

Children in conflict with the law: Is there a basis  
for a rights-based argument for diversion in  
Malaysia?

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## **DECLARATION**

This thesis is submitted to fulfil the requirements of the degree of Doctor of Philosophy. It is my own work and no part of it has been submitted in substantially the same form for the award of a higher degree elsewhere.

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**Signed:** *Paul Linus Andrews*

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*This thesis is dedicated to the memory of my father, P.G. Andrews.*

## **ABSTRACT**

Critical discourse in juvenile justice particularly where a child is in conflict with the law is only just beginning to find its voice in Malaysia. This is in part due to the interwoven elements of politics, penal policies and socio-cultural norms. Hence, although Malaysia has taken steps to comply with aspects of the Convention on the Rights of the Child (CRC), there are gaps in the expectations of the CRC and the actual working of the criminal justice system as far as the child in conflict with the law is concerned. This is not surprising considering the fact that while there are general expressions of the CRC, State parties have a level of discretion to decide on the exact nature and content of the measures for dealing with children in conflict with the law. Further given Malaysia's reservations to a number of the CRC Articles and given the punitive culture existent, the issue of a child rights-based approach to diversion that sets out to realise all children's rights relevant to diversion (as set out in the CRC and other instruments) merits analysis.

Thus, this research involves a qualitative analysis of the state of the law and policies governing children in conflict with the law with a particular focus on the rights of the child as far as diversion within the juvenile justice framework in Malaysia is concerned. This research involves an empirical analysis of a range of international conventions, standards, treaties, rules and decided cases and contextualising these with conversations with principal stakeholders and boys in the Henry Gurney School, which, taken together, seeks to establish whether there is a basis for a rights-based argument for diversion in Malaysia.

## **LIST OF ABBREVIATIONS**

ALR	Australian Law Review
CLJ	Current Law Journal
CRC	Convention on the Rights of the Child
DPP	Deputy Public Prosecutor
EWHC	High Court of England and Wales
FMS	Federated Malay States
HMP	Her Majesty's Prisons
ILKAP	Judicial and Legal Training Institute
LR	Law Reports
MLJ	Malayan Law Journal
NGO	Non-governmental organisations
NHS	National Health Service
PC	Privy Council
PEMANDU	Performance Management & Delivery Unit, Malaysia
PP	Public Prosecutor
SUHAKAM	Human Rights Commission, Malaysia
UKHL	United Kingdom House of Lords
UN	United Nations
UNAFEI	United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders
UNDP	United Nations Development Programme
UNICEF	United Nations International Children's Fund
UNODC	United Nations Office on Drugs and Crime
WLR	Weekly Law Reports

## LIST OF TABLES AND FIGURES

### Tables

<b>Table 1:</b>	Cases brought to the Court for Children 2011-2015	31
<b>Table 2:</b>	Statutory provisions and definitions used	36
<b>Table 3:</b>	Imprisonment rates, Malaysia, Singapore and Thailand	71
<b>Table 4:</b>	Purposeful sampling of participants	138
<b>Table 5:</b>	Summary of stakeholders interviewed	140
<b>Table 6:</b>	Boys interviewed at the Henry Gurney School	141
<b>Table 7:</b>	Classification of children in the Integrity School System	203

### Figures

<b>Figure 1:</b>	The Malaysian Juvenile Justice System	33
<b>Figure 2:</b>	Number of children arrested for a criminal offence by age (2003-2008)	44
<b>Figure 3:</b>	Legal research styles	120
<b>Figure 4:</b>	Matrix of interviewees	139
<b>Figure 5:</b>	A map of Malaysia indicating the geographical locations of Kuala Lumpur and Kuching	150
<b>Figure 6:</b>	Entrance to the Puncak Borneo Prison, Kuching, Sarawak	150
<b>Figure 7:</b>	Themes and sub-themes	172

<b>Figure 8:</b> Four teenagers (two aged 16 and 17 respectively) charged with murder being taken to the Magistrates Court in Penang	189
<b>Figure 9:</b> The waiting room for child witnesses at the special court	198
<b>Figure 10:</b> Inside the Magistrates Court, Petaling Jaya where Gus serves as a Court Adviser	199
<b>Figure 11:</b> Current structure of post-trial detention of children in conflict with the law	200
<b>Figure 12:</b> A word cloud representation of interview transcripts	236

## CONTENTS

Declaration	i.
Acknowledgements	ii.
Abstract	iii.
List of abbreviations	iv.
List of tables and figures	v.

### Chapter 1: Introduction

1. Introduction	12
2. Fundamental research questions	14
3. The context of this study and the approach taken	14
4. A review of relevant prior research	15
5. Reflections	19

### Chapter 2: The Malaysian context of juvenile justice

1. Introduction	22
2. A brief overview of the Malaysian legal system	22
3. The development of legislation concerning juveniles	25
4. Ratification of the Convention on the Rights of the Child	26
5. The Child Act 2001	29
6. The Malaysian Juvenile Justice System	30
6.1 Definition of 'child' and 'children in conflict'	36
6.2 The age of criminal responsibility in Malaysia	38
6.3 Official statistics	41
6.4 Sentencing policies	45



7.	The move towards reform	50
8.	The current legislative regime	52
9.	Reflections	54

### **Chapter 3: The underlying norms in Malaysia**

1.	Introduction	56
2.	The context of culture	58
3.	Penal policies and the culture of politics	62
	3.1 Judicial attitudes and the child in conflict with the law	67
	3.2 Incarceration in Malaysia	71
	3.3 Corporal punishment	76
4.	Measuring punitiveness	79
5.	The definition of ‘child’ in Malaysia	82
6.	Evolving capacities and arbitrary lower age based restrictions	83
7.	Islam and criminal responsibility	87
8.	The concept of rights	91
9.	A child rights-based approach?	96
10.	The Malaysian position on rights	98
11.	The Convention and the notion of rights in Malaysia	100
12.	Islam and child rights in Malaysia	106
13.	Diversion in the youth justice system	108
14.	Reflections	115

### **Chapter 4: Research Design**

1.	Introduction	117
2.	Understanding legal research	118
3.	Socio-legal research	122
4.	The qualitative approach in this study	124
5.	Research design	127
6.	Collection of data	129
	6.1 Documents as a resource for research	130

6.2 Interviews	133
6.3 Interviewing children	142
6.4 Credibility and validity	144
7. Ethical considerations	145
8. The Henry Gurney School, Puncak Borneo, Sarawak experience	149
8.1 Gaining access	151
8.2 Informed consent, confidentiality and anonymity	156
8.3 Conversations with the boys in the Henry Gurney School	159
9. Analysis of data	165
10. Reflections	167

### **Chapter 5: Conversations -Themes and Patterns**

1. Introduction	170
2. Penal policies and cultural embeddedness	172
2.1 Corporal punishment	173
2.2 Prison culture	176
2.3 The age of criminal responsibility	179
3. Children on remand, in custody and in courts	181
3.1 The Police and children	181
3.2 Children in court	188
4. Detention and incarceration	200
4.1 The impact of detention and incarceration	201
4.2 Cognitive, emotional and psychological assessments	209
4.3 Detention as a last resort?	213
5. Views on child rights in Malaysia	216
5.1 Awareness of child rights	216
5.2 Advocating child rights: Cultural norms versus Western hegemony	220

6.	Diversion	226
	6.1 Development and implementation	227
	6.2 Challenges in implementation	232
7.	Reflections	235

### **Chapter 6: Conclusion**

1.	Introduction	238
2.	Translating treaty obligations into effective action in Malaysia	239
3.	The culture of childhood in Malaysia	242
4.	Cultural relativism versus universalism and the rights discourse in Malaysia	247
5.	Implementing diversion in Malaysia	254
6.	Whither the rights-based argument for diversion in Malaysia?	259
7.	Conclusion	263
8.	Postscript	267
	 Bibliography	 269
	 Appendices	 328

## **Chapter 1**

### **Introduction**

*'Ralph wept for the end of innocence, the darkness of man's heart, and the fall through the air of the true, wise friend called Piggy.'*

Golding (1954:216)

## 1. Introduction

On May 30, 2002, in Kuala Lumpur, Malaysia, a boy stabbed a girl twenty times with a sharp object, after being taunted by the victim, who repeatedly called him “fatty.” The boy was aged 12 and the victim, Mei Fong, was aged 11. As it so often happens with the loss of innocence and the awareness of the ‘darkness of man’s heart’ (Golding, 1954:216), the offending boy, WK, was then brought into contact with the Malaysian juvenile justice system. The ensuing series of cases<sup>1</sup> brought the newly minted *Child Act 2001* and its impact on children in conflict with the law<sup>2</sup> to life.

Society’s perceptions of crime and offending often forms the basis in which it responds to the notion of children in conflict with the law. This response manifests itself in the administration of the juvenile justice system. Yet this response is often a wilful manifestation of legislative schizophrenia – to endeavour to support children on the one hand and the desire to regulate and control the lives of young people on the other. Policy makers and those involved in the administration of justice, particularly those that deal directly with children, are often at conflict as to the best way forward.

There is evidence across the globe of various jurisdictions facing the ebb and flow of policy challenges in the implementation of youth justice policies. It therefore comes as no surprise that globally, there has been a wave of contrasting theoretical assumptions underlying juvenile justice approaches, shifting from medical models to opportunity theories to labelling to deterrence, from paternalism to legalism to mitigating social processes to just deserts and ultimate policy engagements between liberal approaches with that of conservatives (Klein, 2001). Until very recently, Malaysia remained largely unaffected by these varied theoretical assumptions as the juvenile justice system remained in the main, constant in its philosophical underpinnings with evidence of high levels of punitiveness. This position is

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<sup>1</sup> *Kok Wah Kuan v Public Prosecutor* [2004] 5 MLJ 193, *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174 and *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

<sup>2</sup> The term ‘children in conflict with the law’ refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence.

exacerbated by the lack of research informed policy decision making owing to a long history of disengagement with critical issues impacting juvenile justice.

Critical discourse in the area of juvenile justice particularly where a child is in conflict with the law is only just beginning to find its voice in Malaysia and some of these issues will be explored in this study. The lack of critical analysis in Malaysia is in part due to the interwoven elements of penal policy and politics. Therefore, this study aims to create critical academic discourse to influence policy makers. The view is that the critical criminologist plays a pivotal role in not just combating knowledge but to combat the power of knowledge (Sim, 2009 quoting Cohen, 1979:49-50) particularly where the power of knowledge is in the hands of those in power.

An empirical analysis of a range of international conventions, standards, treaties, rules, legislative provisions and judicial pronouncements and contextualising these with conversations with principal stakeholders and with incarcerated boys in the Henry Gurney School, which, taken together, aim to establish whether a strong rights-based argument for the introduction for diversion in the juvenile justice system in Malaysia is possible. It is also hoped that a critical analysis of the underlying norms and the context of culture in Malaysia would present a unique view of the Malaysian child in conflict with the law. Where appropriate, reference to jurisdictions that share a similar tradition of the common law are explored with a view to establish points of convergence or divergence.

The aim therefore is to generate critical, robust, credible and persuasive arguments that might help shape a 'principled youth justice informed by international human rights instruments' (Goldson and Muncie, 2006:203).

## **2. Fundamental research questions**

In seeking to pursue critical discourse in the area of juvenile justice, particularly where a child is in conflict with the law, this research endeavours to explore the following fundamental research questions:

1. What is (are) the underlying philosophical approach (es) in Malaysia in dealing with rights of children in conflict with the law?
2. Is there an obfuscation of the rights of the child and are children merely treated as objects of concern? If so why.
3. What are the points of convergence/divergence in these policies with that of other jurisdictions and its impact on diversion strategies?

## **3. The context of this study and the approach taken**

The impetus for this study was drawn from a personal engagement with issues impacting children in conflict with the law. This was through membership of two committees involved in dealing with broader issues of rights and crime, namely, the Constitutional Law Committee of the Malaysian Bar and the Malaysian Crime Prevention Foundation. Involvement in these Committees, resulted in a realisation that many Malaysians, especially children and particularly children in conflict with the law, are not aware of their rights. The experiences in these committees also yielded a desire to find deeper meaning to the complexities of how children are socially constructed in Malaysia. In developing the framework of the study, it also became clear that history, politics and societal norms have a direct bearing on the child in conflict with the law. These norms in turn, impinge on the implementation and realisation of obligations arising from the Convention on the Rights of the Child (CRC).

Plans to introduce the broad concept of diversion in Malaysia emerged as an important aspect following the ratification of the CRC in Malaysia. However, it appears that Malaysia has encountered challenges in implementing specific diversion practices. The intersection between meeting treaty aspirations and political reality were therefore constituent elements that also fuelled the basis for this study.

In exploring these matters, this study seeks to draw the reader through the complex relationship between the theoretical framework and the empirical data in a fluid and explorative manner. This introductory Chapter, explores the background and motivation for this study and is followed by five substantive Chapters.

Chapter 2, traces the development of the Malaysian juvenile justice system in Malaysia. This affords an understanding of the impact of her colonial past on the overarching juvenile justice system. The impact of the various international treaties on the juvenile justice system are also evaluated.

Drawing from these elements, Chapter 3 explores the attitudes, beliefs and sentiments of the collective history of the Malaysian political system and how these elements impact the juvenile justice system. These underlying norms in turn, have direct bearing on the concept of rights. The Chapter then probes the theoretical and philosophical foundations of diversion practices.

Chapter 4, establishes the approaches taken in designing this research which serves as the conduit to bridge the theoretical foundations with the empirical data. The approach taken in this study is to use a broader, less restrictive concept of ‘research design’ and this allows greater engagement with the phenomena being explored, in this case, the rights of the child in conflict with the law.

The application of this is seen through the various conversations with stakeholders and boys in Chapter 5. In keeping with the reflexive inductive approach of this study, appropriate conclusions about a rights-based perspective are established in Chapter 6.

#### **4. A review of relevant prior research**

A review of relevant prior research involving issues of children in conflict with the law and their rights serves two fundamental purposes. Firstly, to develop the justification for this study and secondly it serves to inform this study as to the choices made about the methods used.

From a Malaysian perspective, issues affecting children in conflict with the law, has generated legal scholarship and interest although the body of work is rather limited. Mustaffa’s (2006) comparative study of the Family and Community Group



Conferencing (FCGC) in Thailand and rehabilitation aid hostels or halfway houses in Japan formed the basis of suggesting these approaches be applied in Malaysia (2006:88). There was no reference to diversion and nor issues of child rights and neither was there any reference to the CRC. The approaches reviewed by Mustaffa did not find its way into the juvenile justice system in Malaysia.

Ahmad's (2013) mixed method study of children in pre-trial processes in the Malaysian juvenile justice system highlighted worrying patterns. One hundred and sixty-four respondents from secure approved schools and those detained in prison were surveyed and this was then supplemented with interviews with stakeholders and one child from each of the institutions. Ahmad reports that among others:

- (69.7%) agreed that the arrest process left a negative impact on them;
- (70%) felt that they were not treated with respect by the enforcement officers;
- (53%) were not brought to the court within twenty-four hours upon arrest;
- (55.9%) were handcuffed upon arrest;
- (72%) were not granted access to contact family or a solicitor;
- (62.8%) reported that they were mistreated while being detained;
- (53.1%) reported that they were detained together with the adult offenders while under remand and
- (63.4%) reported that they did not feel satisfied with the court proceedings.

These findings illustrate the gaps in the provisions of the *Child Act 2001* and actual practice and indicates a very high disregard of a range of child rights. However, whether the children were *aware* of their rights is not evident given that the statistical data are merely indicative of the responses to the questions posed. Thus, as illuminating as the findings are, the deeper meaning to these issues could not be fully explored as the paper subsequently went on to consider the broader issues of crime prevention among youth.

Mustaffa in his recent doctrinal study on the need for the introduction of diversion in Malaysia concluded 'that the process of implementation of diversion may not be straightforward as it requires an integrated approach which combines drastic

amendment of laws and policies, improvement of logistics, recruitment of manpower and enormous investment of financial resources' (Mustaffa, 2016:152). The paper however did not explore issues of cultural and political embeddedness nor did it seek to explore views of stakeholders or children themselves. It also did not view the issue of diversion from the child rights perspective.

The most comprehensive study conducted in relation to children in conflict with the law was the collaborative project undertaken by UNICEF and the Ministry of Women, Family and Community Development Malaysia of the juvenile justice system in Malaysia (UNICEF, 2013). This study represents a significant and valuable contribution to the body of knowledge in focus as it provides a broad account of the various issues impacting juvenile justice applying document analysis, the use of quantitative analysis and triangulating these with interviews with children as well as stakeholders.

Given that the study sought to evaluate the entire juvenile justice framework, it did not address the issues of *child rights* (emphasis added) through the lenses of the children themselves. Similar studies drawn from UN agencies and non-governmental organisations discussed in the study, also provided analyses and views on child rights from the perspective of application of the law although these studies did not directly seek the views of the children themselves.

Other works include Dusuki's discussion of child rights and the provisions of Article 12 (2006) as well as child rights in the context of human rights and Islam (2012). These contributions to legal scholarship involve traditional doctrinal analysis of the state of the law and provide detailed discussions on the development of the law as well as challenges faced in implementing the CRC.

An interesting perspective on child rights is Nalasami et al (2015) and their study of the implementation of the CRC in the Children Homes under the Social Welfare Department in Malaysia. Data was collected from 402 registered children who were staying in six Children Homes across the country and employed self-report surveys including face-to-face structured interviews, key informant interviews, and documentation survey. The study identified gaps between the child protection rights

proposed by the CRC and the rights practised in Children Homes and concluded that a rights-based approach is an influential empowerment tool for children to control their own lives, to choose suitable services, and to make decisions about quality of the care and services they receive (2015: 243). While the focus of this research was directly on child rights in relation to children in homes, it did not specifically address the issue of children in conflict with the law or the issue of diversion. It did not attempt to suggest how the gap could be reduced.

There is evidence of global discourse on issues of children in conflict with the law, their rights and issues of diversion. (See for example, Freeman, (2000); Goldson (2000); Polk (2003); Denov (2004); Muncie (2009a); Hollingsworth (2013) or Richards (2014) among others). These discussions suggest that issues of child rights and diversion appear to have resonance irrespective of the diversity in jurisdictions.

There have been several studies that applied an empirical analysis of child rights and the CRC from an international perspective. For example, Lundy et al (2102) and their study of the legal implementation of the CRC in 12 European countries concluded that ‘successful implementation of the CRC is key to realising children’s rights’ (2012:99). There has not been a similar study done in Malaysia.

Given that at the time of writing, there have not been studies in Malaysia that seek to apply a qualitative approach in understanding the rights of the child in conflict with the law in relation to diversion, this study aims to enhance the legal scholarship in the area, particularly in seeking the views of the incarcerated boys as live actors and not as objects of research. It seeks to do so in a clear manner applying academic standards of research elucidated in this study.

While there are perceived limitations in pursuing qualitative approaches, the choice of the approach is reliant on finding the approach that best provides the richness and context that the researcher seeks to explore. This allows the researcher to find issues that are often missed through other approaches. These include exploring subtleties and complexities, and evaluating possible relationships, causes, effects and dynamic processes involved in the context of the study. Further as this study uses a more descriptive, narrative style, it is hoped that this research might be of benefit to

practitioners and policy makers by providing a nuanced view of the Malaysian context.

To ensure that the methodological and analytical steps produce reliable and robust outcomes, a number of safeguards will be addressed in this study including triangulation of data, establishing a data trail, acknowledging researcher subjectivity, participant review, and adequate consideration of disconfirming evidence and contradictory interpretations. These matters are considered in Chapter 4.

## **5. Reflections**

As suggested above, this study seeks to weave together an empirical analysis of a range of documents and contextualising these with conversations with principal stakeholders and incarcerated boys. The principal objective is to establish an original analysis of a rights-based argument for the introduction for diversion in the juvenile justice system in Malaysia. Given that this study did not have pre-determined well-worked-out hypotheses, the study was not context bound and so concepts and ideas evolved as the study progressed, being context sensitive and reflexive. This level of reflexivity operated throughout every stage of this study, particularly where conversations with the stakeholders and boys were concerned. Thus, in the course of this study, a number of pertinent matters emerged.

Firstly, at the onset of the study, diversion was developed as a central concept warranting analysis. In Chapter 3, reference is made to the notion that this study was essentially concerned with those practices that divert young people early in the justice process, particularly *prior* to formal court intervention and those strategies that aim to avoid custodial sentencing *post-trial*. (Emphasis added).

However, as the study progressed, it became evident that the interviewees treated the practice of diversion as an amalgam of both these types of diversionary practices. This blurring of concepts, is indicative of the fact that stakeholders themselves view diversion as a very broad concept. Further, there is also some level of uncertainty about how diversion works or is to be implemented. The lack of specifics in determining the scope of diversion are also a reflection of the ambiguity in finding a strong philosophical underpinning that is necessary to graft the concept of diversion

within the Malaysian juvenile justice system. Thus, references to diversion as discussed in the latter parts of this study acknowledge the blurring of pre-trial and post-trial diversion and as such, a broad all-encompassing phrase ‘diversion’ is applied.

Secondly, it became apparent in the course of this study, that while diversion is an important facet in the juvenile justice system, it cannot be viewed in isolation from the broader notion of the rights of the child. Thus, this study establishes the premise that the rights of the child and how it is contextualised in Malaysia is a condition precedent to the successful implementation of any plans for diversion. A child in conflict *has a right to diversion* (emphasis added) and this presents a fresh perspective on how the rights of the child in conflict with the law is perceived, understood and realised. This fact suggests that the choice of which concept of diversion is to be considered becomes a secondary issue and this matter fades out of focus as the primary issue of the rights-based argument assumes a greater level of importance in the study. In some ways, the issue of diversion cannot be fully realised without resolving the broader philosophical context of rights and it is this conundrum that emerges as a significant factor in the Malaysian juvenile justice system.

Thirdly, this study highlights that advocating child rights in Malaysia, represents the challenge of establishing universal rights in a culturally diverse world. The embedded culture of politics and punitiveness and the deeply entrenched culture of childhood mean that a rights-based argument for diversion faces challenges in its implementation. Thus, the complexities of the multi-dimensional element of the Convention on the Rights of the Child (CRC) and its application in Malaysia are a reflection of the deeper fundamental abstractions of treaty compliance.

## **Chapter 2**

### **The Malaysian context of juvenile justice**

*'Children begin by loving their parents; as they grow older they judge them;  
sometimes they forgive them.'*

Wilde (2006:58)

## 1. Introduction

One week after stabbing Mei Fong aged 11, twenty times, the young boy, WK, aged 12, accused of the offence appeared before a Magistrates Court in Malaysia, in a sleeveless T-shirt, track bottoms, slippers<sup>3</sup> and handcuffs<sup>4</sup> to answer to the charges proffered against him (Idrus, 2002). As this was a murder charge, the case was then transferred to the High Court. A year later, the High Court found the boy guilty of murder, a capital offence.

Following a series of appeals and cross appeals, the finality of the Federal Court decision delivered in 2008 (*Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1*) affirmed a guilty verdict. WK (by then aged 17) was to be detained for an indefinite duration in prison ‘during the pleasure of the Yang di-Pertuan Agong’ (the Ruler). This was in accordance with section 97(2) of the *Child Act 2001*; a provision that had been grafted from the *Juvenile Courts Act 1947*, which in turn had drawn judiciously from the United Kingdom’s *Children and Young Persons Act 1933*.<sup>5</sup>

The case highlighted the complex application of the CRC where a child is in conflict with the law especially where a child has killed another child. The case also brought to the fore the context of how children in conflict with the law come into contact with the juvenile justice system. The Malaysian juvenile justice system owes much of its heritage to its colonial past and is thus inextricably intertwined with that historical context.

## 2. A brief overview of the Malaysian legal system

Malaysia is a parliamentary democracy based on the traditions of the Westminster model and is a constitutional monarchy. It is a Federation of 13 states with a strong central government. The written Federal Constitution (Article 3) recognises Islam as

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<sup>3</sup> Colloquialism that refers to rubber flip-flops/sandals commonly used in Malaysia.

<sup>4</sup> *The Child (Amendment) Act 2016* prohibits the use of handcuffs save in exceptional circumstances.

<sup>5</sup> See section 53 (1) which states that a sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but *in lieu* thereof the court shall sentence him to be detained during His Majesty’s pleasure. Once so sentenced, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Secretary of State may direct.

the religion of the Federation with provisions that allow other faiths to be practised without impediment so long as no attempt is made to propagate such other faiths to those that profess the Muslim faith. That it is defined in these terms is a consequence of the evolution of its rich socio-political development.

As part of the Commonwealth, Malaysia's legal framework and system owes much of its heritage to the British administration of Malaysia. As far as the administration of justice in relation to children, it is unsurprising that the laws and policies that were introduced by the British during this period of colonisation from 1824-1957 remained the basis for the underlying philosophical position on children in conflict with the law.

Prior to the arrival of the British, documentary evidence of a functioning legal system and the administration of justice in Malaysia were scarce. This situation arose because 'Malay laws were never committed to writing' (Wilkinson, 1970:6) but there is evidence to suggest Malay *adat* law (Malay customary law) was the dominant personal civil law being applied. This was applied in conjunction with Islamic law and thus the *Sultan* or ruler performed his role as arbitrator and judge in most proceedings (Wilkinson, 1970). There is little evidence to suggest the presence of a hierarchy of courts or judicial personnel or the application of the notion of separation of powers or the application of judicial precedents during this period in time (Ahmad, 2007).

The 15<sup>th</sup> and 16<sup>th</sup> century saw the emergence of a rudimentary legal system albeit a system built largely upon customary laws, with a corresponding administration of justice. This period also saw the emergence of codified laws or written laws for example the *Undang-undang Melaka* and the *Undang-undang Laut Melaka* (Laws of Malacca and the Maritime Laws of Malacca). These were laws enacted in the state of Malacca, an important trading port in the south-west of Malaysia. The *Undang-undang Melaka* has forty-four chapters and covers a wide range of matters including among others, the responsibilities of the ruler and his chiefs, criminal and civil offences and even includes rules governing bankruptcy (Liaw, 1976).

The laws of the indigenous people of Malaysia (the indigenous people of Malaysia consist of a number of tribes spread out across the country and are distinct from the



majority Malay populace and the Indian and Chinese ethnic minorities) was described as being consistent with other primitive societies where ‘all laws are based on the principle of tribal interest and self-preservation’ (Buss-Tjen, 1958:252).

In so far as the Malay population was concerned, Buss-Tjen’s work also identifies that there is some evidence of restorative justice in the *adat perpatih* (a category of Malay customary law) and that ‘the *adat perpatih* aims at restitution and compensation of the injured rather than punishment of and revenge on the culprit’ (Buss-Tjen, 1958:261) The following example, stylised in the form of a poem found in Buss-Tjen (1958: 261) best illustrates this philosophy:

*Yang menchinchang yang memapas, (Who wounds must heal),*

*Yang membunuh, membangunkan, (Who slays must replace),*

*Yang menjual, memberi balas. (Who sells must restore).*

In the *adat temenggong* however, (a further category of Malay customary law) there is evidence of a system of laws that are more retaliatory in nature. There is also evidence to indicate that Malay customary law also has in its development the influence of Hindu principles although this was eventually displaced by the infusion of Islam. Hence, there were variances in the manner and form of laws and nuances that were established over time following the spread of the Hindu faith and then that of the spread of Islam (Winstedt, 1953). In the initial stages, the arrival of the British did not have much of an effect on the manner in which the various peoples of Malaya (Malaysia as it was then described) administered their legal affairs but over time, this changed.

The British first arrived in Penang (an island port in the north-west of Malaysia) in 1786, not to govern but primarily because of the lucrative spice trade and to establish a naval presence in the region but by 1875, that tentative first step had already become less so. The Privy Council in the case of *Ong Cheng Neo v Yeap Cheah Neo and Ors (1875) LR 6 PC 281* declared that, ‘the law of England must... be taken to be the law of Penang so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances.’

The sphere of British expansion eventually led to British rule exercised over Malaya. It was the period of British rule, leading up to the independence of the Federation in 1957 that witnessed the emergence of what is commonly accepted as a functioning legal system replete with the attributes commonly associated with legal systems; through the establishment of courts, structures and personnel to manage the system.

The infusion of aspects of the English legal system was tempered with the prior experience of introducing similar laws in India. This period of development was not without challenges as the application of English laws and western jurisprudential concepts were tested against the customary and Islamic laws prevailing at that time particularly those relating to personal laws or those relating to land matters. However, eventually, customary laws were relegated to being merely a category of laws with a very limited scope of application.

The Japanese occupation of Malaya brought a temporary suspension of this system and after the war; the push to independence brought with it the basis for the present constitutional structure in Malaysia.

### **3. The development of legislation concerning juveniles**

One of the earliest pieces of legislation concerning juveniles in Malaya was the *Children Enactment 1922, No. 1 of 1922, F.M.S. (Cap 158)*, which among others dealt with penalties for cruelty to children by assault, ill-treatment, abandonment, or exposure and restricted child labour and the employment of children.

Following the Japanese occupation of Malaya, the *Juveniles Court Act of 1947 (Act 90)*<sup>6</sup> was introduced amidst concerns that the war had resulted in disruption to the life of the juvenile and as such, juveniles required the ambit of the law to protect them from abuse and neglect. There were also concerns expressed that juvenile delinquency was on the rise as a consequence of the war. A Juvenile Delinquency and Juvenile Welfare Committee was formed to advise the government as to suitable measures that

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<sup>6</sup> The 1947 Act was only repealed recently by the *Child Act 2001*. The *Child Act* also repealed the *Women and Girls Protection Act 1973 (Act 106)* and the *Children Protection Act 1991 (Act 468)*.

might be adopted to address these issues as well as to where possible, make recommendations for promoting juvenile welfare in post-war Malaya. The Report of the Juvenile Delinquency and Juvenile Welfare Committee (1947) identified the underlying philosophical principles that support the mechanisms to control and regulate the issue of juvenile delinquency.

The fundamental features of the 1947 Act were *inter alia* the creation of a separate Juvenile Court (Section 2) for offences involving children (a child is one who is under the age of 14) and young persons (aged between 14-17) as well as the creation of a structured system for the probation of offenders. Part V of the Act also provided for children to be sent to approved schools for a period of three years or until they reached 14 years of age (whichever was longer).

The underlying philosophy in dealing with children in conflict with the law was that of reform by means of education and discipline. This was based on the United Kingdom's *Prevention of Crime Act 1908*<sup>7</sup> and the equivalent provisions therein that deal with Borstal Institutions of that period or similar provisions in the United Kingdom's *Children and Young Persons Act 1933*. This position in Malaysia remained notwithstanding the emergence of the *Convention on the Rights of the Child* as adopted by the United Nations in 1989.

#### **4. Ratification of the Convention on the Rights of the Child**

In 1995, some six years after the emergence of the Convention, Malaysia ratified the *Convention on the Rights of the Child* (CRC) as an indication of its commitment to the protection and welfare of children. Thus, Malaysia like the other 195 countries that have since ratified the CRC as part of their national law, placed itself under an international doctrine that endeavoured to create minimum standards with which it was hoped a shared model of justice could exist (Junger-Tas 1994; Doek 1994; Muncie 2004).

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<sup>7</sup> The Preamble to the *Prevention of Crime Act 1908* declares, '[a]n Act to make better provision for the prevention of crime and for that purpose to provide for the reformation of Young Offenders...'

However, despite ratification of the CRC, Malaysia had reservations<sup>8</sup> to eight articles and these include among others:

a. Article 2 (the non-discrimination clause): Malaysia's reservation to this provision was on the basis that there were enshrined Constitutional provisions that facilitate affirmative action for a specific ethnic group.<sup>9</sup> The Malaysian Constitution is also silent on matters of sexual orientation. A further challenge is the issue of child marriages<sup>10</sup> that are discriminatory against the girl child.

b. Article 7 (the right to a name and nationality): Malaysia's reservation to this provision was because of unresolved issues involving undocumented children. Malaysia is not a State party to the *Refugee Convention 1951* and its *1967 Protocol*. Malaysia has also not acceded to the *Convention relating to the Status of Stateless Persons 1954* and the *Convention on the Reduction of Statelessness 1961*. Asylum-seekers and refugees are not issued any documents by the Malaysian authorities, which would allow them to be properly identified as having a special protected status.

Thus, non-Malaysian children born in Malaysia, such as asylum seeking and refugee children as well as children of undocumented migrant workers are at risk of not being registered at birth.

c. Article 14 (the freedom of religion clause): Malaysia's reservation to this Article was on the basis that Islam as practiced in Malaysia, does not facilitate the freedom to depart from the faith. Further, Article 12(4) of the Malaysian *Federal Constitution* declares that the religion of a person under the age of eighteen years shall be decided by his parent or guardian. This provision in the constitution has also been

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<sup>8</sup> The International Law Commission defines a reservation as *inter alia*, a unilateral statement, however phrased or named, made by a State, whereby the State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application (The International Law Commission, 2011).

<sup>9</sup> Article 153 (1) of the *Federal Constitution* states *inter alia* that it shall be the responsibility of the Agong (Ruler) to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak.

<sup>10</sup> In Malaysia, the marrying age is 16 for Muslim girls and 18 for Muslim boys. However, they can marry before, if permission is obtained from their parents and the Syariah courts. For non-Muslims, the minimum age is 18, but girls as young as 16 can marry if they obtain permission from their state's Chief Minister.

the source of problems associated with cases of unilateral conversion of a child by one parent who has converted to Islam.<sup>11</sup>

d. Article 28 1(a) (the right to education): This states that primary education should be free for all children. Refugee children of school age are unable to attend school in Malaysia as pursuant to the *Education Act 1996* only children who have a birth certificate may enrol in educational institutions. This requirement precludes refugees, asylum-seekers, stateless children, children of legal or illegal migrant workers or street children

e. Article 37 (the prohibition against cruel treatment or punishment): The reservation to this was primarily on the basis that children can be subject to caning or whipping in Malaysia and that Malaysia still maintains the death penalty. Some of these issues have been addressed in the recent amendments to the *Child Act* in 2016 but notwithstanding this; the reservations are still in place at the time of writing.

At the time of ratification, these reservations were made on the basis that the Articles were said to be inconsistent with the Constitution, national laws, including Syariah laws and national policies, as indicated above (UNICEF, Malaysia, 2014).

Thus, while there was a quick response to ratify the treaty, the reality on the ground was that many of Malaysia's existing laws and norms as well as its administration of juvenile justice were not in line with the expectations of its perceived treaty obligations and more importantly, there were matters of culture and ideology that were unresolved.

In recent years, the Malaysian government has withdrawn some of its initial reservations to the CRC. Thus in 2010, it lifted reservations to Article 1 (defining the age of a child); Article 13 (regarding the freedom of expression); and Article 15 (regarding the freedom of assembly and participation). In 2011, the government also

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<sup>11</sup> For an example on this complicated matter, see the issues raised in the saga of *Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho* [2016] 4 MLJ 455, *Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa)* [2015] 7 MLJ 153 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552.

signed two of three Optional Protocols to the CRC, which deal with the sale of children, child prostitution and child pornography, and on children in armed conflict.

Despite these withdrawals, the juvenile justice system in Malaysia remained static with the institution-based detention and rehabilitation model inherited from the British, notwithstanding the fact that such a model had long since been abandoned in the United Kingdom. Institutions for children in Malaysia tend to be large; with the primary rehabilitation strategy adopted steeped in the traditional standardised regime of discipline, religious instruction and vocational training (UNICEF, 2013).

## **5. The Child Act 2001**

Some six years after Malaysia's ratification of the CRC, the *Child Act 2001* was enacted. The Act consolidated and repealed three pieces of legislation in existence<sup>12</sup> with a view to ensure that the developmental needs of children would be recognised.

The preamble to the Act declares that it is an Act 'to consolidate and amend the laws relating to the care, protection and rehabilitation of children and to provide for matters connected therewith and incidental thereto.' Notwithstanding the introduction of the Act in 2001 and the changes it introduced, the Malaysian perspective on children in conflict with the law and in particular, policies that shape the rights of the child has remained in the main largely unchanged. Hence, Malaysia's approach to children in conflict with the law is still primarily grounded in formal police and court-based interventions and institution-based rehabilitation based on drill, training and education both formal and religious (Child Rights Coalition Malaysia, 2013).

The obligations to the treaty did not yield fundamental changes in the manner Malaysia treats children in conflict with the law. The reservations in place also meant that the broad aspirational goals of the treaty in acknowledging the rights of the child were not fully met. Such a response to an international organisation and the transfer of its policies be it forced or voluntary is well documented (Dolowitz and Marsh, 2000).

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<sup>12</sup> These were, the *Juvenile Courts Act 1947*, the *Women and Girls Protection Act 1973* and the *Children Protection Act 1991*.

As in many instances of policy transfers, there can be challenges in implementing an international model of youth justice in a particular jurisdiction, whether those following the common law tradition or even those following the continental systems (Molina and Alberola, 2005).

Hence, while there was a response to the CRC and there was an attempt to implement it in Malaysia through the *Child Act 2001*, there were areas of non-congruence or ‘policy failures’ perhaps caused by an uninformed policy transfer (Dolowitz and Marsh, 2000:17). An uninformed policy transfer process led to a failure to consider the need to ensure changes in other areas of the administration of juvenile justice in Malaysia. These policy failures are also perhaps a reflection of a common problem of government rhetoric in the realm of international politics being the dominant discourse while the inconsistencies in implementation of the policy on the ground remain unresolved. This matter is considered below.

At another level, the decision to ratify the treaty and adopt some principles while being unable to fully implement others demonstrate the challenges associated with ‘cherry picking’ or ‘butterfly collecting’ (Crawford, 2002:111) policies without regard to the cultural and societal context in the jurisdiction in question. As is therefore the case in many instances of policy transfers, there is an absence of any consideration of ‘culture, ideology and discourse’ (Muncie 2001:33) in the adoption of the CRC into the Malaysian context. The basis for Malaysia’s treaty obligations will be considered in Chapter 3.

## **6. The Malaysian juvenile justice system**

A report of Parliamentary proceedings indicates that 4,730 criminal cases have been brought to the Court for Children since 2011 with 4,021 (85%) prosecutions. The Deputy Minister, (of the Ministry of Women, Family and Community Development), suggested that the high prosecution rates were indicative of strong prosecution evidence leading to successful prosecutions. For the years 2011-2013, the rates were consistent but in 2014, there was a sudden 38.7% spike (Table 1 below).

Year	Cases brought to the Court for Children
2011	889
2012	841
2013	896
2014	1243
2015 (As at Sep)	861

**Table 1:** Cases brought to the Court for Children. Source: Hansard, 3 Nov 2015, col 1040-1050, 2011-2015. Available at <http://www.parlimen.gov.my/files/hindex/pdf/DR-03112015.pdf>.

No reasons were proffered for this increase and there was no indication of the types of crimes involved or the subsequent sentencing imposed. There was also no indication of how many cases did not lead to prosecution (Hansard, 3 November 2015, col 1040-1050).

A recent report suggests that the most children were involved in property-related crimes at 36.0 % in 2015. This was followed by drug related crimes at 29.7% and offences against persons at 13.4% (The Department of Statistics Malaysia, 2016).

A plausible reason for this is that Malaysia does not currently have any formal diversion programmes or processes for resolving minor offences through mediation or through other restorative approaches. Thus ‘in the majority of cases, regardless of how minor, the police conduct a full investigation and submit investigation papers to DPP for a determination of whether charges are appropriate’ (sic) (UNICEF, 2013:52). While there is some measure of discretion used by the police and prosecutors to dispose of minor child offences, there is no legislative or policy directive or set of guidelines to encourage diversion of children. This results in a lack of empirical data to compare the exercise of this discretion with the rate of prosecution but it is clear that the rate of prosecution has increased and appears to be on the rise.

In the United Kingdom, children are reportedly committing fewer crimes. The number of proven offences has been decreasing; it has fallen by 9% from the year



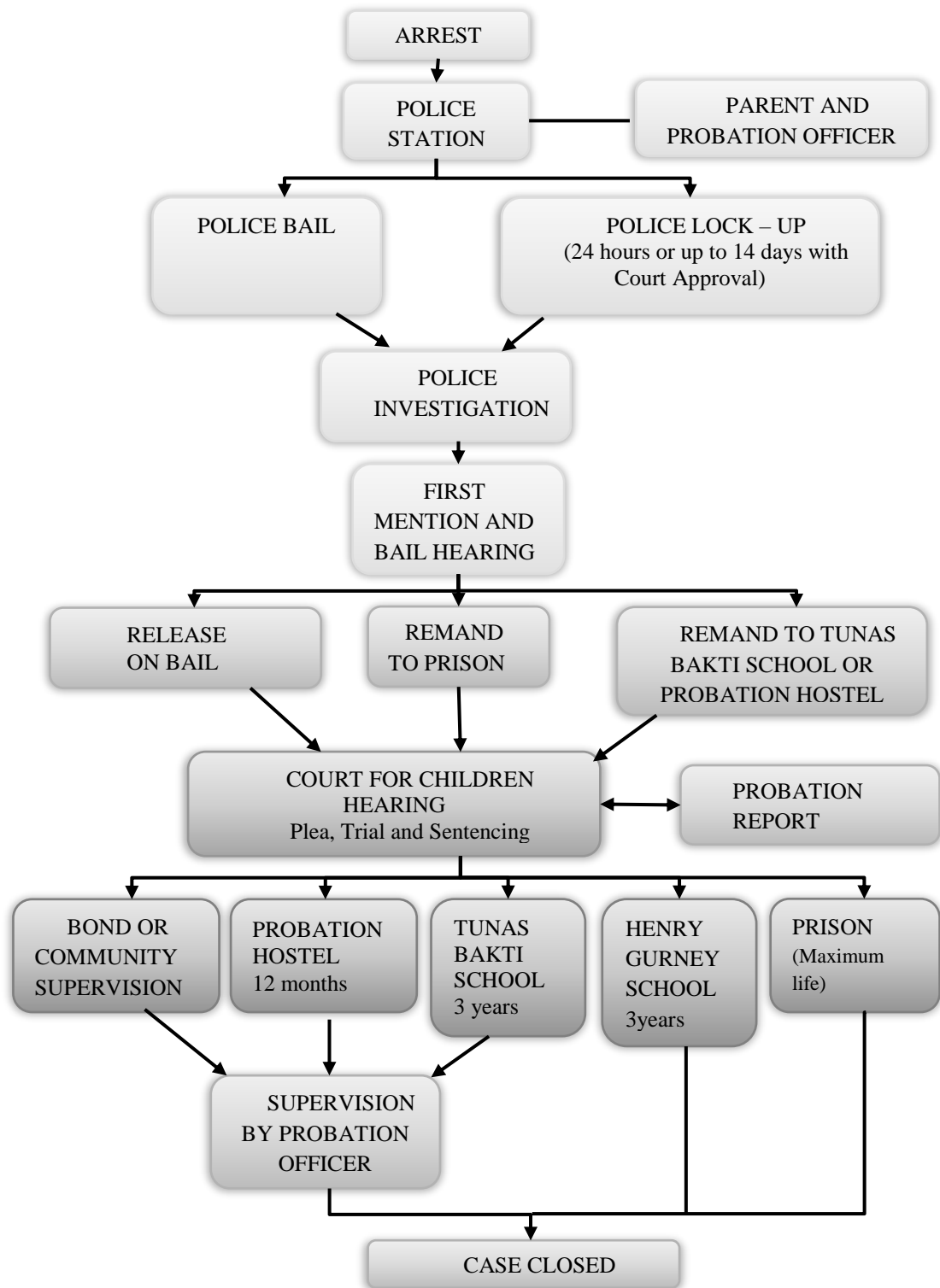
ending March 2015 and by 74% since the year ending March 2016 (Youth Justice Board/Ministry of Justice, 2017:8). It has been suggested that the fall in youth custody in England and Wales can be attributed to ‘increased diversion and a depoliticization of youth crime’ which in turn it is argued, has contributed to ‘a more tolerant decision making within the court arena’ (Bateman, 2012:36). The matter is also subject to, among other reasons, the ‘wider influences in the form of economically driven pragmatism’ (Smith, 2014:109). Indeed, it has been suggested that the fall may more commonly be explained on the basis of political or financial concerns, (Goldson, 2010; Bateman, 2015) determined by a perceived need for austerity (Bateman, 2014). Such a position is not evident in Malaysia as economic pragmatism has not been a primary motivation to consider alternatives to youth custody.

Procedurally, if a child in Malaysia is not released on bail, the matter will be decided by a Magistrate in the Court for Children. The child will either be sent to a facility managed and operated by the Department of Social Welfare<sup>13</sup> (subject to the availability of space) or alternatively to the Prison Department where a child may end up in prison or alternatively be sent to the Henry Gurney School.

UNICEF suggests that, ‘there is no written guidance with respect to how this discretion is exercised and statistics show no consistency in decision-making based on the nature or gravity of the offence’ (UNICEF, 2013:45). An overview of the Malaysian juvenile justice system is represented below (Figure1):

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<sup>13</sup> The Department was established in 1946 and currently functions as a department within the Ministry of Women, Family and Community Development providing services to children, senior citizens and others deemed to be in need.



**Figure 1:** Source: The Malaysian Juvenile Justice System, (Ministry of Women, Family and Community Development and UNICEF Malaysia, 2013:21)

Four different types of institutions for child offenders, with varying degrees of security have been established under the provisions of the *Child Act 2001* namely:

- Probation Hostels,
- Approved schools: *Sekolah Tunas Bakti* (The Tunas Bakti Schools)
- Henry Gurney Schools and
- Prisons – where children are kept in separate facilities from adults.

The *Child Act 2001* identifies circumstances in which children are *not* subject to institutional control. Thus:

- A child under the age of 10 years shall not be sent to an Approved School.
- A child under the age of 10 years cannot be made to reside in a Probation Hostel and
- An offender below the age of 14 years cannot be sent to a Henry Gurney School.

UNICEF in its comprehensive report states that these institutions and schools are:

[G]overned by relatively dated regulations that contain provisions that are not in accordance with the CRC and international standards. Children in Juvenile Correctional Centres are governed by the Prison Act and Rules, which have very limited special provision for young prisoners. Current practices with respect to limitations on private family visits and disciplinary practices are of particular concern. While discipline is generally based on a system of rewards and loss of privileges, there are some practices that are contrary to the CRC and international standards, including the use of solitary confinement, corporal punishment, reduction in diet, stress positions, and restriction of family visits (2013:118).

Teh reports that ‘desirable behaviour is encouraged through a book system which is tied up with rewards and privileges. This system focuses on specific behaviour modification through deprivation of privileges’ (Teh, 2002:209). This is the residue of approaches introduced through British colonisation for more than a century; still

maintained and now appearing to be seamlessly part of what constitutes the Malaysian juvenile justice system.

The consequence for the child in conflict with the law is the probability of being detained in some form of institutional set-up. Sentences of detention are commonly given, rather than being as a last resort (Child Rights Coalition Malaysia, 2012). The UNICEF study in 2013 found that a significant number of children are held on remand for very minor offences and that a high percentage of children in prisons are those who have not yet been found guilty of a crime. Hence, 52.7% of children on remand were accused of minor property related offences and only 20% were charged with serious offences involving violence (UNICEF, 2013). Approximately 2.2% of the total prison population of 49,200 held in 47 institutions are juveniles, minors or young offenders (Ministry of Home Affairs, Malaysia, 2015).

The large numbers in detention would of course result in a significant investment in the maintenance of the system. In 2013, the Deputy Home Affairs Minister reported that for the period 2010-2012, the Malaysian government spent RM665, 000, 096 to manage the entire prison system including the correctional schools (Hansard, 24 October 2013, col 1040-1050). Despite the cost and the global trends in moving away from this model, (Bateman, 2014), there is still a reliance on detention and incarceration as a means to deal with offending.

The Henry Gurney School was established by the *Henry Gurney School Regulations* in 1949 pursuant to the *Juvenile Courts Act 1947*. It is a closed secure institution for the detention of children and juveniles aged between 14 to 21 years pursuant to Section 74 of the *Child Act 2001*. There are five (four for boys and one for girls) Henry Gurney Schools as at August 2017. In 2013, there were 839 children and juveniles in the three Henry Gurney Schools existing at that time (Prisons Department, Malaysia, n.d.).

There are currently nine Tunas Bakti Schools nationwide, with a total capacity for 1,200 children. Malaysia has one fully separate Juvenile Correctional Centre, as well as six Juvenile Correctional Centres co-located with adult prisons. The co-located facilities are fully separate from adult facilities, with their own programmes for young

prisoners under the Integrity School system. The *Prison Act 1995* and *Prison Regulations 2000*, which have very limited special provision for young prisoners, govern children in Juvenile Correctional Centres. (UNICEF, 2013). The issue of detention in these settings will be considered in subsequent Chapters.

In considering the juvenile justice system in Malaysia, some other ancillary matters require consideration.

### 6.1 Definition of ‘child’ and ‘children in conflict’

Despite lifting the reservation to Article 1, inconsistencies in the definition of the child in Malaysia remain, with multiple, contradictory definitions of the child under both civil and Syariah law. Consequently, there is no specific use of the term “child” in the administration of justice. Malaysia has several different statutory provisions that refer to young people in differing ways. The following table (Table 2) adapted from Kassim (2006) identifies some of the common interpretations used:

STATUTORY PROVISION	DEFINITION USED
<b>Prison Act 1995</b>	a juvenile or a young offender is defined as “a prisoner who is under the age of 21 years”
<b>Child Protection Act 1991</b>	a child is “a person under the age of 18 years and below
<b>Children and Young Persons Employment Act 1966<sup>14</sup></b>	a child as a person aged between 10 and 14 years, and a young person as one aged between 14 and 16 years
<b>Child Act 2001<sup>15</sup></b>	a child as a person under the age of 18 years and below

**Table 2:** Statutory provisions and definitions used. Source: Kassim, W. (2006). ‘Juveniles on remand: trends and practices in Malaysia’, Proceedings of the 129<sup>th</sup> International Senior Seminar Participant’s Paper. Available at: <<http://www.unafei.or.jp>> [10 June 2014].

