implementation of the Act 611. Darussalam argued that more child offenders are being sent to prison by the courts to obtain a deterrence effect as of immediately. As a result, Henry Gurney Schools became less 'in demand' and their operations had to be minimized and with that the number of child offenders sent to prison increased. Statistics shows that the number of children in prisons throughout Malaysia reached 2,614 in 2010. This fact proves that the judges in the Malaysian Courts prefer the theory of deterrence than rehabilitation. Since Act 611 is a new act which replaces the Juvenile Court Act 1947 (Act 90), Majid (2002) explicitly criticized the provision of the light whipping punishment in section 91 of Act 611 that is seen to have many loop holes from the legal aspects point of view. At the same time, Majid proposed an order of community service to be implemented and used towards the child offenders, given that it has yet to be inserted in Act 611. This is because, the order for community service is based on the theory of rehabilitation and is a better option of punishment for the child offenders (Samuri, 2012). Interestingly, Majid extends his explanation of the provisions of Act which also involve parents in the commandments that apply to child offenders. With that, Act 611 will focus more on the theory of rehabilitation, with the inclusion parents in the process of rehabilitation of the children, it can give off a positive impact.

Furthermore, Dusuki (2010) explained that the order of imprisonment for child offenders in Malaysian law is in direct conflict with the provisions of Article 37 of Convention on the Rights of the Child (CRC) and found it to be a cruel and degrading punishment. This strengthens the argument that the theory of rehabilitation is the focus of the CRC today. However, it does not attract the attention of the legislative and judiciary in Malaysia to meet the aspirations of the convention. In fact, the survey reports the Malaysian Human Rights Commission against the child offender detention center also emphasizes on the aspects of rehabilitation by suggesting that the child offenders reinforced with education (Suhakam, 2010). In addition, the drafting of the Child Witness Evidence Act 2007 (Act 676) to prove that children are not as mature as adults and requires special protection while giving testimony. The same can be argued for the punishment imposed on them, therefore it must be taken into consideration that the offenses committed by a child, is without a strong rationale or sense. All this suggests that the juvenile criminal justice system in Malaysia is still caught between two theories of punishment, prevention or rehabilitation.

Furthermore, among the examples of punishment based on the theory of deterrence and can affect the child offenders' self, is the detention sentence in a prison during the pleasure of King and with unfixed term. This order is in lieu of the death penalty as seen in Section 97 of Act 611 and has used several times in Malaysian Courts. Dusuki (2009) argued that this order was not in keeping with the aspirations of Article 37 UNCRC and the child's situation becomes worse when he or she reaches the age of 21 years because they will be detained together with adult offenders. This shows that although Act 611 does act in the best interests of the child offenders, but there are still a few orders within the act that are based on the theory of deterrence and therefore it can still affect the interest of the child. Regarding this issue, Abdul Rahim (2008) has discussed the decision of the Court of Appeal on the case *Kok Wah Kuan v Public Prosecutor* [2007] 4 Current Law Journal 454, who found that section 97 of Act 611 is unconstitutional. Abdul Rahim concluded in his arguments, "they also should not be raised directly in the context of the sentence, because it is still putting the sentence in the hands of the judge who tried the case. The King can only consent to the period of the detention of the child offenders which is determined by his pleasure." The debate that was explored by Anita is more focused on how far would the extent to which capital punishment may be imposed on child offenders and the legal issues arising from the provision in Act 611. He also did not debate or discuss the underlying theory of the sentencing order or question the critiques made by the jurors against it for child offenders. Mohamad (2008) also expressed the same issue with Abdul Rahim, but decided that section 97 be amended so that no executive powers were to be involved in sentencing. Mohamad's view that is parallel to that of the Court of Appeal appears to no longer be relevant, since the Federal Court has overruled it.

As Nayagam argues (2009), the Juvenile criminal justice system in Malaysia that does not favor the best interest of the child should be revamped. Nayagam stressed that child offenders should be rehabilitated and not punished with the theory based on deterrence so that they can be returned to the community to become useful members of society. Nayagam view is in line with Sanborn (1994) which asks the juvenile courts to focus on the interest of the child and not the interests of society.

#### *Discussion:*

Only by examining the views and opinions of the magistrate in the Court For Children in the theory of punishment, the study will get a clearer picture of the landscape of the juvenile criminal justice system in Malaysia. As asserted by Samuri (2008a), the Juvenile Courts in Malaysia are more likely to choose the theory

of deterrence rather than the theory of rehabilitation in issuing orders for child offenders. This is expressed clearly in the many judgments as argued by Justice Sharma in the case of *Tan Bok Yeng v Public Prosecutor* [1972] 1 Malayan Law Journal 214:

I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly, ornamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.