The term commonly used is that of a “child” or at times “juvenile”. It is also common to use the terms interchangeably. The CRC of which Malaysia is a signatory

<sup>14</sup> This was amended by the *Children and Young Persons (Employment) (Amendment) Act 2010*.

<sup>15</sup> The *Child (Amendment) Act 2016* retains this definition.

defines a child to be any person below 18. Dusuki (2006) is of the view that the framers of the *Child Act 2001* intended that there should no longer be any reference to the word “juvenile” or “young offender”, both implying negative connotations. However, these terms continue to be used particularly when describing the overall structure of the system and when the media reports the occurrence of youth offending.

The approach taken in Malaysia was therefore to have the *Child Act 2001* as the principal Act governing the protection of children. As noted above, the 2001 Act consolidated three former Acts and thus children in Malaysia; regardless of age, (whether they are victims or offenders) are governed by a single Act. The lack of a precise definition to deal with the respective age groups can hinder the development of a comprehensive strategy in dealing with children who are exposed to the justice system. For purposes of this study, the definition of “child” in Article 1 of the CRC will be used. Thus, a “child” is a person below the age of 18.

Ancillary to the difficulties in identifying a specific definition where age is concerned there are problems in describing the child who comes into conflict with the law. Media representation or society’s views of such a child is varied and common terms used include “juvenile delinquents”, “street urchins”, “gangsters”, “young criminals”, “abandoned children”, and such labels often remain through the life of that child and add to the stigmatization of the child into his/her adult life. Such descriptions often represent ‘images of dangerousness’ and there is ample evidence of such demonization in the British press (Muncie, 2008).

The risk of demonization of children in the United Kingdom and the corresponding overly tough law and order responses, were clearly illustrated in the events that occurred following the killing of 2-year-old James Bulger by two 10 year olds (Muncie, 2009a). This is not to say that there are global variances in dealing with children who kill for example Smith and Sueda’s (2008) comparative examination of this phenomena in the United Kingdom and Japan illustrate such differences.

Perhaps being mindful of the potential for negative stigmatization, the specific words articulated in Article 37 of the CRC refer to the rights of children alleged as, accused of, or recognized as ‘having infringed the penal law.’ However, this phrase

has been construed to also refer to as ‘children in conflict with the law’ and this is evidenced by the use of the phrase in various UN or UNICEF documents (United Nations, 2007b). Thus, the term ‘children in conflict with the law’ refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence.<sup>16</sup>

Malaysia, in applying the principles of the CRC has as far as its response to the UN, maintained the use of the phrase ‘children in conflict with the law’ (UNICEF, 2013). The Malaysian *Child Act 2001*, in defining “child” adopts principles of Article 37. Thus, Section 2 of the Act defines a “child” as a person under the age of eighteen years; and in relation to criminal proceedings, a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code.

However, while there is a general understanding of the need to maintain a neutral phrase, media representation of children in conflict with the law does not accord with this approach and it is common to find references to negative descriptors being used.

## **6.2 The age of criminal responsibility in Malaysia**

The Malaysian *Penal Code* stipulates 10 to be the age of attainment of criminal responsibility. The code includes a *doli incapax* presumption, which states that children between 10 and below 12 who have not shown sufficient maturity *may be* absolved from criminality as well (Section 82 and 83 of the Malaysian *Penal Code*). A further presumption of law enshrined in section 113 of the *Evidence Act 1950* states that a boy under the age of thirteen years is incapable of committing rape.<sup>17</sup>

While the CRC does not prescribe a specific age for criminal liability, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (otherwise commonly referred to as the Beijing Rules) state that the beginning of that

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<sup>16</sup> The phrase is to be distinguished from the broader notion of *children in armed conflict*. Violations against children in armed conflict include killing or maiming of children, recruitment or use of children as soldiers, attacks against schools or hospitals, denial of humanitarian access for children, abduction of children, rape and other grave sexual abuse of children (United Nations Security Council Resolution 1612).

<sup>17</sup> A similar presumption of sexual incapacity was abolished in the United Kingdom by virtue of the *Sexual Offences Act 1993*.

age shall not be fixed at too low an age, and should be based on children's emotional, mental and intellectual maturity. However, the UN Committee has also been critical of the practice of the *doli incapax* principle (United Nations, 2007b).

The debate on raising the age of criminal responsibility in the United Kingdom following the enactment of *The Crime and Disorder Act 1998* and the abolition of the principle of *doli incapax* represents a microcosm of the broader global discussion on the issue. Thus, in the United Kingdom it has been argued that the politicization of juvenile crime and the failure to embrace the application of knowledge and evidence to raise the minimum age is argued to be the reasons for the 'adultifying of children aged 10 years' and this is then argued to be a 'mutation of justice' (Goldson, 2013:126). The *Age of Criminal Responsibility Bill 2017-2019*, sponsored by Lord Dholakia, which aims to raise the age of criminal responsibility in England and Wales to 12 years old reached its second reading as at September 2017 and represents the most recent attempt to raise the age of criminal responsibility.

Hence, there is a general move towards a higher age of criminal liability/responsibility, which is assessed, not purely from a legal perspective but even from a medico-legal perspective. Delmage for example argues for a 'rebuttable presumption for those above the specified age of criminal responsibility (whatever that might be), the presumption being that the individual lacks the competence/capacity/developmental maturity to commit an offence until proven otherwise' and that this 'development continuum' (2013:107) ought to be explored through the development of neuroscience. Criminal responsibility should not be determined by an arbitrary age.

The issue of the age of criminal responsibility cannot be determined by a singular test of capacity in which the child is assessed on his/her knowledge of the difference between right and wrong but should involve a variety of complex issues. These include cognizance of the child's stage of psychological development and his or her lived experience (Mc Diarmid, 2013). This matter will be considered in further detail in Chapter 3.



In Malaysia, the issue of the age of criminal responsibility is further muddled by the application of Islamic law. Malaysia's legal system facilitates the application of Islamic law or Syariah law and Article 3 of the *Federal Constitution* declares Islam as the religion of the Federation. As a Federation, Syariah laws are administered by the respective states of the Federation. Syariah courts have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in the Constitution in particular as indicated in Item 1, List II of the State List. Owing to the coexistence of the Civil Courts and the Syariah Courts within the legal system jurisdictional conflicts often arise and this can be evidenced as far as the interpretation of "child" is concerned.

For example, in the *Syariah Criminal Offences (Federal Territories) Act 1997*, liability for criminal acts is attributed to the act of a person who has attained *baligh* (having attained the age of puberty per Islamic law), and is of sound mind and of free will. A Muslim child is not held responsible for any criminal act (as determined by the Islamic Laws) until the child reaches the age of puberty. Thus, as far as a Muslim child is concerned, where there is criminal offence committed under Islamic law, the child's criminal liability is not determined by the minimum age requirement but is dependent on the attainment of his or her puberty. Puberty is determined by physical and sexual maturity.

Generally, under the Syariah law, the sign of puberty for a male is determined by the ejaculation of sperm and for a female by the first menses, she experiences. In the absence of these signs, puberty of a person will be determined according to his or her age. Muslim scholars however have different views in determining the appropriate age of puberty and evidence of how this is resolved is not well documented in Malaysia. These matters are considered in Chapter 3.

Malaysia submitted its first report to the Committee on the Rights of the Child in 2006 (United Nations, 2006) some nine years after the prescribed date for submission. In its concluding observations in response to Malaysia's first country report, the UN Committee on the Rights of the Child (United Nations, 2007a) noted with concern the low minimum age of criminal responsibility and recommended that Malaysia raise the

age to at least 12. It also recommended that Malaysia review its dual legal system (Civil and Syariah) as some domestic laws are obstacles to the realisation of the CRC in Malaysia. However, these recommendations have not yet crystallised into corresponding legislative amendments. The age of criminal responsibility remains at 10 and given Malaysia's socio-religious and political context, it appears that the duality of laws will remain.

### **6.3 Official statistics**

Malaysia has a current population of slightly more than 32.3 million (Department of Statistics, 2017). 29.4 per cent of the population (approximately 9.4 million) are children aged below 18 years of age (Department of Statistics, 2017). This is a significant proportion of the population and it is undeniable that issues affecting children in conflict with the law require attention.

However, despite the significant proportion of children in the population, obtaining credible published data on the rate of youth offending can be a challenge. In a recent report on the state of the Malaysian Juvenile Justice System, it was stated:

[A]ssessing patterns of offending is difficult due to gaps in data collection and inconsistencies in statistics collected by the different agencies. It is also difficult to measure the extent to which changes in child crime statistics reflect an actual change in rates of child offending, or merely changes in policing and data collection practices (UNICEF, 2013:16).

The lack of official statistical information is ameliorated to some extent by the national media although these are anecdotal statements that indicate to some extent the level of children in conflict with the law. For example, in June 2012 it was reported that there were 2,500 '*juvenile delinquents*' (emphasis added) serving time in Malaysian prisons, most them for minor offences (Chen, 2012). In 2014, it was reported that based on police statistics, juveniles involved in crime had more than doubled from 3,700 cases in 2012 to 7,816 cases in 2013. The year 2013 saw a 47% jump in nationwide violent crime among minors, aged between 12 and 17, with some even involved in murder and rape.

Cases of violent crime went up from 368 in 2012 to 542 in 2013 among schoolchildren, while cases involving non-school going children saw a 137% jump with 2,011 cases reported in 2013 as compared to 849 cases in 2012 (Lee, 2014). The number of 'juvenile offenders' in 2015 was at 4,569 cases. It was also reported that of these, 36% were property-related crimes with 29.7% involving drug related offences and crimes against persons at 13.4% (Department of Statistics, Malaysia, 2016).

These statistics are not generally available to the public but are made public through media reporting of police statements as illustrated by the reports indicated above or made public through legislative scrutiny of the executive in Parliament. Owing to the restricted access to these data, there is great difficulty in ascertaining whether there are differences in methodological or sampling approaches and correspondingly there is difficulty in assessing the impact of such differences in the statistical data represented. In most instances, a final figure is revealed but the precise research design and methodological approaches adopted remain hidden from scrutiny. This then leads to the uncertainty as to the veracity and reliability of such data.

This is particularly the case with police recorded crime statistics. Police recorded crime statistics represent a measure of the amount of crime that is reported to and recorded by the police in the approximately 837 police stations across Malaysia. The recorded crime statistics do not include crimes that have not been reported to the police or that the police decide not to record. These recorded crime statistics are then quantified *via* index crime reports, which are statistics that are considered representative of the most serious crimes or those that are reported with sufficient regularity and with sufficient significance to be meaningful as an index to the crime situation (Singh, 2005). Such an approach is neither unique nor peculiar to Malaysia and is the approach adopted by many countries. For example, in the United States, The Federal Bureau of Investigation collates and collects crime statistics through its Uniform Crime Reporting Program.

As with the experience in other jurisdictions, police data is subject to a number of limitations. Firstly, police data only provides information on those criminal offences that have come to the attention of police. Not all crimes committed are detected by the

police (or, necessarily, the victims). Secondly, and perhaps more importantly, not all crimes committed are reported to the police. For example, (Sims and Myhill, 2001) report that only 39% of all crime incidents in the 2000 British Crime Survey were reported. This represents the ‘dark figure’ of crime and as in other jurisdictions across the globe is a matter of concern in Malaysia (Singh, 2005).

Thirdly, not all crimes reported to police are *recorded* by police. Police discretion determines whether a crime is considered to have been committed or whether the matter is best left with a civil insurance claim and thus whether it merits recording. Thus, as suggested by Patrick (2011) police-recorded crime data can still be influenced by the police.

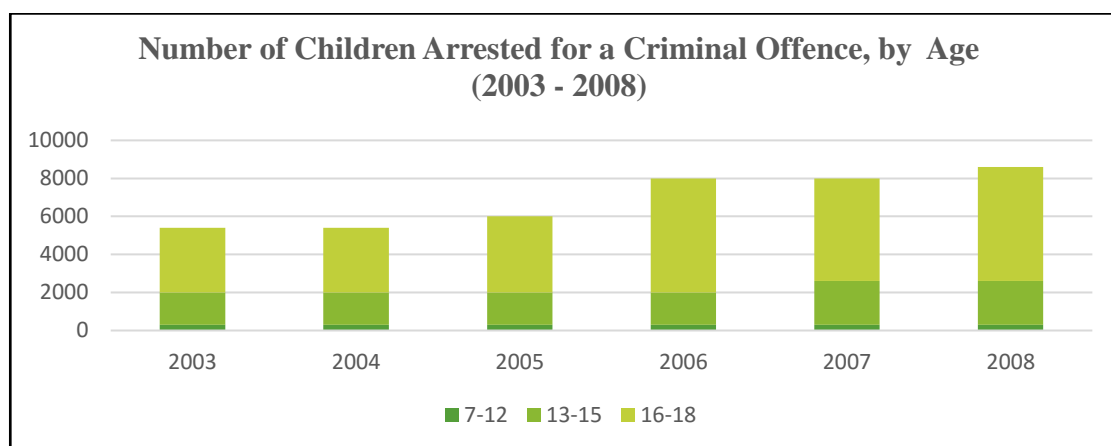
Malaysia does not conduct a nationally representative, household victimisation survey equivalent to the Crime Survey for England and Wales (formerly the British Crime Survey). However, the Malaysian government through its Government Transformation Programme has instituted a ‘Fear of Crime Survey’, an independent survey commissioned twice a year to measure the fear of crime across Malaysia. In 2011, it was reported that Malaysians’ fear of crime index improved from 52% (for the period November 2010 to January 2011) to 48.9% (for the period March to May, 2011) (PEMANDU, 2011b). In 2016, the Index Crime rate fell by 2.8% and the Perception of Crime Indicator (PCI) for the capital city of Kuala Lumpur registered a decline from 80% to 61% (PEMANDU, 2016:47).

As with the experience in other jurisdictions there is a certain amount of mistrust in police recorded crime statistics or those revealed by the Ministry responsible. The experience in the United Kingdom suggests that such mistrust stems from ‘perceived potential for police or ministerial interference in the production and presentation of the statistics’ (Home Department, 2006: iii). That view has also been expressed in Malaysia with critics of the government claiming an obfuscation of crime statistics (Fuller, 2013).

Criminologists argue that official crime statistics are socially constructed and are frequently ‘tinkered with’ to suit policy expediency (Maguire, 2012: 239). Thus, crime is impossible to measure as a notion of truthfulness. Crime statistics are argued to be

an ‘amalgam of what parliament dictates and how the public responds’ (Jenkins, 2013). The complexities and weaknesses in measuring the overall crime statistics in Malaysia are therefore also prevalent in those statistics that deal with children in conflict with the law. Government rhetoric and political machinations can and does influence the representation of crime among children and this is a tendency in almost all jurisdictions. This is then further complicated by the failure to create an overarching policy on juvenile justice among the various agencies and Ministries involved.

The lack of consistency in data collected by the various Ministries and the difficulty in getting the requisite permission to conduct independent data collection presents challenges in developing a true understanding of the complexity of issues that surround children in conflict with the law. The lack of data ‘impacts on the effectiveness of government policy making and reflects a poor recognition of the need for the on-going review of the delivery of equitable justice system services’ (Coverdale, 2010:72). But if the figures above and those reported below in Figure 2, are representative of the general state of the system presently in place, then there is a concern as to whether the existing policies, laws and procedures are best suited to meet the issue of children in conflict with the law.



**Figure 2:** Number of Children arrested for a criminal offence by age (2003-2008). Source: The Malaysian Juvenile Justice System: A Study of Mechanisms for Handling Children in Conflict with the Law’ (UNICEF Malaysia, 2013:6).

## 6.4 Sentencing policies

This concern is further expressed in the sentencing policies that impinge upon the child in conflict with the law. Malaysia entered a reservation to Article 37 of the CRC primarily owing to her existing approaches in dealing with children in conflict with the law. This is particularly the case in certain criminal offences. Thus, notwithstanding the principles of *doli incapax*, children above 12 years of age are treated as adults for the purposes of criminal liability, regardless of the nature of the crime. This presents problems for example, when the crime concerned is an offence that mandates the death sentence.

A stark representation of the problems in the application of the law can be seen in (*Lim Hang Seoh v PP [1977] 1 MLJ 68*), a case decided before the enactment of the *Child Act 2001*. A 14-year-old was tried for the possession of firearms, an offence under section 57 of the *Internal Security Act 1960* which is also a security offence by Regulation 2, *Essential (Security Cases) Regulations 1975 (ESCAR)*. The offence carries the mandatory death sentence.

Regulation 3(3) of ESCAR expressly excludes the application of the then *Juvenile Courts Act 1947* in instances where juveniles are charged with security offences. Consequently, the court, left with no other alternative, sentenced the boy to death and the Federal Court subsequently affirmed that decision. However, a final appeal to the Ruler<sup>18</sup> was lodged and his death sentence was commuted to detention at a secure school until he was to be 21.

A child can be detained at the pleasure of the Ruler as seen in *Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1*.<sup>19</sup> As discussed above, the respondent who was 12

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<sup>18</sup> Malaysia is a constitutional monarchy. Hence, the Ruler (or in the Malay language *Yang Di-Pertuan Agong*) is the Head of State of the Federation but is subject to Westminster-style conventions. The Ruler has constitutional powers of pardon as stated in Article 42 of the constitution as well as a prerogative power of mercy and clemency.

<sup>19</sup> For examples of similar instances of an indeterminate sentence see *Duruvendran a/l Sakajaven v Public Prosecutor [2016] 5 MLJ 281*, *Public Prosecutor v Ramayah a/l Ramalu and another appeal [2016] 5 MLJ 355*, *Public Prosecutor v Maznah bt Abdussomad & Anor [2015] 7 MLJ 518*, *Asri bin Beddu v Public Prosecutor [2013] 3 MLJ 893*, *Public Prosecutor v Low Kian Boon & Anor [2011] 5 MLJ 595*, *Public Prosecutor v Khairul Al Sidek bin Lurin & Anor [2010] 8 MLJ 1*, *Mohd Haikal bin Mohd Khatib Saddaly & Ors v Public Prosecutor [2009] 4 MLJ 305*.

years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under section 302 of the *Penal Code*. He was convicted and ordered to be detained at the pleasure of the Ruler pursuant to section 97(2) of the *Child Act 2001*. On appeal, the Court of Appeal upheld the conviction but set aside the sentence imposed on him. The Court released him from custody on the sole ground that section 97(2) of the *Child Act* was unconstitutional as it infringed the principles of separation of powers by consigning to the Executive (in this case the Ruler) the judicial power to determine the measure of the sentence to be served by the appellant.

On appeal to the Federal Court, the child, was ordered to be detained in prison *albeit* isolated from adult inmates thereby setting aside the order of the Court of Appeal, reaffirming the High Court's decision, and ultimately concluding that the concept of separation of powers was not an integral part of the Malaysian constitution. The court arrived at this decision by applying the law in a narrow and literal approach and curiously, while reference was made at the Federal Court to the provisions of the CRC it was more to highlight failings in the *Child Act* particularly in making clear the ambit of sentencing in the law.

The Malaysian government does not publish statistics on death sentences or executions and while there are media reported statistics on death row inmates, there is no available data on how many children have been sentenced to death and have had their sentences commuted other than those mentioned in law reports or media reporting of such instances. For example, as at February 2017, media reports suggest that more than 1,100 people have been convicted and sentenced to death by the courts (Rahim, 2017).

The *Child Act 2001*, pursuant to section 91, provides that the Court for Children shall have power to *inter alia*:

- admonish and discharge the child;
- discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;

- make a probation order under section 98; order the child to be sent to an approved school or a Henry Gurney School;
- order the child, if a male, to be whipped with not more than ten strokes of a light cane;
- impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court.

It is to be noted that the section makes a clear distinction that only male children are subject to whipping. Whipping and its socio-cultural implications and the changes introduced in legislative amendments introduced in 2016, will be considered in Chapter 3.

Section 90(12) and (13) makes it mandatory for the Court for Children to consider a probation report before making an order against the child and to consider the opinion of the Court Advisers. The Act states that probation reports must be prepared by a probation officer and must contain information with respect to the child's general conduct, home surroundings, school record, and medical history. The Court may also request a report from a social welfare officer, registered medical practitioner, or any other person whom the Court for Children thinks fit.

It is important to note that the Act does not make any reference to general principles or criteria for making decisions about sentencing and neither does it include an explicit statement that deprivation of liberty be used only as a measure of last resort. Further, there are no clear limitations on the types of offences for which a custodial order may be used. Thus, for example, there is no direct exclusion of the provisions of *Regulation 3 ESCAR 1957* which could mean that the complications of the decisions of *Lim Hang Seoh v PP [1978] 1 MLJ 68* or that of *Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1* may well be repeated. This is as section 11(5) of the Act states that the Court for Children does not have jurisdiction over children charged with an offence punishable with death.

It has been argued that in cases involving children, the tendency is to be more punitive rather than reformatory. While there is some evidence of the best interest of



the child being acknowledged, the primacy remains on the perceived need to protect the public with tougher sentences (UNICEF, 2013). Unlike the experience of other jurisdictions, particularly in Western Europe and the United States, in which there were perceivable ‘punitive turns’ in youth justice systems (Muncie, 2008:108) in Malaysia, the focus has always been on punishment and control rather than placing the rights of the child in conflict with law on a higher level of importance. As suggested by Gray, ‘the over-riding theme of serving the ‘best interests of the child’ can be used to cloak intensifying control over young people’s behaviour’ (Gray, 1996:301-302). Some of these broader aspects of control are also seen in the manner on which children in conflict with the law are treated in Malaysia.

Thus, Malaysia’s treatment of young offenders does not fall within the acceptable international standards and as such ‘punitive values associated with retribution, incapacitation, individual responsibility, and offender accountability have achieved a political legitimacy to the detriment of traditional principles of juvenile protection and support’ (Muncie, 2008:110).

Arguably, the Malaysian context in which youth justice functions is a reflection of its socio-political background. Malaysia has only had a single political party in power since its independence in 1957<sup>20</sup> and until very recently the Executive had always enjoyed complete dominance of Parliament. Executive dominance over the legislature also meant that there was for many years a singular political view on youth justice. A strong paternalistic government also meant that the role of civil society engagement in matters pertaining to children in conflict with the law has been weak for the greater part of the political development in the country.

While the discourse on youth justice and the corresponding arguments on rights have begun evolving, much of the state of the youth justice system remained dominated by a singular political view. Civil society is only just beginning to find a voice in this space. Much of this evolution is attributable to the influence of international agencies like the United Nations and the expectations expressed through

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<sup>20</sup> The recent elections in May 2018 saw for the first time, an ouster of this political party in favour of a new coalition. This will be considered in Chapter 6.

the CRC that mandate a greater engagement with civil society and to engender child participation in that process.

Mustaffa (2006) argues that there appears to be a lack of alternate sentencing policies including for example the basic application of community work.<sup>21</sup> The sentencing policy in Malaysia is rather narrow and traditional in its approach. In most cases, the approach is towards institutionalized rehabilitation, which often do not adequately respond to the age of the child concerned (UNAFEI: 2000).

The Malaysian Human Rights Commission suggests that, ‘the Government must institute alternatives to punishment for juvenile offenders, especially for petty crimes.’<sup>22</sup> Imprisonment for petty crimes should no longer be acceptable. Instead a rehabilitative or restorative system, such as a community service and restitution, must be introduced’ (SUHAKAM, 2009:12).

Similarly, the United Nations, in its Human Rights Council Working Group on the Universal Periodic Review report noted that ‘there was no specialized response to children in conflict with the law’ and that ‘principles of proportionality and detention as a last resort were not always followed’ (United Nations, 2013:7).

Unsurprisingly a rather critical view of the issue was reported by a coalition of non-governmental groups working to respect and uphold the rights of children in Malaysia. In its Status Report on Children’s Rights in Malaysia, it noted with concern that, ‘Malaysia currently does not have any legislative or policy directive to encourage restorative justice programs, including diversion, for children’ and that sentences of detention are the commonly given as opposed to being the last resort (Child Rights Coalition Malaysia, 2013:28).

In recent years, critical discourse from the various human rights agencies and non-governmental organisations in Malaysia indicate that there is a need to be sensitive to the needs of the child and to review approaches taken in relation to children in

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<sup>21</sup> Community service orders were introduced in 2016 through the *Child (Amendment) Act*.

<sup>22</sup> The Commission did not venture to identify what constitutes ‘petty crimes’.

conflict. For example, in relation to the detention orders that permit a child to be detained without trial under statutory provisions.

So as suggested by Dusuki (2006), the rights of a child in conflict with the law must be fully respected in accordance with international norms, particularly internationally recognized practices such as restorative justice and diversions.

The Ministry of Women, Family and Community Development have acknowledged the lack of holistic approaches in dealing with children in conflict with the law. At the Beijing High Level Meeting in 2010, Malaysia acknowledged that its legal and policy framework needed strengthening. This would include exploring the introduction of new global strategies, such as diversion and other community-based responses (UNICEF, 2010).

## **7. The move towards reform**

Subsequently, the government embarked on an assessment of the juvenile justice system in Malaysia commissioned through a joint collaboration between the Ministry of Women, Family and Community Development and UNICEF, Malaysia. A comprehensive report entitled *The Malaysian Juvenile Justice System: A Study of Mechanisms for Handling Children in Conflict with the Law* was published in November 2013.

The project represented a unique inter-agency partnership between the Government and UNICEF within the broader policy transfer agenda. It represented a fulfilment of assurances made in Beijing through the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985* for the setting up of a high-level, inter-agency Child Justice Working Group that will develop an integrated national juvenile justice reform strategy and plan of action.

The forward suggests that key findings and recommendations from the report will enable the Ministry of Women, Family and Community Development to develop a more holistic solution in addressing matters relating to children in conflict with the law including among others the issue of diversion, restorative justice, and alternatives

to custodial sentencing. An examination of the recommendations pertaining to diversion will be considered in a separate section.

Given the move towards reform, amendments to the *Child Act* were scheduled to be tabled before Parliament in June 2014 but the proposed amendments were not made public. A closed briefing session was held in March 2014 with representatives from the opposition political parties as well as selected NGOs in attendance. The obvious concern here is that there is a perceived move away from civil society engagement in the process of legislative amendments. The proposed amendments were finally introduced late in 2016.

Clearly, what is needed is more than merely piecemeal reforms, but rather a fundamental shift in the conceptual approach to children in conflict with the law. Primarily that conceptual approach involves the need to separate the concept of children in conflict with the law and children in need of protection in order to avoid the obfuscation of the rights of the child. Evidence of this paradox is seen in the provisions of the existing *Child Act 2001*.

The preamble provides that every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any status. It has extensive provisions dealing with a child in need of protection but at the same time also describes in section 92 the manner in which whipping of a child is to be carried out. The application of the death penalty in relation to certain offences once again illustrates the paradoxical position of child rights in Malaysia. These issues represent the reasons (among others) for Malaysia's reservation to Article 37 of the CRC.

It is also to be noted that child participation in this process is extremely weak and as argued by (Dusuki, 2006) there is a marked absence of express statutory provisions mandating for such participation in all aspects generally and particularly, within their involvement in juvenile justice system. This as Scraton (2008) argues, reflects the position that children in conflict with the law are excluded from processes of consultation and decision making that determines their destinies.

Thus, although Malaysia has introduced the National Plan of Action for Child Protection 2009, which contains provisions for the increased participation of children, little has been done formally to encourage child participation particularly in matters of juvenile justice. Much of the elements of child participation are essentially limited to participating in the various workshops creating awareness of the CRC. It has been suggested that this position stems from the perception of children not as individual rights-bearers, but as ‘objects of concern’ and this is directly a consequential result from ‘unresolved conflicts of a philosophical nature’ that impinge on the concept of the rights of the child in Malaysia (Child Rights Coalition Malaysia 2013:10). Given these criticisms, recent amendments to the Act sought to remedy some of these concerns.

## **8. The current legislative regime**

After much delay and uncertainty, the *Child (Amendment) Act 2016* was passed, introducing new provisions that sought to address several observations and recommendations made by the UN Committee on the Rights of the Child after Malaysia’s first report<sup>23</sup> to the Committee in 2007. The approach taken was not to enact a new Act but to make substantial amendments to the existing principal Act, the *Child Act 2001*. Thus, the opportunity to revisit the purpose and philosophy of the Act was missed. The original Preamble as enacted in 2001 remains, with no *direct* (emphasis added) reference to the issue of child rights.

This matter notwithstanding, in relation to children in conflict with the law, the following principal amendments have been introduced:

- a. That a child who is arrested will not be handcuffed save in exceptional circumstances. The child shall also have the right to be informed of the grounds for arrest as well as the right to be provided by counsel and to have family members be informed (section 62 of the *Child (Amendment) Act 2016*, which inserts a new section 83A in the principal Act).

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<sup>23</sup> As at 2018, the second report is now, well past due.

- b. The abolishment of whipping as a form of punishment for children found guilty of criminal offences (Section 67 of the *Child (Amendment) Act 2016* abolishes section 92 of the *Child Act 2001*). Caning in schools however, was not abolished and the provision has no application as far as offences committed in breach of Islamic law. This will be considered in the subsequent Chapter.
- c. The introduction of community service (By virtue of an amendment to section 33 through section 331 of the amending Act 2016).
- d. The creation of a “National Council for Children” with overarching duties and responsibilities on all matters including among others to ‘develop programmes and strategies’ educating society of the ‘rights and dignity of a child’ (Section 3 of the *Child (Amendment) Act 2016*). The Council aims to have two children appointed although how this is to be done is not prescribed.
- e. The creation of “Child Welfare Teams” to coordinate locally based services if among others, a child is found guilty of any offence (Section 7A).

However, there are several areas that remain unresolved and there is a need to consider what further aspects require attention (UNICEF, 2015a). Thus, at the time of writing, the reservations to the CRC remain, the duality of laws in relation to Syariah law remain, the minimum age of criminal responsibility remains and the overarching norms that determine ‘culture, ideology and discourse’ (Muncie 2001:33) in relation to children in conflict with the law, appear to be in the main, undisturbed and disconnected from these amendments. The newly minted *Child (Amendment) Act 2016*, although introducing the concept of community service, is disconcertingly silent on the issue of diversion.<sup>24</sup> Some of these matters will be considered in Chapters 5 and 6.

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<sup>24</sup> While the Act did not include Diversion, UNICEF supported the mission of two representatives from the England and Wales Youth Justice Board to share experiences with relevant stakeholders and provided technical advice in relation to the drafting of an enabling provision on diversion for the Child Bill (UNICEF, 2015b). These provisions did not materialise in the *Child (Amendment) Act 2016*.

## 9. Reflections

The discussion above encapsulates the historical context of the Malaysian juvenile justice system. Her colonial past has had a strong influence on the development of laws and systems that impact on a child in conflict with the law. The deeper philosophical abstractions that were part of the early evolution of the juvenile justice system have become seamlessly embedded in the post-colonial Malaysian system.

The Malaysian juvenile justice system, has, mirrored the evolution of international perspectives on child rights. In the era where children held no fundamental rights under the law, the Malaysian justice system did not have a separate system of justice for juveniles. At the time when children were considered a separate and special class of immature persons in need of State protection, these welfare principles were echoed in the *Children Enactment 1922* and the subsequently enacted *Juveniles Court Act of 1947*. However, subsequent global developments in child rights did not find its way into Malaysia. From a philosophical perspective, the Malaysian juvenile justice system placed less emphasis on children's rights, and instead focused on accountability and principles of punishment.

The CRC has become a constituent part of the juvenile justice system following Malaysia's ratification in 1989 and the passing of the *Child Act 2001*. However, as considered above, the text and subtext of how child rights are manifest, reflect the varied contradictions in espousing universal rights in a culturally diverse world. Thus, while recent changes were introduced through the *Child (Amendment) Act 2016*, a number of inconsistencies remain, particularly where a child is in conflict with the law. As noted above, diversion was not introduced in the amended Act and this is considered in Chapter 5 and 6. The challenge in advocating the broader philosophical aspirations of the treaty are best understood by considering the impact that the underlying norms have on the overall juvenile justice system. This is considered in Chapter 3.

### **Chapter 3**

#### **The underlying norms in Malaysia**

*'See if you can take [the handkerchief] out, without my feeling it: as you saw them do, when we were at play this morning.... You're a clever boy, my dear.... I never saw a sharper lad. Here's a shilling for you. If you go on, in this way, you'll be the greatest man of the time.'*

(Dickens & Tillotson, 1982:58)



## 1. Introduction

Following the Federal Court's verdict of guilt, WK, the young boy charged with murder described in previous Chapters, was incarcerated for an indeterminate period, harbouring aspirations of reading law while in custody (Habibu, 2010) still handcuffed to the crime as he was at his very first appearance in court many years ago. He was finally released in 2016 after spending most of his formative years incarcerated. The preamble to the *Child Act 2001* acknowledges that 'a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance' and that 'every child is entitled to protection and assistance in all circumstances.'<sup>25</sup> The paradox is that while a child is deemed lacking in his or her physical, mental and emotional immaturity, that very child is most vulnerable when he or she is in the criminal justice system apparently designed to protect him or her.

In this case, the crime was a violent one with the Court of Appeal, per Gopal Sri Ram declaring that 'this was a gruesome murder' (*Koh Wah Koon v PP [2004] 5 MLJ 174 at p183*) and clearly the loss to Mei Fong's family was immense and irreplaceable.<sup>26</sup> A child has killed another child in a violent manner and there are difficult choices to be made, a balancing of conflicting views and emotions and values. In the words of Hoffman LJ citing Isaiah Berlin, 'the world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate and claims equally absolute. The realisation of some of which must inevitably involve the sacrifice of others' (*Airedale NHS Trust v Bland [1993] WLR 316 at 355C-D*). The debate is a well-argued one, with notions of retribution for a horrific crime competing with the need to recognise that the offender was a child at the time of the offence.

Malaysia did not experience the similar well-documented media frenzy associated with the Bulger case (Muncie, 2008) and neither was there the same intensity in

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<sup>25</sup> The genesis for this is in the preamble to the *UN Declaration of the Rights of the Child 1959*, which is replicated in the preamble to the *Child Act 2001*.

<sup>26</sup> The mother of the victim is reported as stating, "Whatever I feel is meaningless now because it cannot bring my daughter back. Let the court do its work. Let the system take its course. I feel sorry for him. That's all I can say" (Ng, 2003).

seeking tougher laws for children as that experienced in the United Kingdom (Munice, 2009a). While there were calls to tighten the law or to have better provisions or introduce clarity in the law (Hah, 2007), these views arose primarily from the decision of the Court of Appeal setting aside the sentence. This was based on the view that a sentencing function (essentially a judicial function) administered by the Yang di-Pertuan Agong (the Ruler, who is a member of the Executive) is incongruent with the tenets of the doctrine of separation of powers and hence the provision; section 97(2) was deemed unconstitutional.

Public opinion on the matter was muted with a balanced view between the decision to seek retribution or to find a better solution. The level of ‘moral panic’ (Cohen, 1973:9) that followed was mild in comparison to that associated with the Bulger case. A plausible explanation for this is the variance in media reporting cultures between both jurisdictions.

The Court of Appeal however was clear in its views that, while the sentencing of the child was a problem, the conviction was safe and the presiding judge is reported to have said that he ‘wants to keep the boy away from society as long as possible’ (Mageswari, 2007). Paradoxically while the Preston Crown Court expressed similar thoughts in the Bulger case, the sentence imposed on Venables and Thompson had a tariff.<sup>27</sup> However, in the Malaysian case, there are no direct equivalent provisions for such a tariff. Further, in the Malaysian context, such a function was accepted through the decision of the Federal Court, as within a wider interpretation of the separation of powers.

Malaysia has recently introduced changes to its *Child Act 2001* by virtue of the *Child (Amendment) Act 2016* and there are plans to reform and modernise its juvenile justice system. However, in that discourse, the limitation is that Malaysia would ‘ensure the rights of the child under the Articles 2, 7, 14, 28(1) (a) and 37 of the CRC

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<sup>27</sup> Although the manner in which this was administered proved to be a point of dispute, with equivalent challenges on the executive performing judicial functions see *Secretary of State for the Home Department ex parte Venables and Thompson, R v. Secretary of State for the Home Department, Ex Parte Thompson* [1997] UKHL 25; *V v United Kingdom Application no. 24888/94* and *T v United Kingdom Application 24724/94*.

are preserved *as long as they are not against the provisions of the Federal Constitution, laws and national policies*' (emphasis added) (ASEAN Inter-Parliamentary Assembly, 2011). The *Tokyo Rules 1990* appear to accept this, allowing member States to take into account 'the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.'

The use of the caveat is not very comforting. It makes the declaration to ensure that the rights of the child are preserved, as merely illusory. It also suggests that national laws will trump the rights of the child in conflict with the law. It has been suggested that the Malaysian position of considering the amendments to domestic laws as a condition precedent before a withdrawal of any reservation was 'putting the cart before the horse.' The better approach is to withdraw these reservations first to serve as a catalyst for ensuring immediate changes to the laws (SUHAKAM, 2008). Thus far, this approach has not been considered and as such, the reservations remain. Perhaps the plausible argument for the perceived 'dragging of feet' is that there are greater complexities involved that are drawn from the underlying philosophical approaches that have been subsumed in the criminal justice system.

These norms in the political culture and penal policies then impinge on issues of a rights-based argument for diversionary approaches of a child in conflict with the law. These approaches have themselves become the voice of the "tough on crime" rhetoric of political elites, which in turn create in the minds of the public, concern about crime (Beckett, 2000). This cycle of reinforced views creates the context in which the Malaysian juvenile justice system operates.

## **2. The context of culture**

As suggested in the preceding chapter, Malaysia's juvenile justice system has not experienced the varied theoretical assumptions that have formed the basis for corresponding changes in penal policies affecting children as other jurisdictions have. In fact, the overall penal policy is one that is highly punitive in nature particularly where, for example, sentences of whipping or death by hanging are available for

certain offences.<sup>28</sup> From the discussion above it is also possible for sentences of an indeterminate detention period. It is also possible for an individual to be detained without trial for up to two years, which was introduced through the *Prevention of Crime (Amendment) Act 2017*. The Act does not apply directly to children, but if a child (from the age of 17 onwards) has been convicted on at least three occasions of offences involving dishonesty or violence, these convictions may form the basis to order detention without trial once the child attains the age of 21. The amendments empower a five-person government-appointed panel to impose up to two years' preventive detention on certain criminal suspects. These decisions are not subject to judicial review except on procedural grounds i.e. challenges based on remedies available under administrative law.

The historical evolution of Malaysia's penal policies, rooted in the British penal policies of early 19<sup>th</sup> and 20<sup>th</sup> century, has led to an embedded philosophical approach underlying its penal policy. These matters were considered in Chapter 2. As the country gained independence and evolved over the period of 61 years, that philosophical approach took on a defined pattern and with a predominantly state controlled media, a dominant one-party political system and a strong central government, Malaysia's penal policy has been defined by assumptions fixed in that mould. Thus, the attitudes, beliefs, and sentiments that form the collective history of the Malaysian political system and the life histories of the individual actors of the system, set the foundation for the 'political culture' underlying its existing political system, which in turn, it is argued, influences the juvenile justice system.

The term 'political culture' is primarily associated with the work of the American political scientist Gabriel Almond. Almond defined political culture as 'the specifically political orientations – attitudes toward the political system and its various parts, and attitudes toward the role of the self in the system' (Almond and Verba, 1963: 12). Thus, the political culture of a nation is 'the particular distribution of

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<sup>28</sup> These are found in the Malaysian *Penal Code (Act 574)* which owes its genesis to the *Indian Penal Code 1836*. The *Indian Penal Code* is 'the longest serving criminal code in the common law world' (Chan, Wright and Yeo, 2011).

patterns of orientation toward political objects among the members of the nation' (1963:13).

Almond and Verba refer to the three major kinds of beliefs that influence the character and policy outcomes of political systems namely 'the cognitive, the affective, and the evaluational' approaches. These belief structures provide the context of coherency in which the political system and its actors function. Thus, those that advocate notions of political culture argue for the meaningful understanding of what motivates the thoughts of the political actors as opposed to merely studying the social class or occupation or other institutional structures that surround the individual (1963:14).

Almond and Verba's *Civic Culture*, used public opinion surveys in five countries to identify a cluster of attitudes that the authors believed to be most advantageous for a stable democracy. Methodological deficiencies set the grounds for strong criticisms much of which appear to be justified (Verba, 1980) but the work set the pace for further insights and approaches in this area.

An alternative approach in developing an understanding of political cultures is the anthropological view. Clifford Geertz (1973), for example argues that culture is a property of a whole society, or subgroups within society, but in any case, not of individuals (Elkins and Simeon, 1979). The vast range of theoretical views that have developed in the study of culture have interspersed a wide range of disciplines. While there are those who argue that 'political culture remains a suggestive rather than a scientific concept' (Chilton, 1988:420) the application of cultural studies engendered 'cultural criminology' studies that sought to 'integrate the fields of criminology and cultural studies or, put differently, to import the insights of cultural studies into contemporary criminology' (Ferrell, 1999:396).

The foundations for the study of culture in the United Kingdom emerged from what has been described as 'the Birmingham version of British Cultural Studies' (Agger, 2014:75). Owing to its attribute as being interdisciplinary its approach, the application of cultural studies has been applied in those intervening years, in the study of deviant and criminal subcultures, to the importance of symbolism and style in shaping

subcultural meaning and identity or in establishing a feminist critique of sub cultures, or in facilitating our understanding of the role of mass media in shaping criminal behaviour and deviance (Hebdige 1979, 1988, Hall & Jefferson 1976, Clarke 1976, McRobbie 1990, Cohen 1973, Cohen & Young 1973).

The emphasis is on understanding social action in terms of the deep reading of culture or cultures in which the social action is viewed. In interpreting this role, Geertz considers that ‘man is an animal suspended in webs of significance he himself has spun, I take culture to be these webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning’ (Geertz, 1973:5). The basis for this is to challenge the conventional quantitative research ‘which wantonly imposes survey category and Lickert Scale upon its subjects’ (Hayward and Young, 2004:268). Hayward and Young further suggest that the rational choice theory and positivistic approaches to crime that dominate contemporary sociological theory ‘have very simple rational/instrumental narratives’ (Hayward and Young, 2004:263).

That cultural criminology sets out as an emerging orientation has been challenged with O’Brien for example arguing that there is a ‘fundamental confusion about what culture represents in relation to different levels of analysis’ (2005:600). At another level, cultural criminologists are accused of ‘theoretical gerrymandering’ and failing ‘to adequately adhere to the theoretical perspectives they rely on’ (Spencer, 2011:209-210). However, as suggested by Bevier, ‘cultural criminology brings together disciplinary distinct but logically related research principles and practices to form a cultural methodology suited for the late modern world’ (2015:44).

In the context of this study, an analysis of the philosophical underpinnings of the child in conflict with the law in this context will attempt to ‘bridge the gap between researcher and researched subject and capture the lived experiences and realities’ of the Malaysian context of youth justice. This is drawn from Weber’s *verstehen* embodied in many aspects of qualitative research, for example by Ferrell’s (1998) ‘Criminological Verstehen’ although for present purposes it is not in the commonly associated model of the researcher being absorbed in the criminal activity that is

subject to scrutiny. Coupling this with the anthropological thick description approach will facilitate a deep and rich account of the issue of the rights of the child in conflict with the law. The theoretical framework for this argument is explored in Chapter 4.

### **3. Penal policies and the culture of politics**

Post-colonial Malaysia's, penal policy evolved much in the same direction as its neighbour Singapore. Until its independence in 1965, Singapore was part of Malaysia and shared a considerable common political and cultural history. In a comprehensive study of Singapore's penal history, Pieris suggests that Singapore has often been represented as a 'punitive city' owing to its 'pervasive apparatus of surveillance, the policing of political opposition and continued use of corporal punishment and the death penalty' (2009:217).

These descriptors arguably are equally applicable to the political culture in Malaysia. Post-colonial Malaysia maintained laws introduced by the British that were designed to subvert political dissent against the colonial power and the threat of the spread of communism. Both Malaysia and Singapore have a shared historical evolution as far as British intervention was concerned. Thus, Malaysia, like Singapore had preventative detention laws and various measures introduced that were incongruous with many human rights principles. Penal policies of the 19<sup>th</sup> century, reliant on the penal philosophies of the time, were soon embedded in the system.

These draconian security laws, such as the now repealed, *Internal Security Act (ISA)*, were sometimes used to jail government critics or muzzle political dissent. The state of the political culture has been defined by the development of a strong central government acting in a paternalistic manner. The discourse established was one that convinced the citizens that punitive laws were necessary to maintain peace and harmony among the various ethnic groups in Malaysia and that chaos would ensue if not for the rigour of the law. For many years, this discourse and the rhetoric that followed were accepted but owing to a greater awareness of civil rights, that view began to change over the last decade.

In the 2013 Malaysian general elections, the ruling political party won 60% of the 222 parliamentary seats although only securing 47.38% of the popular vote (Hing and

Pong, 2014). Following what was perceived as a less-than-successful performance, the government pushed a moderate agenda to appease growing disenchantment with the application of harsh laws by repealing some of these laws. However, within a short time, there was a reversal of direction with plans to toughen a range of other laws. Amendments to the *Prevention of Crime Act 1959* (in 2014 and 2017) justified as necessary to battle a rise in violent crime reflect this about turn and similar views were raised to argue for the reinstatement of the earlier-abolished *Emergency Ordinance* which allows for detention without trial. Perhaps it was more about the dominant political party in the ruling coalition seeking to appease party expectations, fretting over perceived growing opposition to the government.

Garland's (2001) description of the culture of crime control has elicited much debate as to the fundamental factors that determine penal policy in the realm of criminology. Garland himself describes these criticisms and debates as 'part of a collective project that has been rapidly unfolding in the sociology of punishment over the past several years' (Garland, 2001:160).

From a Malaysian perspective, the ruling party's playing to the gallery does have a resonance with Bottoms' (1995:40) descriptive of 'populist punitiveness' or Pratt's 'penal populism' (2007). However, perhaps the reality is the view suggested by Tonry that, '[i]n countries in which most or some penal policies have become more severe, the reasons are not rising crime rates, increased awareness of risk, globalization, or the conditions of late modernity, but rather distinctive cultural, historical, constitutional, and political conditions' (2007:1).

Perhaps the only distinction from a Malaysian perspective is that Malaysia did not move from a less severe penal policy to that of one that is more severe. If anything, it has always been punitive and while there was a momentary move towards moderation leading up to the 2013 election, order was quickly restored and it remains thus. Further, there is very little evidence to suggest that such 'populist punitiveness' in Malaysia can be empirically proven.

Applying Lijphart's descript (1999: 301), Malaysia appears to be in the tradition of a 'majoritarian' or 'conflict' democracy where, as suggested by Lappi-Seppälä (2008),



there is a jostling between competing political parties, an environment antithesis to that of consensus-style democracies. The distinction from a Malaysian perspective is that it has always had one political party in power since its independence in 1957 with opposition parties fulfilling the role of merely providing opposition. It is only until very recently has there been some measure of a collective opposition in the form of a coalition that is attempting to provide an alternative political entity with a view to create a two-party environment.

In his comparative analysis of children who kill children, Green (2008) establishes the premise that political culture forms a significant part of the explanation for the very different reactions to the killing of young children by other children in Norway and England. Hamilton (2013) however, is of the view that Green's analysis with Lijphart's demarcation as the base, affords a definition of political culture that 'appears thin and unduly narrow, without reference to underlying cultural values' (1999:157). From a Malaysian perspective, culture and politics are an interwoven experience.

Malaysia's structure of politics has been divided according to racial and ethnic patterns and this has engendered a lack of class-consciousness with Judith Nagata suggesting that 'Malaysians show little awareness in class distinctions in the western sense of the term' (1975:117). Thus, the Malaysian penal policy has been shaped by historical events, culture and religion and its institutional structures and the narrow approach of demarcation alluded to by Green's analysis perhaps does not adequately capture the broader and deeper aspects that are peculiar to it. These factors provide the underlying philosophical argument that underpin Malaysia's juvenile justice system and this determines its measure of punitiveness with regard to children in conflict with the law as well as the treatment of the rights of the child in conflict with the law.

A further factor is the lack of awareness of class-consciousness over a long period which has resulted in a society that had very little to offer by means of welfarism (Garland, 2001) and hence the concept of rights has remained muted. As suggested by Lappi-Seppälä punitive policies that make more use of imprisonment are to be found in countries that lack a 'consensual and corporatist political culture', that do not have

high levels of 'social trust and political legitimacy', and are lacking in notions of a welfare state (2011:321).

A small part of this landscape is evolving today with a greater awareness of the class divide and the issue of rights that transcend that of race and religion. However, there is, at this point, uncertainty as to whether the prospect of class-consciousness would eventually lead to a civilizing process (Elias, 2000) that might form the basis for a less punitive penal policy. The plans to introduce diversion, in so far as children in conflict of the law is concerned, appears to indicate at the very least, a tentative engagement with these issues but the concern is how that change will fit in the broader punitive penal policies that have been in existence for more than 60 years. Further and perhaps more importantly, how will the various stakeholders involved in the administration of justice, accustomed to the punitive penal policies, deal with approaches that require an almost immediate change in attitude where non-custodial approaches are concerned. These elements are also deeply embedded in the socio-cultural norms that define Malaysian cultural attitudes towards children.

While the immediate post war penal policy and political culture in England headed in the direction of the abolition of corporal and capital punishment (Ryan, 2003), the political culture in post-colonial Malaysia remained static. Legislative reforms and policy considerations that peppered the criminal justice system particularly those that affected children in conflict with the law, in England over the six decades did not take root in Malaysia. It is certainly interesting to consider whether had Malaysia remained a colony, whether the changes that occurred in England would find its way into Malaysia or conversely, what the position would have been if Malaysia had not been subject to British intervention.

The combination of a perceived increase in crime rates and political rhetoric have led to the present punitive attitudes in penal policy. Malaysia has never had a broad nation-wide analysis of public opinion on the measure of punitiveness nor has there been a large-scale analysis of social attitudes on sentencing.

A recent endeavour in analysing public opinion on the death sentence in Malaysia yielded interesting results (Hood, 2013). Malaysia is neither a party to the

*International Convention on Civil and Political Rights 1966* nor its *Second Optional Protocol* aiming at the abolition of the death penalty.

The views of a representative sample of 1,535 Malaysian citizens on the mandatory death sentence indicated that a large majority were in favour of the death penalty, whether mandatory or discretionary with 91% expressing that support for murder, 74 to 80% for drug trafficking depending on the drug concerned, and 83% for firearms offences. In so far as the mandatory death penalty, 56% were in favour of it for murder, but only between 25% and 44% for drug trafficking and 45% for firearms offences. However, these views changed when respondents were given specific scenarios in which the sentences were applicable resulting in a large gap between the level of support ‘in theory’ and the level of support when faced with the ‘reality’.

The report then concluded that ‘the level and strength of support among the Malaysian public for the death penalty for murder is lower than is perhaps commonly supposed. This suggests that public opinion ought not to be regarded as a definite barrier to abolition of the death penalty for murder’ (Hood, 2013: xiv). Even though the study was the first and thus far, the only attempt to assess public opinion on the death penalty, it is difficult to gauge for certain societal attitudes on sentencing policies in Malaysia.

The previous political party was in power since Malaysia’s independence in 1957 and had in place a punitive approach in its sentencing policies and a ‘tough on crime’ stance. That they have secured electoral success suggests that the electorate supported this approach even if they failed to secure the popular vote in 2013 and lost in 2018. Further, there has not been, to date, any views expressed by the collective opposition on their own approaches on the current penal policy. At best, there is opposition to the use of preventative detention laws primarily because it is suggested that these laws have been used to stifle opposition to the government. Thus, the penal policies in place have been determined by discourse controlled and managed by those in power.

Three aspects of the juvenile justice system perhaps best reflect penal policy norms in Malaysia.

### 3.1 Judicial attitudes and the child in conflict with the law

There is evidence to suggest that courts are keen to punish particularly where the child in conflict is involved in serious offences or where public interests are at stake. For example, in a case decided before the CRC, Sharma J in *Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214 said:

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 ([1972] 1 MLJ 215).

Some 34 years later, not much had changed. This notwithstanding that the *Child Act 2001* was in force. In *Public Prosecutor v Low Kian Boon & Ors* [2006] 6 MLJ 254<sup>29</sup>, the first accused aged 18 and the second accused, a 17-year-old boy were jointly charged with the murder of the victim in the early hours of November 12, 2003. The victim's right hand was almost severed and he had 23 slash wounds, which eventually led to his death.

In finding the accused and his accomplice guilty of manslaughter, the High Court imposed a 10-year jail term. The court was of the view that:

Serious crimes committed by youth seems to be on the rise and wrong signals would be sent to youths and the public at large into believing that the courts would be ever so indulgent to treat them with kid gloves, should they ever be convicted of such crimes, if deterrent sentences are not meted out to impress upon these youths and like-minded offenders that crime does not pay ([2006] 6 MLJ at 295).

After a series of appeals and cross appeals the Federal Court in upholding the Court of Appeal decision, substituted the 10-year sentence on Low Kian Boon, the first accused, who was already aged 24 at the time, with the death penalty after finding him

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<sup>29</sup> The victim's stepdaughters (aged 16 and 14 at the time of the incident) were also charged in connection with the offence but were acquitted and discharged by the Shah Alam High Court on Feb 6, 2006, without their defence being called.

guilty of murder. His accomplice, the second accused, who was already aged 23, was ordered to be further detained in prison for an indeterminate period at the pleasure of the Sultan (*Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 42).

Similarly, in *Public Prosecutor v Mohd Turmizy bin Mahdzir* [2007] 6 MLJ 642, both the accused were under the age of 18 at the date of *commission* of the offence for the possession of 419.4g Cannabis pursuant to the *Dangerous Drugs Act 1952*. However, owing to an alternative charge tendered *after* they had attained the age of 18,<sup>30</sup> the case was heard by the High Court and not the Court for Children. (Emphasis added). In sentencing both the accused to 10 years' imprisonment and 10 strokes whipping<sup>31</sup>, the court had this to say:

It is important to stress that child or youth cannot be used as a 'cloak of convenience' in order to shelter from accepting proper responsibility for criminal behaviour ... It is important to stress that where young offenders conduct themselves like adults and commit serious or grave crimes; they may attract less leniency in sentencing than their age might otherwise demand... (6 MLJ 642 at 655).

In none of the instances above, particularly cases decided after the *Child Act 2001*, was there any reference to the CRC or of the rights of the child. No arguments were presented on the promotion of the child's sense of dignity and worth, or of the child's reintegration into society. Judicial interpretation appears to be confined to the strict legal interpretations of the law. In fact, in *Public Prosecutor v Mohd Turmizy bin Mahdzir* the court was of the view that:

[T]he reformatory theory, especially for children is certainly important but too much stress or emphasis cannot be laid on it to such an extent the tenets of punishment provided by law is altogether vanished (6 MLJ 642 at 653).

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<sup>30</sup> Counsel for the accused is on record for suggesting that there was a delay in framing the alternative charge.

<sup>31</sup> Sections 286–291 of the *Criminal Procedure Code* govern the procedures involved and has its origins in the *Straits Settlements Penal Code Ordinance IV 1871* introduced by the British.

A different approach however was adopted for example, by the court in *Public Prosecutor v Low Hai Voon [2010] 8 MLJ 582* where a child of 14 years and 9 months was charged with culpable homicide not amounting to murder following a fight involving helmets. The court accepted the guilty plea, recorded the probation report and took cognizance of issues raised in mitigation and considered the desirability and benefit of keeping young, first offenders out of prison. The court in applying *section 91(1) (f)* of the *Child Act 2001*, sentenced the child to be held at the Henry Gurney school until he attains 21 years of age.

In the case of Kok Foo Seng, the accused was found guilty of drug trafficking, a capital offence which ordinarily mandated the death penalty. However, as the accused was a child at the time of the offence, he was imprisoned at the age of 14, only to be released 13 years later after being pardoned by the Sultan of Pahang (the Ruler of the State) following constant efforts by the boy's family to pursue the case for a pardon (Cheah, 2007). It is to be noted that in many instances, recourse to the indeterminate detention sentence, is most often used in cases that involve drug trafficking, murder, or kidnaping.<sup>32</sup>

In response to the application of section 97(2) in Malaysia, The United Nations Committee on the Rights of the Child expressed its concern stating that such sentences cause 'problems in terms of the development of the child, including her/his recovery and social integration' (United Nations, 2007:25).

The basis for this view is in Article 40(1), which urges countries to recognize the right of the child in conflict to be treated in a manner which promotes the child's sense of dignity and worth taking into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40 therefore sets the basis for the overall aim of child justice systems that it amongst other things, should encourage children to take responsibility for their actions and that the justice systems should emphasise the reintegration of the child into

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<sup>32</sup> For a range of cases, see n 19 above.

society. Diversion and alternatives are highly compatible with these aims and should therefore be preferred over the detention of children that come into conflict with the law.<sup>33</sup>

This view is further supported by the explanatory guidelines issued that encourage State parties to take measures for dealing with children in conflict with the law without resorting to judicial proceedings and making these measures an integral part of their juvenile justice system. Further, State parties are encouraged to ensure that children's human rights and legal safeguards are thereby fully respected and protected as per the provisions of Article 40 (3) (b) (United Nations, 2007b: para 24).

Clearly, the emphasis is to encourage the promotion of the use of child rights-based diversion, implemented with appropriate legal safeguards, as an integral part of child justice systems. This emphasis in turn is on the basis that most child offenders commit only minor offences (although in the opinion of the Committee, such measures should not be limited only to children who commit minor offences but should be applied across the range of circumstances) (United Nations, 2007b: para 25). Thus, the application of diversion through the CRC rests on the underlying philosophical foundation of rights.

While it may still be possible to establish diversionary processes without this foundation, the danger is that such a direction may result in cosmetic changes to the existing laws to facilitate diversion merely to fulfil international obligations. This then may result in further 'unresolved conflicts of a philosophical nature' that impinge on the concept of the rights of the child in Malaysia (Beijing Rules, 2010) particularly where the child is in conflict with the law.

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<sup>33</sup> In 1990, the *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* had established among other principles, a set of basic principles to promote the use of noncustodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

### 3.2 Incarceration in Malaysia

Country/Area	Total	General Population	Imprisonment rate (per 100000 population)
Malaysia	51 602	30.8 million	167
Singapore	11 691	5.83 million	201
Thailand	334 279	69.14 million	483

**Table 3:** Imprisonment rates, Malaysia, Singapore and Thailand. (Adapted from: The World Prison Brief, The Institute for Criminal Policy Research). Available at: <<http://www.prisonstudies.org/>> [17 May 2018].

According to the Ministry of Home Affairs, Malaysia, the general prison population as at October 2016 stands at 51 602 held in 47 institutions<sup>34</sup> (Table 3 above) spread across the country with an occupancy level (based on the official capacity) of 113.9% (as at October 2016). This is the highest it has been over the past 15 years. The prison population rate (per 100,000 of national population) is at 167 based on an estimated national population of 30.8 million at October 2016. This however, is not the highest among Malaysia’s immediate neighbours, with Singapore at 201 and Thailand at 466.<sup>35</sup>

The issue of incarceration rates and its impact on punitiveness (if any) will be considered below but it bears noting that of the total prison population, approximately 2.2% are juveniles, minors or young offenders as defined by the differing provisions of Malaysian law alluded to in the preceding Chapter. (For example, the *Prison Act 1995* defines a juvenile or a young offender as “a prisoner who is under the age of 21 years” whilst the *Child Act 2001* and the *Child (Amendment) Act 2016* defines a ‘child’ as “a person under the age of 18 years and below”).<sup>36</sup>

<sup>34</sup> This consists of 35 prisons, 4 reformatory centres, 5 special recovery centres and 5 Henry Gurney centres.

<sup>35</sup> Statistics for Singapore are as at 31 December 2017 and as for Thailand, it is at 1 March 2018.

<sup>36</sup> These figures do not include 912 children detained under immigration laws in 2015 (there were 5,648 asylum-seekers and 2,282 refugees in detention centres throughout the country) (UNCHR, 2016).



In the United States, law enforcement agencies made 1.6 million arrests of persons under the age of 18 in 2010 and larceny-theft, simple assault, drug abuse violations, and disorderly conduct offences accounted for half of all juvenile arrests in 2010 (Sickmund and Puzzanchera, 2014). Similarly, in 2008, of the over 2 million youth under the age of 18 arrested, about 95% *had not* been accused of violent crimes, such as murder, rape, or aggravated assault (Puzzanchera, 2009). In 2010, of the nearly 100,000 youth under the age of 18 who were serving time in a juvenile residential placement facility, 26% had been convicted of property crimes only, such as burglary, arson, or theft (Sedlak and Bruce, 2010).

In the United Kingdom, for the year ending March 2015 there were 43,148 defendants (aged 10-17) proceeded against in the courts of which 30,960 were sentenced for their offences. The vast majority of these defendants (21,203) were sentenced to community sentences while 1,834 were sentenced to immediate custody (Ministry of Justice, 2016).

As noted above, most children on remand are accused of minor property related offences (theft, theft of motor vehicle, possession of stolen property, housebreaking) and that only 20% were charged with serious offences involving violence (causing injury, robbery, rape and other sexual offences, murder). Further, it was suggested that a three-year period of institution-based rehabilitation is effectively “over treatment” for the vast majority of Tunas Bakti Schools and probation hostel residents, most of whom have committed very minor property-related offences (UNICEF, 2013). Gray’s observation of the situation in residential institutions in Hong Kong in the late 1990’s suggests that such juveniles are ‘not hardened criminals and have had exceedingly short criminal careers’ (1996:314).

Six years earlier, the United Nations Committee on the Rights of the Child in assessing the implementation of the CRC had already identified that, ‘many States Parties still have *a long way to go* (emphasis added) in achieving full compliance with the CRC’ (United Nations Committee on the Rights of the Child, 2007b:1). Thus, notwithstanding the passing of the *Child Act 2001*, Malaysia like many other State parties had “a long way to go.”

This is not a malady peculiar to Malaysia. Muncie's (2009b) analysis of the 'concluding observations' for 15 western European countries found the common thread of a failure to recognize the fundamental issues of the distinctive needs, dignity, humane treatment of children as central to the realisation of children's rights.

The theoretical basis for the dangers of incarceration and detention of children in conflict with the law is well documented. (For example, Kashani et al (1980); Forrest et al (2000), Hayes (2009) among others) From a Malaysian perspective, UNICEF (2013:73) argues that:

[T]he placement of children in approved schools, hostels and other educational or rehabilitative institutions, while preferable to imprisonment, also constitutes deprivation of liberty and should be used only as a measure of last resort for children who commit violent crimes, or persist in committing other serious offences.

Notably missing in the 2013 UNICEF report was any discussion on the emotional and psychological impact of incarceration on children. There has not been any empirical analysis of suicides, mental health issues or sexual assaults because of incarceration of children in Malaysia. However, there are examples in other jurisdictions.

National data in the United States suggest that incarcerated youth are at particularly greater risk for suicide; the prevalence rates of completed suicide for this group are between two and four times higher than those for youth in the general population (Gallagher and Dobrin, 2006). In the United Kingdom, the Prison Reform Trust has reported that 11% of young people in state custody have previously attempted suicide. The rate of suicide in boys aged 15–17 who have been sentenced and remanded in custody in England and Wales is suggested to be 18 times higher compared with the general population (Prison Reform Trust and INQUEST, 2012). The subsequent impact on adulthood can be severe. In the United States, a recent study analysing data from 14,344 adult participants in the National Longitudinal Study of Adolescent to Adult Health, 'suggest that incarceration during adolescence and early adulthood is independently associated with worse physical and mental health outcomes during

adulthood’ (Barnett et al 2017:7). Children are therefore particularly vulnerable to mental health issues and the mental health issues that exist within broader adolescent population has been investigated in a number of jurisdictions.

Hagell’s (2002) analysis of international literature review concludes that rates of mental health problems are at least three times higher among children in the youth justice system than within the general population of children. In the United Kingdom, a 2004 study found that one in ten children aged between five and 16 years has a clinically diagnosable mental health problem. Just over half of these children and young people (5.8 per cent) have a conduct disorder; 3.7 per cent an emotional disorder (anxiety, depression) and one to two per cent have severe attention deficit hyperactivity disorder (ADHD) (Office for National Statistics, 2004). A recent evaluation of the Youth Justice Liaison and Diversion pilot scheme in the United Kingdom, found that 80% of young people had between one and five vulnerabilities, which range from mental health issues, behavioural issues, and social problems (Haines, A. et al. 2012).

In 2015, one in eight Malaysian children aged 10 to 15 reported symptoms of mental ill health in 2011 to 2012, as measured by a high or very high total difficulties score (Office for National Statistics, 2015). Further, findings from the National Health and Morbidity Survey<sup>37</sup> (NHMS, 2017) in Malaysia found that anxiety was the most common mental health problem among Malaysian adolescents aged 13 to 17 years followed by depression and stress. The lack of available information on the mental health of a child in conflict with the law in the various detention facilities precludes any valuable assessment on the matter in Malaysia but such concerns are far from misplaced. A further element is the impact of psychosocial factors.

For example, Baur et al’s (2011) study on the psychosocial backgrounds of ‘delinquent adolescents’ among ethnic groups (Turkish, former-Yugoslavian and Austrian) in Austria, found ‘high rates of psychosocial adversities: broken homes,

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<sup>37</sup> The National Health & Morbidity Survey: Adolescent Mental Health 2017 was aimed at assessing the prevalence of depression, anxiety and stress including comorbidity and associated factors among 27,497 secondary school students in Malaysia using self-administered anonymous questionnaires adapted from the Malaysian Global School Health Survey (GSHS) 2012.

psychiatric morbidity within the family, parental criminality, trauma and difficulties with conduct and performance at school' (2011:195).

Other than the dangers of incarceration, a further view is that institutional treatment of children in conflict with the law particularly for minor offences or those that do not involve murder should be used a measure of last resort because of the rights of the child and on the recognition of the status of the child.

Although Malaysia has taken steps to comply with some aspects the CRC with the various measures alluded to above, there are gaps in the expectations of the CRC and the actual working of the criminal justice system as far as the child in conflict with the law is concerned. This is not surprising considering the fact that while there are general expressions of the CRC, States parties have a level of discretion to decide on the exact nature and content of the measures for dealing with children in conflict with the law.

Further given Malaysia's reservations to several CRC Articles and given the punitive culture existent, as discussed above, the issue of a child rights-based approach to diversion that sets out to realise all children's rights relevant to diversion (as set out in the CRC and other instruments) merits analysis. More importantly the CRC is not part of Malaysian law save where the provisions in the Convention have been validly incorporated into the domestic law by statute, which it has not done except in so far as some aspects of the CRC, incorporated through the *Child Act 2001*.

Thus, Malaysian courts are not bound to enforce the articles found in the Convention except the limited provisions of the CRC as enshrined in the *Child Act 2001*. This approach was recently affirmed in *Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho* [2016] 4 MLJ 455 and affirms the dualist approach in the incorporation of international law in municipal or domestic law (Crawford, 2012). On the issue of the impact of the treaty, the court stated 'international treaties do not form part of our law unless those provisions have been incorporated into our laws' [2016] 4 MLJ 458).

An illustration of an alternative broader interpretation of the application of the CRC can be found in *Minister for Immigration and Ethnic Affairs v Teoh* [1995]128 ALR 353. The High Court of Australia, while recognizing that the Convention was not part of the domestic law declared that ‘ratification of a Convention is a positive statement by the Executive Government to the world and to the Australian people that the Executive, Government and its agencies will act in accordance with the Convention’ (1995:365).

In the United Kingdom, like Malaysia, incorporation and inclusion is dependent on the enactment of a specific law. However, there have been instances where a broader view has been adopted. For example, in the Supreme Court case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, Lady Hale noted that Article 3 of the CRC was ‘a binding obligation in international law’ on the basis that ‘the spirit, if not the precise language’ of Article 3 had also been translated into domestic law. However, Malaysian courts have not adopted such a wider interpretation of the law and neither have there been attempts to interpret the Constitution in light of any obligations arising from the CRC.

### **3.3 Corporal Punishment**

As stated above, section 91 of the *Child Act 2001* permits light caning. Thus, for example a 17-year-old youth was sentenced to be whipped 10 times with a light cane for two counts of robbery and instilling fear in his victim (The Star, 2012). Whipping can be executed in open court as in the case of three youths who were whipped as punishment for committing armed robbery administered pursuant to Section 293 of the *Criminal Procedure Code* (The Star, 2013) and where a 19-year-old youth was caned for rape (Tariq, 2014).

While there are legitimate concerns over the use of whipping as punishment and more recently criticisms on the whipping of children in open court (Nadirah, 2014), the sentence has long been accepted in the legal and regulatory framework<sup>38</sup> and more

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<sup>38</sup> The Home Minister informed the *Dewan Rakyat* (Parliament) that 8,481 prisoners, most of them foreigners, were caned in 2013 as punishment for criminal offences (Carvalho et al, 2014).

importantly within the socio-religious environment. Thus, the caning of a child by his/her parents appears to draw legitimacy from Article 89 of the *Penal Code* where such an act ‘is done in good faith for the benefit of a person under twelve years of age.’<sup>39</sup>

This is in *pari materia* with the now repealed<sup>40</sup> section 1(7) of the United Kingdom’s *Children and Young Persons Act 1933* which provides the common-law defence for ‘any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him.’

Corporal punishment of boys in Malaysia is regulated by the *Education Regulations (Student Discipline) 2006* under the *Education Act 1996* and Article 350 of the *Penal Code* affirms that caning of a student by a head teacher does not amount to criminal force.

Corporal punishment of male and female children in the home is lawful, and appears to be a culturally accepted norm. Kumaraswamy et al (2011) suggest that culture has a prevailing hold on how Malaysian parents discipline their child citing a Malay proverb, ‘*sayangkan tanak tangankan*’<sup>41</sup> which the writers interpret to mean ‘if you love the child, then you should use your hands (i.e. physically beating etc.) to teach them a lesson’ (*sic*) (2011:27). In their study, the writers found that most of the 196 medical students surveyed, had a favourable attitude to receiving corporal punishment believing it to be ‘one of many ways to teach them a lesson in life’ (2011:27). Interestingly, the study did not seek to ask participants of their awareness of the CRC or explore the notion that cultural values aside, the CRC prohibits corporal punishment. Neither did it explore the respondents’ views on their rights.

Corporal punishment contradicts the CRC but as mentioned above, there is no prohibition of cruel, inhuman or degrading treatment or punishment in the *Federal*

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<sup>39</sup> The same cannot be said if a Malaysian parent was to cane a child while in another country as illustrated in the case of Malaysian parents who were jailed in Sweden for doing so (Pak, 2014).

<sup>40</sup> Section 1(7) has been repealed by the *Children Act 2005*.

<sup>41</sup> The equivalent being spare the rod and spoil the child. The issue of religious freedom and caning in the UK was considered for example in *R. (on the application of Williamson) v Secretary of State for Education and Employment UKHL 15 [2005] 2 A.C. 246*.

*Constitution*. Malaysia has also not ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *International Covenant on Civil and Political Rights*, the *Second Optional Protocol to the ICCPR* aiming at the abolition of the death penalty, the *International Convention on the Elimination of All Forms of Racial Discrimination*, or the *International Covenant on Economic, Social and Cultural Rights*.

Similar challenges emerge when considering the use of capital punishment in Malaysia. Amnesty International Malaysia (AIM) reports that Malaysia was ranked 10<sup>th</sup> in the use of the death penalty among 23 countries where executions were recorded (Amnesty International, 2016).

In the second cycle of the Universal Periodic Review in 2013, it was recommended (by Belgium) that Malaysia should eliminate all forms of cruel, inhuman or degrading treatments, particularly judicial beatings that should immediately be subjected to a moratorium. The response from the Malaysian government in the Report of the Working Group on the Universal Periodic Review was to state:

Malaysia rejects the assertion that seeks to equate torture, inhuman, cruel or degrading treatment or punishment with corporal punishment including whipping and other forms of punishment as prescribed under existing laws which are carried out only upon direction by the Courts and which remain valid and legal forms of punishment in the country (United Nations 2014a:3).

The caveat entered was not to exclude the possibility of ‘revisiting those recommendations as appropriate’ (2014:2) and that it (Malaysia) ‘remains committed to take progressive steps in improving Malaysia’s compliance with international human rights standards’ (2014:5).

As indicated above, with the passing of the *Child (Amendment) Act 2016*, whipping as a form of punishment for children found guilty of criminal offences has been abolished. The path to abolishing the provision was not without debate with some confusion as to whether the proposed amendment to the Child Act would abolish caning completely and seek to punish parents if they caned their children.

Nevertheless, as it stands, caning carried out in open court has been abolished. However, as noted, caning of children by parents and teachers<sup>42</sup> remains unaffected.

This appears to draw legitimacy from Article 89 of the *Penal Code* and by the *Education Regulations (Student Discipline) 2006* under the *Education Act 1996* and Article 350 of the *Penal Code*, which affirms that caning of a student by a head teacher does not amount to criminal force. Further, corporal punishment remains a lawful sentence under Islamic law for males and females. For example, the *Syariah Criminal Offences (Federal Territories) Act 1997* identifies the punishment of whipping of up to six strokes for the offences of false doctrine, incest, prostitution, homosexual acts and other sex offences. This is considered below.

The current position therefore remains the same. Child rights, be it under the relevant Islamic legislative pronouncements or those under the existing provisions of law refer to the need to *protect the child* but paradoxically there are discernible contradictions in expressing that intent. (Emphasis added).

#### **4. Measuring punitiveness**

Attitudes towards punishment are often hard to define or locate within a given society. Kury and Obergfell-Fuchsm as cited in Adriaenssen and Aertsen (2015:92) suggest that ‘punitivity is a broadly used and vague concept.’ It has been suggested that people’s perception of crime and punishment generally represent a central aspect of normative culture and more specifically represent a form of formal social control (Stylianou, 2003). It has also been suggested that measuring public opinion through surveys or polls provide a useful ‘social barometer to measure satisfaction with important government services’ and they reflect ‘the public’s mood and priorities for criminal justice reform’ (Flanagan, 1996: 5).

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<sup>42</sup> Corporal punishment was outlawed in state schools in the United Kingdom in 1986 and in all schools eventually in 1988. Section 58 of the *Children Act 2004* limited the use of the defence of reasonable punishment. Thus, it could no longer be used when people are charged with offences against a child, such as causing actual bodily harm or cruelty to a child. This debate is likely to continue when the Scottish government confirmed its support for a ban on smacking children in October 2017.



The challenge is of course defining what it is that is being measured and how best to do so. In their analysis of the various empirical approaches in determining the measure of punitiveness, Adriaenssen and Aertsen concluded that there were four main recurring elements to measure punitive attitudes. These four elements were where respondents were asked their opinions about ‘the goals of punishment, about specific forms of penal sanctions and their intensity or about specific sentencing policies.’ As such, they suggest ‘a multidimensional operationalization of punitive attitudes’ from which they argue that a punitivity index can be developed (2014:4). A departure from this approach is to consider the levels of public knowledge on matters of sentencing or more specifically public opinion as a function of knowledge (Hough and Roberts, 1999).

As has been considered above, there has not been, as yet, a similar endeavour to measure the Malaysian public’s opinions or attitudes on sentencing, save for the endeavour to gauge public support (or not) for the death penalty. The approach taken in this instance is not entirely new or novel and there is ample evidence of similar approaches taken in assessing views over issues connected with the death penalty, (for example Bohm and Vogel (2004); Ramirez (2013)). The findings in Malaysia show that, in these circumstances, the majority of the public surveyed did not support the mandatory death penalty, and this should be the basis to remove the assumption that public opinion is a barrier to abolition of the death penalty. That said, the death penalty remains in Malaysia. The Cabinet in August 2017 however, has agreed to review the *Dangerous Drugs Act 1952* to allow judges to use their discretion in sentencing offenders instead of imposing the mandatory death sentence (Kanyakumari, 2017).

There has also never been an attempt to understand sentencing trends and evaluating public knowledge and public opinion on these issues. As has been alluded to, Malaysia does not conduct a nationally representative, household victimisation survey equivalent to the Crime Survey for England and Wales (formerly the British Crime Survey). This lack of information on data coupled with a less than critical media results in an environment that has a State-led top-down approach to the administration of criminal justice at a broader level. Consequently, there is less

engagement with public opinion or sentiment. Malaysia did not share the post-war British experience where an inclusive social democracy facilitated social equality and security provided by the welfare state (Cavadino and Dignan, 2006).

Punitiveness in Malaysia is therefore difficult to measure. The United Nations Surveys on Crime Trends and the Operations Criminal Justice Systems (commonly referred to as the UN CTS) collects basic information on the recorded crime and on resources of the criminal justice systems in member states. In its analysis of the punitivity of criminal justice systems (UNODC, 2010), there was an attempt to measure systemic punitivity estimated by the rate of total persons incarcerated per total persons convicted noting that Malaysia had a 52% increase in prison population between 1997-2007, placing it in the top 12 Asian nations with the largest increase. Further, it appears that the largest increases of adults convicted can be seen in Malaysia (24.4% in the whole period 1996 – 2006) and interestingly, England and Wales (20.2% in 1996 – 2006) and Northern Ireland (37.6% in the period 2001 – 2006) (UNODC, 2010).

While incarceration rates are not the best measure of punitiveness, there is some indication of Malaysia's penal policy based on the available data. This coupled with the use of the death penalty, preventative detention laws and whipping of offenders are perhaps indicative of the level of punitiveness. There are obvious concerns on placing too much emphasis on the measure of punitiveness. Roger Matthews argues that 'punitiveness remains a 'thin' and under-theorized concept' (2005:178) and that a preoccupation with 'limited oppositions and polarities' fail to do justice to the diversity, contradictions, reversions and tensions in current crime control policy' (2005:195).

However, what appears clear in this context is that Malaysian norms (these include matters of ethnicity and religion) and its historical evolution have a definite impact on its political culture particularly the influence of these matters on policy makers. Thus, as Hamilton suggests, 'the continued potency of national political culture and institutional arrangements in the determination of criminal justice policy serves to further reinforce the 'cultural embeddedness' of penal affairs' (2013:165).

This broader notion of ‘cultural embeddedness’ then has an impact on the manner in which juvenile justice is administered. As considered in Chapter 1, in the Malaysian context, there appears to be an absence of any consideration of ‘culture, ideology and discourse’ (Muncie 2001:33) in introducing the global shared values of the CRC resulting in ‘policy failures’ caused by an uninformed policy transfer (Dolowitz and Marsh, 2000:17). These issues will be considered in subsequent chapters.

## **5. The definition of ‘child’ in Malaysia**

In the preceding Chapter, it was noted that following Malaysia’s ratification of the CRC, the *Child Act 2001* adopted the provisions of Article 1 of the convention in defining a ‘child’ as a person below the age of 18. Notwithstanding this, as has been noted, there are variances in other statutory provision as to the definition of ‘child’, as to the terminology used (for example juvenile) or as to the various age determinants that set the boundaries for the definition used. These inconsistencies in the definition of the child with multiple, contradictory definitions of the child under both civil and Syariah had been noted twice by the United Nations (2007a as well as 2013) but remain. The lack of commitment has been alluded to in Chapter 2 and is perhaps best explained on the basis that there are no direct legal sanctions in the event of a breach. Further, a breach does not afford the alleged victim of such breach any avenue for redress. Malaysia has yet to ratify Optional Protocol 3, which sets out an international complaints procedure for child rights violations.

Thus, for example, the *Children and Young Persons (Employment) (Amendment) Act 2010* defines ‘child’ as a person who has not completed his fifteenth year of age, while a ‘young person’ is construed as a person who, not being a child, has not completed his eighteenth year of age. This is inconsistent with the definition in the *Child Act 2001*. In the matter of marriage, the laws define the minimum age for marriage for girls inconsistently. By virtue of section 10 of the *Law Reform (Marriage and Divorce) Act 1976*, the minimum age for marriage for a non-Muslim person is eighteen years. However, with the approval of the Chief Minister, a girl of sixteen may be authorized to enter into a marriage.

By virtue of section 8 of the *Islamic Family Law Act (Federal Territory) 1984*, the minimum age for marriage for a Muslim person is eighteen for a man and sixteen for a woman. However, if the Syariah judge has granted his permission in writing in certain circumstances, then a child younger than sixteen may enter into marriage. This has led to issues of child marriages that are conceivably recognised by Islamic law but may be incongruous with the spirit of the CRC.<sup>43</sup>

The inconsistencies in the application of Islamic law and the CRC are due to the underlying historical, cultural and religious conditions that are embedded in the Malaysian political and cultural norms. Such inconsistencies are seen at the operational level and at a broader philosophical level, particularly matters that deal with the rights of the child. These philosophical differences influence two further ancillary issues, namely arbitrary age-based criteria and Islam's interpretation of criminal responsibility.

## **6. Evolving capacities and arbitrary lower age based restrictions**

The basic premise of the Convention is that a 'child' is born with fundamental freedoms and inherent rights available to all human beings but with specific additional needs in recognition of a child's cognitive, emotional, social, moral and physical competencies drawn from the social, cultural, economic and emotional environment that they are in.

A child faces a range of aged based criteria that govern various aspects of their lives at which they are deemed capable of making decisions for themselves, decisions with adult consequences for example to enter into contracts,<sup>44</sup> become a company director<sup>45</sup> or become a soldier.<sup>46</sup>

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<sup>43</sup> Child marriages were not abolished in the *Child (Amendment) Act 2016*. The Women, Family and Community Development deputy minister reported in Parliament that there were 9,061 child marriages recorded over the last five years: Hansard 19 May 2016, col 1120-11300. Available at: <<http://www.parlimen.gov.my/files/hindex/pdf/DR-19052016.pdf>> [13 Nov 2016].

<sup>44</sup> Section 11 of the *Contracts Act 1950* read together with the *Age of Majority Act 1971*.

<sup>45</sup> Section 196 (2) *Companies Act 2016*.

<sup>46</sup> Section 18 (4) *Armed Forces Act 1972*, which however states that a recruiting officer shall not enlist any person under the age of seventeen and a half years without the written consent of his parents or of his guardian.

The assumption upon which the age-based criteria are set is on the basis that children lack the capacity to take responsibility for decisions and the minimum age requirement ensures that the child is protected. This of course rests on a further assumption that the adult's perception of the child's competence is the right one and that such an assumption is accurate. A final assumption made is that the needs of the child mysteriously cease or change when a child attains a specific age. Clearly as seen in the section above, the age based criteria used in defining a 'child' leads to rather confusing positions.

As briefly considered above, the minimum age of criminal responsibility in Malaysia (save where Islamic law is concerned) is set on an age-based criteria. Thus, the age of criminal responsibility as stated in the Section 82 and 83 of the *Penal Code* is ten. The code includes a *doli incapax* presumption, which states that children between ten and below twelve who have not shown sufficient maturity *may be* (emphasis added) absolved from criminality as well (of the Malaysian *Penal Code*). This means that children under ten cannot be arrested or charged with a crime. Children between twelve and seventeen can be arrested and taken to court if they commit a crime but, as discussed above, are entitled to be dealt with by youth courts. However as noted above, there can be complications particularly where the criminal offence involves a capital offence.

As noted previously, the CRC does not prescribe a specific age for criminal liability, but merely states that the beginning of that age shall not be fixed at too low an age, and should be based on children's emotional, mental and intellectual maturity. However, in considering the Malaysian context, the UN Committee on the Rights of the Child in its concluding remarks noted with concern the low minimum age of criminal responsibility, which is ten years in the *Penal Code*. It also noted the discrepancies between the minimum age standards in the Penal Code, the interpretation of the Muslim jurists in the *Syariah Court* and the *Syariah Criminal Procedure (Federal Territories) Act 1984* (United Nations, 2007a).

Thus, a child as young as 12, who is said to be in need of special safeguards, care and assistance owing to his or her physical, mental and emotional immaturity, may

find themselves in the adult criminal justice system and subject to its most severe penalties. There is a greater risk that a child in conflict with the law who faces an adult administered criminal justice system can be exposed to severe emotional and psychological stress (Drizin and Leo, 2004). As noted in Chapter 2, the basis of setting an arbitrary age of criminal responsibility is argued to lead to the ‘adultifying of children aged 10 years’ and a ‘mutation of justice’ (Goldson, 2013:126).

There are variations across the globe in determining the minimum age of criminal responsibility. A 2011 report indicates that in at least 142 states, children may be taken to court for criminal acts at an age between 6 and 15 and of these, 31 states impose a minimum age of criminal responsibility at 7 (Melchiorre and Atkins, 2011).

An alternative view suggested is to consider the principle enshrined in Article 5 in which the CRC acknowledges the ‘evolving capacities’ of the child which recognises that children will acquire competencies at different ages, and their acquisition of competencies will vary according to the environment and culture in differing life experiences. Acknowledging this recognises that children require ‘varying degrees of protection, participation and opportunity for autonomous decision-making in different contexts and across different areas of decision-making’ (Lansdown, 2005:3).

Children in the juvenile justice system are not ‘just little adults nor is the world in which they live in the world of adults’ (McCord et al, 2001:15). A similar view was expressed by the Supreme Court of the United States in *Roper v. Simmons* (543 U.S. 551, 2005). In deciding that the sanction of capital punishment was unconstitutional<sup>47</sup> for crimes committed by individuals younger than 18 years of age, the court concluded that juveniles differ from adults in three significant ways.

Firstly, on the basis that juveniles lack maturity and have an underdeveloped sense of responsibility that are not often found in adults and understandably so and these qualities often result in ‘impetuous and ill-considered actions and decisions.’ Secondly, juveniles are more vulnerable or susceptible to negative influences and

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<sup>47</sup> For a brief review of the historical development of juvenile capital punishments in the United States, see Byrd, J. (2006). Constitutional law & (and) criminal law. *University of Arkansas at Little Rock Law Review*. 29(1):119-164.

outside pressures, including peer pressure owing to the fact that juveniles have less control, or less experience with control, over their own environment. Lastly, that the character of a juvenile is not as well formed as that of an adult resulting in transitory personality traits and these factors taken together result in the diminished culpability of juveniles (per Justice Kennedy).

Hence, there is a general move towards a higher age of criminal responsibility based on broader medico-legal perspectives recognising the concept of a development continuum understood through the development of neuroscience (Delmage, 2013). A singular test of capacity based on adult determined arbitrary age fails to engage with a variety of complex issues that make up the factors that influence a child's behaviour, these include cognizance of the child's stage of psychological development, and his/her lived experience (McDiarmid, 2013). This is particularly so since 'the social brain and social cognition undergo a profound period of development in adolescence' and this period represents a particularly sensitive period for the processing and acquisition of sociocultural knowledge (Blakemore and Mills, 2014:201).

Much of this argument corresponds with neurological research that seeks to apply various technological advances to understand the adolescent brain. A range of studies (Furby and Beyth-Marom, 1992; Cauffman and Steinberg, 2000; Spear, 2000; Sowell, 2003; Gogtay et al., 2004) indicate that the development of the human brain is organic and that organic development is most pronounced during adolescence. These studies connect the state of the development of the brain<sup>48</sup> to corresponding behavioural or emotional tendencies unique to the adolescent which impact planning, decision making, impulse control or reasoning (Giedd, 2004). As the adolescent enters adulthood, there is evidence of pruning of areas in the frontal lobe (Sowell, 2001). Gardner & Steinberg, (2005) suggesting that fluctuations in the growth of the frontal lobe are likely to cause an adolescent to be lacking in foresight, have poor impulse control, to be driven by emotions, and be susceptible to peer pressure. Perhaps more importantly is the fact that an arbitrary age set ignores the fact that there are

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<sup>48</sup> Giedd describes these developments as 'explosive' (2004:83).

fundamental differences in brain activity between individuals (Mohr and Nagel, 2010).

A report by the Royal Society concludes that ‘it is clear that at the age of ten the brain is developmentally immature and continues to undergo important changes linked to regulating one’s own behaviour’ and that ‘the evidence of individual differences suggests that an arbitrary cut-off age may not be justifiable’ (Royal Society, 2011:14). Thus, the present age of criminal responsibility in Malaysia has a direct bearing on the notion of a child in conflict with the law and his/her engagement with the criminal justice system. There has been evidence to suggest that the majority of adolescents who engage in criminal behaviour will do so during adolescence and at no other period of their life, an ‘adolescence-limited’ behaviour (Moffitt, 1993:676). Thus, introducing diversionary strategies while still maintaining an arbitrary lower age of criminal responsibility, presents a philosophical paradox about dealing with a child in conflict with the law.

## **7. Islam and criminal responsibility**

As alluded to in Chapter 2, Malaysia’s legal system facilitates the application of Islamic law or Syariah law. As a Federation of 13 States and three Federal Territories, each of the respective states administers Syariah laws and hence each State has its own specific laws that govern persons professing the religion of Islam.

Notwithstanding the fact that the *Child Act 2001* was enacted as the principal legislation governing children, a child in breach of Syariah law falls out of the application of the Act. Similarly, the *Criminal Procedure Code* which governs aspects of criminal law and process (for example, stop and search powers, arrest, search, bail etc.) does not apply when a child is in breach of Syariah laws as Syariah laws have specific provisions governing criminal procedure. A child in conflict with the Syariah law will be subjected to the Syariah courts, which have jurisdiction only over persons professing the religion of Islam.

The duality of law and procedure is enshrined in the Constitution and by virtue of Item 1, List II of the State List, where specific areas in which States have the authority to pass laws over persons professing the religion of Islam have been listed. Thus,



States have the jurisdiction *inter alia* for the creation of offences<sup>49</sup> against precepts of that religion and punishment of persons professing the religion of Islam. Primarily these deal with Crimes punishable by *hadd* (the plural being *hudud*) that include crimes such as illicit sex, sodomy, homosexual behaviour, consumption of alcohol or even where a man impersonates a woman.<sup>50</sup>

Hence, the application of Syariah law is based on each State having laws that determine the *offences* that are punishable under Syariah and a further set of laws in each state that determine the *criminal procedure* involved. (Emphasis added). This presents two discernible problems.

The first is that there can be variances in the definition and scope of Islamic laws as applied in the 11 States and 3 Federal Territories. For example, none of the State laws that deal with *offences* defines a ‘child’ although all State laws, save three, merely refer to the child on the basis of exclusion of criminal liability for a child who has not yet attained puberty. In so far as *criminal procedure* under Syariah law, all States make no reference to a ‘child’ but the term ‘juvenile offender’ or ‘youthful offender’ is used. (Emphasis added). A ‘youthful offender’ refers to a person above the age of ten and below the age of sixteen years save in the State of Perlis where the age is set as a person under the age of eighteen years. From the perspective of administering the law in Islam, this presents a problem particularly if one considers the possibility of criminal offences committed by a person aged 17 in more than one State.

Secondly, there are contradictions in the manner in which the minimum age for criminal liability is determined between provisions of Syariah law as applied in the States and with that of other general criminal laws. As considered in Chapter 2, that in so far as a Muslim child is concerned, where there is criminal offence committed

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<sup>49</sup> A private member’s Bill introduced in 2017, aims to amend the *Syariah Courts (Criminal Jurisdiction) Act 1965* (Act 355) with a view to increasing the Syariah courts’ maximum sentencing limits to 30 years’ jail, RM100,000 fine and 100 strokes of the cane from the current maximum of three years’ jail, RM5,000 fine and six lashes.

<sup>50</sup> For example, Section 7 of the *Syariah Criminal Code Enactment 1988* for the State of Kedah, states ‘any male person who, in any public place, wears woman’s attire and poses as a woman shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.’ Similar provisions exist in all other States. A similar prohibition can be found in Deuteronomy 22:5 of the Old Testament.

under Islamic law, the child's criminal liability is not determined by the minimum age requirement. It is dependent on the attainment of his or her puberty (*baligh* in the Malay language) and coupled with their capability to perceive and understand (Abiad and Mansoor, 2010) or is of sound mind and of free will.

In their analysis of the provisions of the respective state Syariah laws, Yusof and Rahim (2014) identify significant differences in how puberty (*baligh*) is defined in the various State laws. The four approaches are:

- a. in a general sense, indicating that a child has attained puberty;
- b. when a person has attained the age of twelve *qamariah* (lunar) years;
- c. when a person is older than fifteen years; and
- d. where a person has attained puberty, and is of sound mind and of free will.

The distinctions above suggest that defining criminal responsibility is not uniformly applied in the States and there appears to be a mix of arbitrary ages set, as well more generic approaches determined by the attainment of puberty. Puberty is deemed the point at which the child leaves childhood and enters adulthood and this determined by physical and sexual maturity.

Hence, under Syariah law, physiological evidence of puberty for a male is determined by the ejaculation of sperm and for a female by the first menses she experiences. In the absence of these signs, puberty of a person will be determined according to his or her age. Muslim scholars however have different views in determining the appropriate age of puberty and there are a number of theological approaches that are relevant but as suggested in Chapter 2, documented evidence as to how this is resolved in Malaysia are not readily available for analysis.<sup>51</sup> However in

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<sup>51</sup> The *Daily Times* in Pakistan reports the case of the Supreme Court requiring medical tests to be carried out in order to determine whether a 13-year old Hindu girl had attained puberty to rule on whether the girl's conversion to Islam and subsequent marriage to a Muslim man were valid (Kamran, 2006).

Malaysia's response to the United Nations (United Nations, 2006) the conflicting interpretations by the following Muslim scholars were acknowledged as thus:

- a. According to the Hanafiyah, the age of puberty for both male and female is 15.
- b. According to Imam Abu Hanifah, the age of puberty for male is 18 and for female is 17.
- c. According to the Malikiyah, the age of puberty for both male and female is 18.
- d. According to the Syafi'iyah and the Hanabilah, the age of puberty for both male and female is 15 (2006:37).

Suffice to say that the principal means of determining criminal responsibility as applied by Islamic law in Malaysia is reliant on physiological evidence coupled with the relevant age requirements being met. The challenge in applying this approach is that the onset of puberty is not universal in its occurrence in the life of a child. There is ample scientific evidence of disorders of puberty that are classified as early (precocious) or late puberty that cannot be easily established on the basis of purely physiological (or clinical) evidence but one that requires fairly complex biochemical assessments of puberty (Prentice and Williams, 2013) or the use of skeletal imaging (Diméglio et al, 2005). Thus, the mere manifestation of the physical symptoms of attaining puberty, are not by themselves sufficient to determine puberty. Further, there are broader emotional and psychological aspects that require consideration.

The low age of criminal responsibility set under the general criminal provisions coupled with the reliance of puberty as an age determinant under Syariah law presents a problem in how the age of the child in conflict with the law is defined and interpreted. This notion of criminal responsibility also implies that girls under Islamic law may face the prospect of sanctions for breach earlier than boys and this then raises the issue of gender bias.

Clearly, globally, there 'has been a trend for countries around the world to raise their ages of criminal responsibility' (Hazel, 2008: 32). The UN Committee on the Rights of the Child (United Nations, 2007a) had recommended that Malaysia raise the age to at least 12 and recommended that Malaysia reviews its dual legal system (Civil

and Syariah) but given the complexity of the socio-political structure in Malaysia and the position of Islam in Malaysia, this has not been resolved. This conflict will likely remain even with the plan of introducing diversion and raises the issue of the extent to which the rights of the child have a place in this discourse.

## **8. The concept of rights**

The development of the concept of rights is in tandem with the corresponding religious, cultural, philosophical and legal developments of human civilisation. It is therefore, inextricably connected with the development of socio-democratic traditions. There is ample historical evidence of the existence of rights in societies where systems of propriety and justice were established.<sup>52</sup> Early expressions of the concept of rights rest upon the fundamental notion that ‘human rights are held by individuals simply because they are part of the human species’ (Ishay, 2004:3). The state of being human therefore implies that ‘human rights also are inalienable rights’ as one cannot cease being human, ‘no matter how badly one behaves or how barbarously one is treated’ (Donnelly, 2013:10).

In its early contemporary manifestations, the concept of rights emerged as the expression of political will natural to man. These early concepts of rights built upon the theoretical foundations of Paine, Locke and Montesquieu among others formed the basis for transnational concepts of human rights as witnessed in the American Declaration of Independence of 1776 and the French Revolution of 1789. By the 20<sup>th</sup> century, the concept of rights had evolved as a moral, political and legal framework that espouses philosophical idealism.

Thus, following the turmoil of the Second World War, the Preamble to the Charter of the United Nations affirms the post-war world order’s belief in ‘fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’ The Universal<sup>53</sup> Declaration recognises

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<sup>52</sup> These range from The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and the writings of Confucius (Ishay, 2004:7).

<sup>53</sup> Whether such rights are capable of being ‘universal’ remain a contested matter and forms much of the debate surrounding cultural relativism and Western hegemony explored below.

civil, cultural, economic, political and social rights. An analysis of the concept of rights primarily involves understanding both the *form* and *substance* of rights. (Emphasis added).

Hohfeld's (1913) analysis sought to describe the form that the concept of rights took. Thus, Hohfeld's analysis therefore argues that rights, duties, privileges, no-rights, power, immunity, disability, and liability are correlative concepts. These concepts interplay between each other in a scheme of opposites and correlatives. As such, a person's rights would correspondingly involve an application of duties and each individual is situated in this complex matrix of relationships. The concept of rights therefore cannot be viewed in isolation from other varying but equally important concepts. Hohfeld identified four types of rights, and these are claim rights, liberty rights or privileges, powers or abilities, and finally, immunities. These rights are only intended as conceptual tools and therefore arguably are not subject to criticism on the basis that they do not explain our legal understanding of particular rights.

In spite of that view, there have been a number of differing views on the Hohfeldian analysis of rights. For example, Neil MacCormick (1977) suggested that a right-holder rather than just being a generalised beneficiary of the rules was the intended beneficiary of a *specific share* of benefit. (Emphasis added). Joseph Raz (1986:189), argues that the interest of the right-holder or an aspect of them, are sufficient enough a reason for imposing duties on others either not to interfere with the performance of some action, or to secure the right-holder in something. These criticisms challenged the form or structure of the concept of rights.

In the broader context of analysing the *substance* of rights, particularly those that impact children, two principal theoretical accounts emerged. The Will theory also known as the choice theory as propagated by Hart (1982), suggests that a fundamental feature of rights is that allows rights-holders to assert a level of control over another person's duty akin to that of a 'small scale sovereign' (1982:183). This then implies that the rights holder has free choice to insist upon their rights, or to waive them. A complication that arises from this line of thinking is that children (at least young ones)

cannot be bearers of rights, as they lack the capacity to claim or waive them (Campbell, 1992). In Campbell's view, the Will theory is 'inadequate as an expression of the moral significance of persons, particularly children' (1992:1).

However, Hart argues that the Will theory does recognise children are rights-holders, albeit represented by others such as their parents or other guardians until they reach maturity (Hart, 1982).