From the above transcript, Justice Sharma in view leaned more towards the fact that the theory of prevention is no longer appropriate after the drafting of Act 611. This is because there exists a new Act 611, which supports the aspirations of the new theory that is the theory of rehabilitation. Although the new act is now in existence, Justice Sharma judicial reasons are still referred to by the courts in later cases. Even though, Act 611 firmly states within its introduction that to prioritize the best interest of the child, is the only one thing that is guaranteed and protected by the theory of rehabilitation. To satisfy the interests of society, the courts meant that the choice of the theory of deterrence is their first choice. In fact, the intention of Parliament when drafting the Act 611 is to prioritize the best interests of children. Act 611 in the preamble states: "a child, by reason of immaturity in physically, mentally and emotionally, needs protection, preservation and assistance ..." Instead, this is once again expressed by Samuri (2008b), judges in Malaysia prefer public interest, an interest that is supported by the theory of deterrence.

In addition, Budin (2010) also explores the attitude of the judiciary that is too hard on the child offenders and do not utilize the provisions of orders based on the theory of rehabilitation in Act 611. As a result, more child offenders are being sent to prison or receive stiffer punishment. According to Budin, there are children aged 14-18 years whom are in jail for offenses that range from the minor offenses to serious offenses. Although members of the judiciary issued an order based on the background of the child offenders and the type of offense committed, Budin argues that the best interests of the child is more important than other aspects of the punishment.

The need to review the application of the theory of deterrence and rehabilitation in the Court For Children is apparent when a study quotes the opinions of Villarante and Suhakam in relation to these issues. Villarante (2005) explains that the courts in Malaysia have the perception that criminal offenses committed by children would usually involve the initial planning and thinking ahead. Villarante believed that such perceptions have been detrimental to the interests and welfare of the children and causing them to be restricted from their rights as stated and guaranteed by the CRC. Villarante criticized the Courts for Children as on one hand they are courts that had guaranteed to protect the interests of the child, is also the same court that imposes an order of imprisonment or detention for many years, adding to that most child offenders are not represented by proper counsel and automatically plead guilty. Furthermore, Villarante explains that to change the juvenile criminal justice system in Malaysia, a paradigm shift has to be made to all parties involved in the Court For Children, such as judges and magistrates, advisors, lawyers and prosecutors.

In fact, Suhakam (2009) illuminated this problem by proposing that the Court For Children in Malaysia be made more responsible and sensitive to children that are in conflict with the law. To ensure that justice will be delivered, the system of justice must take into account the maturity and their background. In addition, Suhakam found that the magistrate in the court concerned must have specific training in handling cases related to children as well as urge the courts to be more proactive so that delayed and long remand involving child offenders cases do not occur.

Further, Rubin (1952) identifies that this problem arose because the Juvenile Courts is a high court and powerful body that has power over children, especially in matters relating to criminal law. Powers conferred to the courts have caused many problems affecting the lives of children. In the end, the juvenile court becomes the protector of society and not the child. Surprisingly, Rubin continued, that the statute also states that children's interests will always prevail. The conflict between the provisions of the law and the practice of it within the court is a serious matter to be debated.

The appropriate thing to do by the courts is to issue the order to defend the interests of the child as it was the intention of Parliament while drafting the Act 611. Any interpretation which will result in the injustice towards the child should not happen in court, especially one which is called the Juvenile Court, as argued by Lord Denning in *Northman in the case of Barnet v Council* [1978] 1 WLR 221, 228.:

In all cases now in the interpretation of statutes, we adopt such a construction as will promote the general legislative purpose underlying the provision... Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the Judges can and should use their good sense to remedy it - by reading words in if necessary - so as to do what Parliament would have done, had they had the situation in mind.

There is no doubt that there are members of the judiciary that sometimes do not understand the purpose of an act being made by Parliament and how it is related to the child. Although the function of the judiciary is to interpret the law, but they too cannot escape from wrongly interpreting the provisions of a statute as seen in the verdict of the Court of Appeal in the case of *KuanKokWah v Public Prosecutor* [2007] 4 Current Law Journal 454, which was criticized by Abdul Rahim (2008). The Malaysian judiciary is no exception and this scenario can occur here. For example, in terms of punishment of children, the Federal Court has upheld the High Court and rejected the interpretation made by the Court of Appeal in the case of *Public Prosecutor v KokWahKuan*, [2007] 6 Current Law Journal 341.

#### Conclusion:

From this preliminary study, it can be concluded that the juvenile criminal justice in Malaysia faces a number of legal issues to be solved. The main issues to be addressed are the underlying theory of sentencing orders in the Act 611 that will be issued by the Court for Children. Although Act 611 is a provision that prioritizes the best interests of the children, yet the act has yet to fully prioritize the theory of rehabilitation in the sentencing of child offenders. Deterrence theory is still in place in the hearts of the magistrates in court, even if they have the option to order a lighter sentence. This preliminary study suggests that significant for the Act 611 still to be evaluated and improved by inserting a new order or sentence based on the theory of rehabilitation, such as community service order.

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