Neil MacCormick (1982) in his study suggests that the existence of a right precedes the imposition of a duty. It is because children have *a right* to be cared for and nurtured that parents have the *duty* to care for them (emphasis added). Therefore, children do have rights, irrespective of their ability to waive or claim them. The alternative view, identified as the Interest theory (MacCormick, 1982, Raz, 1986, Campbell, 1992) suggests that children, as humans, have rights if their interests are the basis for having rules, which require others to behave in certain ways with respect to these rules. The Will theory is thus inappropriate and should be rejected because of its inability to account for children's rights (MacCormick 1982, 157–165).

Freeman (1992) argues that the Will Theory is an inadequate explanation of the basis of children's rights, since children who still lack the capacity to *form a will* are not in a position to *assert* these rights at all. As Freeman points out, children have *interests* that justify protection before they develop *wills* to assert their rights. (Emphasis added).

Another approach is to avoid making the dichotomous division between the Will and the Interest theory (or for that matter between rights and needs). Wolfson (1992) suggests treating capability as a continuum, gradually moving from welfare rights to freedoms.

A child is in need of protection because they are deemed to be 'not yet human beings' (Verhellen, 1993:358) or 'adults in waiting' (Matthews and Limb, 1998:67) and such a view of the child represented the welfare perspective of children, a perspective that dominated the much of the legal response to issues that impact on children.

The opposite spectrum to this philosophical debate suggests that children are autonomous subjects (King, 2007) competent and capable of holding human rights of their own. This philosophical debate framed much of the development of the notion of child rights, particularly in the development of the international framework.

A range of criticisms emerged on the very notion or substance of rights itself. These include among others, broad criticisms on rights, feminist perspectives on the limitations of the rights discourse, postmodernist cynicism, communitarian challenges and cultural relativism perspectives (Tushnet, 1984; Perry, 1984; Smart, 2002; Faraday, 1994; Olsen, 1984; Gaete, 1993; Ignatieff, 2001; Hutchinson and Monahan, 1984 among others). These criticisms focussed particularly on the individualistic and adversarial nature of rights, the view that the rights discourse is empty rhetoric concealing unjust distributions of power. Critics also argue that rights are indeterminate, intellectually incoherent, and therefore unhelpful in resolving actual conflicts. Steiner et al (2008) suggest that human rights protected in international treaties are invariably vague and ambiguous and that this malady is most acute with respect to economic, social, and cultural rights. These perspectives find resonance in the human rights debate in Malaysia and will be explored below, particularly in Chapter 6.

Notwithstanding the theoretical disputes and vagueness regarding the concept of rights, the international arena has demonstrated a historical commitment to the issue of rights as reflected in the various international instruments and treaties that have appeared in the 20<sup>th</sup> century.

Higgins (1999) attributes this infusion of rights in the international sphere to the vagueness of international human rights in itself. Thus, the language of rights is open to a varied and open textured interpretation, which then serves as a means to pursue aspirational goals. International human rights therefore have the means to transform whole societies encouraging collective mobilization rather than individual claims. Higgins suggests that to respond to diversity in identities and cultures the 'personhood' and the needs of various types of individuals, with the full range of cultural, gender and geographic differences need to be addressed (Higgins 1999:245)

and this of course includes children. The application of the form and substance of the concept of rights can be gleaned from the evolution of the various treaty provisions involving children.

The *Geneva Declaration 1924* regarded children as ‘objects’ that need protection, rather than individuals with personal rights. For example, the fourth principle of the *Geneva Declaration* provides that, ‘the child must be put in a position to earn a livelihood and *must be protected* (emphasis added) against every form of exploitation.’

The more detailed *Declaration of the Rights of the Child 1959* regarded children as subjects to their own legal rights but still addressed only the protective aspect of children’s rights. Thus, the Preamble to the Declaration highlights children’s need for special care and protection, ‘including appropriate legal protection, before as well as after birth.’

As is clear, both these documents focussed on the rights of children to special measures of care and protection and thus dealt, in fact, with children’s welfare. The notion of children’s freedoms and autonomy had not been specifically acknowledged yet. Article 24(1) of the *Covenant on Civil and Political Rights 1966* also alludes to this by providing that a child shall have, ‘the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.’ Similarly, Article 10 of the *International Covenant on Economic, Social and Cultural Rights 1966* provided that, ‘special measures of protection and assistance should be taken on behalf of all children.’

With the adoption of the CRC, the approach taken was to strike a ‘balance between viewing the child as the object of caretaking who requires various services and protections from adults and the rights of the child to act fully in his or her capacity as a person’ (Fass, 2011:18). Thus, the CRC recognises that children have civil, political, economic, social, health, and cultural rights. Perhaps fundamentally as well, the CRC through Article 12 acknowledges the right of the child to be heard directly or indirectly through a representative in any administrative or judicial proceeding affecting the child.



The flurry of states ratifying the CRC led to the need to review state policies on the treatment of children and the philosophical basis for which existing laws and policies that are applicable to the child. Academic discourse centred primarily on the debate as to determining whether a child is capable of having rights.

The CRC is the most ratified of all the treaties on human rights and implies an array of important changes in the social group of childhood. The governments that approved the CRC committed themselves to allowing children to develop their potential in a context without hunger, poverty, violence, negligence or other injustices or hardships, respecting at the same time their civil, economic, social, cultural and political rights. It also encompasses provisions guaranteeing respect for the child's identity, self-determination and participation. Countries are legally bound to honour children's rights, and this yields an opportunity to initiate public dialogue and action on behalf of young children (Arnold, 2004:4).

Thus, the treaty came to endorse, for the first time, the idea that the child as a being in possession of rights and of fundamental liberties. It recognises every child as the bearer of his or her own human rights. These rights are not derived from or dependent upon rights of parents or any other adult. This is the foundation for both the concepts of emancipation and of empowerment of the child.

### **9. A child rights-based approach?**

UNICEF does not have a specific definition of a 'child rights-based' approach. It elects to apply a broader view and thus refers instead to a 'human rights-based' approach to programming. Thus, diversion and alternatives should comply with the rights set out in the CRC and other human rights instruments (this is not limited to Articles 37(b) and 40, but *all* articles). As such, the child must be seen as a complete human being, not just in terms of the juvenile justice label (UNICEF, 2007b).

International rights standards, for example the *European Convention on Human Rights (ECHR)* have also increasingly formed the basis of legal challenges brought by children. Many of the successful claims have invoked applying what Ferguson (2013) refers to as 'rights for children.' Ferguson argues that the concept of 'rights for

children' are to be understood from the perspective of fundamental human rights, in which case children are plainly rights-holders (2013:181).

Ferguson distinguishes 'rights for children' with 'children's rights' to which she refers to as 'a class of rights that includes both rights targeted specifically at children and rights in relation to which the identity of the right-holder, who happens to be a child' (2013:178).

A reason attributed to the importance of rights is the social value attached to it. Freeman describes this value in terms of the dignity of the rights-holder and thus 'rights are important because they recognise the respect the bearers are entitled to. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and integrity' (2007:7). This principle is seen in Article 40(1) of the CRC, in which countries are urged to 'recognize the right of every child ... to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.' It has also been suggested that any theory of rights that fails to accommodate children's rights must be deficient in some manner (MacCormick, 1976).

The norms surrounding the notion of 'rights of the child' have a direct bearing on understanding the basis in which the Malaysian juvenile justice system is framed and the manner in which children are treated within that framework. Clearly, there are issues with reconciling philosophical issues that determine the child's status *qua* offender and his/her status as a child. The age of criminal responsibility, the use of harsh sentencing and the use of detention and the apparent lack of non-detention approaches in the system are perhaps indicative of perceived shortcomings in the Malaysian juvenile justice system. It is also perhaps indicative of the extent in which the system embraces the notion of a rights-based youth justice system that preserves a child's foundational rights.

Hollingsworth (2013) argues that 'an essential component of a rights-based penal system for children is that it should not irreparably or permanently harm the child's foundational rights' (2013:1046). Such harm she argues can be avoided through lower sentences, different types of punishment and alternative guiding principles 'not

because children are less culpable, but because of the impact on their development as fully autonomous individuals' (2013:1067).

Thus, for Hollingsworth, foundational rights are 'an attempt to highlight the child's special status as a 'becoming' rights-holder' (2013:1061). This then facilitates what Buss considers as a focus on 'what we want children to become and how we might help them get there' (as cited in Hollingsworth, 2013: 1061).

In this context, the application of a rights-based argument for diversion seeks to discover the extent to which Malaysia recognises the notion of foundational rights and further, whether the failure to introduce diversion through the amended Child Act ignores the foundational rights of the child to develop as fully autonomous individuals. Thus, while the existence of these rights, at least as a political, and sometimes legal, aspirational goal, are in place, the actual workings of the juvenile justice system appear to be inconsistent with this.

#### **10. The Malaysian position on rights**

The framers of the Malaysian constitution elected to describe the concept of 'rights' as concepts of '*fundamental liberties*'. (Emphasis added). The distinction is not without argument particularly in the context of the American jurisprudence where distinctions are made between civil rights and civil liberties (Delgado, 2004). For present purposes, it may be best to conclude that the Malaysian position appears to be one in which these phrases appear to be used interchangeably.

These bundles of liberties are found in Articles 5-13, Part II of the Constitution and include the right to life and personal liberty; freedom from slavery and forced labour; protection against retrospective laws and repeated trials; equality provisions; freedom of movement; freedom of speech, assembly and association; freedom of religion; rights in respect to education and the right to property. In 2001, the constitution was amended to include gender equality. The Malaysian constitution is silent on matters of equality in relation to disability, pregnancy or sexual orientation.

While these fundamental liberties are provided for in the constitution, these rights are not absolute and hence are subject to limitations. For example, while there is a

right to life and personal liberty, such rights are subject to the law. Parliament may also by law impose on the rights conferred such restrictions as it deems necessary or expedient in the interest of the security of the Federation. Thus, for example while one has the right to life, such a right is subject to the provision of section 302 of the *Penal Code* which declares that ‘whoever commits murder shall be punished with death.’

The death penalty and other limitations on the freedom of expression and association and the power of the state to restrict such freedoms in the interest of national security places a restriction on Malaysia’s obligations arising from international treaties and conventions.

These include those reservations expressed in relation to the *United Nations Declaration on Human Rights 1948* (UDHR), *Convention against the Elimination of Discrimination against Women 1979* (CEDAW) as well as those relevant to the CRC. In the recent Universal Periodic Review (United Nations, 2013) Malaysia expressed, its commitment to progressively review reservations made with a view to withdrawal of reservations where appropriate.

Judicial approaches to interpreting these rights have been restrictive. The *Federal Constitution* empowers the courts to declare invalid legislative and executive action that are inconsistent with the Constitution. However, the Malaysian judiciary in several decisions<sup>54</sup> has ‘adopted a strict legalist and literalist approach, marked by insularity and an unwillingness to contemplate fundamental underlying principles’ (Tew, 2016: 695). The courts have tended to defer extensively to the political branches exercising little meaningful review over government intrusions on fundamental liberties. Tew (2016) attributes this phenomenon to the strong dominance that the ruling party has over the executive and executive dominance of the legislative chamber.

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<sup>54</sup> Tew (2016) cites examples of this restrictive judicial interpretative approach in: *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 6 CLJ 541, *State Government of Negeri Sembilan & Ors v. Muhammad Jazaili Mohd Khamis & Ors* [2015] CLJ. 13, *Public Prosecutor v. Azmi Sharom* [2015] MLJU 594, *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

As such, the context in which rights in Malaysia are applied is that while the underlying philosophical basis is built upon broad notions of *liberties* to determine the limits of governmental action, the political reality is starkly different. Any reference to the concept of *rights* is limited to the basic idea of rights and as such do not include the full range of positive rights, for example economic, social and cultural rights. (Emphasis added). These rights have been incorporated through obligations imposed *via* the various treaty/convention provisions and are not expressly stated in the constitution. Ancillary legislative provisions have been enacted to complement the gaps in the constitution and to introduce some measure of economic, social and cultural rights. However, there is merit in making the claim that the state must fulfil its *duty* in protecting and guaranteeing those rights. (Emphasis added). There is also a claim that the judiciary must assert greater control over increasing legislative and executive erosion of human rights. As suggested by Harding (2012) the Malaysian paradox is that ‘it exhibits the fundamental rights mechanisms and rhetoric, but these are sporadically applied and habitually restricted in scope’ (2012:21).

### **11. The Convention and the notion of rights in Malaysia**

The implementation of the *Child Act 2001*, was a means to reconcile the expectations of the CRC with domestic laws but, as considered above, issues impacting on child rights remain, for example the application of the mandatory death sentence, the indeterminacy in life imprisonment convictions or that a child can still be caned and whipped. The existing provisions in the law that restrict freedom of association, expression or those that permit preventative detention without trial or the plurality of Islamic laws and secular law being applied in so far as a child is concerned also appear to be incongruent with the CRC. This, it appears, is a common problem. Hathaway (2002) suggests that ratification is sometimes seen as a meaningless signal, with little or no impact on state behaviour.

Furthermore, the underlying philosophy of the CRC is premised on the element of protection and the recognition that the child has the right to participate (Article 12) and hence arguably is capable of having rights. As such, states are under an obligation to ensure that in both practice and policy, this philosophical aspiration was to be

achieved. The CRC acknowledges the significance of developmental psychology and the pedagogical evolution of the child for the application of the rights-based philosophy and this is achieved through the recognition of the concept of a child's evolving capacities as enshrined in Article 5.

As was noted in Chapter 2, Malaysia had initially entered reservations to CRC Articles 1, 2, 7, 13, 14, 15, 28(1)(a) and 37 on the basis that these do not conform with the Constitution, Syariah laws, national laws and policies of the government of Malaysia (UNICEF, 2014).

At this stage, plans to introduce diversion, in compliance with the CRC, appears to be driven by state interests, in the mould of the realist interpretation of treaty compliance. This view suggests that the states' interests 'provides the spring of action; the necessities of policy arise from the unregulated competition of states; calculation based on these necessities can discover the policies that will best serve a state's interest [which is the preservation and strengthening of the state]' (Waltz, 1979: 117).

Shor (2008) suggests that 'norm-violating governments conform to human rights norms only when it is in their self-interest to comply with external pressures' (2008:119). Arguably, this appears to be the case given Malaysia's punitive system and various other restrictions on rights in general. However, from a Malaysian perspective, there also appears to be other variables that have resulted in treaty obligations and these include the reputational costs (associated with compliance), pressure from domestic non-governmental organisations and the socialization and ideological conversion of public officials, particularly those directly involved in operational aspects of the CRC.

This is further compounded by the lack of enforceability as far as treaty obligations are concerned. By virtue of Articles 43-54, a Committee on the Rights of the Child is established and State parties undertake to submit to the Committee periodic reports on the 'measures they have adopted which give effect to the rights recognised . . . and on the progress made on the enjoyment of those rights.'

The Committee (or for that matter the General Assembly) does not have the power to impose punitive measures against offending States but may make 'suggestions and

general recommendations' Further as can be seen, State parties may enter reservations and in the case of Malaysia (and many other State parties) may also provide assurances of broad intentions to comply. It is also evident from the preceding discussion, there are also differences of perception in particular between State agencies and 'other competent bodies' (the norm is to seek the views of various agencies or NGOs operating in the State concerned) invited to participate in this process.

Governmental responses have always been to highlight measures taken and on providing assurances, where needed, that inadequacies are being resolved. Often, a more critical or cynical view is adopted by the NGO's consulted. Perhaps from a Malaysian perspective, the positive development through the implementation of the CRC through domestic legislation is the inter-agency report that was undertaken by the Ministry of Women, Family and Community Development and UNICEF to study the juvenile justice system and the corresponding changes that were introduced.

Thus, the Convention presents difficulties in ensuring efficient cooperation and uniformity in application among member States. However, as has been considered, Malaysia is not alone in its stance in not being able to give its full approval to the CRC provisions. A number of African, Arab and Asian countries have adopted similar positions and a primary argument raised was on the perceived western and hegemonic spirit of the Convention and therefore felt it necessary to introduce charters of their own. For example, the *African Charter on the Rights and Welfare of the Child (ACRWC) 1999* or *The Arab Charter on Human Rights 2004*. As of November 2013, 13 states have since ratified the Arab Charter (De Schutter, 2014:33).

Furthermore, in the absence of a supranational authority to police compliance and to demand action at various levels, there is a gap between the expectations of the Convention and national implementation.

Freeman (2000) suggests that a plausible reason for the gap between the Convention and practice is the view from the left, citing for example the views of Tushnet (1984, 1992). This view suggests that owing to the vague and indeterminate meaning afforded to the concept of rights, those who wield power can manipulate the

meaning of 'rights' as they wish. As such, the language of rights undermines efforts to accomplish genuine social changes by diverting attention from the real abuses, the imbalance of power, economic disparities, social oppression, and focuses instead on symbolic abstractions. Freeman (2000) also points to attacks from the right and from communitarism arguing that for both, there are 'too many rights' and 'too few responsibilities' (citing for example Etzioni, 1993). Arguably, the Malaysian position is fraught with these symbolic abstractions and yet this again is not unique within the contested notion of the perceived universality of rights.

The Malaysian juvenile justice system, has, mirrored the evolution of international perspectives on child rights. In the era where children held no fundamental rights under the law, the Malaysian justice system did not have a separate system of justice for juveniles. At the time when children were considered a separate and special class of immature persons in need of State protection, these welfare principles were echoed in the *Children Enactment 1922* and the subsequently enacted *Juveniles Court Act of 1947*. However, subsequent global developments in child rights did not find its way into Malaysia.

From a philosophical perspective, the Malaysian juvenile justice system placed less emphasis on children's rights, and instead focused on accountability and principles of punishment. Similar experiences in finding a balance between contrasting philosophical views exist in other countries that share a common historical connection with British colonial exploits, for example in India and Singapore (Saibaba, 2012). Gray's analysis of the position in Hong Kong, another former British colony, suggests that the challenge is in finding the balance between contrasting philosophical traditions of punishment, justice, and welfare. Such a balance, Gray suggests, has rarely been achieved in Western jurisdictions or in Hong Kong for that matter (Gray, 1996). These philosophical challenges therefore complicate arguments about the rights of the child.

In jurisdictions that have a written constitution, there is a basis to argue that the rights of the child in conflict with the law can find further support from the rights defined in the constitution and as interpreted by the courts. For example, the Indian



Constitution (Articles 15(3), 21A, 23 and 47) has specific provisions on child labour and special laws for children.

The position in the United States reflects a paradox of envisioning of child rights. Having refrained from ratifying the Convention, there are many aspects of child rights that are argued to be governed by broad judicial interpretations of constitutional rights. Yet, children in conflict with the law encounter adult-like treatment that is incongruous with the CRC and ‘many terrible things happen to children in the United States today, and the Constitution has not proven to be effective in addressing these evils’ (Guggenheim, 2006:44).

In recent years, there has been some judicial response to the issue of child rights and incarceration. In *Graham v. Florida* 560 U. S. (2010), the United States Supreme Court issued a historic ruling that life without parole sentences for juveniles convicted of non-homicide offences, unconstitutional. In the majority opinion, Justice Kennedy explained that the decision ‘gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.’

Similarly, in *Miller v. Alabama* 567 U. S. (2012), the Court struck down statutes in 29 states that provide for mandatory life-without-parole sentences for children, on the basis that a such a provision contravenes a foundational principle that the ‘imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.’

In *Montgomery v. Louisiana* 577 U.S. (2016), the court ruled that the Miller decision applies retroactively. For juveniles, a mandatory life sentence without the possibility of parole is unconstitutional. Justice Kennedy, writing for a 6-3 majority, noted that the Court in *Roper*, *Graham*, and *Miller* found that children are constitutionally different from adults in their level of culpability as they lack maturity and a sense of responsibility compared to adults.

The Malaysian constitution is a written one. However, it does not afford any specific rights to a child. Further, as noted above, neither does it contain any provision on the prohibition of cruel, inhuman or degrading treatment or punishment.

Article 5(1) of the Malaysian *Federal Constitution* provides that '[n]o person shall be deprived of his life or personal liberty save in accordance with law.' The exception to the provision facilitates the application of statutory limitations to the freedom to life and personal liberty. This includes the various capital punishment provisions that are applied as far as children in conflict with the law are concerned as well as those that allow the child to be detained for an indeterminate period, almost akin to the life-without-parole sentences in the United States. These underlying issues have resulted in Malaysia expressing reservations to a number of provisions of the CRC notably Article 37.

While the principles enshrined in the constitution are applicable in a general sense to children, as was previously noted, Malaysia's approach to juvenile justice functioned based on treating children as objects of concern, reflected in the formal police and court-based interventions and institution-based structures and the statutory provisions that governed juvenile justice. The implementation of the *Child Act 2001*, while bringing with it an attempt to reconcile the expectations of the CRC with domestic laws did not adequately fulfil all aspects of the spirit of the convention.

Thus, while Malaysia has ratified the treaty, introduced changes in the law and policies affecting a child in conflict with the law and while it is still likely to reform the law, 'gaps between law and practice are often vast' (Dusuki, 2012: 205). At another level, the multiplicity of issues that are inconsistent with the philosophical basis of the CRC creates gaps in the idealism espoused by the convention and the actual workings of the criminal justice system, particularly those that affect the child in conflict with the law. The effect is that the child in conflict with the law in Malaysia is caught in a 'rights gap' with restrictive domestic laws at one end of the spectrum and broad right-based notions as expressed in the Convention at the other end. More pertinently, the child is not likely to be aware that this gap exists.

This is not a phenomenon peculiar to Malaysia. Since the inception of the CRC in the United Kingdom there has been a series of challenges in implementing the CRC with Smith suggesting that ‘little has changed in recent years to enhance the rights of children and young people’ (Smith, 2011:146). The situation is not very different in Canada with Denov commenting that ensuring ‘the provisions of the CRC are taken seriously requires political will, government commitment and strong public support for the implementation of children’s rights’ (Denov, 2004:17).

Realistically governments face challenges in giving adequate time, resources and energy to addressing children’s rights. The child rights agenda is in competition with other government priorities and restricted financial resources. The experience in other jurisdictions demonstrate conflicting policy struggles where ‘discourses of child protection, restoration, punishment, public protection, responsibility, justice, rehabilitation, welfare, retribution, diversion, human rights, and so on, intersect and circulate in a perpetually uneasy and contradictory motion’ (Goldson and Muncie, 2009: vii). Clearly, this underscores the view that claims are being made for children’s rights even though there are unresolved conflicts of a philosophical nature and if these conflicts are not adequately resolved, it is likely that the rights of the child will remain an empty and illusory concept.

## **12. Islam and Child Rights in Malaysia**

Special prominence is given to Islam in the Malaysian Federal Constitution. As has already been considered, matters of the Islamic faith are dealt primarily by state laws as enacted within the Federation. Islam affords a child a range of rights and these are primarily those that deal with the well-being of the child. These include for example the right to education, health care or even gender equality. Thus, states are reminded of the importance of ‘parliamentary endorsement and ratification of international conventions, treaties and agreements pertaining to the rights of children, followed by the state’s adherence of such agreements, provided they do not contravene with the correct understanding of Shariah’ (UNICEF, 2005:11). The primary approach is to treat children as objects of concern and this is well represented in policies and approaches adopted by the administration of Muslims in Malaysia.

However, as has been considered above, the issue of the age of criminal responsibility remains a matter of concern, as there is a divergence in theoretical approaches towards determining the issue of age. A further socio-cultural issue considered was corporal punishment.

In its report, *Inhuman sentencing of children in Malaysia*, (Child Rights International Network, 2013) CRIN stated that 19 girls and boys were sentenced to whipping under Syariah law and 19 were carried out under Syariah law across the same period.<sup>55</sup> Corporal punishment is thus a lawful sentence under Islamic law for males and unlike the provisions of the *Child Act 2001*, for females also.

For example, the *Syariah Criminal Offences (Federal Territories) Act 1997* identifies the punishment of whipping of up to six strokes for the offences of false doctrine, incest, prostitution, homosexual acts and other sex offences.<sup>56</sup> The Act applies to children (males or females) who have attained the age of puberty according to Islamic law (Articles 2 and 51) and this amplifies the differing standards in the application of the laws applicable to children in conflict with the law, particularly where the application of Islamic law is concerned.

In so far as, imprisonment of children under Islamic Law is concerned, Section 2 of the *Syariah Criminal Procedure (Federal Territory) Act 1997* provides for the age of youthful offender as ‘an offender above the age of ten and below the age of sixteen years.’ Any Muslim child who is above the age of ten is presumed to have the ability to understand the nature of the act committed but the child lacks the understanding of legal consequences of such act. Thus, the legislation provides for such category of person not to be punished by imprisonment.

While females are not whipped under the *Penal Code*<sup>57</sup> or under the earlier *Child Act 2001*, pursuant to Islamic law this is permitted. For example, in 2009, a 32-year-old was sentenced to receive six strokes from a rattan cane after admitting in an

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<sup>55</sup> Whipping was also a permissible form of punishment under the *Child Act 2001* but was limited only to males. The *Child (Amendment) Act 2016* has since abolished this.

<sup>56</sup> See Articles 4, 20, 21, 22, 23, 25 and 26.

<sup>57</sup> However, the mandatory death sentence applicable for drug trafficking makes no distinction between males or females.

Islamic court to the crime of drinking beer in a bar<sup>58</sup> (Ahmed, 2009). In 2010, three women were caned under Islamic law for committing adultery. This was reported to be the country's first-ever case involving flogging of women<sup>59</sup> (Anis, 2010).

Recent amendments to the *Child Act* did not address the issue of corporal punishment but abolished judicial administered caning in court. From a Malaysian perspective, the confluence between child rights and Islam extend to socio-religious practices that include acceptance of child brides considered above or female genital mutilation practices.<sup>60</sup> These issues bring to the fore the difficulty in applying a universal concept of rights in a culturally diverse world.

### **13. Diversion in the youth justice system**

Diversion is 'an attempt to divert, or channel out, youthful offenders from the juvenile justice system' (Bynum and Thompson, 1996:430). The channelling of children away from the formal justice system is achieved through alternative procedures and programmes. Diversion therefore involves 'strategies developed in the youth justice system to prevent young people from committing crime or to ensure that avoid formal court action and custody if they are arrested and prosecuted' (Muncie, 2004:307). Ancillary to this is the need to ensure that this is done without necessarily fully absolving them of culpability for their actions and where possible, to also offer elements of supportive interventions within existing conventional correctional systems (Beck et al., 2006; Goldson, 2000).

Underlying the concept of diversion is the view that processing children in conflict with the law through the juvenile justice system may do more harm than good

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<sup>58</sup> This was subsequently commuted to a three-week community service at a children's home by the Ruler of the State.

<sup>59</sup> Enactment No. 8 of the *Syariah Criminal Procedure Enactment 2002* in Pahang (a state within the Federation) specifies that the whipping rod shall be not more than 1.22 meters and its thickness not more than 1.25 centimetres. The person 'shall use the whipping rod with average force without lifting his hand over his head so that the offender's skin is not cut and that the offender shall wear clothes according as per the expectations of Islam.'

<sup>60</sup> Isa et al (1996) in their study of 262 Muslim women found that a form of female *circumcision* is practiced in the State of Kelantan. The authors argue that the term 'female genital mutilation' would therefore be a misnomer in the Malaysian context. Recently the Health Ministry claimed that FGM is a "harmless" procedure pursuant to medical guidelines drawn up by the Health Ministry (Brown, 2018).

(Lundman, 1993). Thus, a formal court process may stigmatize some children for having committed relatively petty acts and as such society *creates* the criminal by labelling certain acts as deviant and treating individuals who commit those acts as outsiders, (Becker, 1963). Such labelling Lemert (1951) argues, leads to secondary deviance as the offender internalizes this behaviour. Here Lemert illustrates this with the 'errant schoolboy' example (1951:275). The offender now behaves in accordance with the label that society has affixed (Schur, 1971). A further argument put forward was that in matters of delinquency, a policy of radical non-intervention should be adopted (Schur, 1965). Notwithstanding the view that non-intervention can be perceived as 'benign neglect' or 'simply doing nothing' (Cohen, 1988:198) a number of reasons have been put forward to argue the basis of diversion as an alternative to formal court proceedings.

In part, diversion ameliorates the problem of overburdened juvenile courts and overcrowded prison facilities, so that courts and institutions can focus on more serious offenders. This then has the dual effect of helping to ease financial constraints on the system (Levin, 2010). Most juvenile crime is limited to a particular episode and hence deemed transitory and the argument being that young people will most likely grow out of offending behaviour over time as they mature (Cunneen and White, 2002). Further, diversion has been associated with reduction in recidivism (Goldson, 2000).

A study involving young men in Canada found that involvement in the formal aspects of the juvenile justice system increased the likelihood of subsequent engagement with the adult criminal justice system. The particular study established that the greater the intensity of, and the more restrictive, the intervention, the greater will be the negative impacts later in life, particularly its impact on criminal activity (Gatti et al, 2009).

In fact, studies have shown that young people who are diverted away from the criminal justice system experience lower levels of recidivism compared to those who are dealt with by the courts (Goldson, 2000) and this has been established in other jurisdictions for example in Australia (Cunningham, 2007).

Although an overview of studies done in Canada, yielded mixed results as far as the rate of recidivism is concerned (Wilson and Hoge, 2013). However, perhaps more importantly, diversion facilitates the opportunity for children to have access to and receive appropriate intervention strategies away from the formal juvenile justice system (Beck et al., 2006).

Diversion primarily operates at three levels:

1. Crime prevention strategies, which aim to prevent young people becoming involved in criminal activity in the first instance;
2. Diversionary schemes which aim to divert young offenders away from the criminal justice system as early as possible; and
3. Sentencing options which aim to divert young people away from custodial sentences (Polk 2003; Polk et al 2003).

This study initially sought to explore the second and third level of diversion — those practices that divert young people early in the justice process, particularly prior to formal court intervention and those strategies that aim to avoid custodial sentencing. However, as noted in Chapter 1, conversations with stakeholders led to blurring of these theoretical concepts and as such the application of diversion in practice, yields a measure of uncertainty. This is considered in Chapters 5 and 6.

The principle that the child be accorded the right to such interventions has found their way into international jurisprudence through United Nations, UNICEF and other agencies and as such, there is an attempt to bring member states in line with a singular global standard of universal application. Whether this in itself is desirable or even attainable will be considered in this research but suffice to say the approach has been to encourage member states to abide by these global standards of youth justice. However, the reality is that while the CRC has been frequently described as the most ratified human rights convention in the world, it is also lamentably the most violated (Muncie, 2008).

Article 40(3)(b) of the CRC requires States parties to promote the establishment of measures for dealing with children in conflict with the law without resorting to

judicial proceedings, provided that human rights and legal safeguards are fully respected. *The Beijing Rules* through Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. The UN Committee on the Rights of the Child in interpreting article 40(1) of the CRC suggests that such alternatives should not be limited to children who commit minor offences (United Nations, 2007b).

As early as 1989, New Zealand introduced its *Children, Young Persons and Their Families Act 1989* in which the goals and values underpinning the system are explicitly described in its objects and principles. These emphasise a number of established values relating to the protection of rights, welfare and justice considerations. Diversion from courts and custody was to be preferred, as well as the least restrictive sanctions. There is an emphasis on accountability and a separation of welfare and justice matters. There is also an emphasis on newer and restorative values of empowerment of children and families, repair of harm and the reintegration of offenders into society.

The New Zealand system represented the first legislated example of a move towards a restorative justice approach to offending which recognised the participation of all involved in the particular offence and focuses on repairing the harm, reintegrating the offender, and restoring the balance within the community affected by the offence. The unique integration of Maori custom and law with that of Western criminal justice systems affords an underlying philosophical justification for the structure of the youth justice system.

Similarly, the Scandinavian states (Denmark, Finland, Iceland, Norway, and Sweden) have strong supportive based interventions that are not reliant on criminal acts as the basis for these measures. The use of restorative justice concepts including for example the use of mediation has had a strong resonance in these jurisdictions (Lappi-Seppälä, 2007).

While the context of such a restorative justice can be loosely found in the early cultural history of Malaysia, the concept was fragmented, at best, and with eventual British dominion, the fragments of such a restorative approach no longer has



resonance in Malaysia. The developments in New Zealand unfortunately did not significantly influence policy directions in Malaysia as to the child in conflict with the law and it is only in recent years that the concept of restorative justice had come to the fore in the discussion as to the direction that Malaysia should take in juvenile justice.

Diversion as a measure has yet to achieve a high degree of acceptance in the region. In the South Asia region, the concepts of diversion and restorative justice have yet to take hold and countries in the region have yet to make diversion a core feature of juvenile justice legislation (UNICEF 2006). Perhaps a fundamental underlying reason for this is the potential for the ‘bifurcation’ of the criminal justice systems (Bottoms, 1995:40) with coercive and punitive measures on the one end, particularly that of the adult criminal justice system and inclusive community-based or custodial sentences in the youth justice systems at the other end of the track. This is of course not unusual and perhaps the situation in New Zealand reflects this; where a hitherto stable youth justice system built upon diversion and decarceration straddles a populist punitive adult criminal justice system despite recent attempts to bridge this gap (Lynch, 2012).

Perhaps from a Malaysian perspective, there is some blurring of lines particularly when one considers that, in the criminal justice system, whipping and the death penalty are legally prescribed sentencing options for certain offences even when children are involved. Clearly if a measure like diversion were to be introduced in situations where children are in conflict with the law, it is unlikely that there would be a corresponding ‘softening’ of the adult criminal justice system nor would it be likely that the system as applied to adults would take a greater punitive turn. This is because the Malaysian penal system already is punitive but it may in turn be reflective of the experience in New Zealand.

While there is a consensus that diversion as a measure ought to be in place in Malaysia and notwithstanding the ratification of the CRC, the *Child Act* enacted post – CRC did not include any specific provisions with respect to pre-trial diversion of children. Reliance was placed on a general provision in Article 145(3) of the *Federal Constitution*, which *inter alia* provides that the public prosecutor has the power,

exercisable at his/ her discretion, to institute or discontinue criminal proceedings, as a basis to argue for the basis of introducing diversion. In any event the provision has not been used in that manner and more importantly, formal diversion programmes or processes are presently not in place and thus even if the discretion was exercised, diversion itself could not be carried out. Therefore, in most instances, while there may be some element of ‘gatekeeping’ (Gray, 2008:180) through police discretion in charging a child in conflict, the likely outcome is the application of a formal criminal process or that no action is taken.

More worrying is that there is no mechanism to evaluate the consequence of exercising the discretion. There is some measure of discretion also availed to the Director of Public Prosecution to decide whether to prosecute but ‘there are no guidelines or standard procedures to encourage the use of prosecutorial discretion in children’s cases and no formal process for screening all cases for possible diversion’ (Ministry of Women, Family and Community Development and UNICEF Malaysia, 2013:53). The lack of a procedural set of guidelines can lead to perceived biasness in deciding whom to charge. Perhaps more telling is that this leads to a void in available data in measuring the frequency in which the discretion is used or when it is not.

In view of Malaysia’s obligations under the treaty, the joint report on the Malaysian Juvenile System suggest the following key areas in so far as diversion is concerned:

- i. Amendments to the *Child Act* to facilitate processes and guidelines for the implementation of diversion
- ii. Development of guidelines and training for police and prosecutors on the exercise of the new cautioning and diversion powers.
- iii. Development of a screening process and screening / assessment tools to guide decisions about diversion,
- iv. Designation of an agency to manage diversion programmes
- v. Development of diversion programmes through inter-agency partnerships

- vi. Community awareness and sensitisation to build broad-based support for diversion (2013:55).

The argument in support of diversion has found its way in the internationalization of rights as far as the child in conflict with the law and such an internationalization of rights recognises the need for alternative to court based punishments. This was initially expected to be part of the amended *Child Act* in Malaysia. However, as noted above, the issue of diversion was not included in the Act.

Applying the concept of diversion in practice can be difficult. Kelly and Armitage (2014) cite similar issues faced by Richards. The issue raised were four interrelated questions, ‘... what young people are to be diverted from and to; whether young people are to be ‘diverted’ from the criminal justice system or offending; whether young people are to be ‘diverted’ from criminal justice processes or outcomes; and whether diversion should be considered distinct from crime prevention and early intervention’ (2014: 122).

A further concern with diversionary procedures is the potential for net-widening. Yet there are studies that indicate different outcomes. For example, Pritchard’s (2010) analysis of over 50,000 police records pertaining to young people’s contact with the Tasmanian criminal justice system between 1991 and 2002 found no evidence of net-widening.

These divergent research findings notwithstanding, ‘diversion at both an ideological and a practical level has been a key feature of Western youth justice systems’ and ‘continue to have a stronghold’ in Western youth justice systems (Richards, 2014:124).

Given that the diversionary approaches were excluded in the *Child (Amendment) Act 2016*, there are concerns whether the Malaysian juvenile justice system, will be child friendly, child appropriate and meaningful to children, fulfilling the ideal of ‘Child First, Offender Second’ (Case and Haines, 2015:157). It is unclear at this point how diversion can be introduced in a youth justice system that has multiple philosophical contradictions in relation to the child in conflict with the law.

## **14. Reflections**

A child rights-based approach to diversion is one which sets out to further the realisation of *all* children's rights relevant to diversion (as set out in the CRC and other instruments). As stated above, the child must be seen as a complete human being, not just in terms of the 'juvenile justice' label (UNICEF, 2007). However, given Malaysia's reservation to a number of the CRC Articles and given the punitive culture existent, it is not likely that *all* children's rights to diversion would be possible.

As such, there is a danger that the implementation of diversion measures becomes disengaged from the context of rights and is merely a reactive response to obligations expressed through the UN. As suggested by Marshall and Parvis (2004:236), 'rights give children a stake in our society' and this must rest upon recognising the foundational rights of the child to develop as fully autonomous individuals.

An analysis of a range of international conventions, standards, treaties and rules as undertaken in this and the preceding Chapter establishes the legal framework in dealing with children in conflict with the law in Malaysia. The discussion provides an understanding of the 'culture, ideology and discourse' involved (Muncie 2001:33). The subsequent Chapters will attempt to contextualise these with conversations with principal stakeholders and boys in the Henry Gurney School system, to determine whether there is a recognition of the broader context of rights and in particular, rights of the child to diversion. This process aims to capture the lived experiences and realities of the people involved to describe and analyse conversations obtained through interviews.

**Chapter 4**  
**Research Design**

*'I am the Lorax. I speak for the trees. I speak for the trees for the trees have no  
tongues.'*

Dr. Seuss (1971:29)

## 1. Introduction

In the criminal justice system, it is often the case that the voice of the child in conflict with the law is lost in the cacophony of adult voices. WK, the young boy accused of murder mentioned in preceding Chapters, found his case being first heard before the Magistrates Court when he was 12. He then endured a very public High Court trial and a short-lived period of freedom following the Court Appeal's decision. Subsequently, following the Federal Court's pronouncement of guilt some 5 years after the crime, he was sentenced to be detained for an indeterminate period at the pleasure of the King. At the trial, the child was advised to remain silent (*Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1*).

The court did not specifically address the broader aspects of the CRC particularly on the notion that children in conflict with the law needs to be protected in every stage of the juvenile justice process as advocated in the Convention.

The case raised interesting constitutional issues on the concept of separation of powers, particularly between the executive and the legislature. It also explored the nuances of *actus reus*, *mens rea* and provocation in criminal law and it also considered the death penalty and its application to children pursuant to the *Child Act 2001*. The case was argued by adults in a battle between legal practitioners and yet what of the very child in conflict with the law?

In a brief interview, the child was reported to have said that living in prison toughened him as 'we learn to survive because anything can happen. In prison, you have to take care of yourself because parents are not there to protect you' (The Star, 2007). His counsellor was reported to have said that although the boy was remorseful for the murder, the boy needed assistance to lead a normal life as the crime 'has turned him into an introvert' (The Star, 2007).

This again raises the paradox of the child in conflict with the law. His prison counselor felt he *needed assistance* but the boy discovered very quickly that *he* has to *take care of himself* (emphasis added) to survive and be self-reliant in a system apparently designed to protect the child in accordance with Article 40(1) of the CRC as enshrined in the preamble of the Malaysian *Child Act 2001*. A system where his

rights are meant to be respected and his welfare protected within the ideals as espoused above by UNICEF through Article 40(1).

It is apparent that in this instance, the notion of ‘Children First, Offenders Second’ grounded in ‘child-friendly principles of universalism, diversion and normalisation, progressed through inclusionary, participatory and legitimate practice and evidenced through measurable behaviours and outcomes’ was not achieved (Case and Haines, 2015:226). Further, the issue of culpability aside, the child’s foundational rights have been harmed and the impact on his development as a ‘fully autonomous’ individual has been compromised and there is a failure to recognize the child’s special status as a ‘becoming’ rights-holder’ (Hollingsworth, 2013:1061).

As indicated in Chapter 1, this research seeks to explore the following fundamental research questions:

1. What is (are) the underlying philosophical approach (es) in Malaysia in dealing with rights of children in conflict with the law?
2. Is there an obfuscation of the rights of the child and are children merely treated as objects of concern? If so why.
3. What are the points of convergence/divergence in these policies with that of other jurisdictions and its impact on diversion strategies?

The approach taken in this Chapter therefore is to establish the theoretical research scaffolding that builds on the language of child rights as considered in the preceding Chapters. The purpose here is to explore the approaches and choices I took in designing this study to best serve the objectives of the study.

## **2. Understanding legal research**

For those not within the realm of legal academia it is often difficult to understand what legal research and scholarship entails. What often counts for pure legal research is usually in the area of jurisprudence or commonly referred to as the doctrinal approach to research. This is where there is an engagement in law and legal concepts, often referred to as an analysis of black-letter law (McConville and Wing, 2007). This

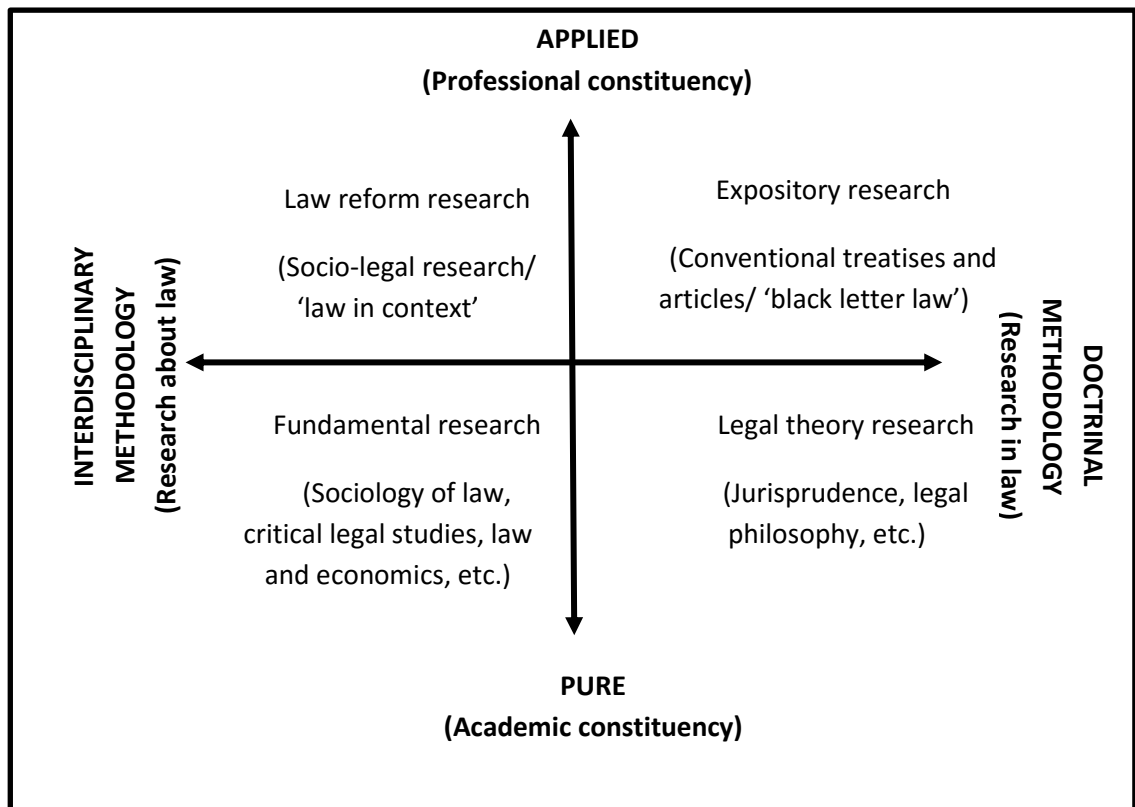
engagement invariably involves an analysis of cases, statutes, and rules. This tradition of legal research has been my own personal experience as a law student and that of my own research experience journey.

Given that the realm of legal research is not easily understood, Hutchinson and Duncan (2014) suggest that academic lawyers are beginning to realise that the doctrinal research methodology needs clarification for those outside the legal profession and that a discussion about the standing and place of doctrinal research compared to other methodologies is therefore required. This in their view stems from a critical view that the doctrinal method is simply scholarship rather than a separate research methodology. In support of this perception, Hutchinson and Duncan (2014) cite Posner's view that law is 'not a field with a distinct methodology, but an amalgam of applied logic, rhetoric, economics and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions' (2014:83).

There have been a number of attempts to provide some understanding of the approaches to legal research. The Arthurs Report 1983 cited in Trakman (1983), in its analysis of legal education and research in Canada offered a four-part, hierarchical classification of research arranged in an ascending order of importance. Importance was placed on 'fundamental research' which involves the notion of law as a social phenomenon and exploring, for example, its social, political, economic, philosophical and cultural implications and associations.

Figure 3 (below) represents Chynoweth's (2008) interpretation of this four-part classification, although this interpretation does not view the classification in any order of importance.





**Figure 3:** Chynoweth, P. (2008). Legal research styles. In Ruddock, L & Knight, A (eds.), *Advanced Research Methods in the Built Environment*, Wiley-Blackwell, Oxford.

However, Weisberg (1983) was critical of Arthurs' hierarchical classification of research concluding that, 'as classification this is nonsense; as prescription, it is worse. It is nonsense to suggest that research *in* law is less fundamental than research *about* law' (Emphasis added) (1983:159). This criticism succinctly represents the debate that frames approaches to legal research, particularly the debate as to notions of the degree of importance between categories that involve research *in* law and research *about* law.

In Australia, the Pearce Report 1987<sup>61</sup> cited in (Roper, 1987) categorised legal research in three ways. These were doctrinal research, theoretical, and finally reform-oriented, which involve recommendations for change, based on critical examination. Conspicuously missing was fundamental legal research as a category with the report

<sup>61</sup> Pearce, D., Campbell, E. and Harding, D. (1987). *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission*.

suggesting that the classification was too imprecise. There was also disagreement with the implication that this category was more important than the others were.

Within a span of 18 years, the categorisation of legal research identified in the Pearce Report was deemed narrow, with the Council of Australian Law Deans (CALD) noting in 2005 that, ‘legal research today may be thought to be considerably broader than the tripartite classification of the Pearce Report’ (CALD, 2005:2). The Council considered legal research as embracing *empirical* research, *comparative* research, research into the *institutions* and *processes* of the law, and *interdisciplinary* research (especially, though by no means exclusively, research into *law and society*) (CALD, 2005:2). (Original emphasis).

Notably missing in the CALD classification is Arthurs’ hierarchical structure of legal research. At about the same time, Cownie’s (2004) empirical study<sup>62</sup> of the ‘lived experience’ (2004:1) of legal academics teaching and researching law in English universities, found that the move away from traditional black letter culture to a pluralistic approach seemed well advanced.

However, Cownie notes that the same study also suggests that half the respondents were reluctant to describe their research as taking a socio-legal slant because of notions of how the black-letter culture is viewed by the profession. This view notwithstanding, the multidisciplinary legal research approach is said to have ‘enriched the study of law’ and ‘influenced many aspects of legal practice’ (Baldwin and Davies, 2003:881).

The relationship between the two spheres (research *in* law and research *about* law) is not one without debate even if the hierarchy of presumed importance is ignored. One view suggests that doctrinal legal research is a service to legal practice arguing that those that engage in a multidisciplinary approach fail to understand law as a normative science. The counter view from those that engage in multidisciplinary research is that scholarly legal research has a purpose in itself and that doctrinal legal

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<sup>62</sup> Cownie’s study relied on semi-structured interviews with fifty-four legal academics in law schools in England between June 2001 and December 2002.

research is not much more than merely ‘defending personal opinions’ (Gestel et al, 2012:9). A more critical view espoused by Roger Cotterrell (1995) suggests that ‘all the centuries of purely doctrinal writing on law has produced less valuable knowledge about what law is, as social phenomena, and what it does than the relatively few decades of work in sophisticated modern empirical socio-legal studies’ (1995:296).

This study is not one within the scope of tradition associated with pure doctrinal research. This is because this study recognises that ‘today’s legal scholarship is diverse, covering many topics outside traditional areas of the law, built on methodologies drawn from the social sciences and humanities as well as traditional doctrinal analysis’ (Davidson, 2010:562). The reliance on broader areas of methodologies seeks to enhance this study by providing depth and context that a pure doctrinal study may not adequately yield. Further, given that this study seeks to explore the relationship between the various stakeholders and boys in the Henry Gurney School, a socio-legal approach best fits this purpose and best fits the research objectives sought. Some of these issues are considered below.

### **3. Socio-legal research**

This study involves an analysis of the state of the law and policies governing children in conflict with the law and with a particular focus on the rights of the child, in so far as diversion within the juvenile justice framework in Malaysia is concerned. The study will seek to contextualise this with conversations with stakeholders and incarcerated boys. This approach is within the broad notion of socio-legal research and seeks to present socio-theoretical and empirical analysis of the law and its relationship with the state and others involved in the juvenile justice framework. This process of analysis is recognised within the broad scope of an empirical study (Dobinson and Johns, 2007).

This approach would facilitate a perspective on the ideology, politics and policies that have shaped Malaysia’s treatment of children in conflict with the law and would further facilitate the understanding of how these phenomena interact or intersect with global approaches.

The Nuffield Inquiry (2006:3) adapting the definition from Baldwin and Davies, (2003) define empirical legal research as one that explores the ‘impact of law and legal processes in society’ particularly its impact on a range of social institutions citizens (2006:1). According to Cane and Kritzer, (2010:4) empirical research involves ‘the systematic collection of information (“data”) and its analysis according to some generally accepted method’ with particular importance attached to the systematic process of collecting and analysing the information which can come from a wide range of sources including surveys, documents, reporting systems, observation, interviews, experiments, decisions, and events.

The underlying basis for this is that ‘empirically, law is a component part of the wider social and political structure, is inextricably related to it in an infinite variety of ways, and can therefore only be properly understood if studied in that context’ (Harris, 1986:112). Thus, socio-legal research is recognised as having a central position in legal scholarship with Cotterrell (1995) suggesting that it is the ‘most important scholarship presently being undertaken in the legal world’ (1995:314).

This is a departure from the traditional notion of legal scholarship rooted in legal doctrine and employing conventional methods of legal analysis and argument useful in the main to practitioners and those directly involved in such discourse. There is a range of views on the scope of legal education and its corresponding effects on legal research. For example, Edwards argues that ‘if law schools continue to stray from their principal mission of professional scholarship and training, the disjunction between legal education and the legal profession will grow and society will be the worse for it’ (1992:41). Rhode (2013) suggests that American legal education with its combination of lecture and Socratic dialogue that focuses on doctrinal analysis leaves much to be desired from a pedagogic standpoint.

The reality is that contemporary legal scholarship today has become pluralistic in its values, purposes, methods, and perspectives. Kissam (1988) suggests that among other reasons, this phenomenon arises from current and contemporary interest in integrating legal doctrine and social context. Cane and Kritzer (2010) suggest that the

healthy pluralism of empirical approaches to the study of law and legal phenomena includes the quantitative and qualitative approaches in empirical legal research.

In achieving the research objectives and in answering the research questions, this study applied a combination of methods and in this case that combination relied primarily on documents as a source of research and interviewing as a means to enhance an understanding of the phenomenon being considered in this research (May, 2001). The approach taken is one in the traditions of qualitative research, to ‘capture and categorize social phenomena and their meanings’ (Webley, 2012:928). Such diversity in legal scholarship is ‘recognition of the variability and richness of human culture’ (Sarat, 2004:36).

#### **4. The qualitative approach in this study**

There are many labels to qualitative research. Ely et al (2003) note that Tesch (1990) compiled a list of 46 terms that social scientists have used to name their versions of qualitative research concluding that ‘the sheer number is mind-boggling’ (2003:3).

However, in defining the process, Kirk and Miller (1986: 9) suggest that qualitative research ‘fundamentally depends on watching people in their own territory and interacting with them in their own language, on their own terms’ and is ‘seen to be “naturalistic,” “ethnographic,” and participatory”.’ As such ‘qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them’ (Denzin and Lincoln, 2000: 3). Therefore, unlike quantitative research, qualitative research is ‘research that produces findings not arrived at by statistical procedures or other means of quantification’ (Strauss and Corbin, 1998: 11).

Thus, qualitative research emphasises the human, interpretative aspects of understanding the social world and the interconnectivity of different aspects of people’s lives. The psychological, political, social, historical and cultural factors that interplay in this process are all recognised as playing an important part in shaping people’s understanding and experience of their world. In this regard, qualitative

research is seen to reject the positivistic natural science model and to concentrate on understanding, rich description, deep reading and emergent concepts and theories.

As suggested in the preceding Chapter, Geertz interprets this role as an ‘interpretative one in search of meaning’ (Geertz, 1973:5). The basis for this is to challenge the conventional quantitative research ‘which wantonly imposes survey category and Lickert Scale upon its subjects’ (Hayward and Young, 2004). Hayward and Young further suggest that the rational choice theory and positivistic approaches to crime that dominate contemporary sociological theory ‘have very simple rational/instrumental narratives’ (Hayward and Young, 2004). Thus, interpretivism seeks to overcome some of the perceived limitations associated with positivism.

It bears repeating that this study will represent an analysis of the norms that underpin the child in conflict with the law and in this context, will attempt to ‘bridge the gap between researcher and researched subject and capture the lived experiences and realities’ of the Malaysian context of youth justice. As noted above, this is drawn from Max Weber’s *verstehen* embodied in many aspects of qualitative research. This is described as ‘the interpretive understanding of social action in order thereby to arrive at a causal explanation of its course and effects’ (Henderson and Talcott as cited in Tucker, 1965:88).

However, the notion of *verstehen* is not without criticism. As early as 1948 Theodore Abel argued, ‘[t]he most obvious limitation of the operation is its dependence upon knowledge derived from personal experience. The ability to define behaviour will vary with the amount and quality of the personal experience and the introspective capacity of the interpreter’ (Abel, 1948: 216). Thus, the researcher’s perspective and values make it impossible to conduct an objective, value free research.

In the intervening years since, the significance of the investigator’s own interpretations and understanding of the phenomenon being studied has gained a much wider theoretical and philosophical support and acceptance. Researchers bring experiences of various kinds into play and these include ‘technical knowledge and experience derived from research, but also their personal experiences’ which Anselm Strauss refers to as ‘experiential data’ imploring researchers to ‘ “mine your

experience, there is potential gold there!” ’ (Strauss, 1987:11). Berg and Smith (1988:22) suggest that ‘it can be maintained that virtually no information about a person, group or social system exists without a relationship with that person or social system.’ In this regard, the researcher seeks to record accurately their own observations while also seeking to uncover the meanings their subjects bring to their life experiences.

In response to the criticism levelled by poststructuralists and postmodernists that any snapshot of the life experience of a subject is inevitably viewed through lenses tainted by ‘language, gender, social class, race, and ethnicity’, qualitative researchers have adopted ‘a wide-range of interconnected interpretive methods, always seeking better ways to make more understandable the worlds of experience that have been studied’ (Denzin and Lincoln, 2000:12).

One approach is to avoid the descriptors “subjectivity” or “objectivity” in describing the process. Michael Patton (2001: 50) suggests adding ‘empathic neutrality to the emerging lexicon that attempts to supersede the hot button term objective and the epithet subjective.’ This approach suggests that there exists a middle ground between becoming ‘too involved, which can cloud judgment, and remaining too distant, which can reduce understanding’ (Patton, 2001:51).

As noted by (Jansen and Peshkin, 1992) subjectivity in qualitative research is unavoidable but this can provide insights, hypotheses, and validity checks that enhance the richness of the discussion. The key perhaps is not to impose assumptions and values that are uncritical in relation to the research. Reason describes this as ‘critical subjectivity’ which is ‘a quality of awareness in which we do not suppress our primary experience; nor do we allow ourselves to be swept away and overwhelmed by it; rather we raise it to consciousness and use it as part of the inquiry process’ (Reason, 1988:12).

In this sense ‘both qualitative and quantitative researchers think they know something about society worth telling others, and they use a variety of forms, media, and means to communicate their ideas and findings’ (Becker, 1986:122). The approach taken in this study therefore is to avoid being dismissive or intolerant of

other varying research approaches in order to preclude the ‘rigidity of polarized, dualistic thinking that sets qualitative and quantitative research as black and white knights engaged in an endless ideological battle...’ (Darbyshire, 1997:1) but at the same time being prepared to ‘watch out for methodological watchdogs!’ (Bourdieu and Wacquant 1992:227).

## **5. Research Design**

Yin (1994:18) refers to the concept of design as ‘the logic that links the data to be collected (and the conclusions to be drawn) to the initial questions of the study.’ In undertaking this study, I relied on understanding and evaluating my own experience in traditional pure doctrinal research as an undergraduate and post-graduate student and as a researcher. In traditional pure doctrinal research, legal doctrinal scholars not only use the legal system as their subject of inquiry, but also as their theoretical framework.

This approach in legal research served me well in the analysis of the various statutory provisions, case law and international treaty obligations considered in this study. While I have found these processes useful, I found that there are limitations in this approach. Of particular concern is the lack of engagement with the individuals who are most often the subjects of the law, the boys and the various stakeholders in the juvenile justice system. Thus, I felt that the choice of hearing from these individuals would help enrich the study. This of course entailed for me, the discovery of new approaches and skills that I had hitherto not been exposed to as a student or as researcher. These approaches are also not generally used in the realm of legal practice.

In the course of understanding legal doctrinal scholarship, there have been attempts to encourage the use of a wider range of skills. For example, Karl Llewellyn, (1955) encouraged legal scholars to work patiently on new kinds of extra-doctrinal scholarship by working carefully with interdisciplinary ideas. This notion of exploring interdisciplinary knowledge to widen my scope of understanding legal phenomena appealed to me as I felt that this would put me in a better position to understand and appreciate the context of the law as it affects the lives of children in conflict with the law.



Tushnet (1981) notes that legal scholars need substantial amounts of time to develop an understanding of social theory that might usefully be employed in extra-doctrinal legal scholarship. The challenge is that legal scholarship is often ‘torn between grasping as much as possible the expanding reality of law and its context, on the one hand, and reducing this complex whole to manageable proportions, on the other’ (Hoecke, 2011: vii).

In recognising this challenge, I sought to strike a balance between these diverse needs in contemporary legal scholarship. Hence this study is an exploratory inquiry using semi-structured interviews with court officers, lawyers, police, prison officers, civil servants, NGO’s, UNICEF and incarcerated boys in Malaysia to seek an understanding on child rights in relation to diversion and framing these with the documents and cases relevant to the discussion. I was conscious of the need to keep the scope of the research to manageable portions. I sought to achieve this by applying the traditions associated with empirical qualitative research in law particularly the philosophical and theoretical foundations associated with the methodology as considered in this Chapter.

The qualitative approach was taken because I was keen to explore and understand the social world using both the participant’s and my understanding of the phenomena being explored; in this case the rights of the child to diversion in Malaysia. This is due to the view that understanding the phenomena is mediated through meaning and human involvement and this I felt was best understood through the research design I had applied in this study.

The qualitative approach has found increasing application in legal scholarship particularly in seeking to understand people’s perception of law, justice and the legal profession (Webley, 2012:927). This is not to say that similarly, quantitative research in law has not been undertaken nor enriched the body of legal scholarship and knowledge. For example, a recent study on examining victim-oriented tort law in action using an empirical examination of 1,237 decisions involving claims of sexual abuse in the Catholic Church in Netherlands (van Dijck, 2018) or a 2014 study on 205 death-eligible murders leading to homicide convictions in Connecticut from 1973–

2007 to determine if there were unlawful racial, gender, and geographic disparities (Donohue, 2014).

Brownsword is of the view that in so far as socio-legal research is concerned, it is now accepted that theoretical work and empirical content share a level of engagement and synergy (as cited in Gestel et al, 2012 ) and that all empirical research has an implicit, if not explicit, research design (Yin, 1994). However, in this study, a broader and less restrictive concept of “design” commonly associated with the quantitative research field was employed. Thus, I did not have a pre-determined well-worked-out set of hypotheses to be tested nor did I have specific data-gathering instruments that produce data to be statistically analysed in a separate process (Becker et al, 1977).

The theoretical framework derived from the data and data collection and analysis proceeded together. I endeavoured to ensure the study was not context bound but sought to be context sensitive and reflexive. Reflexivity represents the capacity to reflect upon the researcher’s actions and values during the research, when producing data and writing accounts. Thus, in this regard, the research design was a reflexive process ‘operating through every stage of a project’ (Hammersley and Atkinson, 1995:24). This aspect of qualitative research recognises that it ‘is not static but developmental and dynamic in character, the focus is on *process* as well as outcomes’ (Holloway and Wheeler 2010:4).

The following sections explore the approaches and techniques I used to collect and analyse data, and how these elements taken together constituted an integrated strategy to seek an understanding on how events, actions, and meanings have shaped the issue of child rights in relation to diversion in Malaysia.

## **6. Collection of data**

Denzin and Lincoln, (2000:3) suggest that ‘qualitative research involves the studied use and collection of a variety of empirical materials.’ However, in most cases data are usually collected through three main methods: direct observation, in-depth interviews and analysis of documents (May, 2001: 138-73; Punch, 2005:168-192; or Patton, 2001: 4-5). These methods are usually applied on their own but it is also

possible that several types of data collection might well be used in one qualitative project.

Given that this study is an exploratory inquiry in seeking an understanding of child rights in relation to diversion, the methods I chose serve as a means to answer my research questions by providing the data needed. In order to avoid the potential risks that the conclusions derived reflect only the systematic biases or limitations of one specific method, I relied on the integration of data from documents and interviews of stakeholders and of incarcerated boys themselves. This afforded a better assessment of the different voices and multiple constructions of the notion of child rights in general and more specifically to those that relate to diversion in the juvenile justice system.

This is not triangulation in the strict sense of mixing quantitative methods with that of qualitative methods as a means of validity testing but an attempt to engage with the complexity of the issue of child rights to develop a richer and deeper understanding. Kelle (2001: para 14) notes that, ‘triangulation should not be considered as a single unique method, but as a somewhat vague metaphor with different possible meanings that can be related to a variety of different methodological problems and tasks.’

The focus in this study is on understanding the norms that determine the notion of child rights. This is evidenced through the various documents and contextualising these through interviews with the social actors that are involved in this process both at a micro and macro level (the boys themselves and the adults that are involved in policy making and the administration of juvenile justice). I felt that this could provide a robust explanation for whether a rights-based argument can be sustained with regards to diversion.

### **6.1 Documents as a resource for research**

May notes that, ‘documents, as the sedimentations of social practices, have the potential to inform and structure the decisions which people make on a daily and longer-term basis; they also constitute particular readings of social events’ (2001:176).

Macdonald (2008) suggests that documentary evidence provide a record of the social world. The documents in this context are “socially produced” as they are

produced ‘on the basis of certain ideas, theories ... principles,’ and written for specific purposes and audiences, which in turn shaped their content and form (2008:287). The social contexts of the documents considered in the preceding Chapters reflect the evolving interpretations of the child and the rights of the child particularly the international treaties discussed and the corresponding Malaysian legislation.

Yanow (2007) suggests that documents can provide background information prior to designing the research project and as such can either corroborate interview data or they may refute them. This provides an opportunity for the research to challenge or confirm the narrative in these documents. In traditional doctrinal legal scholarship, legal scholars collect empirical data from statutes or cases; develop hypotheses on their meaning and scope, which are then tested using principles of interpretation or precedents or applying jurisprudential arguments. There is a strong reliance on a range of documents in the analysis of the law. This has been my training and has been the main approach to my own understanding of legal research.

While this study had a strong reliance on documents, the nature of analysis is broader than the approach taken in traditional doctrinal legal scholarship. Thus, owing to the nature of the subject matter of this study, I relied on documents as a *resource for* research. This is to be distinguished from documents being made the *subject of* social research (Brookman (1999) cited in Noaks and Wincup, 2004:107). (Emphasis added).

The range of documents subjected to this process of analysis included *inter alia*, a range of formal documents including statutory enactments, judicial pronouncements in decided cases, treaty and conventions, records of parliamentary proceedings, a range of international and domestic policy documents and media reports. Documents therefore ‘provide evidence of policy directions, legislative intent, and understandings of perceived shortcomings or best practice in the legal system, and may even indicate agenda for change’ (Webley, 2012:8). In the context of this study, these are key issues that influence dealing with children in conflict with the law, particularly the underlying philosophical arguments.

However, the reliance on documents as resource for analysis is not without criticism. A general critique directed, is that like most qualitative analyses it tends to be ‘conjectural, non-verifiable, non-cumulative, ‘meanings’... arrived at by sheer intuition and individual guesswork’ (Cohen, 1974: 5) and thus expects readers to trust the interpretations given and further, to assume that these are then accurate and legitimate.<sup>63</sup> This view also recognises that there is an inherent danger of an ‘ideological hegemony’ where the literature being reviewed and the assumptions entrenched in it can also deform the framing of the research and as such the researcher is therefore implored to ‘use the literature, don’t let it use you’ (Becker, 1986:149).

Although this study does not involve making documents the *subject* of social research, elements of the four criteria of ‘authenticity, credibility, representativeness and meaning’ were applied to assess the quality of the documentary evidence being investigated (May, 2001 in applying the typology developed in Scott 1990).

In the context of this research, the documents relied on provided evidence of policy directions, legislative intent and in some instances, social reality itself. I relied on a range of public and /or formal documents and this facilitated an appreciation of the social and cultural context and forms of discourse that shaped the documents concerned. Global developments in child rights have found their way into the Malaysian landscape and these were considered in preceding Chapters. The analysis of documents afforded the opportunity to discover the points of convergence and divergence when these international standards are measured against the existing Malaysian juvenile justice system. More importantly, I was able to assess whether the aspirational aspects as expressed in these documents were actually applied in practice through conversations with stakeholders and incarcerated boys. In assessing ‘credibility, representativeness and meaning’ I sought to find evidence of this through the interviews and drawing themes that bring the documents reviewed into context and this is explored in Chapters 5 and 6.

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<sup>63</sup> Bloch for example, asks *inter alia* ‘Did they speak the truth? Were the books ascribed to Moses really his?’ (1954:74).

## 6.2 Interviews

Building on the scaffolding of the research questions in this study, interviews helped flesh out the form and shape of the study. Interviews provided the *data* that contributed to discovering the actual or perceived experiences of those involved. Qualitative interviewing is not construed as merely a means or method to obtain *answers* to questions. (Emphasis added). It is a technique in which the interaction between the researcher and the participant elucidates knowledge about the social world (Gubrium & Holstein, 1997). Thus, the process of active interviewing involves a broader function in which there is an evaluation of the manner in which information is created as well as how interviewees respond, rather than just merely assessing, what was said (Byrne, 2004).

The purpose of the research interview in this context was to explore the views, experiences, beliefs and/or motivations of specific stakeholders on the issues raised in this study. In this regard, interviews provided a ‘deeper’ understanding of social phenomena than would ordinarily be obtained from purely quantitative methods, such as questionnaires (Silverman, 2005). I was therefore able to ‘understand the world from the subject’s points of view, to unfold the meaning of people’s experiences’ (Kvale, 2007: xvii).

Individual interviews are used extensively by qualitative researchers in examining legal phenomena, and perceptions of law. For example, as Cownie (2004) did in understanding the lived experience of academics or as Sommerland (2007) did to investigate contemporary changes to the legal profession.

The choice of using interviews was based upon the desire to find the approach that would best provide the richness and context that I sought to explore. This allowed an opportunity to find issues that are often missed through other approaches. These included exploring subtleties and complexities, and evaluating possible relationships, causes, effects and dynamic processes involved in the context of the study. The analysis of the data was descriptive and narrative in style, which I hope will bring value to practitioners and policy makers.

In the context of this study, a series of semi-structured interviews were executed with principal stakeholders. This allowed an opportunity to ask a series of open-ended questions, with accompanying questions that sought to probe for more detailed and contextual data. This approach facilitated acquiring rich in-depth information with opportunities to seek nuances that a purely textual research might miss. This in turn provided the opportunity to understand the unique experience of each individual as well as an appreciation of shared circumstances in which they encounter with children in conflict with the law, and meanings they attribute to their own lived experiences.

Thus, I developed ‘an understanding of the context of the project to facilitate alertness to significant themes’ (Noaks and Wincup, 2004:79). A further advantage of semi-structured interviews was ‘that it is open to the reception of unanticipated information to be discussed, which may not have been highlighted in a structured interview’ (Barbour and Schostak 2005:42). This flexibility is advantageous as I could probe a line of questioning in response to the participants’ answers, while keeping to the main topic of the interview (Byrne, 2004).

In interviewing the principal stakeholders, I drew heavily on the ‘responsive interviewing’ model proposed by Rubin and Rubin (2012). This in-depth interviewing model is within the realm of the interpretive constructionist philosophy and allowed me to interview purposefully selected individuals ‘who are knowledgeable, listening to what they have to say, and asking new questions based on the answers they provide’ (2012:5) and to treat both the interviewer and interviewee as ‘people, with feelings, opinions and experiences’ (2012:10). However, this framework served as a guide and not a rule and as Rubin and Rubin suggest that, a philosophy should not be a ‘list of commands or instructions to always do this or never that’ (2012:39).

As this study is qualitative in nature, it therefore produced findings not arrived at by statistical procedures or quantification methods (Strauss and Corbin, 1998). This point notwithstanding, a recurring challenge often posed to the nature of qualitative research is how many subjects. Kvale (1994) suggests that this is ultimately contingent on the purpose of the study.

As far as this study is concerned, the number of subjects chosen reflect the epistemological and methodological questions about the nature and purpose of the research. This approach is in keeping with the view that ‘the quest for universal generalizations is being replaced by an emphasis upon the contextuality of knowledge’ (Kvale, 1994:166).

Given that the purpose was to seek the views of knowledgeable participants with insights into the specific area of research, a range of principal participants were considered. The selection of participants followed Patton’s (2001) concept of purposeful sampling and covered the range of stakeholders. Access was also gained to interview boys from the Henry Gurney School Puncak Borneo, Sarawak and this will be considered below. Thus, ‘the logic and power of purposeful sampling lies in selecting *information-rich* cases for study in depth. Information-rich cases are those from which one can learn a great deal about issues of central importance to the purpose of the research, thus the term purposeful sampling’ (Patton, 1990:169).

As this study entails interviewing a pre-defined and visible set of actors, I was able to identify the particular set of respondents of interest that were able to assist in discovering the issue of child rights in relation to diversion. I utilised personal networks for opportunities to contact relevant officials. These contacts were individuals that I had encountered in the course of my involvement in the Constitutional Law Committee of the Malaysian Bar Council and in my role as a state executive committee member of the Malaysian Crime Prevention Foundation.

As Kidder et al (1986) suggest, with good judgement and an appropriate strategy, researchers applying purposive sampling can select the cases to be included and thus develop samples that best suit the needs of the research study. Given that the range of participants (sample) is stratified and included legislators, the judiciary, the police and others involved directly in policy decision-making in specific aspects of children in conflict with the law, it was necessary to consider principles of elite interviewing. Elite interviewing is defined as ‘the use of interviews to study those at the ‘top’ of any stratification system’ (Moyser, 2006:85).



The term 'elite' has often been adapted according to the specific nature of the research enquiry. Hence, 'elite' has been defined as 'a group of individuals, who hold, or have held, a privileged position in a society' (Richards, 1996:199). In Linda McDowell's study of employees working at different levels for merchant and investment banks in the City of London the term 'elite' was adapted to mean 'highly skilled, professionally competent, and class-specific' (McDowell, 1998: 2135).

In the context of this study, the term 'elite' was taken to mean an interviewee who is given non-standardised special treatment because of the specialist knowledge they possess and are thus able to 'teach' the researcher (Dexter, 2006:18-19). This was certainly the case in this study, as I had interviewed individuals who were directly involved in policymaking decisions or in the administration of justice. These included for example, a senior civil servant in the Ministry of Women, Family and Community Development, a Deputy Superintendent of Police formerly from the specialist child unit (D11) of the police force, a Magistrate from the Court for Children, Prison officers, a Member of Parliament and the various specific skilled and class specific individuals interviewed from various child rights organisations.

Owing to my interaction with some of these individuals in the committees mentioned above, access to these elites was established and I was able to build rapport with them. I felt that this in turn led to good intellectual dialogue and honest reflections on the issues. Perhaps at some level, they treated me as an 'elite' although I did not consciously see myself as one. Yet this led to greater candour in the manner of responses given and facilitated open discussions.

This interviewing process facilitated discovering their perspectives and/or discovering the underlying motivations for policy decisions or approaches. The elite interview data collected is to confirm (or otherwise) information had been collected through documents and other participants in the study. The interview process involving elites required specific strategies and approaches unique to the relationship (Harvey, 2011).

I provided comprehensive information about the study prior to the interview (*Appendix 1*) and I ensured that I made adequate preparations prior to the interview.

This involved developing an understanding of the specific role of the person that I was going to interview. This provided an opportunity to explain to the interviewees why they were chosen and why they were specifically able to provide considerable value to the study. Harvey suggests that interviewers need to be prepared ‘because often elites might consciously or sub-consciously challenge them on their subject and its relevance’ (2011:434).

In keeping with Harvey’s advice ‘to avoid asking elites closed questions because they do not like to be confined to a restricted set of answers’ (2011:434) the semi-structured interview approach worked best. Additional questions were framed in response to the answers given and this yielded conversations that were open textured and in some cases extended beyond 45 minutes.

I was conscious of the fact that in the actual execution of the interviews, it did not proceed in what is commonly understood as interviewing. I found that the actual process was more akin to having conversations with the individuals. Questions were asked but it was framed within the context of having a conversation. This I found created a greater connection with the persons I spoke to especially with the various stakeholders concerned.

In keeping with the traditions associated with qualitative research the selection of participants and situations were not intended to be statistically representative generalizable to an entire population. Instead, the focused, in-depth study was designed to go beyond description to find meaning, even if that meaning or the perceptions involved a small number. From this, I was able to explore how the participants understand the world and interact with each other. The purpose is not to measure frequency but seek depth and insight in understanding the phenomena.

The table below represents the range of participants interviewed (Table 4):

CATEGORY	DESCRIPTION	METHOD	TOTAL
Government Agencies/ Policy Stakeholders/Legislators/Academics	The Ministry of Women Family and Community Development		1
	Constitutional Law Committee Bar Council Malaysia	Semi-Structured Interviews	1
	Child Rights Committee Bar Council Malaysia		2
	UNICEF Malaysia		1
	National Child Rights/ Non-Governmental Organizations/Academics		6
	Member of Parliament		1
Stakeholders in the Criminal Justice System	Magistrates/Court for children	Semi-Structured Interviews	1
	Royal Malaysian Police		1
	Prisons Correctional Officer		2
Boys	Boys in the Henry Gurney School	Semi-Structured Interviews	10

**Table 4:** Purposeful sampling of participants

Conversations with principal stakeholders and the boys, sought to explore whether there is a recognition of the rights of the child to diversion and to seek an understanding of the broader context of these rights. This process aimed to capture the lived experiences and realities of the people involved in the phenomena in question (Creswell, 2013). An understanding of the multiple participant meanings that are set in the context of the political, social and cultural environment in Malaysia would assist in drawing out a deeper appreciation of the specific research questions. This facilitates the text, subtext and context of child rights in relation to diversion to be explored.

These conversations involved interviews with 14 stakeholders in the juvenile justice system, 2 correctional officers and 10 boys from the Henry Gurney School (Figure 4 below).



**Figure 4:** Matrix of interviewees

The following table (Table 5) summarises the stakeholders interviewed in this study:

No	Participant	Affiliation/Organisation
1.	Jones	Child Rights activist
2.	Vivian	Court for Children adviser and Child Rights NGO
3.	Farida	Lawyer, Constitutional Law Committee, Bar Council, Malaysia and human rights advocate
4.	Sylvia	Child protection officer, UNICEF
5.	Terry	Retired prison officer and presently a counsellor
6.	Adiba	Co-ordinator, Community Outreach Programme established in a public university
7.	Noemi	Member National Advisory and Consultative Council for Children and an academic
8.	Gus	Court for Children adviser and Child Rights NGO
9.	Irene	Magistrate, Court for Children
10.	Ona	Police Officer formerly with the Sexual, Women and Child Investigation Division (D11), Criminal Investigation Department
11.	Charles	Senior civil servant, Ministry of Women, Family and Community Development
12.	Tabitha	Member of Parliament
13.	Lawrence	Lawyer, member of the Child Rights Committee, Bar Council Malaysia
14.	Arianne	Lawyer, member of the Child Rights Committee, Bar Council Malaysia
15.	George	Correctional Officer, Henry Gurney, Puncak Borneo, Sarawak, Malaysia
16.	Luke	Correctional Officer, Henry Gurney, Puncak Borneo, Sarawak, Malaysia

**Table 5:** Summary of stakeholders interviewed.

The table below (Table 6) represents the boys interviewed at the Henry Gurney School, Puncak Borneo, Sarawak, Malaysia:

No	Name	Age upon entry	Age as at 2017	Period of detention	Offence/s
1.	Wilson	18	20	2015-2017	Theft: s378 Penal Code
2.	Nicholas	17	19	2016-2019	Possession of stolen goods: s411 Penal Code Methamphetamine: s15 Dangerous Drugs Act 1952
3.	Lony	18	20	2015-2018	Statutory rape: s375 Penal Code
4.	William	18	19	2016-2018	Housebreaking and possession of stolen goods: s457& s411 Penal Code
5.	Everest	18	20	2017-2018 <sup>64</sup>	Possession of stolen goods: s411 Penal Code Criminal intimidation: s506 Penal Code Attempted murder: s307 Penal Code
6.	Angah	17	20	2014-2017	Rape: s375 Penal Code Theft: s378 Penal Code Ganja: s15 Dangerous Drugs Act 1952
7.	Aman	16	18	2015-2018	Criminal intimidation: s506 Penal Code
8.	Udin	16	17	2016-2019	Statutory rape: s375 Penal Code
9.	Dom	18	20	2015-2018	Methamphetamine: s15 Dangerous Drugs Act 1952
10	Odeng	19	21	2015-2017	Statutory rape: s375 Penal Code

**Table 6:** Boys interviewed at the Henry Gurney School, Puncak Borneo, Sarawak, Malaysia.

<sup>64</sup> Everest was placed in a different Henry Gurney School prior to arriving to the one in Puncak Borneo Sarawak in 2017.

I recorded the interviews and then transcribed the interviews in detail which itself required many hours of effort. Agar (1996) found that it can take six hours for every recorded hour and indeed I found it to be a lonely endeavour with tiredness and fatigue setting in often through the process (Roulston et al, 2003). However, such detailed transcription facilitated familiarity with the content and thus through this process and I could observe the subtleties in the way people interacted (Rapley, 2007) even if in this instance, such interaction occurred without the participants physically interacting with each other. Admittedly, the method of converting verbal communication to text can (and does) result in the loss of inflection and context, but as this research does not have as its central focus, conversational discourse analysis, this was considered as an acceptable compromise.

### **6.3 Interviewing Children**

As noted above, 10 boys were interviewed. The boys interviewed had an average age 19.4 and technically fall out of the specific definition of ‘child’ as per the CRC. However, it is pertinent to note that one of the boys interviewed was aged 17 at the time of the interview. All the boys (save one) entered the Henry Gurney School system at the age of 18 or below. Perhaps more significantly, all the boys had already come into contact with the juvenile justice system when they were children. Further, given the vulnerability of their specific experience through the juvenile justice system, I felt it necessary to acknowledge the treatment of children in the research process.

Article 12 of the Convention gives children the right to participation but children’s views have historically been deemed unimportant and unreliable. The development of law in relation to child witnesses in criminal trials being a good illustration. The law traditionally required the judge to warn juries of the danger of convicting a defendant on the evidence of a child unless independent evidence capable of corroborating the child’s account were available. In the United Kingdom, the rule in relation to unsworn evidence of children has been abolished by section 34 of the *Criminal Justice Act 1988*.

In Malaysia, section 90(9) (b) of the *Child Act 2001* allows a child to give sworn evidence or make any statement when making his defence. In relation to unsworn

evidence, the position in Malaysia is similar to the situation in the United Kingdom prior to the 1988 amendment (Section 133A of the *Evidence Act 1950*).<sup>65</sup>

In so far as the voice of the child in research, Mills (2004) notes that ‘the neglect of children’s perspectives in social sciences has come about as a result of particular social constructions that estimated them as incapable of producing relevant, reliable or representative evidence’ (Mills 2004: 31). Children have more frequently been the objects rather than the subjects of social research (Morrow and Richards, 1996).

In the context of this study, I felt it was necessary to recognise that, ‘acknowledging children as rights-holders has significant implications for research processes’ Lundy and McEvoy (2012a:129). Adult proxies can never give an accurate and valid account of children’s experiences or opinions (Mahon et al, 1996). I felt therefore that it was pertinent to understand their lived experiences of the boys in the Henry Gurney School system and to acknowledge their voice without relying on adult proxies.

Punch suggests that children are not used to expressing their views freely or being taken seriously by adults because of their position in an adult-dominated society (1992). Therefore, the ‘cognitive abilities of children and power differentials between adults and children require special consideration’ (Mishna et al, 2004:450). I felt I needed to be reflexive to the boys’ voices to take into account the actual research contexts of their voices and ‘the power imbalances that shape them’ (Spyrou, 2011:152). Taking account of the context requires that I had to be *critically* reflexive and to constantly evaluate my role as a researcher and the research subject. The issues that influenced the interview process of boys in this study is considered in detail below.

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<sup>65</sup> This states that where a child of tender years who is called as a witness does not in the opinion of the court understand the nature of an oath, he may give unsworn evidence if the court is satisfied that he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.



## 6.4 Credibility and validity

As with the use of documents as a resource for research, the use of interviews as a technique has been challenged. The challenge comes from the within the fraternity of qualitative research as well as beyond. For example, there are concerns as to whether the informant in an interview is telling the truth or whether the truths being explored are stable across situations and perspectives (Dean and Whyte, 1958). Becker and Geer (1957) suggest that there is a level of ‘incompleteness’ of interview data as compared with the data obtained from participant observation. Deutscher (1973) argues of the realities in the disjunctive truths between what people *say* and what they actually *do*. (Emphasis added). Thus, the data from an interview which measures verbal behaviour, is only presumed to be descriptive of what people are doing and this Deutscher argues affects the validity of this presumption.

Kvale suggests that there are ‘ten standardized responses’ to the rather ‘stereotyped objections’ to the stimulus “qualitative research interview” and that while these objections are ‘highly predictable, they may be taken into account when designing, reporting, and defending an interview study.’ In fact, in answering and dismissing these objections, Kvale introduces ten ‘alternative’ challenges to the process of interviewing (1994:147).

While these arguments do not generally invalidate the use of interview data in the usual manner, they serve in providing the researcher with an understanding of the limits to what can be inferred from such data. As such, the use of documents and stratified sampling of participants assist in building levels of assurance. I applied the range of general guidelines and strategies to ensure the credibility and reliability of this method of gathering data and principal reliance was made to those identified in Arksey and Knight (1999).

According to Arksey and Knight, the validity of the interview process can be strengthened by using interview techniques that build rapport and trust, prompting interviewees to illustrate and expand their initial thoughts, ensuring that the interview process is sufficiently long to ensure greater depth and constructing interview questions that are drawn from literature (1999:43-59).

As noted above, 16 interviews were conducted with stakeholders. Each of these sessions were approximately between 45 minutes to an hour. The 10 boys in the Henry Gurney School were interviewed for about 30 minutes each. The interviewees were comfortable and at ease with sharing their knowledge and experience and this afforded useful and valuable data. Rowley suggests that ‘a good rule-of-thumb for new researchers is to aim for around 12 interviews of approximately 30 minutes in length, or the equivalent, such as six to eight interviews of around one hour’ being mindful to avoid “drowning in a sea of data” (2012: 263).

The restriction on interviewing the boys was borne out of necessity as the Prison Department had allocated approximately 6 hours on one day to interview the 10 boys. Given the restriction of time, it became expedient to make full use of the time afforded and as such, the interviews were focussed on the specific experiences the boys encountered in the juvenile justice system particularly those that involved arrest, detention and proceedings in the Children’s Court and to seek their views on diversion. The iterative nature of the qualitative research process also permitted some level of adjustment as analytic insights were tested against new observations to allow refinement to the basic research questions (Stake, 1995).(see *Appendix 8* for the basic research questions). The restriction on time did not impact the scope of the study given that the interviews were designed with the research objectives in mind. Further, as became apparent during the course of the interviews, the boys were willing to share their experiences of arrest, detention and trial. This provided information rich in its detail and ensured that the quality and validity of the data obtained was not compromised. Evidence of this is seen in the following Chapter.

## **7. Ethical Considerations**

The increased concern for accountability in research has led to the establishment of systems for research governance. Thus, data and information arising out of research should be accessible and open to scrutiny. This requires researchers to conduct their work responsibly, subject to the highest ethical standards within the moral and legal regime of the society in which the research is conducted as well as to the wider society it serves.

The nature of the in-depth, unstructured nature of qualitative research and the fact that 'it raises issues that are not always anticipated mean that ethical considerations have a particular resonance in qualitative research studies' (Ritchie and Lewis, 2003:66). The need to pay close heed to ethical issues in qualitative research is well documented (Ritchie et al 2013, Miller et al 2012; Christians, 2000; Denzin & Lincoln, 2000; Fine et al, 2000 among others). This involves responsibilities to research participants, particularly the boys, to colleagues, policy makers, and the people to whom the findings derived will be made aware of.

Joseph Maxwell (2009:216) argues that 'ethical concerns should be involved in every aspect of design' including methods, goals, the selection of research questions, validity concerns, and the critical assessment of the conceptual framework. Given that there was a need to interview a range of participants, it was envisaged that there would likely to be inherent tensions particularly owing to the fluidity and inductive uncertainty in undertaking qualitative research with ethical guidelines that are static and increasingly formalised through the requirements in ensuring ethics clearances in universities and funding agencies.

Thus, this study sought to ensure that participants had a complete understanding of the purpose and methods to be used in the study, the risks involved, and the demands placed upon them as a participant. Participants were also made aware that due consideration would be made to ensure that confidentiality is maintained but that despite every effort made to preserve it, anonymity and confidentiality may in certain circumstances be compromised.

The primary ethical issues in this research revolved on issues of informed consent, anonymity and confidentiality. The other key issues related to the management of disclosures, and to participants' potential discomfort, particularly for the boys in the Henry Gurney School.

Further as this research involved incarcerated boys with one aged 17, due care and diligence to the protocols covering such research as defined by the United Nations *Convention on the Rights of the Child* (CRC), the *Research Ethics and Research Governance Code* at Lancaster University as well the standards of good ethical and

research practice published by The *British Society of Criminology's Code of Ethics for Researchers* (now the *British Society of Criminology Statement of Ethics*) 2015 and the *Social Research Association*. The principles of good practice set out in the *Data Protection Act 1998 (UK)* and the *Personal Data Protection Act 2010 (Malaysia)* were abided by.

However, as Smyth and Williamson note (2004: 10), these codes operate primarily on a system of 'self-regulation' given that membership of these organisations is voluntary and the guidelines are not enforceable by law. In fact, Goodyear-Smith et al (2002) suggest that if the emphasis is on the *prevention* of unethical research, this inevitably results in the impediment of researchers from doing their work. The preferable focus should be the *promotion* of ethical research. (Emphasis added). Yet this is also a contested matter with some arguing that the ethical review process is more concerned about institutional liability (Adler and Adler, 2002) than about the promotion of ethical research.

While social researchers can interpret ethical guidelines as just that, merely guidelines, researchers are, nevertheless, subject to certain legal requirements that influence how research ethics, and more specifically issues of informed consent, are managed particularly where children are involved. Malaysia does not have similar provisions to for example Article 8 of the United Kingdom's the *Human Rights Act 1998* or the *Data Protection Act 1998* which has been suggested to have relevance to consent in relation to all research (Montgomery, 2003).

The *Human Rights Act 1998* protects the right to respect for private and family life and is argued to support the need for consent to participate in research (Masson, 2004). In the context of medical records, the European Court of Human Rights is of the view that, 'the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention' (*MS v Sweden* (1997) 28 EHRR 313, para. 41).

The Malaysian constitution does not have similar provisions and the right to privacy is not expressly recognised as a constitutional right. Malaysian courts have

however recognised a cause of action for violation or invasion of privacy rights is actionable under the law of tort. For example, in *Lee Ewe Poh v Dr Lim Teik Man & Anor [2011] 1 MLJ 835*, a patient was successful in an action against her doctor for taking photographs of her private parts during a stapler haemorrhoidectomy procedure without her consent.

The Malaysian *Personal Data Protection Act 2010* regulates the collection, holding, processing and use of personal data however; the Act has no application in relation to non-commercial affairs. There are specific laws that govern healthcare and the issue of consent is recognised as far as research in these areas are concerned. The lack of specific regulatory framework governing the right to privacy in Malaysia notwithstanding, this research adopted those standards expected and expressed through the various codes and guidelines identified.

In the context of this study, the initial submission for ethical approval commenced in November 2015 and involved the completion of the required documentation as per the *Research Ethics and Research Governance Code* at Lancaster University. This involved the completion of prescribed forms, the submission of an outline of the proposed study and documents that provide an assurance of ethical procedures to follow regarding the use of human subjects in this study (a complete set of participant information sheets and consent forms with variations to take into account the appropriate level of understanding for children). At this point in time, details of the potential incarcerated participants were not known. Ethical approval was obtained in early 2016. An amended submission was made in July 2017 following conditions imposed by the Henry Gurney School. This is considered below.

As such, formal written consent from all participants was obtained including from the legal guardians of the boys and from the boys directly involved in the research. This was supported with an information sheet specifying what participation entails. Participants were given assurances as to confidentiality and anonymity as well as to their right to withdraw from the research. All data was digitised, password protected and all portable devices used for the storage of identifiable data was password encrypted. The relevant documents are found in *Appendices 1 and 2*.

## **8. The Henry Gurney School, Puncak Borneo, Sarawak experience**

As noted above, the Henry Gurney School was established by the *Henry Gurney School Regulations* in 1949 pursuant to the *Juvenile Courts Act 1947*. It is a closed, secure institution for the detention of children and juveniles aged between 14 to 21 years pursuant to Section 74 of the *Child Act 2001*. As at August 2017, there are five Henry Gurney Schools, namely in Telok Mas, Melaka (all-boys); Kota Kinabalu, Sabah (all-girls); Keningau, Sabah (all-boys); Puncak Borneo, Sarawak (all-boys); and Batu Gajah, Perak (all-girls).

I had been given permission to interview 10 boys in the Henry Gurney School Puncak Borneo. The Henry Gurney School Puncak Borneo is an all-boys correctional institution, governed by Malaysia Prisons Department under the purview of the Ministry of Home Affairs.<sup>66</sup> As the school comes under the supervision of the Prison Department, the provisions of the *Prison Act 1995* and *Prison Regulations 2000* apply. These laws have very limited special provisions for young prisoners.

The *Prison Act 1995* defines a juvenile or a young offender as a prisoner who is under the age of 21 years. As noted above, the Prison system does not use the phrase ‘child in conflict with the law’ but uses a different definition and acknowledges a wider aged range of persons. In this instance, all the boys interviewed save one, entered the Henry Gurney system before they were 18.

The school is co-located within the Puncak Borneo Prison complex, which is about 30 kilometres away from the heart of Kuching, 980 kilometres and two hours by flight from Kuala Lumpur, where I reside (Figure 5 below).

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<sup>66</sup> The Prison Department is also responsible for the administration and management of all penal establishments in Malaysia including Rehabilitation Centres.



**Figure 5:** A map of Malaysia indicating the geographical locations of Kuala Lumpur and Kuching. Available at <<http://www.sejarah-negara.com>> [3 October 2017].

The Prison has a total area of 43.91 hectares, is surrounded by high walls, and is equipped with an anti-climb fence and an integrated electronic security system, which includes CCTV monitoring (Figure 6, below). It has a capacity for 550 male and female inmates who are either remand or convicted prisoners. Although the Prison itself began operations in 2008, it only commenced receiving juveniles in 2016 (Prison Department, Malaysia, n.d.).



**Figure 6:** Entrance to the Puncak Borneo Prison, Kuching Sarawak. Source: Prison Department Malaysia. Available at: <<http://www.prison.gov.my/images/carta-en/penjara-penjara.htm>> [10 Sep 2017].

The school is equipped with basic facilities, such as classrooms, a canteen, dormitories, offices and counselling rooms. The juveniles are required to participate in a series of structured programmes through the *Putra Module* (*putra* means *son* in Malay and derives its origins from Sanskrit). The overall approach is to shape attitudes and to develop knowledge and skills akin to those once used in the Borstal system in the United Kingdom. The language of section 75 (1) (c) (ii) of the *Child Act 2001* reflects this, '[that]by reason of the nature of the child's criminal habits and tendencies it is expedient that the child be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime.'

These modules cater to those below the age of 18 years, those aged 18 and above and those without basic education (Kassim, 2006). The requirement to provide education is as per the provisions of the Rule 151 of the *Prison Rules 2000* and Rule 38 of the *Henry Gurney School Regulations 1949*. To ensure that juveniles receive appropriate levels of education, retired teachers who are rehired on contract, enter the facilities to conduct lessons.

### **8.1 Gaining access**

Clearly the context in which this study aims to explore involved several challenges, given that there are powerful dynamics at play. The role of the perennial 'gatekeeper' who 'controls research access' cannot be denied (Saunders, 2006). As has been considered above, access to data is restricted and there are further restrictions imposed by law on certain information. For example, the *Official Secrets Act 1972* contains provisions which seek to prohibit disclosure of information and other details about official documents not necessarily on the basis that the information is otherwise unavailable or unobtainable.

Malaysia does not have in place any laws that support access to information through principles of the freedom of information. This is notwithstanding the fact that Malaysia has adopted Article 23 of the *ASEAN (The Association of Southeast Asian Nations) Human Rights Declaration*, which affirms all the civil and political rights in the Universal Declaration of Human of Human Rights. The freedom of speech



provision in the *Federal Constitution* (Article 10) is narrowly interpreted and as such, freedom of information is not regarded as a fundamental human right. This of course makes the issue of gaining access a live issue for researchers.

Following University approval to conduct interviews, I made a formal written request to the Malaysian Prison Department to interview children in the prison system. The Prison Department required a copy of my offer letter, a copy of an outline of my research proposal and the proposed questions for the children. However, this request was rejected *via* a formal letter dated 24<sup>th</sup> November 2016 with the justification that the children concerned were already being ‘subjected to too many studies’ (*Appendix 5*).

Blaxter et al. suggest that researchers need to ‘negotiate access’ and to ‘adopt a reasoned, planned and modest strategy’ to improve the probability in gaining access to such documents or information (as cited in Noaks and Wincup, 2004:55). This process of negotiation will require the researcher to ensure that the process of research is not potentially threatening to the gatekeeper so as not create ‘politics of distrust’ (Davies et al., 2011). To avoid the potential to cause such distrust it is best to create an environment that is characterised by ‘mutual respect, trust and professional integrity’ typified as a “warm” environment (Larsen and Walby, 2012:281).

I adopted these strategies to appeal the rejection. This involved making phone calls and negotiating with the Prison Department to gain access. The discussions centred on answering issues identified by Bogdan and Bilken (2007:87-88) namely explaining in greater detail specific aspects of the study, the expected level of disruption to the daily routines of staff and participants, the ultimate purpose of the study and exploring future engagements with the Prison Department. There was also an honest discussion with the Prison Department officials as to the ultimate objective of the study in relation to the children in conflict with the law and I had the opportunity to discuss the prospects of future engagements with the Prison Department.

Following these discussions, I made a formal appeal, which was submitted in June 2017. The Prison Department in a letter dated 21<sup>st</sup> June 2017, approved the request to interview ten male juveniles (limited to Malaysian citizens) and two senior

correctional officers at the Henry Gurney School, Puncak Borneo, Sarawak (this is 980km away and two hours by flight from Kuala Lumpur) on the 19<sup>th</sup> July 2017 from 9.30 a.m. to 3.30 p.m.

In approving the study, the following conditions were imposed:

1. That I would undertake *inter alia*:
  - a. not to use information obtained for purposes of publicity or use such information in any seminar, forum, conference, symposium or academic journal or any other medium that would facilitate other parties obtaining such information;
  - b. not to capture images, record the interviews using devices and to comply with a list of 11 other conditions;
  - c. not to adversely affect the image of the Prison Department, the Ministry of Home Affairs and the Government of Malaysia;
  - d. to submit two copies of the research findings to the Institution as well as the Policy Division, Malaysian Prison Department.
2. A further requirement to sign off a letter of undertaking to comply with the specific conditions of the *Official Secrets Act 1972* and to acknowledge that the full extent of the law will be applied should there be a breach of the provisions therein.

The Prison Department also reserved the right to withdraw the approval granted or the results of the research carried out in the event of any material breach of the conditions imposed (for the full set of documents as translated see *Appendix 6*).

The level of gatekeeper control therefore was at multiple levels. These included limiting the conditions for access to participants, limiting access to data and to respondents, restricting the scope of analysis and by retaining prerogatives with respect to dissemination strategies (Broadhead and Rist, 1976).

Firstly, there were controls as to *where* (emphasis added) it was appropriate to conduct the study. The reasons for the choice of the specific institution selected were not made known to me. There were other Henry Gurney Schools closer to Kuala Lumpur and the trip to Puncak Borneo incurred personal costs and resulted in delays in the completion of this study. In negotiations with the Prison Department, the suggestion was that children in the Integrity School and those in the Henry Gurney Schools closer to Kuala Lumpur were being subject to too many studies and this had an impact on staffing and the juvenile's daily routines. It was necessary therefore to persevere although admittedly, the impact on time and cost in most circumstances would deter researchers to pursue the opportunity to interview participants.

Secondly, gatekeeper control was exercised in the choice of participants or *who* (emphasis added) to interview. The boys were pre-selected by the institution and were made to sign off institutional consent forms prior to the interview date. The criteria for selection was not made known but only male juveniles were to be interviewed. There was no indication of whether the boys were given the option to decide whether they wanted to take part in the study. The sample was ten juveniles in conflict with the law, aged between 17 to 20 years old (a mean of 19.4)<sup>67</sup> and I had no control of the age group selected. It does appear that the institution had decided to select older boys, perhaps being mindful of the nature of the subject matter of the interviews. The obvious danger here was the potential for institution managed information being inherently "safe" or biased given that the choice of participants was determined by the School. The potential for such danger is explored further below.

Finally, gatekeeper control was also asserted in *how* (emphasis added) the information obtained could be used. The numerous restrictions on the use of information and the nuances of maintaining institutional reputation at the peril of punishment presented interesting challenges as to gatekeeper control and management of data.

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<sup>67</sup> The Henry Gurney School is a closed secure institution for the detention of children aged between 14 to 21 years. While the mean was 19.4 years, the boys interviewed (save one) *entered* the system prior to being 18 years of age and a few of them encountered aspects of the juvenile justice system early on in their lives. The interviews ought to explore the experiences leading up to incarceration.

These matters are not new and the notion of gatekeeper control and access to information has been the subject of concern amongst researchers. Broadhead and Rist (1976) cite Spencer's study of the military elite in West Point and summarised the strategies often employed by gatekeepers thus:

1. Refusal to allow access to data by classifying "For Official Use Only";
2. Limited access only to data that are either incomplete, distorted, or managed;
3. Explicit control of the researcher by the assignment of personnel (1976:329).

Clearly, there were pragmatic issues to consider as well. If I breached the conditions imposed, I would certainly forfeit any future entry or research opportunities with the Prison Department. This of course interferes with any plans to engage with the institution. My pragmatic consideration here was one succinctly described by Buchanan et al (1988) as a four-stage access model of 'getting in, getting on, getting out and getting back.' Further, given that one of the fundamental aspects of this study was to, as a matter of principle, listen to children's voices and viewpoints, this opportunity was too invaluable to refuse, the restrictions notwithstanding.

As noted above, the need to be *critically* reflexive required an evaluation of the researcher's role and the research subject. In this context, this included considering children's voices within the specific institutional setting, to reflect on the negotiations and interactions with the Prison Department, the role of the gatekeeper and the level of influence the research process. As Glazer (1972:172) notes, 'a conscious attempt to compile cases of bureaucratic intrusion would be enlightening and would serve to alert other social scientists to the variety of dangers they face as they attempt to study those whose power far exceeds their own.' The experience in the context of this study exemplifies the need for the researcher to work at developing the relationship with the gatekeeper to establish points of commonality that can serve as the foundation to develop future engagements.

Further, in the context of this study, the requirements imposed by the central Prison Department was mitigated by the positive response received at the Henry Gurney School, Puncak Borneo in Kuching. Staff were favourable and supportive of the

nature of the study. The boys were forthright and honest with their thoughts and there was no evidence of control or censorship exercised by the institution. The lived experience of the boys afforded invaluable insight into the complex issues the study explored. There was also an opportunity to continue engagement with the custodial officers through training in the future. These aspects are explored below.

## **8.2 Informed consent, confidentiality and anonymity**

Informed consent means that participants enter the research project voluntarily, understanding the nature of the study and the danger and obligations that are involved (Bogdan & Biklen, 2007). It is an ethical principle that implies a responsibility on the part of the researcher to 'strive to ensure that those involved as participants in research not only agree and consent to participating in the research of their own free choice, without being pressurized or influenced, but that they are fully informed about what it is they are consenting to' (Davies, 2006: 150).

Thus, an explanation ought to be in terms "*meaningful*" to participants. (Emphasis added). Researchers should also make clear that participants have the right to refuse permission or withdraw from involvement in research at any time and the extent to which they will be afforded anonymity and confidentiality (British Society of Criminology Statement of Ethics, 2015; Statement of Ethical Practice for the British Sociological Association, 2002). The American Psychological Association's Ethical Principles of Psychologists and Code of Conduct suggests that researchers should use language that is 'reasonably understandable' (2017, Para 3.10a:6).

In most cases of academic research, this process involves two stages; the submission of relevant documents (including a participant information sheet and consent forms) to seek clearance from a university ethics committee and this then requires the researcher making an undertaking to obtain informed consent from the participant prior to the research being conducted. There may be some variation in this process. For example, in a study of international variation in ethics committee requirements in New Zealand, United Kingdom, Israel, Canada and America a range from nil in Israel to considerable amendments designed to minimise participant harm

in New Zealand was found (Goodyear-Smith et al, 2002). As noted above, in the context of this study, these processes were complied with.

As this research involved incarcerated boys, there was a need to pay special attention to ethical concerns involving consent. At one end of the spectrum, one of the boys was aged 17. The philosophical debate centres around whether children are competent enough to give informed consent or is there a need for additional consent from an adult responsible for the child at the time participation is sought. What then is the level of understanding that children can be expected to have of what they are consenting to?

Farrell (2005) for example, suggests that researchers should regard children as competent participants and therefore respect their informed consent to participate in the research and correspondingly their right to decline involvement or withdraw from research.

As argued by Alderson, 'to involve children more directly in research can rescue them from silence and exclusion, and from being represented, by default, as passive objects, whilst respect for their informed and voluntary consent can help to protect them from covert, invasive, exploitative or abusive research' (2001:142). In this process, research involving children should demonstrate 'respect for children's status as social actors,' but should not 'diminish adult responsibilities' to them and in so doing there is significant knowledge that can be gained (Woodhead and Faulkner 2000: 31).

From a Malaysian perspective, the age of consent is determined by the *Age of Majority Act 1971*, which sets the age of majority at 18. Thus, as far as the law is concerned, a child below the age of 18 requires the consent of the parents or guardians. However, in recognising the social status of children, I felt it necessary for the boy aged 17 to also consent to the study thereby implying that correspondingly, the boy concerned should be able to deny participation.

A second aspect of the spectrum is that given that this research involved boys in institutional settings, Heath et al., (2007) argue that children must be fully informed failing which the consent becomes a question of *assent*, which refers to a passive

acceptance or non-refusal. (Emphasis added). This refers to a ‘non-refusal or simple agreement without the understanding, discretion and legal validity associated with consequences’ (Alderson, 2007:2274).

However, in the Henry Gurney experience, regulatory requirements mandated securing consent from adult gatekeepers (in this case, institutional officers). Thus, my approach was to respect the gatekeeper’s legitimate interests in securing consent but at the same time ensuring that the principle of obtaining informed consent directly from the boys is not ignored or based on passive assent rather than freely given and fully informed consent. This is to avoid making the legal debate about minors’ consent more about adults’ freedoms than about children’s rights (Alderson, 2007:2273).

In the context of this study, the participant information sheets and consent forms were sent to the Henry Gurney School in advance of the interview date. On the date of the interview, the details of the participant information sheet were explained to each participant and participants signed off accordingly. The institution had also mandated that the participants consent to taking part in the study using a standard set of forms prepared by the Prison Department.

Of the ten participants, one was aged 17 at the time of the interview. A child committed to the Henry Gurney School will be subject to the care, control and legal custody of the Commissioner of the Henry Gurney School. Parents do have some measure of visitation rights but in all other respects, the institution now has legal authority over the child akin to a ward of the State. One of the conditions for committal is that the parents or guardian of the child can no longer exercise or is incapable of exercising any proper control over the child (section 75(b) (i) of the *Child Act 2001*). Therefore, in so far as these child, the Prison Department acted as the institutional guardian and therefore had the power to grant consent in the conduct of research. As considered above, I was not aware of who I was to interview until the day of the interviews itself.

A further matter that emerged was the requirement to submit two copies of the research findings to the Institution as well as the Policy Division of the Malaysian Prison Department. While all participants would be anonymised in the study,

anonymity and confidentiality could not be fully assured. Because of this development, an amended submission to the original University ethics application was made. This was approved before the interviews commenced. The participant information sheet for the participants in the Henry Gurney School were amended accordingly (*Appendices 3 and 4*) and all participants were informed of this. Details of the study were explained again to each of the participants and this was done in the Malay language as well. All documents had already been translated to the Malay language prior to the interview. All participants accepted this and there were no withdrawals from the study. Details of these matters are considered below.

One of the advantages of qualitative research is the discovery-based nature of the approach. This approach often yields valuable information that emerge from conversations with participants and often significant methodological decisions are made on the cusp of new research questions and issues that may be drawn from the process of data gathering itself. However as noted by Smythe and Murray (2000) this complicates the informed consent process as it incurs the risk that the research interview may touch on issues that neither the researcher nor the participant were prepared to discuss and therefore may well go beyond what was specified in the informed consent documents.

The reality though, is that ‘full disclosure of information is neither definable nor achievable’ (O’Neill, 2002:44). A cognizance of these issues is certainly important but perhaps informed consent ‘must not be treated as a sacred principle’ and its application ‘will vary according to circumstance’ (Hammersley & Traianou, 2012: 98). Some of these issues emerged in this study as participants shared their life experiences beyond the confines of the specific research documents.

### **8.3 Conversations with the boys in the Henry Gurney School**

I had arrived in Kuching a day before the assigned date of the interviews. As I had never visited the facility before, I hired a car and headed out in search of the Prison complex. The complex is in a remote area surrounded by villages and plantations. Having located the facility, I returned to the Hotel and spent the evening preparing for the interviews. I had some levels of anxiousness as I was not too sure what to expect



and was concerned with my ability to capture conversations without the aid of a recording device.

I left the hotel at 8.00 a.m. and arrived at the Prison complex by about 8.45 a.m. Access to the School involved a vehicle and security check at the entrance to the Prison complex (See Figure 6 above). After a short drive of about 1km, I was required to leave my car at a designated visitor car park. About 500 meters from the car park, I was taken through another set of high secure gates (three in total) before arriving at the School complex. I was met by the officer in charge of my visit and led to an administrative office.

Within the complex, the boys moved around freely. All of them had their heads shaved and were dressed in white uniforms while correctional officers were dressed in dark brown uniforms. Correctional officers were not armed although there were armed personnel at the entry point and at other specific locations within the entire complex. The boys have defined and structured daily activities. I was informed that the muster roll at the time of the interview at the facility was 91 boys. I found that the very use of the archaic term “muster” was a clear and stark reminder that I was in a prison and that a substantial part of prison culture and its physical structure have remained unchanged over centuries.

Prior to the interview being conducted, all my personal effects (my phone, bag and other personal effects) had to be surrendered and were stored in a secure locker in a secure office. I was only allowed to keep my folder containing the documents needed for the interviews. I was reminded on the prohibition on using recording devices. The children were interviewed in a small private room adjacent to the administrative offices. The room was about 27.8 square meters and had a solid iron door with a sliding bolt. The visual cues of prison life real and present.

As a matter of security, a correctional officer sat at the back of the room. I was informed that his presence was to ensure my safety and security. Perhaps, he was also there to ensure I did not ask damaging questions or alternatively to ensure that I did not ask questions that might be harmful to the boys. I was not entirely sure what his

presence truly achieved as his presence was not uniformly exercised and there were long periods where he was not present.

As discussed above, the questions (see *Appendix 8*) and participant information sheets were translated into the Malay language and had been sent to the Prison prior to the interview. The Prison had also mandated that each participant sign off an institutional consent form. The institutional officers also signed all the forms and this included my letter of undertaking.

I met with ten boys and two correctional officers. The boys were aged between 17 to 20 years old (a mean of 19.4 years), who have been incarcerated in the Henry Gurney School with some having been incarcerated for only six months and those who were there for two years. The range of convictions included property-offences (theft, possession of stolen goods for example), substance abuse, statutory rape, criminal intimidation and attempted murder. Most of these offences took place when the juvenile was under the age of 18.

One of the respondents was married and two had children. 20% of the respondents were ethnic Malay and the rest came from the native population of Sarawak (from tribal populations like the Iban or the Dayak people). The Malay language as spoken in these regions is slightly different from that which is spoken in Kuala Lumpur but this did not pose a problem as good rapport was achieved with the participants and I was able to converse with them in a rather casual mode. I was not dressed in a formal manner and this in addition, I believe, helped in making the boys feel less intimidated.

Given that the boys only spoke in the Malay language, the process of transcription involved translating conversations from the Malay language to the English language. The translation process can be a complex and challenging situation particularly, if the researcher is not a native speaker of the language used by the research participants (Moerman, 1996). However, in the case of this study, as I have spoken the Malay language since early childhood, I did not have to rely on an interpreter in conducting the interviews and could translate the conversations myself.

In those cases where the researcher and the translator are the same person Vulliamy suggests that the quality of translation is influenced by factors such as: the

autobiography of the researcher-translator; the researcher's knowledge of the language and the culture of the people under study and the researcher's fluency in the language of the write-up (Vulliamy, 1990).

While there are valid concerns about the translation process, in the case of this study, there were a number of factors that ensured that the quality of the translation process was not compromised.

Firstly, given that this study did not involve conversation analysis or represent an ethnographic or anthropological study, issues of language and translation were not the primary focus of this study. Given the specific aims of the study, the approach taken was therefore to ensure that the process of reduction and representation was primarily to make the written text readable and meaningful while ensuring accuracy of the transcript.

Secondly, the Malay language is the national language in Malaysia and it was the medium of instruction throughout my educational experience and thus not a foreign language to me. My own familiarity with the language ensured a deeper level of context to the conversations. This element of familiarity with the language meant that the boys felt that I understood their cultural perspectives (Temple 2002). The advantage of this is that the boys were speaking to me in a language they were comfortable with as such and consequently, the boys were forthcoming with sharing their experiences.

Thirdly, given the restrictions on time imposed by the Prison Department, the questions were very focussed and direct and as such the responses from the boys were also focussed on the specific matters raised. This led to a more direct use of language which in turn meant that the perils of conversations getting lost in translation were negated. Further, given the formal use of the Malay language used, the conversations did not involve the use of prison argot (Crewe & Einat, 2007).

At the start of each interview, I explained the purpose of the meeting and each aspect of the consent form was explained in the Malay language. These documents were prepared with children in mind and hence the language used was direct. The boys took the time to read the entire participant information sheet and in some

instances verbalising each clause. I had not expected this yet I felt that they were genuinely seeking to be sure about the process and verbalising helped them understand what they were reading. This was very different with my engagement with stakeholders who moved through this part of the process rather quickly.

I also explained the issue of institutional access to data in that the issues we discussed would be made available to the Prison Department. The boys did not appear too concerned with this issue. There was genuine interest in the subject matter being explored and the presence of the correctional officer in the room appeared to have no impact on the level of engagement that each participant demonstrated. I did not feel that the boys feared that any information they disclose would result in reprisals once I left.

I found that the boys were very cooperative and open with their thoughts even though they were dealing with a stranger. I developed a level of understanding with them and clearly, the use of the Malay language facilitated easier conversational discussions. However, at the same time, I was prepared to encounter situations where they were saying things they believed I wanted to hear. Some of the boys clearly attempted to downplay their active participation in crimes for example, but this was balanced with some conversations that indicated greater reflection on their role in crimes. One or two of the boys were using drugs from as early as 13. I observed the impact of the long-term use of these drugs in some of the conversations. There were perceivable deficits in thinking and motor skills (for example slowness in reading the documents and some difficulty in handling the pen to write, or in opening the door).

As narrating their experiences may be upsetting or traumatic, I endeavoured to ensure that my communication and interviewing of the boys was done in a sensitive and respectful manner. I had been required to have an observer trained in psychology present to ensure that I did not ask questions that were harmful or damaging and we (the observer and I) had prior discussions on how I should structure my approach in talking to the boys. I used an informal and relaxed approach to help the boys feel at ease. In exercising a reflexive approach in this study, I sought to balance the obligation to protect boys from harm while also ensuring that their rights in

participating in this study are respected. However, at the end of the process, I could not be certain of the consequences of our conversations. There was an indication that the boys do share their experiences with each other as well as with counsellors, which may mitigate some of these emotional experiences.

Towards the end of each interview, we spoke of other matters; sports, music and other interests that they may have. We spoke of their aspirations and hopes, and explored positive issues. Some of them had clear ideas about what they wanted to do while others were not too sure.

The interviews commenced at 9.15 a.m. and ended a little after 5.00 p.m. with a lunch break in between. Each interview took about 30 minutes. While this was a very intense process, I found that listening to the boys provided meaningful insight into their lives in a system that is supposed to have their best interests in mind. I took a lunch break at about 1.00 p.m. Lunch was in a canteen manned by female inmates from the main Prison complex, dressed in coloured uniforms that reflect their status (for example, remand or sentenced). These women appear to have some level of freedom in preparing the food and operating the cash till.

The interviews primarily focused on understanding the background of the boys and their experience through the criminal justice system including the present experience in the Henry Gurney School. Their awareness on child rights and on diversion were also explored. It was indeed a challenge to record conversations without the benefit of a recording device, but I made notes of salient points raised.

At the end of the session with the boys, I then had a discussion with two correctional officers. I was struck by the openness and honesty they displayed. I believe that this could be attributable to the fact that institutions operating further from central control functioned differently and I had the impression that the officers in this particular Henry Gurney facility had greater levels of latitude in how they behaved even with an “outsider” like me.

As I left, the reality of the incarceration for these boys was clearly felt. I could walk out but they could not. After returning to the hotel, I recorded my thoughts and impressions on a recording device. This afforded an opportunity to reflect on the

events of the day. Listening to the boys and their experiences certainly gave me a special insight into their lives and allowed me an opportunity to experience for myself how the CRC and the corresponding laws and policies operate in the lives of these boys. I was struck by the paradox of gaining access. It was easier to meet the adults who are involved in the system than to meet the very children subjected through the system. I felt that children's voices were subject to adult controls, in a very adult dominated environment.

I understood that I needed to be pragmatic about my emotional experience through this process. Yet this was not easy. The narratives, while providing insights *into* their lives were also stories *about* their lives and about mistakes and regrets. (Emphasis added). In most cases these were stories about their unpleasant experience in a system designed by adults, apparently in the guise of treaty obligations, yet instead exposed them to the harsh realities of adult life in prison. Some of these views also emerged in my discussions with the adult interviewees. Many of the elites work closely with children but I must admit that there was a sense of helplessness with the current state of affairs. Many of these boys will soon exit the system and attempt to build a normal life yet I was not sure if this is possible given the effects of incarceration and the lives they led prior to incarceration. I was encouraged by the prospects of returning in the future to conduct child rights training and engaging with other stakeholders in this process.

## **9. Analysis of data**

In keeping with a phenomenological analysis of the conversations with the key stakeholders, the method of analysis undertaken is to take the significant statements and group them into larger units of information to seek themes and patterns. This approach to data analysis as applied through the lens of a constructivist, involved using descriptive and evaluative thematic coding of the interview transcripts. This facilitated breaking the data down into more manageable "chunks" and organising of the data using computers in qualitative data analysis.

The use of Computer Assisted Qualitative Data Analysis (CAQDAS) is not without criticism. Early on (Seidel, 1991) suggests that software may cause researchers to be

guided in a particular direction and that the conflation of coding with analysis leads to ‘analytic madness’ (1991:109). Another challenge is that the extensive use of technological aids could, as encountered by Seidel himself; distance the researcher from the data. Further, the vast volume of data can often result in a quantitative analysis of qualitative data, which then muddles the methods across the social sciences (Barry, 1998).

The approach taken in the context of this work is to rely in the use of CAQDAS as a supplementary tool for organising the data. In an early study of qualitative researchers who had used data analysis software, Smith and Hesse-Biber (1996) found that it was used mainly as an organising tool. Of course, in the 20 years since, software development precipitates far greater range of use but as far as this work is concerned, the principal use of such software is to carry out administrative tasks of organising the data more efficiently. The analysis seeks to go beyond merely counting words or extracting objective content from texts but endeavors to examine meanings, themes and patterns that may be manifest or latent in the interview transcripts.

In the context of this research, I decided to use NVivo<sup>68</sup> as the CAQDAS of choice over other packages. This decision was taken primarily because it was relatively simple to use and it was possible to import documents directly from a word processing package and organise these documents easily on screen. Thus, the software served as a central repository from which access to the transcripts (and audio files) was easily referenced, ‘to capture the meanings, valid inferences from emphasis, and themes of texts’ (Krippendorff, 2004:19).

The process of coding and analysing data proceeded through ‘data reduction and sense-making effort’ from which the volume of qualitative material was evaluated to identify ‘core consistencies and meanings’ (Patton, 2002:453). This was followed with a process of seeking clarity in the data and synthesizing parallel ideas. Systematic labelling concepts yielded themes that were subject to an initial coding before the final

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<sup>68</sup> NVivo is a software package designed by © QSR International Pty Ltd to aid qualitative data analysis. For this study, NVivo 11 was used.

themes were arrived at. The specific themes and sub-themes that emerged are explored in the following Chapter.

The transcription of conversations did not follow in the traditions of verbatim transcription and so the written words were not an exact replication of the audio recorded words (Poland, 1995). This approach was taken as I felt that the process of transcription should be more about interpretation and generation of meanings (Halcomb & Davidson, 2006). Thus, in keeping with the specific research objectives, the process of transcription was reflexive and iterative.

In dealing with the conversations with the boys in the Malay language, I had to decide whether to use a literal or a less restrictive approach to the translation of the interviews into English. Honig (1997) suggests that a literal, word-for-word translation does greater justice to the participant's thoughts. The drawback is that such a practice reduces the readability of the text. Given that the aim of the study was to present information that could shape policy decision making and impact practitioners, a less restrictive contextual 'free' translation approach was taken to the text. Thus, a reconstructive approach was used to "polish" the conversations being mindful that in the process of editing that I was alert to the risk of misrepresenting the meaning of the conversational partner (Rubin and Rubin, 2012). However, as indicated above, the questions used in the context of the study were specific to the aims of the study and involved very direct responses and as such, I believe the potential for misrepresenting the boys was greatly mitigated.

## **10. Reflections**

Evaluating legal scholarship can present challenges. Rubin (1992) suggests that although legal academics are constantly engaged in the process of evaluating legal scholarship, this invariably does not involve the application of any theory of evaluation. In most cases, legal academics evaluate legal scholarship 'by intuition, trusting in some undefined quality of judgment' (1992:889) or on the basis 'of vague discussions in the faculty lounge' (Coombs, 1992:706).

In the absence of how standards are met, Kissam suggests that, 'works of scholarship are characterized as "original," "insightful," and "outstanding," or



conversely as “unimaginative,” “mechanical” and “routine”.’ (1988:222). Siems (2008), argues that the dissemination of knowledge in an original manner to satisfy the originality standard for scholarship in a professional discipline like law adds value to legal scholarship. Thus, research that analyses a specific legal problem with a view in achieving coherence and integrity of the law satisfies the originality standard expected in legal scholarship (2008:149). Rubin suggests that legal scholarship be evaluated ‘using the criteria of clarity, persuasiveness, significance, and applicability’ (1992:889).

My experience in pure doctrinal research provided me with a point of reference to frame this study. The whole process of exploring qualitative socio-legal research involved a rather steep learning curve but from a personal point of view, this was certainly worth the effort. I was keen to ensure that the context of this study avoided being vague and disconnected with the social actors that are involved in the juvenile justice system. The choice of research design yielded the opportunity to view the law in action and provided the richness of experience that I felt, was invaluable. The challenges of gaining access and negotiating gatekeeper control were, in the context of this study, an important part of this narrative. The conversations with the boys yielded an insight that was invaluable and rich in context. These conversations are considered in the following Chapter.

## **Chapter 5**

### **Conversations-Themes and Patterns**

*“...and what is the use of a book,’ thought Alice ‘without pictures or conversation?”*

Carroll (1992:7)

## 1. Introduction

Twenty-three years have lapsed since the ratification of the CRC in Malaysia and in that period, Malaysia has ‘made a legal commitment to invest in the wellbeing of its children’ (UNICEF, 2015a). There has been some measure of success in that investment. Indeed, in relation to children in conflict with the law, the introduction of the *Child Act 2001*, despite shortcomings addressed in preceding Chapters, represented a positive step in recognising aspects of child rights. Further owing to UNICEF’s ‘upstream programmatic work’, investments in studies, sub-national situation analyses and data work, capacity development and building with key government agencies, (UNICEF, 2015b:1) there is greater awareness of child rights today.

For example, UNICEF reports that in October 2015, Magistrates and Sessions Court judges received training on child justice. Further, capacity building on diversion was conducted in collaboration with the Ministry of Women, Family and Community Development, with a focus now on the appropriate diversion model for Malaysia and with a pilot study planned in 2016<sup>69</sup> (UNICEF, 2015b).

The preceding Chapters dealt with the range of documents that included statutory enactments, judicial pronouncements in decided cases, treaty and conventions, international audit compliance documents that deal with Malaysia’s treaty and convention obligations as well as reports published by non-governmental-organisations and other international agencies. The underlying norms that provide meaning and context to these documents were also considered.

As has been considered, the position in Malaysia is that while Malaysia has ratified the CRC, there are perceivable problems in keeping with these obligations given the socio-political-cultural and religious norms that have shaped views on the child in conflict with the law. As noted in Chapter 4, 14 stakeholders in the juvenile

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<sup>69</sup> As at 2018, the pilot study has yet to be implemented for reasons that will be explored in this Chapter.

justice system, 2 correctional officers and 10 boys from the Henry Gurney School were interviewed.

The previous Chapters establish the underlying norms that represent the foundation for the juvenile justice system in Malaysia. Thus, in relying on these concepts raised, the interview data was sorted according to the broad themes explored in Chapters 2 and 3. As suggested in Chapter 4, the study is not context bound but is designed to be context sensitive and reflexive. Therefore data collection and analysis proceeded together. Coding and analysing data proceeded through data reduction and sense-making efforts to identify core consistencies and meanings (Patton, 2002). This was followed by a process of reorganising and refining the data. As noted above, systematic labelling concepts yielded themes that were subject to an initial coding before the final themes were arrived at.

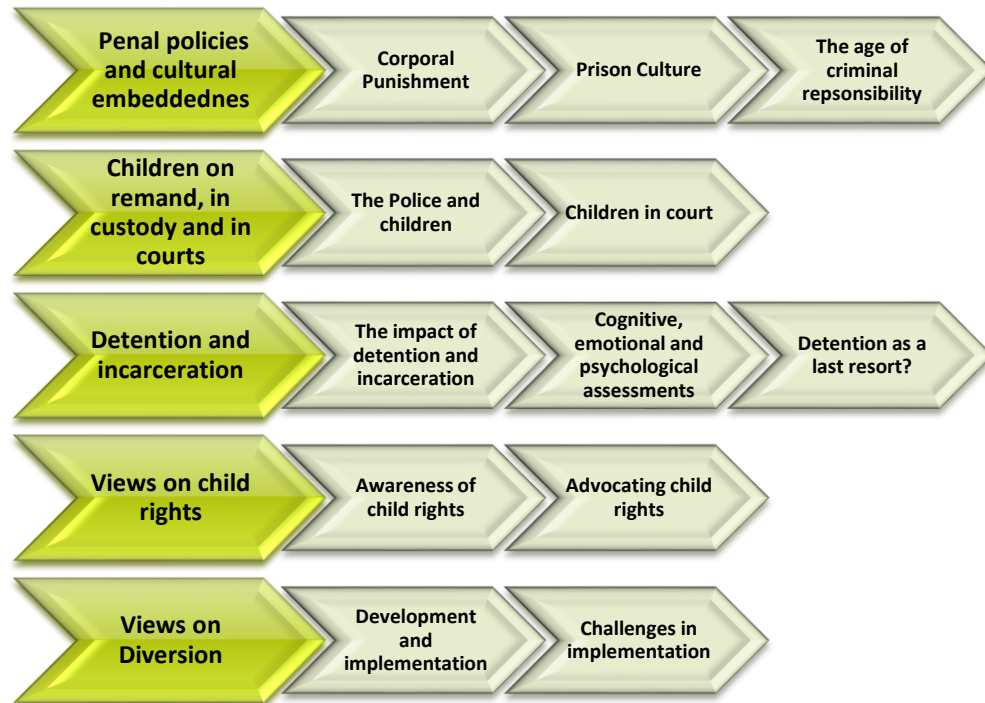
Five broad themes emerged in the context of issues that impinge on the child in conflict with the law. Firstly, penal policies in Malaysia have been strongly influenced by her colonial past and the underlying norms that exist. These matters are reflected in aspects of the juvenile justice system, for example in corporal punishment, prison culture and the age of criminal responsibility.

A second broad theme that emerged was the manner in which children in conflict with the law experience the process of remand, custody and judicial proceedings. Much of this experience involves the child's encounter with the police through these processes. Children also encounter varying levels of power differentials in these situations.

A third broad theme that transpired was the issue of detention and incarceration and its corresponding impact on the children in conflict with the law. These themes and sub-themes explore the philosophical aspirations of the treaty obligations and the reality of the experiences that a child in conflict with the law endures.

The fourth theme explored the issue of rights and how such rights were perceived, understood and realised in Malaysia. It also explores the challenges and issues in advocating rights.

Lastly, a broad theme explored is the issue of diversion and the development, implementation and challenges in introducing diversion in Malaysia. Figure 7 below, illustrates the themes and sub-themes explored in this Chapter.



**Figure 7:** Themes and sub-themes.

The following sections explore these conversations in keeping with the themes and sub-themes that emerged.

## **2. Penal policies and cultural embeddedness**

The preceding Chapters established the argument that the Malaysian penal policies were rooted in the British penal policies. As the country evolved, Malaysia's penal policy has been defined by its identity as a nation with a predominantly state controlled media, a dominant one-party political system, a strong central government and a strong socio-cultural and religious sphere of influence. Thus as noted above, the attitudes, beliefs, and sentiments that form the collective history of the Malaysian political system and the life histories of the individual actors of the system, set the foundation for the culture of politics underlying its existing political system. This in turn, influences the juvenile justice system and its measure of punitiveness with regard

to children in conflict with the law as well as the treatment of the rights of the child in conflict with the law.

To what extent has the ‘continued potency of national political culture and institutional arrangements’ in the determination of criminal justice policy serve to further reinforce the ‘cultural embeddedness’ of penal affairs’ in Malaysia? (Hamilton, 2013:165).

## **2.1 Corporal punishment**

Jones, a child rights activist dealing with children’s issues for the past thirty-five years, is critical of the current system noting that:

*“It is more punitive. It is more about, ‘Oh you’ve done something wrong’ and therefore, a child is punished. ‘Oh, you have stolen a chicken,’ and therefore, they mete out the punishment as prescribed.”<sup>70</sup>*

Jones considers the issue of caning as an example of this punitive culture. In sharing his experience in various national policy-making bodies, he notes:

*“Every time when we have had workshops on torture and the use of the cane for example, you will find a group of people saying, ‘my parents used a cane!’”*

Jones feels that in his experience Malaysians are stubbornly clinging on to an outdated system believing in the notion that pain is the best form of teaching the child a lesson.

As indicated above, the *Child (Amendment) Act 2016*, abolished whipping as a form of punishment for children found guilty of criminal offences. Thus, as it stands, caning carried out in open court has been abolished. However, as noted in preceding Chapters, caning of children by parents and teachers remains unaffected. Further, corporal punishment remains a lawful sentence under Islamic law for males and

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<sup>70</sup> UNICEF cites a case described by many stakeholders of a child sentenced to imprisonment for stealing a chicken although no specific details of the case were provided (UNICEF, 2013:83).

females. Much of this centres on the prevailing socio-cultural position and levels of cultural embeddedness which will be explored in Chapter 6.

Noemi an academic in a law school and a member of the National Advisory and Consultative Council for Children describes her experience in engaging with society on the issue of corporal punishment through public consultations around the country:

*“In summary, in all the public consultations, which had about 500 to 600 participants, 90% to 98% of them wanted to retain the use of the cane.”*

These consultation sessions suggest that support for corporal punishment finds resonance among parents and teachers. Charles, a senior civil servant in the Ministry of Women, Family and Community Development, makes this observation in efforts to introduce child rights in schools:

*“When we talk about their rights, about corporal punishment; that it is not good for the children, there is a contradiction because it is a common practice in schools. How are they going to accept us? How are we going to push them to talk about this? We have 40 to 50 students in a class with one teacher. The international standard is about 20.”*

The teacher-student ratio aside, the issue highlights that while there are those who endeavour to introduce change, they are met with resistance and an argument is put forward that the existing practice is necessary given the circumstances in Malaysia.

The impact of race, religion and culture in relation to child rights is very much ingrained. Farida, a human rights advocate and member of the Constitutional Law Committee, Bar Council, Malaysia is of the view that child rights are marginalised:

*“...so, when it comes to child rights, in Malaysia, just like any other issue, unfortunately, it’s seen through these racial and religious lenses, and often enough because of that, child rights or what’s best for the child, would usually not take centre stage.”*

A similar view is expressed by Noemi. In her engagement with society, the general feedback she receives is one in which corporal punishment is seen as socio-culturally acceptable:

*“When I give talks on parenting, or talks against corporal punishment, I will get feedback from the audience such as “Noemi, you know, I was caned when I was younger, and I turned out fine. So, what’s so bad about caning?”*

Tabitha, in her second term as an opposition Member of Parliament believes that this view is attributable to how children are perceived:

*“Parents are authoritative and culturally, we do not acknowledge child rights. How many Malaysians are aware of child rights? So, for example, the caning of a child by parents or the school, it is not an issue here as it is accepted.”*

Negotiating this complex mix of culture, religion and race is indeed a challenge and stakeholders face these realities head-on in their work. One of the key stakeholders involved in this process is UNICEF Malaysia. UNICEF’s comprehensive report in 2013 has become a starting point for understanding the juvenile justice system and has served as a catalyst in introducing changes in the manner Malaysia deals with children in conflict with the law.

Sylvia, a child protection officer in UNICEF, suggests that the approach taken in dealing with child rights was to engage with the government with advocacy rather than take a confrontational approach. Thus:

*“I think it is a constant process of negotiation and dialogue. I don’t think it’s you go to the government and say, ‘these are all the recommendations, let’s do all this.’ It’s not how it is going to work. It’s also about building trust.”*

In dealing with some of these socio-cultural issues, Sylvia suggests that UNICEF again negotiates its way through by making sure that conversations on sensitive issues like child marriages or violence against children are part of an open dialogue with the government.



This process of negotiating around issues is not the experience that Tabitha endured in Parliament. She describes the process in which the *Child (Amendment) Bill 2016* was discussed in Parliament. She notes that the Dewan Rakyat<sup>71</sup> debated the bill (about 65 pages) in 5 hours and by the 4<sup>th</sup> of May 2016, it had passed the upper house. Tabitha also explains the challenges she faces:

*“It is not easy to discuss issues of child rights in Parliament. Issues like child marriages, unilateral conversion or even caning become complicated because we have socio-cultural issues. As a non-Muslim opposition MP, I am criticised for raising these issues. I am asked, ‘Why am I challenging Islam?’ or ‘How can 1.6 billion Muslims be wrong’. So, this is a challenge for me. There does not appear to be any political will to change some things, whether it is the CRC or CEDAW.”<sup>72</sup>*

Thus Tabitha feels that there is a disconnect between treaty obligations and actual implementation on the ground. However, she acknowledges that in areas of child health or education, Malaysia appears to be faring better compared to other issues including children in conflict with the law.

This pattern of relationships between international agencies like UNICEF, NGOs, civil society and various government stakeholders and the legislative processes represents a key component of the development of child rights in Malaysia. Thus, the debate about child rights very often involves questions about religion and culture that are deeply entrenched. Advocating child rights is seen as a threat to these entrenched values and as seen in Tabitha’s experience, the political divide often dominates legislative activity.

## **2.2 Prison culture**

This pattern of relationships and the often-opposite views on penal policies can be seen in for example, the issues surrounding capital punishment. As discussed in

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<sup>71</sup> The Malaysian Parliament is a bicameral Parliament. The lower house, the *Dewan Rakyat* consists of elected representatives and the *Dewan Negara*, consists of appointed representatives.

<sup>72</sup> *The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)* is an international treaty adopted in 1979 by the United Nations General Assembly.

preceding Chapters, children found guilty of capital offences (for example murder or specific drugs offences) are not sentenced to death but are held for an indefinite period at the pleasure of the Ruler. Adults are sentenced to judicial canning which is administered with a long, heavy rattan cane, not more than half an inch in diameter administered to the bare posterior (Section 288, *Criminal Procedure Code*) and adults are hanged (section 281, *Criminal Procedure Code*). The discussion on the position in Malaysia was discussed in Chapter 2. Stakeholder views yielded diametrically opposite positions.

Jones is of the view that capital punishment is not a deterrent:

*“Is it an answer to deter drug trafficking? No, it is not. Research shows that you can have all the death penalty you want, it is never deterrence.”*

The insider perspective as viewed through the lenses of a retired prison officer elicited a stark reality. Terry a retired prison officer and presently a child counsellor was part of the prison system for 35 years. He expresses this honest view of his lived experience in adult prisons:

*“I think that we should continue. Many people might not agree, but that’s their opinion. I’ve seen executions.<sup>73</sup> I don’t feel any pity. I just see, observe, and he dies. I just turn around and go back to work. I don’t pity them. I might feel sad for a while, but because I am a custodial officer; I am required to do it. There is nothing anyone can do. It’s something normal for me. To me, crime doesn’t pay. Whether they are innocent or not, I am not sure.”*

Goffman (1961) notes that in ‘total institutions’ typically, two different social and cultural worlds between the inmate and officials develop, ‘tending to jog alongside each other, with points of official contact but little mutual penetration’ (1961:9). Terry’s views of the prisoner reflect the notion that prison officers will in most cases regard the inmate ‘as “criminals” after all’ (Weinberg, 1942:721).

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<sup>73</sup> Section 281 (e) (i) of the Criminal Procedure Code mandates the presence of prison officers among others, during the carrying out of the death sentence.

Terry's sense of detachment in witnessing whipping and hangings is part of his 35-year experience in the system. The sense of being 'comfortably numb'<sup>74</sup> and desensitised within the lived experience of prison officers is a well-documented experience in prison culture. Liebling and Price (2001) note that, 'prison work demands of staff that they cope with brutality without becoming brutalised' (2001:160). Crawley in Bennett et al (2008) indicate that most prison officers have become 'desensitised to the distress and suffering of others' (2008:148). This sense of detachment is not limited to prison officers. Genders and Player's (1995) ethnographic study of HMP Grendon note the impact of desensitisation on the researcher conducting research within the prison system.

Correctional officers in the Malaysian Prison system are not assigned permanently to the sectors that hold children during their service. They are moved within the system and so deal with both adults and children. This is may not be the best way to deal with the children especially if the issues of being desensitised with the specific issues that impact the child.

Adiba's observation as a student visiting the Integrity School (as part of the Community Outreach Programme and Continuing Legal Education module) is rather stark:

*"To be honest, some of the wardens are very negative and seem to have given up on the boys. You must be strict, but that doesn't mean that you must be cold. So those wardens in the prison should also treat them like a child."*

George has been a correctional officer since April 2007 and currently serves in the Henry Gurney School, Puncak Borneo. He was actively involved in the setting up of the Integrity School in Kajang (a town about 20km from the capital city Kuala Lumpur). He is of the view that dealing with children requires a different approach:

*"I think the choice of correctional officers for children should be a specialised role and should be based on their personality. Dealing with children requires us to*

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<sup>74</sup> Borrowing the phrase from Waters R. & Gilmour D. Comfortably Numb. Pink Floyd; The Wall, 1979.

*understand children so that we can develop a rapport with them and build trust. We should not be multi-tasking with other roles within the prison system.”*

Luke has been a correctional officer since 2007. He has served in another prison in Sarawak before being transferred to the Puncak Borneo Prison. He works in the Integrity School system in Puncak Borneo. Luke expresses his view:

*“I am here to work and I have about 30 more years to go. I have to keep fresh so training and gaining knowledge about children would help but a promotion could result in an officer moving to the adult facility.”*

George agrees:

*“It is a good idea to have more training because here in Sarawak, our exposure is lacking compared to Kuala Lumpur. However, we are always subject to being transferred so I am not sure if it will make a difference.”*

Correctional officers in Puncak Borneo appear to recognise that incarcerated children are differently positioned to adults but given the current system, there does not appear to be plans to separate the career structures or to have a separate set of laws to deal with children in the prison system. The danger here is that being exposed to the entire prison culture will mean that correctional officers must either adapt to different treatment regimens or as is more likely, find themselves progressively desensitised.

### **2.3 The age of criminal responsibility**

As noted in the preceding Chapters, the age of criminal responsibility in Malaysia is 10 and Malaysia also maintains the *doli incapax* presumption, in that children between 10 and below 12 who have not shown sufficient maturity may be absolved from criminality as well (Section 82 and 83 of the *Penal Code*). UNICEF Malaysia notes that less than 3 percent of children arrested by the police are aged 12 years or younger and as such recommended the raising of the minimum age of criminal responsibility to 12 noting that this could be done ‘without compromising public security’ (UNICEF, 2013:29). This however was not forthcoming in the recent amendment to the *Child Act*.

Vivian, an adviser in the Court for Children and a Child Rights NGO representative feels that there is no necessity to increase the minimum age of criminal responsibility. She notes that in most cases, the children that appear in the court she serves are above twelve. In fact, Vivian indicates that the impact of the low age is negligible:

*“It is fine. In any case, there are very few and the numbers are small. There is no end to it as well. You can say twelve and some will say fourteen so there is no end to it.”*

As a Magistrate, Irene suggests that most children that appear before her are also above twelve:

*“The majority would be between 14 and 17 years of age. I have only encountered one case involving a 12-year-old but that was in a different court.”*

Charles, a senior civil servant within the Ministry of Women, Family and Community Development suggests that it is unlikely that a change is forthcoming:

*“When we consider the legal age, it is difficult to decide which point is better. However, there is a problem of drawing a line. Whatever line that you draw, there will always be an argument. For the moment, the line is still at 10 and 12. So, you see, even though it is rather low I think we have that system in place given our culture and values. So, I think, for now, I'm still quite comfortable with that kind of setting.”*

Thus, in Malaysia, the current position remains unaffected by the global trend. The low statistical evidence of very young children who are in conflict with the law draws two different views as suggested by the discussion above. Statistically very few children at that age are brought into contact with the system. Yet this argument is used in support of retaining the low age of criminal responsibility and the UNICEF perspective has not as yet found favour. Further, it is to be noted that the minimum age of criminal responsibility for breaches of Islamic laws as discussed in the preceding Chapters remain.

### **3. Children on remand, in custody and in courts**

In the preceding Chapters, WK, accused of murder in 2002 appeared in court, in a sleeveless T-shirt, track bottoms, slippers and handcuffs to answer to the charges proffered against him. The *Child Act 2001* had just been enacted and understandably, at that point in time, the purpose and the intent of the Act in affording child rights had not permeated into the actual workings of the juvenile justice system. In the 15 or so years since, has the environment changed?

#### **3.1 The Police and children**

There is evidence to suggest that young people generally have less positive attitudes towards the police than adults do (Flexon et al, 2009; Bridenball and Jesilow, 2008; Hurst and Frank, 2000). Hinds (2007) suggests that, ‘negative contact with police during adolescence may have a significant impact on lowering young people’s attitudes towards them’ (2007:198). There is also evidence that attitudes towards the police may be shaped from an early age (Powell et al, 2008). The intergenerational perspective between parents and children also have a bearing on perceptions towards the police (Sindall et al, 2016). Murphy’s (2015) study, indicate that procedural justice is in fact more important to youth than it is to adults.

In Malaysia, the National Youth Survey 2012 interviewed 2,105 Malaysian youth aged between 17 and 35 years old from all 13 states and the Federal Territory of Kuala Lumpur.<sup>75</sup> 70% of the respondents had either high or moderate levels of confidence in the police. The remaining respondents had either low or no confidence in the police. The levels of confidence were drawn along ethnic lines with the minority ethnic groups having the least confidence in the police and legal system (Leong et al, 2012:50). No explanation was proffered for this position nor was there an attempt to understand why minority youth in Malaysia felt this way.

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<sup>75</sup> This is a broad ranging survey and was not exclusive to exploring youth and police relationships.

However, the perception of ethnic minorities towards the police has been considered in other jurisdictions particularly the United States. (For example, in Sullivan, Dunham and Alpert, 1987; Leiber, Nalla and Farnworth, 1998; Hurst and Frank, 2000; Hurst et al., 2000; Taylor et al., 2001, Skogen, 2006, Flexon et al, 2009). Although ethnic demographics are very different across jurisdictions, the Malaysian ethnic minority view appears to fit the conclusions drawn from existing literature.

As noted in Chapter 1, Ahmad's (2013) mixed method study of 164 children in pre-trial processes in the Malaysian juvenile justice system highlighted that there are concerns about procedural justice as applied to children in conflict with the law.

A similar view emerged in an inquiry in the United Kingdom by the All Party Parliamentary Group for Children in 2014, which noted that, 'there is a lack of trust in the police among many children and young people. Some children and young people fear the police. Encounters between the two groups are often characterised by poor and unconstructive communication and a lack of mutual respect' (2014:3).

In some measure of acknowledging this issue in the United Kingdom, a recent strategy document published by the National Police Chiefs' Council (NPCC) indicates that, 'it is crucial that in all encounters with the police those below the age of 18 should be treated as children first' (2015:4).

From a Malaysian perspective however, UNICEF reports that Malaysia has 'yet to develop a comprehensive, specialised police response to children in conflict with the law' (UNICEF, 2013:38). In the years that have lapsed since the publication of the report, the issue of the police recognizing child rights from an operational perspective, has not been measured.

In most cases where children are taken into custody on remand, the first point of contact is the police and detention on remand. Jones finds the present process unsatisfactory noting:

*"Right now, the police put the child in a lock up. Are the facilities friendly enough? You reduce the boy to his inner clothing, treat him poorly and give him horrible food. Most of the boys I interviewed carry a lot of resentment from the*

*intimidation. You have negative things spoken to the boy and nothing constructive.”*

Lawrence a lawyer and member of the Child Rights Committee, Bar Council Malaysia acknowledges that in his experience in dealing with children on remand:

*“They do not have enough facilities to separate them, so, sometimes they actually put them together with the adults, which is not supposed to be as the law says that they are to be separated. Sometimes they are even handcuffed together and then they are brought together with adults. This is because of lack of knowledge and the police treating them the same as adult offenders. There is also a lack of resources for example insufficient police officers, police cars or inadequate police lock-ups to keep the offenders separate.”*

Of the 10 boys interviewed in the Henry Gurney School in Puncak Borneo, Sarawak, 9 indicated that they were handcuffed and 6 of them allege abuse by the police while in custody. Almost all the boys indicated that they were held in the same cell as adult offenders while on remand. Some boys were kept separate but still encountered police hostility.

Nicholas is 19 and is serving a 3-year sentence for possession of stolen goods, pursuant to section 411 of the *Penal Code* and for possession of methamphetamine pursuant to section 15 of the *Dangerous Drugs Act 1952*. Before this, he had been sent to the Tunas Bakti School for assaulting his teacher in his high school following an argument. He describes his experience:

*“I was in a separate cell but I was beaten and handcuffed while on remand.”*

Another boy, Lony, 20, is serving a 3-year term for statutory rape pursuant to section 375 of the *Penal Code*. He was 16 at the date of the offence while the victim was 15.

*“I was in remand for 7 days. I was kept in a separate cell from adults although there were adults around me. I did not feel afraid as I thought I did not do anything*



*wrong. I think I was treated as an adult offender as the police were aggressive and spoke to me harshly.”*

The power differentials are apparent. The police assert their authority. Udin, aged 17 is serving a 3-year term in the Henry Gurney School for statutory rape pursuant to section 375 of the *Penal Code*. The victim was his girlfriend and was known to him since 2013. The victim’s mother found out that they were having a sexual relationship and lodged a report.<sup>76</sup> He was kept in a juvenile lock-up but alleges abuse by the police on the third day of his remand order:

*“I didn’t do anything because in my mind, I do not have any power to defend myself.”*

Most of the boys spent 7 to 14 days in remand, but in some cases, there was a longer period of remand. David was arrested for possession of a stolen vehicle, criminal intimidation and had a previous warrant of arrest for attempted murder. (Possession of stolen goods: section 411 *Penal Code*, Criminal intimidation: section 506 *Penal Code* and Attempted murder: section 307 *Penal Code*). Upon his arrest and detention, he was handcuffed and kept in the same cell as adults. He was kept in remand for 4 months.

One boy, felt that his condition upon arrest was his own fault. At the age of 17, Angah had a rape charge against him pursuant to section 375 of the *Penal Code*. He was kept in remand together with adults for 14 days and shares his feelings:

*“I did wonder about whether a child should be placed in such a place but I felt that I was confined and handcuffed because I was guilty.”*

The conversations with the boys suggest that the police are not complying with the child rights agenda. This begs the question of the level of awareness and training of

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<sup>76</sup> Section 375 (f) of the *Penal Code*, indicates that individuals under sixteen years of age are not legally able to consent to sexual activity, and such activity may result in prosecution for statutory rape. Section 376 of the *Penal Code* provides that the punishment for rape is imprisonment for a term of not less than five years and not more than twenty years, and may be subject to whipping. Where the offender is a minor and a term of imprisonment is imposed, then section 75 of the *Child Act 2001* will apply and the child will be sent to the Henry Gurney School.

the police. Sylvia acknowledges the challenges that UNICEF face in assessing the impact of awareness of the police of child rights, noting that it is difficult to follow-up on such training:

*“Ideally, the framework we would like is assessing the impact on the child. Of course, impact is not measured instantly, but takes a few years and even then, it is difficult to measure that. However, for us, it is important to know but change in Malaysia takes a long while.”*

There is not much comfort to be drawn from this view. It appears that there are limitations on the impact of training. Noemi is actively involved in the training of police officers and expresses what the ideal position ought to be:

*“Training must start from day one when they enter the Pusat Latihan Polis (PULAPOL) (the Royal Malaysian Police training centre). It cannot be given as an afterthought, when they are already in service. The training should cover all aspects of rights. To treat the child as a child first, and after that, the offence that he has committed or alleged to have committed.”*

Deputy Superintendent of Police (DSP) Ona, joined the Malaysian police force in 1991 undergoing training at PULAPOL (the Royal Malaysian Police training centre). At that time, she did not receive any specific training in dealing with children. Subsequently, she was posted to serve as a Criminal Investigations Officer in a local police district. After serving as an investigating officer, she was eventually posted to a specialist unit set up in 2007 for sexual crimes, domestic violence and child abuse investigations:

*“When I was posted to the D11 unit in Bukit Aman<sup>77</sup> I attended many workshops on child abuse, seminars organised by various NGOs and the Ministry. I also attended courses on how to interview a child as we have a Child Interview*

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<sup>77</sup> Sexual, Women and Child Investigation Division (D11) of the Criminal Investigation Department at the Royal Malaysia Police HQ, Bukit Aman. “Bukit Aman” is a common descriptor for the headquarters of the Royal Malaysian Police and refers to its geographical location in Kuala Lumpur.

*Centre, CIC, based in Bukit Aman. So basically, we were trained how to handle child victims.”*

DSP Ona’s training emphasis appears to be on dealing with child victims, which is perhaps understandable given that the D11 unit serves that purpose. DSP Ona’s posting to this unit was not one of choice but:

*“...because I was promoted to an Assistant Superintendent of Police (ASP), they just sent me there.”*

This suggests that transfers are not essentially based on specific skills or knowledge but as part of a promotion exercise and movement is based on where there appears to be a vacancy. As noted above, much of the training DSP Ona received was in essence, on-the-job training.

DSP Ona believes that one of the reasons this division was established was because:

*“They needed a division which is specially trained; most of them are women officers perhaps women are believed to have more empathy, to be more sensitive in handling these sorts of cases.”*

The D11 division also monitors the more than 800 police stations across the country in matters that involve children, with a strong emphasis on child victims. This involves having the authority to call on the investigating officer to report to the division with the investigation papers of pending cases to monitor developments. The D11 division itself organises in-service trainings. DSP Ona explains that officers attend training and courses that educate them specifically on how to deal with children.

DSP Ona acknowledges that the training is necessary:

*“...because some officers are not aware and to them, everybody is the same. They treat a child just like an adult.”*

Arianne a lawyer and member of the Child Rights Committee, Bar Council Malaysia acknowledges that it was only upon completion of a training workshop

organised by UNICEF and the Malaysian Bar that she learned about issues involving children in remand and custody. She discovered that in a lot of situations there are police breaches of the basic rights of the child.

However, Noemi notes that there are changes:

*“I started 20 years ago and I feel that there is greater awareness among the higher ranked officers. Therefore, there has been a significant increase in awareness levels, compared to when I started way back in 1995. Of course, it can be better but it's improving.”*

After serving close to 10 years in the D11, DSP Ona was promoted again and then transferred out of the division. She now teaches in the police-training academy but interestingly her current work involves a completely different area of law enforcement and it appears that all her experience in dealing with children (and women) is not put to use. DSP Ona accepts this:

*“In the police force, no one is indispensable, so we need to adapt. Even though I have been dealing with children and women in the D11 division, but to me, I am very happy because I can now pursue my studies (a PhD). I am also in a different field and appreciate that I can learn a different thing.”*

A number of matters arise in the context of the police and their relationship with children. Firstly, of concern here is that while training and specialisation as suggested by UNICEF may resolve some of these issues, the perceived lack of awareness of the notion of child rights is uncomfortably evident. The conversations with the boys suggest that these training efforts have not made any significant impact. There is no indication if the manner in which children are treated is a reflection of a lack of awareness or training or more worryingly, whether there is a wilful disregard of these rights.

Secondly, the manner in which children are treated may also be a reflection of how the child is perceived. Perhaps as considered above, there is evidence that the adult's own perception of childhood and the adult's own life experience as a child bears some consequence as to how this adult then sees childhood. Further, in the context of the

police, the view that the detained person is a criminal is evidence of the social distance between the two even if the detained person is a child. This obfuscation of how the child is seen has an important bearing on the levels of acceptance of child rights.

A further issue is that given the specialised skills and knowledge acquired in child rights issues, DSP Ona finds herself in a different area serving a different purpose. The career structure within the police force is often based on filling vacancies as and when they arise. This is perhaps a missed opportunity to develop potential trainers.

Lastly, there does appear to be greater emphasis on acknowledging the child victim but less so in terms of the child offender.

### **3.2 Children in Court**

Courts for Children are established by section 11 of the *Child Act 2001* primarily for hearing, determining or disposing of any charge against a child. The court has jurisdiction to try all offences except offences punishable with death. The court is presided by a Magistrate who is assisted by two advisers one of whom must be a woman. The advisers provide the Magistrate with advice and if necessary, to also advise the parent or guardian of the child. As noted above, in 2015 4,730 criminal cases were brought to the Court for Children since 2011 with 4,021 (85%) prosecutions (Hansard, 3 November 2015 col 1040-1050).

As considered above, Section 62 of the *Child (Amendment) Act 2016* in inserting a new section 83A, expressly indicates that a child who is arrested will not be handcuffed save in exceptional circumstances, namely, if the offence is a grave one or if the child forcibly attempts to resist arrest or attempts to evade arrest.



**Figure 8:** Four teenagers (two aged 16 and 17 respectively) charged with murder being taken to the Magistrates Court in Penang. Source: Dermawan, A. (2017). Four teenagers charged with the murder of Nhaveen. *The New Straits Times*. 19 June 2017. [Online].

The *Amended Act* also now expressly indicates that the child shall have the right to be informed of the grounds for arrest as well as the right to be provided by counsel and to have family members be informed upon arrest. However, unless a child or his parent is aware of such rights, then issues of breach may not be fully understood.

It is interesting to note that despite the signing of the CRC and the passing of the earlier *Child Act 2001*, the express prohibition of handcuffs was only introduced in 2016. As noted in this work, the child, WK, aged 12 accused of murder was brought to court handcuffed at his first appearance in the Malaysian courts, ratification of the CRC notwithstanding. Even if the case were heard today, the position would still be the same, as the exception to section 83A would apply (See for example Figure 8 above).

As a Magistrate in a Court for Children, Irene explains what occurs in her court:

*“If they are on remand then they are handcuffed. As remand cases come in every day and they can appear in the normal court. This is my experience. They are handcuffed together with other adults and they wear the purple remand outfit.”*

Farida, a human rights advocate and a member of the Constitutional Law Committee, Bar Council, Malaysia believes that we do not accord children in conflict with the law proper consideration:

*“I remember being in court and there were about ten children there. They stood in a line, together with adult offenders. It should not be that way. Surely that experience would be imprinted in their mind forever. These are young people at an impressionable age and you would not want that sort of impression left on them.”*

Lawrence often appears as counsel appointed under the Legal Aid scheme and shares his experience in dealing with children who appear in court in cases of remand orders being sought by the Police:

*“During the remand process, sometimes the environment is not conducive at all and the children will be treated as normal offenders. It is only in the Courts for Children, that they will be given certain privileges. So, you have no time to interview them, to find out what happened during that remand period. Most of the time the investigation officer will just ask for an extension, without giving valid reasons. When lawyers are there, sometimes the police officer will quickly remove the handcuff and then they will separate them.”*

The boys in Henry Gurney Puncak Borneo were handcuffed when they were sentenced and were transported to the prison complex. George a correctional officer in the Henry Gurney system explains this:

*“We are governed by the Prison Act and Rules and so we have to abide by them. For example, the use of handcuffs. While it is true that children should not be handcuffed but we have rules to follow and if we don't, we will be cited for breaching our operating procedures.”*

Vivian's experience as a court adviser suggests that there is some change in this aspect to this. In the specific the Court for Children where she serves children are not

handcuffed. However, in some cases, some aspects of the process have not changed and there appears to be a lack of respect for basic levels of dignity as per Article 40:

*“I know, when they walk in maybe they feel intimidated. It is a bit sad. They come into the court and nobody has briefed them. Sometimes, they are in slippers<sup>78</sup> and in torn clothes or in a torn t-shirt.”*

Jones notes that in his experience, many of the boys appear in court alone and without representation and in some cases struggle to understand proceedings. In his view, courts are not friendly to the child. Physical structures also create distance between the Magistrate and the child.

Many of the boys shared their own experience in appearing before Magistrates in the Court for Children.

Wilson aged 20 was sentenced for 3 years when he was 17 for theft of a motorcycle pursuant to section 378 of the *Penal Code*. He was handcuffed when he appeared in court and describes his experience:

*“I was not aware of the system at all and I did not understand the sentencing process. I found that I could not challenge the judge.”*

Nicholas is 19 and is serving a 3-year sentence for possession of stolen goods, pursuant to section 411 of the *Penal Code* and for possession of methamphetamine pursuant to section 15 of the *Dangerous Drugs Act 1952* acknowledges that he was unaware of the process:

*“I have no idea about the system. I was sent to the Sekolah Tunas Bakti because I was beyond control and even though I tried to appeal, it was not accepted.”*

Court processes and procedures often leave most people feeling disconnected. This is also felt by the child in conflict. Lony is now 20 years of age and is serving a 3-year term for statutory rape pursuant to section 375 of the *Penal Code*. He was 16 when he appeared in court and could not understand the legal language used:

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<sup>78</sup> Colloquialism that refers to rubber flip-flops/sandals commonly used in Malaysia.



*“In court, I did not understand what was happening because they speak in a language that I cannot understand. I did not know what my rights were.”*

Given that 23 years have lapsed since the ratification of the CRC and that an amendment to the Child Act has been introduced, these descriptions are of concern. It does appear that in most instances, children are treated as offenders first and not as children first. Even so, the treatment as an offender leaves much to be desired with palpable breaches of the rights of an accused person. There are deficiencies in physical support mechanisms (prison facilities, vehicles and courts) as well as in acknowledging child rights.

A key stakeholder in this process is the Magistrate in the Court for Children and the experience and awareness of child rights that they bring (or do not bring) to the discussion. UNICEF suggests that ‘magistrates tend to be quite young and have limited experience with children’ (UNICEF, 2013:66).

Jones is again critical of this situation:

*“The problem we have is that most of the magistrates are young. For example, they do not know what it means to come from a single-parent family. They do not understand the elements involved.”*

The notion of ‘social distance between settlement agents and those they judge’ (Horowitz, 1990:183) is evident in this context. Magistrates are appointed positions<sup>79</sup> and it is common practice for Magistrates and Prosecutors to also deal with adult offenders on days when there are no Court for Children hearings. In smaller districts, it is likely that the Magistrate is not part of the community he/she serves and this suggests a physical distance that is mirrored in their social distance (Terrio, 2007).

Vivian, on the other hand, has a different experience in the jurisdiction she serves noting:

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<sup>79</sup> Section 78 of the *Subordinate Courts Act 1948*.

*“I have met a lot of these magistrates, they are young and very child-friendly. I was impressed. They are better than the High Court judges who deal with custody matters. I’m happy with the magistrates.”*

Farida has observed the lack of uniformity in how magistrates treat children:

*“When it comes to court and the magistrate, some of them do try to make sure that, whatever required for child offenders are complied with but some are not. It is inconsistent in that sense. The same can be said for the investigating officers too.”*

The duality of roles in dealing with adults and children that the Magistrate plays, in the same physical space, does not go unnoticed. Vivian’s observation in the court she serves is that the Magistrate struggles with the workload:

*“Of course, after she has gone through all these cases involving adults she is stressed as there are so many cases!”*

Irene, a Magistrate in a Court for Children describes her day:

*“Normally we start at 9.00 a.m. If the public prosecutor is not there yet, I will start with other cases for example, children in need of protection and rehabilitation, or children in need of secure protection. Once we are done with that part, then we proceed in court together with the advisers and we will start. We only allow the children and parents to be in court, counsel if any and the DPP, the police that escort child and the interpreter. No other person is allowed. If we have 20 cases, the rest are all waiting outside together with other adults, for example parents. Normally when we sit as a Court for Children, we don't fix other adult cases.”*

It is clear that process of dealing with cases is a long-drawn process with the costs of maintaining the advisers perhaps being a factor in deciding to allocate all cases on the one day.

Further, there are issues as to the extent to which Magistrates and Prosecutors are aware of child rights and the rights of the child in conflict with the law. In 2013, UNICEF reports that ‘all legal officers, including Magistrates and DPP (*sic*), receive

both induction and in-service training on a wide variety of topics through the Judicial and Legal Training Institute (ILKAP), however there is currently no specialised course with respect to children in conflict with the law' (2013:65).

On the issue of whether Magistrates are aware of what rights that the child has,<sup>80</sup> Vivian feels:

*"I doubt they are fully aware. Perhaps they get a 2-hour lecture. But how much of that really sinks in and then there is also experience that comes on the job."*

A further problem is that even when training is undertaken, the career mobility of Magistrates influence the effectiveness of such training. Arianne, a lawyer and a member of the Child Rights Committee of the Malaysian Bar Council also notes:

*"We are discussing the issue of on-going training for judges and the DPP and the police. What happens in any government scenario is that you are promoted and you move. What happens to that new person that comes in? Let's say for example, you happen to take over as a Magistrate in Children Court's, but you've not been trained."*

Who then is to be responsible for such training? UNICEF conducts capacity building through specific training of trainers. In this area too, training is acknowledged as a challenge. Sylvia explains:

*"We engage in capacity building through the training of trainers. UNICEF is not a training institute. You need to make sure the training is monitored or at least maintained. You need to also monitor the outcome and impact of the training as well so, all of this is not quite there yet."*

These matters can and do place constraints on the system. UNICEF does not view its role as a provider of training but a facilitator. It is evident that while some training

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<sup>80</sup> For example, there is no evidence that trial process acknowledges learning disabilities as established in the UK for example in *R on the application of TP v West London Youth Court [2005] EWHC 2583 Admin*.

occurs, the depth of training and the career structure within the Magistrates, hampers the effectiveness of such training. Perhaps more importantly the Magistrates view on child rights is a view developed within his/her socialisation as a child. The incarcerated boys spoken to, indicate the level of distance they feel in proceedings. Court advisers are intended to help bridge this gap.

Gus, an adviser in a Court for Children, describes his role and work in the court he serves:

*“We have close to about 30 court advisers and we go on for two terms. My duty is on Thursday every month. We start at about 9.00 a.m. and it may go on, depending on the cases, up to 4.30 p.m. Sometimes we have more than 40 cases. The allowance is RM150 for the whole day.”*

The advisers sit with the Magistrate and provide advice. Together with the Magistrate, they review case reports and are then consulted before a decision is made. Gus describes this:

*“Before he or she delivers the judgement, they will ask us ‘What do you think?’ So, I will give my views based on the case. I will be more interested in reading the child’s lifestyle, why he is behaving that way.”*

Vivian, a court adviser in another court explains her experience:

*“The whole morning session is dealing with these offenders. They are brought to court and you see their parents. The welfare officer would have prepared a report. When they have pleaded guilty, or if they are found guilty, we read the report, and then we can ask any questions which the Child Act allows us to ask, for example, questions to the family, to the child, to the parents or seek clarification if something in the report is not clear. After that, we decide together with the magistrate, and the other adviser.”*

Gus notes that Magistrates are young in the court he serves in and he has seen Magistrates leave upon securing elevation to a higher court. The perception is that Magistrates are often keen to stick to the ‘letter of the law’:

*“You see they go by the book according to the appropriate sections. ‘This is what you have done, this is what we are going to tell you to do, this is what you’re going to face’ but would that be helpful for the person, I don’t know. You are the Magistrate, so I suppose what you say goes and maybe no one will dare to question you. I would throw in options because I am a social worker and I mix and mingle with people. I talk to people. I am in the streets and have been doing that for 17 or 18 years. In court, you fill forms, tick boxes and complete all kinds of protocol. But does that really help?”*

Decision-making may seem to be process driven but what is the experience that a Magistrate encounters? Irene, a Magistrate in a different court describes her journey. As an undergraduate law student, representatives from the Attorney General’s Chambers came to her University:

*“Immediately after my convocation I joined the judiciary as a contract officer for two years. Initially I was assigned to the High Court as a senior associate registrar. After three to four years in that role I became a Magistrate dealing with criminal and civil cases.”*

It was in this role that Irene was thrust into dealing with cases involving children and she acknowledges the difficulty especially in having access to materials dealing with child rights. Irene acknowledges this:

*“At that time, I was not fully aware of the CRC and all those conventions that relate to children. However, you have no choice, because when you sit as a magistrate, you must decide and before you decide, you have to read!”*

Irene acknowledges that at the start of her role, her reading of materials was very limited. It is only when she recently embarked on her doctoral studies, that she began exploring other materials. Given that Irene had to decide cases involving children without much training or exposure to child rights or issues impacting children, she relied heavily on the welfare report submitted in court.

However, relying entirely on the welfare report itself may not be the best approach as Vivian found that most of the reports do not provide adequate information about the

child especially if the child is reticent when meeting with the probation officer. Another problem that Vivian identifies is that, the probation officers often struggle to cope with their workload:

*“The probation officers don’t have time to see the child three or four times. They might see him in the most uncondusive environment for example, in prison or in the lock-up. He is not going to wait to see if the child is able to talk. He is just going to ask some questions and records it. Just a formality.”*

In mitigating the over reliance on the reports, Magistrates do work with the advisers. In explaining her relationship with the court advisers and the welfare officer, Irene describes it thus:

*“They see things from a different perspective, but sometimes the welfare officer, the two court advisers and the Magistrate have differing views. However, ultimately they are helpful in terms of making an appropriate or suitable order.”*

The advisers are of course limited in their role and Irene explains:

*“For a finding a fact in full trial, they may not be able to help much because their duty is not to find on the issue of fact; when to find guilt or not.”*

As a Magistrate, Irene acknowledges the wider role the advisers play noting:

*“Many of the magistrates, sitting in the Court for Children are young magistrates. So, the advisers, when they talk to the children, and to the parents, they advise parents and the children like a mother or a father would. This aspect is very good.”*

It is clear that a Magistrate has to work with the court advisers to try to come to a settlement. There are concerns with ensuring consistency in this relationship as Magistrates and court advisers come with differing backgrounds and experiences. Irene’s experience may not be the same with other Magistrates. It also does not help that a Magistrates experience is developed in the course of working within the Court for Children system and when they achieve some measure of fluidity in the role, they may be promoted. These matters aside, there are also concerns about the

design and physical structure of the court. There are differences in courts established for dealing with offences against children and those that deal with child offenders.

By virtue of the *Sexual Offences against Children Act 2017*, a new special court for child sexual crimes was established. The special court would focus on cases such as child pornography, child grooming and child sexual assault. It is equipped with infrastructure such as court recording transcription facilities; a waiting room for child witnesses; live video link; child witness screens and disabled-friendly facilities.



**Figure 9:** The waiting room for child witnesses at the special court. Source: <http://www.jpm.gov.my> (4 May 2018).

This is in stark contrast to the physical and structural set up for most Courts for Children that deal with children in conflict with the law. These matters underscore the manner in which children are contextualised within the social structure. The difference in treatment is stark notwithstanding the fact that in essence, both the victim and an offender are children.

The Court for Children in Kuala Lumpur is a specifically designed court to deal with children and this includes cases involving children in conflict with the law.

However, in many other jurisdictions, the Court for Children is a normal functioning Magistrates court that deals with cases within its jurisdiction but on one day (or more) in the week it functions as a Court for Children. The physical setting is unchanged.



**Figure 10:** Inside the Magistrates Court, Petaling Jaya where Gus serves as a Court Adviser. Source: <https://foursquare.com/v/mahkamah-petaling-jaya> (4 May 2018).

The facilities do not cater for the needs of children as noted by Irene:

*“It is an ordinary court of law. Physically, there is no difference. In fact, it was different when I was in Kuala Lumpur as in that court I sat at the interpreter’s table, together with the advisers. I didn’t sit on the bench. But in my current court, I have to sit on the bench together with the advisers as the interpreter’s table is very small and cannot accommodate three persons.”*

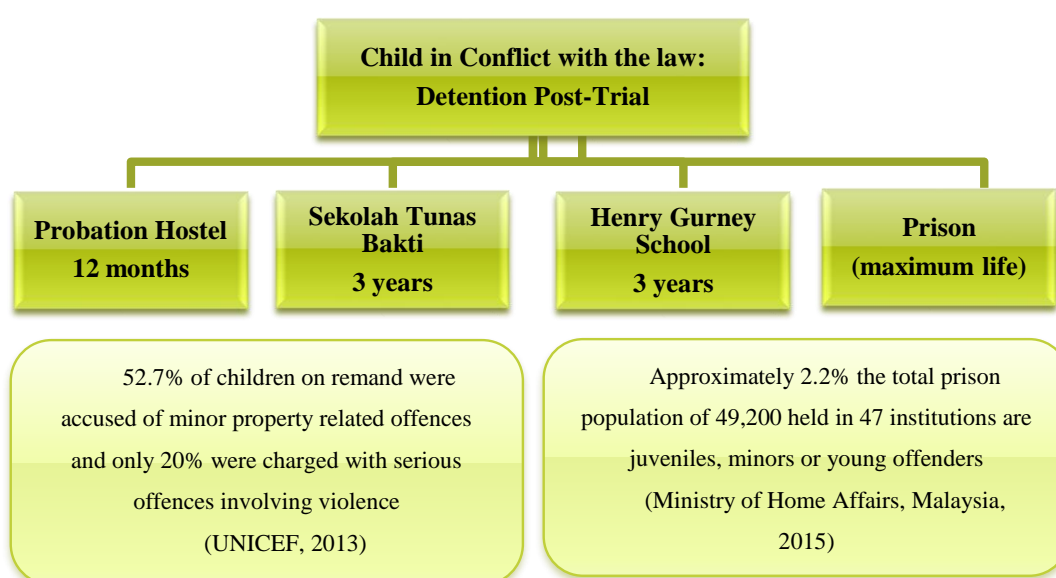
DSP Ona makes an interesting observation:

*“It is 2017 but you see the court structure is still the same. We still don’t have that kind of facility. So, facilities are still lacking. To implement this, we need logistic support from the government, the Ministry and NGOs. Otherwise you just talk the talk and never walk the talk!”*



The conversations above raise a number of issues. As suggested above there are inconsistencies in the level of engagement that a sitting Magistrate has in dealing with the children. While some stakeholders feel that the Magistrates are able to understand the needs of the children, the children themselves find that they do not understand proceedings and the social distance appears amplified. Further, the physical structure of courts do not make it any easier for a child to be comfortable in their surroundings. These matters raise doubts as to the philosophical aspirations of the CRC particularly the notion of a child rights approach to juvenile justice.

#### 4. Detention and incarceration



**Figure 11:** Current structure of post-trial detention of children in conflict with the law.

In the preceding Chapters, reference was made to the Malaysia’s approach to children in conflict with the law. It was suggested that it is still primarily grounded in formal police and court-based interventions and institution-based rehabilitation based on drill, training and education both formal and religious (See Figure 9 above).

UNICEF in its comprehensive report states that these institutions and schools are, ‘governed by relatively dated regulations that contain provisions that are not in accordance with the CRC and international standards’ particularly in the use of

‘solitary confinement, corporal punishment, reduction in diet, stress positions, and restriction of family visits’ (2013:118).

The consequence for the child in conflict with the law is the probability of being detained in some form of institutional set-up. Sentences of detention are commonly given, rather than as ‘a last resort for a child in conflict with the law’ (Child Rights Coalition Malaysia, 2012). The UNICEF study in 2013 found that a significant number of children are held on remand for very minor offences and that a high percentage of children in prisons are those who have not yet been found guilty of a crime (UNICEF, 2013).

#### **4.1 The impact of detention and incarceration**

What then is the impact of detention of children in conflict with the law? Jones observes that children are often detained without any real support. Alarming he notes that prisons and detention centres often do not have dedicated social workers.

Vivian, a court adviser also expresses her dissatisfaction with these institutions noting that:

*“All kinds of things happen there. The new entrants are bullied, and that is treated as something that they must go through, and that is very sad. Then they shave your heads and so you lose your identity there.”*

Jones describes this situation thus:

*“Now, putting them all together in one place, it is just like in ‘The Lord of the Flies’. A senior boy now preys on a junior boy. In no time, he will break the boy. There exists a hierarchy of boys, and the boy is broken. He may have committed theft but he comes out three times worse off!”*

These observations suggest that the social hierarchy among boys in detention are a known occurrence. The aim of the detention process is to rehabilitate the boys but the lack of social workers further exacerbate the situation. How do prison officers deal with this?

*Rule 55 of the Malaysian Prison Rules 2000*, describes the role of prison officers, ‘[i]t is the duty of all prison officers to treat all prisoners with kindness and humanity, to listen patiently to and report their complaints or grievances, at the same time to be firm in maintaining order and discipline.’

Terry, a retired correctional officer with 35 years of experience in the prison service, suggests that he would normally take positive steps to ensure that children are not bullied by their own peers:

*“We make sure they are not bullied inside. I will always check with them. In most cases, they will say that they are not being bullied. Thus far, there has not been any incident for me to take any action.”*

This raises some interesting issues. It does seem rather surprising that in his 35 years, Terry has not encountered any situation that warrants some form of action. Further, it appears that Terry is reliant on asking the children if they have been bullied rather than relying on his own observations of behavioural or other changes. Given the hierarchical social structure that is known to exist, it does seem unlikely for a victim of bullying to lodge a complaint with prison officers for fear of reprisals from other children.

As suggested in Chapter 2, Article 40(1) urges countries to recognize *the right* (emphasis added) of every child to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth. Children in the Henry Gurney system or in prison, just as adult prisoners are subject to the same laws. Thus, according to the *Regulation 3 of the Prison Rules, 2000*, the general principle underlying the administration of the Malaysian prisons is to provide treatment to all the prisoners at all times so as to encourage their self-respect and a sense of personal responsibility. The aim is to inculcate habits of good citizenship and hard work and to encourage them to lead a good and useful life upon discharge from the system.

In the Integrity School System<sup>81</sup> for example, child offenders are given identification numbers (names are no longer used) and are segregated according to categories of offenders, which then determines the colour of the uniforms they wear (See Table 7 below).

Nature/Duration of Sentence	Colour of Uniforms	Visitation Rights
Remand	Purple	Weekly
Under 6 months	Red	Monthly
Over 6 months	Green	Once in three weeks
More than year	Light Blue	Once in two weeks
Long sentences	Dark Blue	Weekly

**Table 7:** Classification of children in the Integrity School System.

Jones makes a valuable observation on the physical structure and design of prisons:

*“Most of the prisons are built with adult male prisoners in mind and are therefore not child friendly.”*

Jones feels that this does not address the specific needs of children in detention noting that the treatment of children appears to follow that of adults:

*“For instance, the right to meet parents. They follow the adult prisoner arrangements where visitation rights depend on the type of offence. So, we have a system where there is a long absence of the father and mother in the life of the child.”*

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<sup>81</sup> Integrity Schools are schools within prisons for juvenile offenders and represents a collaboration between the Education Ministry and the Prisons Department. Volunteer teachers and ‘graduate’ inmates conduct lessons.

In the Henry Gurney School system, the boys have their heads shaved and wear white uniforms. The system of rigour and discipline is also imposed and visitation rights are also restricted. The boys have fortnightly visitation rights but this presents problems, as owing to distance and costs, families cannot afford to visit.

Lony is now 20 years of age and is serving a 3-year term for statutory rape pursuant to section 375 of the Penal Code. He was 16 at the date of the offence while the victim was 15.

*“My family are allowed to visit me fortnightly but because they are far away and it is expensive to come here, they only come about two times a year.”*

Similarly, Aman an 18-year-old boy serving a 3-year term in Henry Gurney. He entered the Henry Gurney School at the age of 16 and describes his contact with his family:

*“My family visits me only if they can afford to come.”*

The underlying philosophy appears to be that of reform by means of education and discipline. Further, the approach appears to be applied without considering the special needs of the children.

Terry offers some insight into the lived experience of the children in the Integrity School system within the Kajang Prison:

*“After they wake up, we do a muster or a body count. After the body count, those who are in the educational programmes will go for their lessons. Those who are not, will do drills, marching and exercises for about an hour or two. After that, they take a shower and this is followed by religious classes or civic lessons.”*

In response to the question as to what purpose the marching and drills serve, Terry, a correctional officer suggests:

*“Well, to induce discipline and inculcate responsibility, so they will not relapse. So, we have a programme, called the Human Development Programme<sup>82</sup> to enhance their personality. Hopefully, negative attitudes and behaviour will change.”*

Goffman’s (1961), participant observational study of mental patients describes at length the ‘inmate world’ of the total institution. Thus, institutions managed by the Prison Department operate on a regime of discipline, religious instruction and vocational training very much in the vein of a ‘total institution’. Clearly, the life of the child in detention represents this contested arrangement.

The shaving of heads, the uniforms, the substitution of names with specific identification numbers, controls on visitation are therefore processes that are deliberately set in motion to diminish the child’s ‘old self’ and attempts to create a new self. The child is dispossessed from normal social roles and contact with his family is limited in accordance with prescribed methods often used for adult inmates. Arguably, the stripping of social roles and mortification of self (Goffman, 1961:14) also implies a stripping of child rights as enshrined in the CRC and the notion of offender first and child second is further entrenched.

From the Henry Gurney School perspective therefore, incarceration and the rehabilitation programmes are designed to change the child’s behavior in the interests of the institution and society. The broad notion of the dangers of incarceration were considered in Chapter 3 above. The incarceration experience itself has an impact on children. Lyon, Dennison, and Wilson (2000) in their study of the incarceration experiences of 84 young offenders across 10 prisons within the United Kingdom reported the young offenders being scared, humiliated, and depersonalised on reaching prison. The need for post-incarceration support also featured heavily as a concern. Ashkar and Kenny’s (2008) study examined the incarceration experiences of 16

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<sup>82</sup> The Human Development Plan involves four phases: Discipline Development, Personality Enhancement, Vocational & Academic skills and Community Reintegration. The rehabilitation process of young people in Henry Gurney Schools is based on the *Putra Module* which is in essence similar to that for children in prisons and ‘is based on the British Borstal model which is no longer in use in the UK’ (UNICEF, 2013:117).

adolescent males in a maximum-security detention report that among other experiences, adolescents experience a sense of loss through reduced autonomy and dislocation from important others.

Jones, in his dealings with children in conflict in the Integrity School, in the Kajang Prison, observed similar experiences:

*“The boys felt that ‘this is our dead end, this is our destiny, and we are done for.’ They are kept there and there is no way out. There is literally no way out. So, they come into the system and they resolve in their mind ‘this is it, it’s going to take survival skills.’ They also felt that they are stigmatized, getting a job, going back to school, it is all a problem. The boys have that perception, that this is life. When you interview them, they are all filled with resentment, for having gone through that system and being treated in that manner.”*

These feelings of resentment were also felt when talking to some of the boys in the Henry Gurney School.

Odeng is 20 years old and is serving a 3-year term for statutory rape pursuant to section 375 of the Penal Code. The victim was someone he had been having a relationship with since they were 13. He was kept in remand for two weeks. This was followed by an extended remand order in the Sibu prison for 1 month and 13 days. He alleges that that he had to endure physical beatings by the police while in remand.

When asked about his experience, he said:

*“I just accepted my fate. Prison is prison, there are no two ways about it and I feel betrayed by the system.”*

Given that Terry has spent 35 years in service, he believes that the current system works well and that in his experience, most children do not re-enter the system:

*“I am sure it works as it is. They are not coming to prison to eat and sleep. They are all made to do something, like marching. If we are too lenient, then problems arise. The public is aware. We have a combination of programmes, under the Human Development Plan and everybody benefits. Whether this is totally accepted*

*by the children that is another matter. I know many youngsters who have been released, have not been caught for at least two years but I do not know if they are re-offending.”*

Terry's views imply that there is an assumption that the Malaysian public desires that the prison system have in place punitive measures to ensure that the child does not have an easy life for the crime he has committed. Arguably, given Malaysia's punitive culture, this may be true although there are no local studies that support this assumption. There appears to be a belief from an insider perspective, that the present system works yet this view is not necessarily shared by human rights or child rights advocates.

The point on re-offending does raise interesting issues. The choice of description is deliberate. Terry makes the distinction between *re-offending and getting caught* (emphasis added). Gray's analysis of youth offending in Hong Kong makes an important observation that most youth crime 'does not justify the incarceration which frequently results, thus giving the false merit and credibility to low recidivism rates' (Gray, 199:585). Given that in many instances, children are incarcerated for minor property offences and are committing such offences for the first time, it may be possible that reoffending is unlikely. Unfortunately, from a Malaysian perspective, there has not been any comprehensive analysis on recidivism rates of children in conflict with the law.

In the United Kingdom, the latest Ministry of Justice statistics published in 2015, show that 'around 53,000 juvenile offenders were cautioned, convicted or released from custody between April 2012 and March 2013 and around 19,000 of them committed a re-offence. This gives a proven re-offending rate of 36.1%, up 0.6 percentage points from the previous 12 months' (2015:7).

Media reports quote the Malaysian Minister of Home Affairs indicating that, the recidivism level in Malaysia is among the best in Asia at a rate of 7.6% in 2015 (Fadzell, 2015) and at 8.59% for 2016 (Othman, 2017). There is no evidence as to how this was measured or what methods were used.



Samuri et al (2013) in their study observed ‘that many inmates of the Henry Gurney School are child offenders who had run away from an approved school (Sekolah Tunas Bakti). Their actions were met with a harsher punishment, i.e. being sentenced to Henry Gurney School’ (*sic*) (2013:163). However, the study does not provide any empirical evidence of this casual observation.

From a Malaysian perspective, statistics on juvenile reoffending specifically are not available and studies on the progression from juvenile offending to adult offending are also not available. Given the lack of empirical data available, it is indeed challenging to draw valid conclusions on the present state of affairs in Malaysia. The problems associated with availability and accessibility to data have been considered in Chapter 2. This makes it difficult to assess the impact of incarceration or detention of children.

In 2013, UNICEF suggested that, Malaysia, should ‘draft new regulations for STBs, Henry Gurney Schools and Juvenile Correctional Centres that conform to international standards’ (UNICEF, 2013:119). In the intervening years some progress has been made especially with the training and education schemes in the Integrity School and the Henry Gurney School but even in 2013 UNICEF reports that, ‘there is still a significant way to go’ (2013:117). The preceding discussion suggests that there appears to be some uncertainty as to whether the principle of detention as a last resort is being practiced uniformly. Many areas require change.

Terry, however, is sceptical that the system will change:

*“No, it won’t change. So, let it be like that. Maybe it is rough and tough but let it be like that.”*

Foucault’s history of the modern penal system acknowledges the unvarying and unchanging justifications of incarceration, ‘word for word, from one century to the other, the same fundamental propositions are repeated’ (Foucault, 1975:270). The Malaysian system has been in place since British colonisation and continues to function applying age-old approaches that are deeply embedded. The use of archaic terms like “muster” or the iron doors with slide bolts are physical manifestations of these approaches to incarceration.

Jones suggests that there are deeper issues about change noting:

*“I have interviewed a number of wardens, who are genuinely wanting a change but they feel that the system is not going to hear their voice anyway. They also feel that they may be penalized. So, they just keep quiet.”*

George a correctional officer in Puncak Borneo, shares his views on the limits of what he can achieve in the system:

*“In Kajang, we received a lot of support for what was planned and I think it works well. Here in Sarawak, we have not been able to implement the same thing. So, the system is not standardised. However, we cannot push for change. The change must come from the headquarters for senior officers to implement.”*

As considered above, the different perspectives, one from someone within the prison system and an NGO-practitioner perspective represents much of the discourse on children in conflict with the law. Clearly, this often results in defensive posturing by the various stakeholders, yet paradoxically, each perspective appears to be thinking of what works best for the child in conflict. There is a pattern to this theme and this typifies challenges in establishing a rights-based argument for children in conflict. Once again, adults argue about what is essentially rights afforded to the child for the child’s well-being and the oft-cited view of child rights being a top-down activity managed and controlled by adults where children are treated as objects of concern.

Children are then part of ‘carceral system’ of disciplinary control in which ‘penal detention has never seriously been questioned’ because the carceral system is ‘deeply rooted’ (Foucault, 1975:287).

#### **4.2 Cognitive, emotional and psychological assessments**

The Integrity School System and the Henry Gurney School in Puncak Borneo, Sarawak, are schools within the prison settings and allow children to continue their formal academic activities. This approach is in accordance with the *United Nations Standard Minimum Rules for the Treatment of Offenders 1954* and the CRC. The approach in recognising the right of the child to education has achieved some measure

of success with a number of children securing good grades but there are challenges particularly those who are in the prison system, yet cannot even read or write.

Adiba, who manages a Community Outreach Programme in a state university, acknowledges her own experience in conducting outreach programmes noting that:

*“You will be surprised how many kids are unable to read. As early as eight years old they are forced to help their mum with her work.”*

Wilson who is aged 20 and entered the Henry Gurney system was sentenced for 3 years for theft of a motorcycle section 378 of the Penal Code. He is unable to undertake the national high school examinations, as he has not been able to complete his education:

*“I cannot meet the minimum level for higher education so I am just attending reading, writing and arithmetic classes.”*

This certainly presents problems with the system currently in place. It suggests that although children who are unable to read or write do receive some basic education, they cannot be part of the complete range of programmes available. Male youth (15-24 years) literacy rates for 2008-2012 are reported to be at 98%. However, the net enrolment ratio for males in secondary school participation for 2008-2012 is only 66.1% (UNICEF, 2016). This suggests that a significant proportion of male children do not continue with secondary school education. However, there is no indication as to why this is so and more importantly where these children end up, be it employment or vocational training. There is no data as to the prevailing rates of literacy among children in conflict with the law.

Further, from a Malaysian perspective, there has not been a comprehensive analysis on mental health issues of children in the juvenile justice system and its correlation to the propensity to commit crime nor has there been any analysis on how these children cope in the present system. UNICEF (2013) notes that ‘many students have behavioural or self-development problems that were not addressed in the standard academic curriculum, and that a greater focus on life skills and cognitive development would be beneficial’ (2013:115).

This suggests that detention of such a child without appreciating the deeper psychosocial issues may only exacerbate the situation.

Jones is again critical of the lack of assessment of these children:

*“How do you assess if a child is doing well? In most cases it is assessed by the child’s participation in religious classes or how well they did in examinations but there is an absence of psychological assessments.”*

An interesting study in 2014 of male juvenile delinquents and ‘normal male adolescents’ in Malaysia suggests ‘the need for individualized approach to treatment or rehabilitation’ (Nadiah Syariani et al, 2014:105). However, as this involved a study of one correctional institution, the authors note that the ‘research findings should not be generalized to the whole juvenile population.’ However, clearly there is evidence of this need within the present system.

A further imputation made is the lack of psychological assessments made on the impact of *detention* (emphasis added) on the child. A child in the present system may attend classes and take the requisite examinations and may even do well, but how the child fares from a mental health perspective is another matter.

Fazel et al’s (2008) meta-analysis<sup>83</sup> of the research literature on the prevalence of mental disorders in adolescents in juvenile detention and correctional facilities in United States found that adolescents in detention and correctional facilities were about 10 times more likely to suffer from psychosis than the general adolescent population (2008:1016). A smaller study in the United Kingdom found that ‘boys in secure care have many needs and a high rate of psychiatric morbidity’ (Kroll et al, 2009: 1975).

The young boy, WK, whose case is referred to several times in this thesis, has now been released after spending close to 16 years in detention at the pleasure of the Ruler.

Jones describes this child’s exit from the Integrity School system:

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<sup>83</sup> Twenty-five surveys involving 13,778 boys and 2,972 girls (mean age 15.6 years, range 10-19 years) met the inclusion criteria.

*“I know in all his fifteen years he has never been for a psychological assessment. Only now, when he has come out many people have asked him to go for either a psychiatric or a psychological assessment. Only now, it dawns on the authorities to consider how he is going to cope. So, time will tell in terms of his rate of adjustment after fifteen years.”*

As an undergraduate law student, Adiba participated in Community Outreach Programmes in the Integrity School in Kajang and had the opportunity to meet the young boy, WK, and developed a friendship with him. She notes:

*“[Y]ou can see that when he was just released, he had a lot of fear and uncertainty especially about how to react to people. He chose to work outside of Malaysia as he was afraid people would know about him and his past.”*

The experience in speaking to the boys in the Henry Gurney School revealed similar issues. Although boys have visitation rights, as noted above this is not a regular occurrence, as families cannot afford the cost of travel. This distance from the family can have serious implications.

Aman is an 18-year-old boy serving a 3-year term in Henry Gurney. He entered the Henry Gurney School at the age of 16. In March 2017, his mother passed away but owing to his detention, he could not attend her funeral. Aman spoke of this incident in an almost indifferent manner and seemed to accept this as part of the consequence of his incarceration.

Another boy, Odeng who is serving a 3-year term for statutory rape is not able to provide for his partner and child while incarcerated. His partner and child have now returned to live with her parents and he has lost contact with them. His parental rights appear to have been subrogated by the law and he was clearly emotionally troubled and frustrated with this development in his life. Odeng’s incarceration is not the best solution to his perceived criminal behaviour. This echoes with what has been raised in the preceding Chapters about the complexities in espousing the international standards and expectations of the law and applying them to the actual operational aspects of the law with the actual child in conflict with the law.

As a correctional officer in the Henry Gurney School, Luke acknowledges the impact of family problems:

*“We understand the differences between adults and children. Most of the time these children are here because of family issues, divorce for example. They lack attention so they end up taking drugs without realising the consequences of their actions and you can see the effects of taking drugs. The slowing down of the brain for example.”*

Some of these boys have been involved in self-administration of drugs from as early as 13 and there are long-lasting effects that may well last beyond the period of incarceration.

The boys are provided counselling and guidance but Luke explains the challenges:

*“Our success in helping the kids actually depends on the environment. We try to build trust with them. The boys do have opportunities to meet with counsellors and welfare officers. They normally choose those they are comfortable with. Of course, some boys will never reveal everything and they keep things inside them. Some are not interested and seem to be wasting their time in here and I am sure some will get worse once they are released.”*

A child enters the system of incarceration with pre-existing psychosocial challenges and in some cases, does not receive the appropriate support, as a child should. Clearly, plans to introduce diversionary approaches require consideration of multiple issues of capacity building, statutory amendments, policy and procedural adjustments but perhaps more importantly is the need to address the support mechanisms to deal with the psychosocial issues that affect the child. These issues will be considered in Chapter 6.

### **4.3 Detention as a last resort?**

UNICEF suggests that detention should ideally be used only in where ‘the child has committed a serious crime involving violence or persists in committing other serious offences and there is no other appropriate alternative’ (2013:88). It also notes that

stakeholder understanding and application of the principle was often not in accordance with existing international standards.

Jones suggests that stakeholders should think about their own children as a basis for evaluating standards of detention.

As a court advisor, Gus notes that placing children in detention has consequences:

*“You put them into places where they should not be, and they train themselves to be tough. Self-preservation is key.”*

However, in the court he serves in Gus notes that detention is normally used as a last resort:

*“But of course there are cases of those incorrigible kids and I suppose as a last resort you need to put them in. However, you need to know what you are doing and where you are sending them. You have to do your homework.”*

As a Magistrate, Irene has visited the Prison Complex in Kajang and visited a Henry Gurney School and a Tunas Bakti School. Irene notes the level of discipline differs between the institutions:

*“If you ask me about discipline and if we are looking at these institutions as a rehabilitation centre, then the Henry Gurney School is much more disciplined and better even though the training is very harsh. Another thing that is good about the Henry Gurney system is the opportunity for the child to obtain some level of certification. This is only a matter of perspective because each place is under a different administration with different environments. To what extent each impacts the child’s psychology, I don’t know.”*

In her own experience, Irene notes that she rarely sends a child to the Henry Gurney School system:

*“Having said that it is very rare. Throughout my service I have sent only 2 or 3 children to the Henry Gurney School.”*

Irene is firm in her views as to her approach in dealing with children in conflict with the law treating them as:

*“Children first. It is always as children first.”*

Data on sentencing trends are not available and as cases in the Court for Children are not reported, there is very little guidance afforded to Magistrates in deciding cases. Irene is not aware of how other Magistrates treat the children in their courts but explains her approach:

*“Probably if we have access to sentencing data that will provide us with a better view of sentencing trends and that will suggest the mind-set of the magistrate. Normally, when we make an order, we will first consider the family, the resources available and what kind of support is there.”*

In one case, Irene and her advisers deliberated about a child who was charged with handling stolen property. He had a single mother who was also disabled and a brother aged 18 who had to work to support the family. The welfare officer’s report suggested that the boy be sent to the Henry Gurney School:

*“How are you going to put this child back in the family, when you know that the support is not there? Even the mother cannot take care of herself, what more if we ask her to look after this child. So, it is a very difficult situation. In the end, we still put this child back with the family. We hope that the brother and the mother will work together. So, in deciding we considered every aspect of their lives.”*

Given the challenges in implementing the detention of the child as a last resort, the rights of the child to diversion appears critical as the implications of detention on mental health are well documented. Further, the lack of assessments before the child is presented to court is also of concern.

There are concerns that there is a lack of suitably trained personnel to deal with specific issues that impact children. Malaysia has not introduced specific laws on social workers. A proposed Social Workers Bill to legislate social work as a profession, mooted in 2010, has been shelved for now, as there were criticisms that legislating social work would kill volunteerism.



UNICEF views the direction Malaysia is taking in terms detention of children conflict with the law as a last resort, as a pragmatic one. Progress though slow, is still being made. Sylvia feels that:

*“I think the idea of detention as a measure is slowly changing for minor offences. Most countries start with minor offences. I think we are trying to open that up a little bit.”*

This highlights the fact that making child rights as an agenda for change can be painstakingly slow as entrenched values and systems require chipping away at small parts of the larger systemic structure. Detention as the last resort although espoused as an ideal is only just making its presence felt in the juvenile justice system.

## **5. Views on child rights in Malaysia**

The operation of the youth justice system indicates the impact of the underlying norms on how child rights are viewed and defended. The preceding sections aim to explore how stakeholders within the system view child rights. Of particular importance are the views of the very children in conflict with the law themselves.

### **5.1 Awareness of child rights**

Jones is of the view that children appear to have some awareness of their own rights but do not have an appreciation of child rights as indicated in the treaty, within the broader human rights framework:

*“They only know that this is probably how the society deals with them. They know something is wrong, but they do not know that this is about their rights.”*

William is 19 years old and was sentenced to 3 years in Henry Gurney for housebreaking and possession of stolen goods pursuant to sections 457& 411 of the Penal Code. He was handcuffed and alleged that he was beaten by the police while in custody. His parents did not visit him. In court, he did not understand the process although after his third visit (in relation to the same offence) he began to understand more. He was not aware of his rights.

*“Nobody advised me of my rights. Not even my welfare officer. I learned from fellow inmates to ask for a lesser sentence but it was not accepted.”*

Another boy, Udin was 13 when he started having relationship with a girl of the same age. They soon became sexually active. The victim’s mother found out that they were having a sexual relationship and lodged a report. He was charged with statutory rape pursuant to section 375 of the Penal Code. He was handcuffed and taken to court where he describes his experience:

*“My parents trusted the investigating officer too much and they asked me to plead guilty because the investigating officer said that it would help my case. I don’t think I had any rights because they did not allow me to speak. In my case they should have asked me if I wanted to marry her or given me community work. I was willing to marry her. My parents did not get a lawyer and in the end, my father tried to appeal but it was too late.”*

In most instances, it does appear that children learn very quickly from peers who are detained with them including from other more seasoned children or in some cases from adult prisoners.

Lawrence describes a case involving statutory rape where a child aged 16 was charged for statutory rape. Lawrence suggested to the child to plead guilty to avoid being sent to the Henry Gurney School. However, the boy was keen to know what two other boys charged in the same case were going to plead. When he found out that they were not going to plead guilty, he wanted to do the same. His friends overheard this discussion and advised him not to do so:

Lawrence explains:

*“After listening to his friends, he then changed his mind. So, they are very influenced by what their friends say and they are also worried about peer perception. My client was just a follower. He had no idea what to expect.”*

Angah is serving a 3-year sentence in Henry Gurney for multiple offences. He was kept in the police lock-up together with adults and explains:

*“I had friends in the lock-up with me and I just followed their advice, what to say and even how to behave.”*

However, in some instances, particularly when children appear in court, Vivian, a court adviser, notices that some children are aware of how the system works and implied that they are aware of their rights:

*“Some of them are very aware. They will ask to be sent to the Sekolah Tunas Bakti and not to Henry Gurney because they feel that Tunas Bakti is not so harsh.”*

Thus most of the boys interviewed, did not have prior understanding or awareness of their rights. Very often, the learning takes place while in remand or custody. In some cases, awareness comes when they are finally incarcerated. UNICEF Malaysia reports that law students from one of the universities make regular, fortnightly visits to the Kajang Prison and also make occasional visits to selected secure homes where there is some guidance on ‘legal information, basic rights, extra tuition for young prisoners involved in tertiary programmes’ (UNICEF, 2013:116).

Adiba was among the law students involved in the Community Outreach Programme (she now manages the programme) and undertook a Community Legal Education module in a state university.<sup>84</sup> As part of this programme (mentioned in the UNICEF report above), students would visit the Kajang Prison and other secure homes fortnightly.

Adiba describes the purpose thus:

*“The purpose is firstly, to educate them on law and about child rights. We also taught them the rights of a prisoner. Secondly, we taught them how to prepare for interviews, for working life. Another thing is that with all that security, six gates and high security, the environment is very, tense, so these activities help break that tension. We also motivate them.”*

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<sup>84</sup> The Module was developed together with the Bridges Across Borders Southeast Asia Community Legal Education Initiative (BABSEA CLE).

There are a number of issues here. Firstly, the attempts to educate children about their rights comes at a point when the children are already in the system. Secondly, there are concerns about the effectiveness of the modules as Adiba explains:

*“It is a bit difficult for me to evaluate whether they have accepted or embraced whatever I have taught them. It's because we usually get different sets of students. They don't send the same people. We rarely get the same people.”*

Terry as a former correctional officer is of the view that the children are not aware of their rights before they enter the system:

*“I don't think children understand rights of the child. No one talks to them of their rights. Neither parents, nor teachers, no one educates them. Only when they have committed a crime, they learn about their rights. Even then, we are not sure if they really understand it. I don't think they really understand it.”*

Vivian suggests that even in secure homes, children are unaware of their rights:

*“They can't do anything. You have no rights there. Of course, they are given food and shelter. They are supposed to have a counsellor to talk to. The counsellor goes in with a lot of hope, but after some time I find that they cannot do a great job.”*

Beyond the confines of detained children, it does appear that children in general are not aware of their rights. Farida is of the view that much of this is attributed to the experience of children in the Malaysian socio-cultural ecosystem:

*“I do not think they are aware of their rights, under the international treaties, or under national laws. As far as I know, I do not think that education on child rights is made a component in schools. I don't think there are enough initiatives, by other parties, including the government or non-governmental organisations. I don't think we have done enough to educate children that they do have rights.”*

Arguably, it is perhaps the case that in Malaysia, children are not seen as individual rights-bearers, but as objects of concern, yet this identification of being objects of concern is fraught with paradoxes. Therefore, within the youth juvenile justice

framework, children are treated as an offender first. These approaches strip away aspects of childhood and child rights.

As noted in preceding Chapters, children have been handcuffed, children have been caned, children are placed in adult detention facilities or even where separate facilities are in place, children are subject to similar rules applied to adult offenders. A magistrate's cognizance of the rights of the child are highly dependent on the individual magistrate's understanding and acceptance of the broader notion of child rights. These issues are also apparent in relation to the police, prosecutors or even correctional officers and other stakeholders. Issues of culture and conceptions of childhood often determine the treatment of children and this will be considered below.

### **5.2 Advocating child rights: Cultural norms versus Western hegemony**

As indicated above, children in conflict are often subject to various child rights infringements at the arrest, investigation and bail stage including for example the failure of the police to inform the child's parents or guardians of the arrest, the lack of access to legal representation and the use of force by police officers during arrest and questioning. Children are held in remand or pre-trial detention for long periods of time and in poor conditions of detention.

As noted above, Malaysia is yet to lift its reservations towards the five core articles particularly Article 37 (regarding torture or other cruel, inhuman or degrading treatment or punishment and unlawful or arbitrary deprivation of liberty). The need to expressly state the rights of the child arrested including the right to counsel or the right to have family members informed for example in the *Child (Amendment) Act 2016* is perhaps an indication that clearly there were breaches notwithstanding the ratification of the CRC or the enactment of the *Child Act of 2001*.

This leads to the consideration as to whether children should be taught their rights. There is a view that teaching a child of his/her rights would be contrary to existing cultural norms and values or perceived to be a dangerous thing. Jones views this as a clash of cultures:

*“First, there is the perception that this is a Western-driven idea. When you have that kind of perception then it appears to clash with religious and moral values. They view it as an attempt to get a child to be defiant, when teaching them their rights.”*

Vivian’s own dealings with parents appears to find similar views but she takes the effort to educate the parents about rights and responsibilities and that with every right comes with a corresponding responsibility.

Sylvia agrees and acknowledges the challenges in considering child rights and the CRC in Malaysia:

*“I think that the education system also plays a role. Children are not encouraged to voice out their opinions. It is more of a spoon-feeding culture and critical thinking is not encouraged. When children can speak up and are given space to speak up, then perhaps their views might be taken a bit more seriously?”*

Adiba views the education system as flawed as it expects a child to never ask challenging questions in school but to accept everything the teacher says. This docile attitude impacts the awareness of their rights. However, there is a suggestion that today, many children, particularly in urban settings are more aware of issues of rights and this sometimes is seen in cross-generational relationships where the younger generation challenge social norms.

Noemi, is also an academic in a law school and notes some changes among the students she teaches:

*“Because they are young you can see the differences. For instance, when I talk to this younger generation, maybe because of their upbringing, they seem more open and they do not really see the issue of rights as Western norms. They do feel that they are entitled to all these rights.”*

It is widely accepted that children in Malaysia have limited rights to express their opinions in issues that affect them. In a recent poll, youth perceive themselves as less empowered to act with only 41% of youth today believing they could influence how the government works (Leong et al, 2012).

The voting age in Malaysia is 21. Interestingly one of the arguments to keep the age at 21 is to suggest that lowering it to 18 would interfere with a young person's tertiary education and that 18 is too young. Yet paradoxically, an 18-year-old in Malaysia can make many adult decisions with adult consequences as noted above.

Following the Government's first Report to the Committee in 2006, reservations to CRC Articles 1 (*age of the child*); 13 (*freedom of expression*) and 15 (*freedom of assembly and participation*) were withdrawn in 2010 but a number of limitations remain in respect of children. For example, there are other limitations on the right to express opinions. The *Peaceful Assembly Act 2012* indicates that children under the age of 15 cannot participate in protests and those under 21 are barred from organising one. Section 15 of the *Universities and University Colleges Act 1971*, while allowing students the right to become members of any political party, does not allow them to stand for election or hold any posts in student societies, organisations, bodies or groups on campus.<sup>85</sup> As noted in preceding chapters, there are broad statutory enactments that limit other freedoms.<sup>86</sup>

There is a noticeable lack of statutory provisions mandating child participation, and arguably, little has been done to formally encourage child participation in practice. In judicial proceedings involving child custody matters for example, it was only in 2011 that the Court of Appeal granted the Human Rights Commission of Malaysia (SUHAKAM) permission to hold a watching brief in a child-custody case, and to address the court on the obligations of Malaysia under the CRC in this regard. In its decision, the Court of Appeal took notice that the child concerned was capable of forming and making known her own wishes on matters.<sup>87</sup>

Jones recalls the issue of lack awareness among the judiciary on the CRC and the rights of the child it affords in that particular case (Jones was then a Commissioner with the Human Rights Commission of Malaysia) noting:

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<sup>85</sup> These amendments were only introduced in 2012.

<sup>86</sup> For example, *the Internal Security Act 1960, Sedition Act 1948, the Printing Presses and Publication Act 1984* among others.

<sup>87</sup> *Low Swee Siong v Tan Siew Siew* [2011] 2 MLJ 501

*“There was a custody case involving a girl and we had to make representations to advise the court of our obligations in the treaty and the court took account of this but this suggests that many agencies themselves are not aware of the rights of the child.”*

The challenge of advocating child rights transcends the judiciary and the government but also includes the lawyers in practice. Arianne explains the broader aims of the Child Rights Committee of the Malaysian Bar:

*“The committee was set up to train lawyers. We must equip the lawyers first. So, our bigger goal is that if we have enough lawyers who can represent children as witnesses, victims or as child offenders, I think that's a big achievement.”*

The Child Rights Committee of the Malaysian Bar was formed in 2016 and Arianne acknowledges that although Malaysia had ratified the CRC some years ago, the level of awareness among lawyers and judges is still rather low:

*“A lot of lawyers do not realise that we need to push boundaries with judges. Every time we go to court, for example, we should take the principal articles and use them. While we are doing that, we are also educating the judiciary and the DPPs<sup>88</sup> about it, because sometimes they forget. There is a tendency to treat this as a Western thing but, it's not so.”*

There is also a further issue of child participation in this process. The 2016 amendment to the *Child Act 2001* introduces a National Council for Children with overarching duties and responsibilities on all matters including among others to ‘develop programmes and strategies’ educating society of the ‘rights and dignity of a child’. The proposed council includes the participation of two<sup>89</sup> ‘representatives from amongst children who shall be appointed by the Minister on the recommendation of the Director of the Social Welfare.’<sup>90</sup> The concern here of course is that the inclusion of children on the committee should not be viewed as tokenism.

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<sup>88</sup> Deputy Public Prosecutors

<sup>89</sup> Excluding the two children, there are 23 adults on the Council.

<sup>90</sup> Section 4(1) (r) as inserted by section 6 of the *Child (Amendment) Act 2016*.



Sylvia makes the point of how children are viewed, noting:

*“Children are not seen as voters; therefore, they may be less on the scale of importance. Children are not being placed in the centre of the work that everyone does. Therefore, all these things play a role on the implementation and enforcement of the CRC. How are children seen and viewed?”*

Charles, a senior civil servant in the Ministry of Women Family and Community Development suggests that there are underlying issues particularly:

*“In our region, as an Asian society, we don’t question authority and parents have so-called “full rights”. However, things are changing. When we ratified the CRC, we needed to do advocacy programmes where the people, especially the children, would know what their rights are. That is the ideal situation but the reality is different. There are challenges for example, resources. Dealing with other agencies is another issue. To get into schools, we need to go through the Ministry of Education. The Ministry of Education have their own reservations, for instance, about corporal punishment.”*

In her work in the Child Rights Committee, Arianne sees the same issues:

*“I would say what happens here, is that in Asian society, we tend to think that we know what is best for the child. The attitude is, ‘We know what’s better for you and you just keep quiet. I know what I am doing.’ Even among lawyers. To be honest, it is very difficult for a lawyer to comprehend the fact that the child has his or her rights and they know what they want.”*

Given the embedded nature of childhood and its cultural construction in Malaysia, clearly there are challenges in introducing concepts that are different. Again, there is a measure of careful engagement. UNICEF Malaysia takes a consultative approach, using advocacy as Sylvia explains:

*“The work generally in this country office is on advocacy, lobbying, towards changing policy, changing legislation. How can we address the social norms? How we can improve services? Again, it’s through advocacy.”*

Farida shares her experience in engaging with the State:

*“You want the government to be committed when it comes to ratifying international conventions but at the same time we also need to work with people on the ground to understand why we ratify that international convention or why do they see their Asian values and culture being under threat?”*

Tabitha, an opposition Member of Parliament shares her experience in working with the government on issues of child rights:

*“Of course, in some areas, the government and the opposition find common ground. For example, in areas of child abuse or child grooming the political divide was not an issue. We have a Bill being considered now and we are working together. However, even in this case we were reactive rather than proactive. We did this only after Richard Huckle’s case.<sup>91</sup> We did not even know that he abused so many children in our own country. However, we still have many unresolved issues. Child marriages and stateless children are just some of the child rights issues that have not been resolved.”*

James and Prout (2015) suggest that rather than seeing children as an aspect of something else (the family, the school, social work and social policy, the market etc.), the better approach is to advocate placing children’s roles, experiences and activities central to the pursuit of childhood studies (2015:x). The childhood experience in Malaysia shaped by its values imbibed, views children through adult lenses. Clearly, given the adult hegemony in relation to child rights, advocating child rights, particularly through educating children of their rights, presents challenges.

Farida describes the challenges in trying to engage with the government to institutionalise constitutionalism as part of the education policy in schools through the Constitutional Law Committee. The Committee faced resistance from the Ministry. Farida’s frustration was evident:

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<sup>91</sup> In 2016, Huckle was convicted in the United Kingdom of 71 counts of serious sexual assault against children ranging from 6 months to 12 years old in Malaysia and Cambodia (The Star, 2016).

*“I think it is very unfortunate that everything in Malaysia seems to be politicised and it is even more unfortunate that our education system is politicised. If you ask me, if the Federal Constitution and constitutionalism were to be made a subject in school, it would benefit the Malaysian citizen. However, it wouldn’t be so for the politicians. So, there is this tussle between what would be in the public interest and what would be in the political interests.”*

However, there are attempts to engage with those marginalised communities. Adiba manages a Community Outreach Programme in the same university where she completed her undergraduate programme:

*“We do programmes such as Street Law where we go out to the community, especially urban poor kids who are at high risk. So, we go out there and we give them some sort of legal lesson through interactive activities. We teach them in a language they can understand.”*

The notion of educating children of the constitution and their rights may not be in the best interest of those in political power as arguably an informed population may be a challenge to political authority. Much of this debate is framed around the broader issue of how human rights are perceived in Malaysia. There is a view that the broad notion of rights is incongruous with Asian/Malaysian values and thus the rights argument is no more than Western hegemony. This view has certainly impacted the rights of the child in conflict with the law as there is some measure of resistance to accept that a child has the capacity to be rights-bearing. These matters will be considered in further detail in Chapter 6.

## **6. Diversion**

As noted above, most of the children coming before the Court for Children have committed minor, property- related offences and that most of these cases could have been handled more efficiently by referring the child directly to a diversion programme at the outset, rather than going through the expense and stigmatising process of numerous Court appearances (UNICEF, 2013).

However, the recent amendments to the Child Act did not include diversion programmes. Based on a request by the Ministry of Women, Family and Community Development, UNICEF supported the mission of two representatives from the England and Wales Youth Justice Board to share lessons learned in the United Kingdom. An informal task force was established to develop an appropriate diversion model for Malaysia. Additionally, UNICEF provided technical advice in relation to the drafting of an enabling provision on diversion for the proposed Child Bill. While the diversion provision was not included in the *Child (Amendment) Act 2016*, UNICEF's Annual Report (2015) is of the view that, 'there is still political will to proceed with the diversion pilot' (UNICEF, 2015b:22).

### **6.1 Development and implementation**

Noemi notes that the process has taken time and is still an on-going activity. After the initial discussions some 5 years ago, there were concerns about whether diversion would be perceived to be an abdication of ensuring crime is punished. Following further concerns about the actual mechanism of diversion, the Ministry responded proactively:

*“Because of all these debates, I think the Ministry responded in a proactive way by having detailed workshops and UNICEF was of course providing financial support. It takes foreign authorities to convince you!”*

Charles a senior civil servant in the Ministry explains the development of introducing diversion:

*“During that time, we were considering two concepts. We were talking about restorative justice and diversion.”*

Given the ethnic make-up of the country<sup>92</sup> there were concerns about whether the concept of restorative justice would work especially if a person from one ethnic group committed a crime with the victim coming from another ethnic group. These

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<sup>92</sup> Malaysia's major ethnic groups are Bumiputra (68.8%), Chinese (23.2%), Indians (7%) and others (1%) (2017, Department of Statistics Malaysia).

situations could heighten ethnic tensions and as such, it was felt that diversion could be a better approach to take. Charles explains:

*“So maybe it was a better idea of introducing diversion where the basic principle is that we should not punish children in the same way we punish adults. Another thing is to give a second opportunity, to the children because they are immature and that the government should give them that kind of an opportunity. The third is that putting them in the jail or the legal system itself would not necessarily bring good to society. You put all the “bad” kids together; it is going to be maybe a disaster, rather than bring any good.”*

As a Magistrate in the Court for Children, Irene feels she cannot change matters:

*“In fact, in cases like statutory rape, especially if it's consensual, diversion may be better as they are in a relationship with sexual activity. However, it is very difficult because when the parents find out the boy gets charged. It is very unfair and in that situation, I think in fact diversion can take place depending on the facts of the case.”*

Problems associated with the issues of statutory rape in Malaysia have elicited some concerns. The provisions of the law are designed to deal with the capacity to consent where the victim is a minor and the perpetrator is an adult. These provisions however run into complications when dealing with situations like Odeng and David considered above.

Luke, a correctional officer acknowledges that the boys incarcerated in cases of statutory rape between consenting teens are perhaps situations where diversion might work:

*“Diversion is good especially if it is section 375 where the prosecution is normally because of the victim's family.”*

George, a correctional officer, acknowledges that diversion requires the system to be sensitive to victims too:

*“Diversion is a good idea because children do not think of the consequences when they commit a crime but it is hard to balance between the victim’s needs and the offenders.”*

As a lawyer and member of the Child Rights Committee, Arianne suggests that sending a child through an institutionalised system of reform and rehabilitation may not be the best option:

*“If you are going to put a child in an environment, where they are going to have the opportunity to mix with seasoned offenders, one of two things will happen. Either the child will say, ‘okay listen, I’m not going get involved in this anymore’ or you know what, ‘that guy looks cool and he is popular’ and I will follow him, and that’s what will happen.”*

As a police officer, DSP Ona views diversion as an opportunity for second chances:

*“Our criminal justice system in Malaysia is punitive, so I think it is high time we should give them a second chance. Like for example, in cases of shoplifting or maybe for begging or for the theft of motorcycles. Therefore, we should give them a second chance for them to learn from their mistakes. To me diversion is a very good programme.”*

As a lawyer who is often involved in cases involving children, Lawrence agrees with the implementation of diversion noting that these children are not mature enough to think rationally. However, Lawrence acknowledges that there are challenges:

*“However, there are many stakeholders involved and they will have to work together to make it happen. Because right now in Malaysia we do not have proper legislation for all the processes and procedures for diversion. When a crime is committed, the victim lodges a police report and the police will investigate. It is then up to the police to send it to the DPP, or the AG, and they will commence with charges against the offender.”*

Arianne, a fellow lawyer, adds:

*“The police do not have that discretion. So, if you have a parent who is aggressive, and saying, “why haven't you taken any action!” and they start sending letters to all the different agencies, the police are duty bound investigate and forward the investigation papers.”*

This view is certainly prevalent among the stakeholders. Clearly, the issue of diversion requires formal implementation through legislation without which it appears that the police will not act. DSP Ona believes that the police force will support diversion but defines the caveat:

*“The officers on the ground will support it if the law provides for it. If it is, then we need to enforce and just follow it. However, because the AG’s Chambers has the prerogative whether to charge or not, so, they must lay out what sort of offences are subject to diversion. Definitely not for serious crimes like rape, murder or drug trafficking. They must draw a line.”*

This is an interesting view. Clearly, the underlying culture in the police force is one that appears to respond to orders. Without clear lines, it appears that there is uncertainty as to how to operate. More importantly, support for diversion is based on following a mandate and not on appreciating the actual broader issue of child rights. This is despite the overall agreement that diversion is a good thing.

Noemi acknowledges the consensus among stakeholders:

*“Obviously most of the stakeholders are already in agreement that children do have rights, and therefore the agreement for diversion. However, it is limited to the extent that diversion, is only in the form of a caution. At this stage, there is no consideration for the Family Group Conference or Committee Group Conference like in Thailand for example.”*

Interestingly, when the incarcerated boys were asked about diversion, only one had some idea of what diversion entails. The other nine had not heard about it but expressed mixed responses.

Wilson was sentenced for 3 years for theft of a motorcycle and had heard about diversion as an alternative:

*“I have heard of diversion but I am not sure it will work. Maybe the boys would not change?”*

Dom is 20 years of age and is serving a three -year term for methamphetamine abuse pursuant to section 15 of the *Dangerous Drugs Act 1952* and suggests that peer influence may be a factor:

*“Well I suppose diversion might work because some kids might change but if they follow their friends around, then it will not work.”*

Given the fact that some boys have disrupted lives outside the system (for example broken families, lack of education or addiction) there is support for being in the Henry Gurney School.

Lony is serving a 3-year term for statutory rape pursuant to section 375 of the Penal Code. He was 16 at the date of the offence and shares his views:

*“I am grateful to be here because I think if I was outside, I am not sure how I would be. In here I get a chance to study.”*

Angah is 20 years of age serving a 3-year sentence in Henry Gurney for multiple offences. At the age of 17, he had a rape charge against him pursuant to section 375 of the *Penal Code*. He was kept in remand for 14 days. The victim was 17 and was known to him. They had been having sex and her mother found out about it and made a report. At the same time, he was also charged for theft and failed a drug test. He views detention negatively but necessary given his prior conduct:

*“I have not heard about diversion. I don’t like confinement but I accept that I need it because I need to be controlled. I am thankful that I get an education both formal and religious. I am not sure I would change for the better outside.”*

The two boys who have children, David and Odeng are supportive of diversion as an alternative. Odeng as considered above, is frustrated that he is incarcerated and so has lost contact with his wife and child. In one sense, these boys have taken on adult responsibilities but are unable to fulfil these roles. David says:



*“In Henry Gurney, I feel I am treated like a child. I certainly would support something like diversion as it would give me a chance to be with my wife and child.”*

The unfortunate consequence in these cases is that in the State’s desire to rehabilitate and reform the child in conflict with the law, another child is left without support and there is always the danger of repeating this cycle of family breakdown and disrupted lives leading to other consequences.

## **6.2 Challenges in implementation**

While there is evidence of a commitment to introduce diversion, there are challenges in the actual implementation. Noemi explains:

*“Number one, training for primarily the police officers. The other challenge is probably backlash from society; the portion of society who I believe may not understand the concept of diversion. So, awareness is not limited to the stakeholders, but also includes people who are potentially affected.”*

In pursuing the commitment to introduce diversion, a pilot study was planned with a view to include it in the recent amendments to the *Child (Amendment) Act 2016*. Noemi describes the outcome:

*“A pilot diversion programme was crafted. The next stage was to decide whether it should be put on statutory footing but, as you know, at the last minute, before it went to Parliament in October 2015, the two provisions on diversion were not there. Having said that, the Ministry is still determined to have the pilot project, quite soon; but how soon is soon? I’m not sure because at the moment, their priority is actually to revise the National Child Policy.”*

A pilot study on diversion was planned for Sentul, a district in Kuala Lumpur. According to Charles, Sentul was chosen as it was thought to have a higher level of children involved in crime. Charles explains the challenges from the Ministry’s perspective:

*“There were stumbling blocks, for example the police would say that they don't have the authority to divert because the law does not allow them to do that. So, we have problems about authority and about procedures. Another problem we faced was deciding the type of offences that we're going to apply. It is not easy to get a consensus. We need to know what we need to do and we need to do advocacy as well to tell the whole community that we are going to have that pilot project.”*

Implementation of diversion as an approach requires engagement with society and as suggested by Noemi:

*“We really need to educate our society, you know, in understanding that because children have rights, primarily they've got a right to be given a second chance.”*

Negotiating with the various agencies and Ministries also present challenges. There are issues of bureaucracy common in the civil service. Charles acknowledges this:

*“We do have some problems with our colleagues in other ministries, especially in communication. It's very sad that bureaucracy in the system slows down efficiency.”*

This appears to be one of the reasons that Malaysia is yet to submit its second report and there are challenges in finding an agreeable consensus:

*“That is why people always question the government, especially my Ministry, why the CRC report is yet to be submitted. Until now, we have not submitted the second report. It is not easy to get all the information from the different ministries. I think this is about communication. Sometimes we are asked why we signed in the first place. I can understand the predicament where they're coming from and we have some limitations there.”*

The suggestion here is that the signing of the treaty may not necessarily be readily embraced by all relevant agencies, as submission of periodic reviews require multi-agency cooperation especially in managing information.

Issues of child rights and locating that within the complex structure of government presents other challenges. The multiple government agencies that are involved include among others the Ministry of Women, Family and Community Development, the Police, the Attorney General's Chambers, the Ministry of Home Affairs, the Education Ministry.

Stakeholders acknowledge that they need to work together. Arianne shares her experience in working together with other stakeholders:

*“We are saying that we cannot work in silos. We have to work together as a team and it is only then that you can push for reform.”*

However, sometimes, there are challenges in dealing with inter-government Ministries. Charles shares his views:

*“Making decisions in a government agency can be slow because we need to consider a lot of interests from various stakeholders. Sometimes that whole process can be painstaking. It is not unilaterally decided by one ministry and we are not the authority that can make decisions. We can only propose to the government and if the rest of them do not agree with this, it is just a no-go.”*

As an opposition Member of Parliament, Tabitha finds changes in government personnel a further challenge:

*“It is also difficult to work together sometimes as there are frequent changes in Ministers. Maybe they need some system of performance indicators to ensure there is consistency.”*

Charles acknowledges that as a civil servant, transfers and movement within Ministries is commonplace. However, he does not think that the movement of civil servants will affect the issues of implementing diversion in Malaysia:

*“Yes, in the government we move. All these things have been reflected in our management and our management is aware about this. This project is not just about me. I have my officers and I have my bosses. With or without me, this is the*

*Ministry's commitment. So, I don't think even if I or even my officers leave, it will really affect matters much."*

Successful implementation of diversion certainly requires the political will to do so as well as a consistency in stakeholder involvement. Given that all key stakeholders involved are subject to mobility and career changes, this can be a factor in the delays in moving these plans further. There are also concerns that in this multi-agency relationship, there are those that may not support the ratification of the treaty. As noted above, the ratification of the treaty may be driven by government rhetoric in the international arena.

## **7. Reflections**

Conversations with stakeholders and the boys provided depth and context to the various documents considered in Chapters 2 and 3. This added a human dimension to the understanding of issues that are relevant in the lives of children in conflict with the law. In analysing the various treaties and international documents, it appears that Malaysia desires to meet some of her international obligations but there are multiple layers of contradictions in meeting those obligations. The lived experience of the child in conflict with the law in Malaysia does not meet many of the aspirational goals of the various treaty obligations. Understanding diversion therefore goes beyond the mere theoretical pronouncements that treaty obligations create.

A further matter that appeared in the context of these conversations was the blurring of the concepts of diversion. As noted in Chapter 3, the concept of diversion that this study sought to explore was diverting children away from the juvenile justice system and diversion operating in post-trial circumstances. However, stakeholders do not make this distinction and reference to diversion is on the basis of a rather broad view of the concept. While there is broad support for the notion of diversion, there are uncertainties as to how such a notion is to be implemented. Applying the concept of diversion in practice can thus be difficult.

These conversations also suggest that contextual issues of politics, culture and conceptions of childhood are deeply embedded in Malaysian society. These entrenched values and norms are difficult to breakdown and this indicates a level of

complexity in the implementation of a rights-based approach in the juvenile justice system even if the child is considered by stakeholders as a central figure in this dialogue. Figure 12, below, is a visual representation of this. Chapter 6 seeks to develop an understanding of these matters.



**Figure 12:** A word-cloud representation of the interview transcripts using ‘rights’ as a query.

## **Chapter 6**

### **Conclusion**

*People, don't you understand  
The child needs a helping hand  
Or he'll grow to be an angry young man some day?  
Take a look at you and me  
Are we too blind to see  
Do we simply turn our heads, and look the other way?*

(Davies, M. In the Ghetto, Elvis Presley; From Elvis in Memphis, 1969)

## **1. Introduction**

In 1989, just a few weeks after the UN General Assembly adopted the Convention on the Rights of the Child, 71 Heads of State and Government and 88 other senior delegates (Malaysia was represented by a State observer) gathered for the 1990 World Summit for Children. At the Summit, delegates expressed a commitment to protect children and to diminish their suffering; to promote the fullest development of their human potential; and to make them aware of their needs, their rights and their opportunities (UNICEF, 1990).

A decade later, the United Nations General Assembly held a Special Session on Children, to serve as an opportunity for world leaders to renew their commitment to children. In the ten years or so that passed since the World Summit and the adoption of the CRC, it was apparent that it takes time to translate political consensus into effective action. In spite of State commitment, a gap remained between promises and action and ‘that it is not enough for leaders to promise something, even when the resources are available to back it up, unless the whole of society is mobilized to achieve the goal’ (UNICEF, 2001: 95).

At the 2001 Special Session, the General Assembly put forth its vision for priority actions for the future on children in conflict with the law. This included the need for the enhancement of national child-friendly systems of juvenile justice where the child’s dignity and worth are promoted, and the child’s social reintegration pursued. To achieve this, State parties were encouraged to ensure that children are only deprived of their liberty as a last resort and for the shortest period possible, to establish a minimum age of criminal responsibility and to ensure due process for all children involved with the justice system.<sup>93</sup>

States were also encouraged to establish alternative structures to deal with children without resorting to judicial proceedings. Further, States were to ensure that the norms

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<sup>93</sup> Malaysia had not submitted its reports as a follow-up to the World Summit for Children 1990 although three other observer States had done so by May 2001 (UNICEF, 2001:140).

in the CRC should be publicised and made known through campaigns and the training of law-enforcement officials, prosecutors, judges, lawyers and social workers.

The complexities of achieving treaty obligations are not peculiar to the CRC. At the World Conference on Human Rights in Vienna (the Vienna Conference of 1993), representatives of 171 States met to review and debate the status of human rights in the world. Forty-five years after the Universal Declaration on Human Rights, 1948, there were many challenges and obstacles that impeded progress. The content, scope and priorities of the implementation of a Universal Human Rights paradigm, particularly the interconnected issues of development, democracy and economic, social, cultural, civil and political rights were the fundamental challenges in successful promotion and enforcement of these rights.

The CRC is a constituent part of the global human rights agenda and in evaluating its implementation in Malaysia a number of observations arise. These observations are drawn from the context of the norms and philosophical underpinnings of the Malaysian journey as seen through the matters raised in the preceding Chapters.

This Chapter seeks to weave together the various aspects that constitute Malaysia's ratification and implementation of the CRC. The purpose is to evaluate the themes and patterns that have been explored to establish whether a rights-based argument for the introduction of diversion in the juvenile justice system in Malaysia is possible. In keeping with a reflexive inductive approach, appropriate responses will be drawn from the fundamental research questions of this work to develop appropriate conclusions about a rights-based perspective in the juvenile justice system.

## **2. Translating treaty obligations into effective action in Malaysia**

Malaysia's journey through the process of ratification and implementation of the CRC has been explored in the preceding sections of this work. Six years after ratification of the treaty, the *Child Act 2001* was enacted introducing elements of the CRC into Malaysian law. This was done in accordance with the expectations expressed in Article 4, which requires States parties to take 'all appropriate legislative, administrative and other measures' for implementation of the rights contained in the Convention. While it is the State, which takes on obligations under the Convention,



the task of translating this into the actual manifestation of child rights, requires engagement from various stakeholders, from the wider society and, of course, from children themselves.

As noted above, incorporation of the Convention in Malaysia follows the dualist model in which an Act of Parliament is required to bring into effect provisions of the Convention. The Malaysian Constitution makes no direct reference to specific child rights and as noted above, does not have wide-ranging political, economic or social rights. Further, as observed, judicial interpretation of the dualist position on child rights is clear and courts appear to apply a very narrow interpretation of rights and are reluctant to expand the scope and application of rights.

The preceding Chapters traced the historical development of child rights and explored the text and subtext of how these rights manifest themselves in dealing with children in conflict with the law in Malaysia. Malaysia's colonial past and the laws and policies introduced at that time appear to have been seamlessly absorbed into the post-colonial evolution of the juvenile justice system of the country.

The empirical analysis of international conventions, standards, treaties, rules, legislative provisions, judicial pronouncements and conversations with principal stakeholders and boys suggest that in many ways, Malaysia's experience is reflected in the conclusions arrived at the World Summit in 2001. Thus, it takes time to put into action political commitment to the treaty and there are gaps between promises made by the government and the actual implementation of the CRC. It is also pertinent to note that the issues influencing child rights are intertwined with the notion of Malaysia's own obligations to the broader global human rights agenda.

It has now been 23 years since Malaysia ratified the Convention and in the intervening years since, there have been efforts to understand the juvenile justice system, to learn from other jurisdictions, to seek to amend the law, to train various stakeholders and to create greater awareness of the fundamental aspects of the CRC.

Amendments in 2016 through the *Child (Amendment) Act 2016*, introduce further efforts in dealing with children in conflict with the law. Yet these changes took a few years to come to fruition. Further, these changes notwithstanding, a number of

fundamental inconsistencies that impinge on the rights of the child in conflict with the law remain.

As noted above, Malaysia has entered reservations to CRC Articles 2, 7,14, 28(1)(a) and 37 on the basis that these do not conform with the Constitution, Syariah laws, national laws and policies of the government of Malaysia (UNICEF, 2014). Malaysia has yet to ratify other treaties that deal with cruel and inhumane punishment. Given its culture of politics and levels of punitiveness that are high, there are difficulties in fulfilling aspects of the CRC and so the overarching juvenile justice system struggles in meeting the philosophical aspirations of the treaty.

The minimum age of criminal responsibility remains at the lower end of the threshold. Stakeholders like Vivian and Charles are of the view that because there are very few young children impacted, it is acceptable to retain this position, although UNICEF and NGO representatives argue a contrary view. Children are kept in remand in poor conditions and are often placed with adults. Children are subject to harsh treatments while in custody. Children can be incarcerated for indefinite periods and there are problems with how children are dealt with in courts and in places of detention. There are problems in applying adult regimes to children in custody particularly in the Henry Gurney/Integrity School system. This in spite of the fact that such children ‘are not hardened criminals but have had exceedingly short criminal careers’ (Gray, 1996:314). As was considered in the preceding Chapter, there are inconsistencies in the treatment of children in conflict with the law. Diversion as an option, although keenly argued, has not yet become a reality.

Often, stakeholders involved are dealing with children and adults in the same system simultaneously. The police and magistrates for example are forced to cope with this duality of roles. There are also concerns expressed on the level of awareness and training that stakeholders have been exposed to and the challenges of ensuring that trained personnel remain in their roles. Stakeholders acknowledge that capacity building is a challenge and the existing infrastructure support is lacking. Separate facilities and systems, a constituent part of treaty obligations, have not been fully realised.

In considering the views of the stakeholders, the suggestion is that there are pockets of change drawn from some level of political commitment in reviewing the juvenile justice system and introducing for example, diversion as an alternative mechanism but the process is “slow”.

After two decades, a common theme that emerges is that change in Malaysia takes a long while and that the endeavour to bring about change requires a process of engagement and negotiation. There are attempts to work together but often bureaucracy within the system hampers effective and efficient progress. The juvenile justice system is deeply embedded and rooted with entrenched political and socio-cultural structures and stakeholders suggest that these are difficult to break down. Conversations with stakeholders suggest that diversion as a broad philosophical approach is still an aspirational goal and there is a level of commitment to make it a reality.

Two broad themes emerge from this discussion, namely the culture of childhood and the issue of cultural relativism versus universalism.

### **3. The culture of childhood in Malaysia**

As noted in Chapter 2, the consequence of ratification is that Malaysia is subject to an international doctrine that endeavours to create minimum standards with which it is hoped a shared model of justice will exist (Junger-Tas 1994; Doek 1994; Muncie 2004). As noted above, notions of culture, politics, ideology and discourse have a significant bearing on how a child in conflict with the law is treated in Malaysia. The notion of universality and universal application of the CRC encounters obvious difficulties particularly where concepts of childhood vary across cultures.

This phenomenon is not peculiar to Malaysia. For example, Burr’s (2002) ethnographic fieldwork among children in Vietnam reveals that despite the almost universal ratification of the CRC, children’s rights are not universal; they are played out differently in different cultural contexts with inevitable points of divergence. Of particular concern to Burr is the communal perspective of rights in Vietnamese society where, ‘Vietnamese children are expected to show deferential respect towards their elders’ (2002:51).

Thus, different societies have different conceptions of childhood, a concept first suggested by Ariès' (1973) histories of childhood. Although heavily criticised for his notions of the “discovery” of childhood, the argument that childhood is historically and culturally contingent is relevant when considering the value systems in Malaysia.

Malaysia appears to share a similar value system with that of Burr's experience in Vietnam. Malaysian children are culturally expected to defer to adults and this includes parents and teachers. Conversations with stakeholders indicate that there is a strong sense of adults being in control and that children are placid in their acceptance of this.

Thus, childhood is not necessarily measured in terms of age but based on the cultural understanding of relationships between children with those in authority, whether they are parents, teachers or the police. The boys in the Henry Gurney School appear to accept their fate in the juvenile justice system and power differentials with those in authority were also experienced. This was particularly evident even among boys like Odeng, who had become fathers themselves.

There is evidence to suggest that this cultural understanding is not limited to an Asian culture but for example, is also reported to be the experience in Africa. Ncube (cited in Freeman, 2011) suggests that the traditional African family ‘expects ‘childhood’ .... to be a continuous period of self-effacing obedience to traditional authority’ (2011:23). As noted above, there is also evidence of how contrasting cultural value systems have led to the creation of the *African Charter on the Rights and Welfare of the Child (ACRWC) 1999* or *The Arab Charter on Human Rights 2004*.

The notion of obedience to traditional authority has resonance in Malaysian culture too. As considered above, corporal punishment is culturally accepted by parents, teachers and even by young people themselves. Religious views also greatly influence attitudes towards corporal punishment. Religious obligations on the child particularly from the Islamic perspective is not a discourse that can be easily questioned as the principles of Islamic edicts are argued to be drawn from divine legitimacy and questioning these values are inferred as a challenge to the religious dogma and more importantly, a challenge to the very authority of God. Reservations to the Convention

on the basis of Islam are not peculiar to Malaysia and include other countries where Islam is the dominant faith for example reservations observed by Afghanistan, Algeria, Brunei, Iran, Iraq, Syria and others (United Nations, 1999).

It is also pertinent to note that such a caveat is not limited to Islam as evidenced by the response by the Holy See, that in acceding to the Convention, it does not intend to “prescind” in any way from its specific mission, which is of a religious and moral character. For example, in interpreting the phrase “family planning” in Article 24.2, The Holy See interprets this to mean only those methods of family planning, which it considers morally acceptable, that is, the natural methods of family planning (United Nations, 1999).

From a Malaysian perspective, reservations to some of the provisions of the CRC arise primarily from areas of incongruence with views on Islam. Hence, freedom of religion pursuant to Article 14 is problematic, as Islam does not recognise the right of a Muslim to abandon his /her faith. As considered above, Syariah law interprets the age of criminal responsibility differently. Children can be subject to whipping under provisions of the Syariah law and this infringes Article 37. Conversations with stakeholders reveal other areas of friction; child marriages or female genital mutilation elicit debate that often result in confrontational posturing where universalism meets cultural relativism.

Given that Islam is the predominant religion in country (about 60% of the population), it is firmly rooted in the belief system of the Muslim population. Owing to its divine origin, it is obligatory on government and Muslim society to implement Syariah laws and principles. This results in great difficulty in arguing some aspects of child rights as the culture of childhood is part of this belief system.

A government that is reliant on the support of the majority would be very cautious in treading the fine line between espousing international obligations and breaching fundamental precepts of Islam at the peril of losing this support. This element of political power and civil society engagement then has a bearing on the child rights discourse.

As noted above, civil society in Malaysia has long functioned with a strong central government with a mix of paternalistic benevolence and a culture of punitiveness that ensures compliance to political power. A child born and raised in this environment will certainly have a lived experience that is different from children in some other jurisdictions. It is also conceivable that jurisdictions that share similar patterns of socialisation may yield similar cultures of childhood.

Adults managing the juvenile justice system were themselves once children, raised in this environment. This yields a level of cultural embeddedness of beliefs as seen in conversations with stakeholders. This offers some measure of understanding of the challenges in implementing obligations under the CRC. It also offers some understanding why change takes a long time.

There is increased recognition among scholars to acknowledge the multiple childhoods within local cultural constructs. Niewenhuys suggests that the notion that ‘all societies would recognize the meaning of the word child to designate both boys and girls up to eighteen years of age highlights the sociological emptiness of the categories used in the language of the convention’ (1998:271). James and Prout propose that ‘the immaturity of children is a biological fact of life but the ways in which it is understood and made meaningful is a fact of culture’ (James and Prout 1997:7). As noted above, the language of rights is often criticised for being vague when construing concrete aspects of rights. Thus, the definition of child as espoused in the CRC and how child rights are perceived and understood in Malaysia indicate the complexities in the language of rights when applied to intricate issues that impinge on culture and society and on the existence of deeper underlying norms.

Conversations with stakeholders suggest that there are differences in how children themselves view rights today. Yet this may also suggest that understanding the culture of childhood in Malaysia involves distinctions between children in urban settings who are aware of their rights, (for example law students in a University in Kuala Lumpur) and those in rural settings who are not, (for example the boys in the Henry Gurney School in Pinack Borneo, Sarawak). There are also underlying issue of distinctions between the relevance of civil and political rights to children in rural settings in

Malaysia where the realities of economic development are perhaps more important than abstract notions of civil and political rights. Defining culture is therefore complex. Stephens (1995: 7), notes, '[t]he culturalization of childhood should not be bought at the cost of an awareness of the complexities of cultural definition in a postmodern world' (1995:7).

Thus, the construction of the adult-child relationship in Malaysia is shaped by the norms that determine the rituals and manner in which children are socialised. These constructions are deeply rooted and have become woven in the way the rights of the child in conflict with the law are treated. The individual social actors who make up the policy determinants in the system have long held beliefs many of which draw from their own culturalisation and understanding of childhood. This level of embeddedness in the juvenile justice system has been influenced by policies introduced by the British at a time when views on children were different, yet these views have become the norm. Levels of punitiveness are high even when they involve children.

The position in Malaysia (as in many other countries) therefore does not necessarily represent the universalism proposed by the CRC. As argued by James and Prout this creates 'different childhoods' all of which are equally 'real' (1997:27). As noted above, Clause 1.3 of the *Tokyo Rules 1990* appear to accept this allowing member States to take into account 'the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.'

Clause 1.3 and the reservations expressed by Malaysia appear to acknowledge that children in conflict with the law in Malaysia are trapped in a 'rights gap' between the expectations of the CRC and the actual workings of the juvenile justice system. It also means that advocating child rights can be a challenge as evidenced through the conversations with some stakeholders. There are situations where competing normative values exist and this often results in a stalemate with stakeholders working through negotiations to break the impasse. The discussion on the culture of childhood is thus framed within the broader notion of universality and cultural relativism.

#### **4. Cultural relativism versus universalism and the rights discourse in Malaysia**

Conversations with stakeholders reveal evidence of a paradox of values. Often stakeholders refer to an Asian culture/value or a Malaysian value system that views the rights discourse as being Western hegemony. So, the universal application of the CRC is argued to be not all-encompassing and cultural practices that are in breach of treaty provisions are couched under the cultural relativism argument. Global perspectives indicate a range of arguments in which State parties argue their positions reflecting a complex array of circumstances perhaps best viewed as ‘multidimensional space of different forms and mixtures of different types of universality and relativity’ (Donnelly, 2013:104).

This argument suggests that recognition of the duality of Islamic laws and secular laws or other cultural practices like child marriages or female genital mutilation or levels of parental control or levels of punitiveness are abstractions of an accepted standard of norms. Malaysia’s reservations to the CRC again reflect this argument. Yet within this perceived “Malaysian” value system, the child is treated with some level of disregard. Parents fear the notion of an empowered child and stakeholders refer to the need to placate these fears by re-enforcing the parallel aspect of responsibility; that a right is accompanied by a corresponding responsibility. As suggested, the paradox of Asian or Malaysian values is also evidenced in the treatment of children in conflict with the law. The preamble to the *Child Act 2001* reflects the values Malaysia places on children yet this is not the reality, especially of children within the juvenile justice system.

Convery et al (2008) suggest that, ‘a rights-based agenda must build on the baseline established by civil-political and economic-social standards and target the structural determinants that inhibit children’s meaningful and effective participation’ (2008:261). A major structural determinant that inhibits the rights-based argument and child participation in this process in Malaysia is the broader rights discourse in Malaysia. There are challenges in embracing a broad universal perspective on human rights in Malaysia and this places a strain on how child rights are viewed.



As noted above, the *Tokyo Rules* allows states to apply broad caveats yet do not provide guidance as to how states are to negotiate this complex relationship between universal rights and local contexts. The preamble to the CRC itself represents the paradox of cultural plurality and universalism. As noted above, childhood is a social construction in which its meaning is negotiated between the different stakeholders in Malaysia, often with conflicting interests. Thus, childhood is argued to be relative. Given the historical and cultural diversity across the globe, cultural relativism is said to be ‘an undeniable fact’ (Donnelly, 1984:400).

The anthropological and normative debate between universalism and cultural plurality features heavily in the broader rights discourse in Malaysia and negotiating perceived Western liberal democracy *vis-à-vis* the “Asian values” debate presents challenges to those that strive to bridge the gap. For example, in issues of sexual or gender identity/orientation, Malaysia takes the view that a liberal interpretation of gender or sexual orientation is contrary to its values and in some instances argued to be detrimental to society. The position with regards to the CRC reflect the broader universal human rights debate, where the concept of universalism is challenged by some member states on the basis that the concept cannot be viewed in isolation of the historical and socio-political contexts of societies.

From a political perspective, Malaysia and other ASEAN member States through the Bangkok Declaration of 1993 challenged the universal aspect of the human rights paradigm. Thus, member States affirmed the view that while accepting that human rights were universal in nature, ‘they must be considered in the context of a dynamic and evolving process of international norm-setting’, taking into account the significance of ‘national and regional particularities and various historical, cultural and religious backgrounds’ (The Bangkok Declaration, 1993: Clause 8). This view is also reflected in Malaysia’s reservations to the CRC and the non-ratification of several other treaties and optional protocols.

Thio (1999) argues that the limited ratification, and the extensive use of reservations ‘framed in terms of non-acceptance of obligations beyond constitutional limits’, among ASEAN countries cast doubts on the level of State commitment to

human rights instruments (1999: 29). For example, Thio (1990) notes, only six of the ten ASEAN countries have ratified the International Covenant on Civil and Political Rights (ICCPR).<sup>94</sup> Mohamad (2002) suggests that the lack of commitment is evidence of a 'wariness of the human rights agenda' stemming from a '[m]istrust of the human rights agenda' (2002:245-246) particularly since ASEAN member states view human rights mechanisms 'as a threat to national sovereignty' (2002: 247).

Linton notes that only six ASEAN have accepted the CRC without reservations to its obligations<sup>95</sup> and the remaining members have entered a range of reservations. Linton argues that 'the effect of these catch-all reservations is to allow each of these states a fall-back whenever they do not wish to comply with a CRC obligation to amend laws or practices that are incompatible' (2008:474).

The uses of reservations are in most cases based on the inconsistencies with domestic law or existing norms. References to the Asian heritage at a geo-political level is seen in conversations with stakeholders at a micro-level. Stakeholders refer to the complexity in negotiating entrenched cultural norms where the centrality of argument is that some features of the rights-based agenda is at odds with Malaysia's cultural heritage.

The suggested view is that individualism as espoused in the rights argument is being at variance with communal values commonly associated with Asian communities where obligations to the state, religion, community, and family are a priority (Whiting, 2003). The perceived need to ensure the greater good of the community over individual rights is evidenced in the measure of punitiveness in Malaysia. As considered in Chapters 2 and 3, capital punishment, whipping, caning and various other laws that restrict the freedom of speech, freedom of association or freedom of expression are illustrations of the measure of punitiveness.

Whiting (2003) argues that the Malaysian position, particularly in the 1990's, was that 'civil and political rights, such as freedom of speech and assembly, as well as due

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<sup>94</sup> Brunei, Malaysia, Myanmar and Singapore are neither parties nor signatories to the treaty.

<sup>95</sup> Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, and Vietnam.

process rights concerning arrest, detention, and a fair trial, are luxuries that Asian states cannot afford' and that the focus should be on basic economic and social rights (2003: 63-64). Such a view is still relevant in the Malaysia of today.

In Malaysia, the resistance in embracing the broader liberal interpretation of civil and political rights rests on the basis that punitive measures are necessary to maintain social order and stability. Concerns about religious and ethnic tensions are argued to be justified communal values that are to be protected. Stakeholders refer to the fear of communal strife as the reasons for the failure to introduce restorative justice as alternatives even where children are involved. Thus, the need to maintain social order appears to take precedence over individual rights.

Applying the cultural relativity argument to the Malaysian context, particularly in relation to children's rights, reveals a range of paradoxes. If the notion of community and family were treated as a valued commodity, one would expect children in Malaysia to enjoy a vast range of rights especially in relation to protection and care. Nevertheless, the reality is not quite the case, as seen in the various issues discussed in the preceding Chapters.

Arguably, had it not been for the ratification of the CRC, the impetus to introduce the Child Act and the subsequent amendments and other policy decisions may not have been forthcoming. It took a catastrophic sexual abuse case to introduce legislation dealing with sexual grooming offences through the *Sexual Offences Against Children Act 2017* yet a proposal to include ban on child marriages as a sexual offence within the Act was voted out in Parliament by the majority with concerns that it would be contrary to Islamic laws.

The *Child (Amendment) Act 2016* also did not address the issue of child marriages although an attempt was made to engage with the issues of religion and the CRC when the Bill was debated particularly in considering the position in other Islamic states. It was also clear in the debates that other issues that impinge on broader child rights matters including corporal punishment or the unilateral conversion of a child were left untouched. There was a sense that members of Parliament wanted more evidence

drawn from research to understand the issues before making any legislative or policy changes (Hansard, 6 April 2016, col 1650-1810).

The juvenile justice system and the views of the stakeholders in Malaysia suggest that children are treated as objects of concern rather than rights bearing subjects. Arguably, this suggests that cultural relativism as applied to children in Malaysia, in truth represents a failure to protect children's rights. Further, if this approach persists, then there is a continued exclusion of children from universal protection of their rights.

Therefore, abiding to an uncompromising cultural relativist argument may lead to a sense of apathy in dealing with children in conflict with the law. Freeman (2011) argues that if 'a culture can only be judged by endogenous value judgments, and that moral principles which derive from outside that culture have no validity, morality has become a slave to custom (2011:17). Conversations with stakeholders suggest that there is growing awareness of the points of convergence and divergence between national laws and policies with those of the CRC but as it stands, the existing reservations to the CRC remain.

Of concern is the perceived position of the State in relation to these issues. Higgins (1994) suggests that relativism 'is a point mostly advanced by states...It is rarely advanced by the oppressed, who are only too anxious to benefit from perceived universal standards' (1994:96). Arguably, children in Malaysia are subject to the State's interpretation of cultural relativism at the expense of the advancement of children's rights.

Malaysia's obligations to the broader human rights framework is also to be viewed with its regional relationships with countries in the ASEAN fraternity. Within the context of ASEAN itself, the emphasis is on principles that include peaceful settlement of dispute, the renunciation of the use of force, non-interference, and consensus-based decision-making (The ASEAN Charter, 2007).

This principle of non-interference has been criticised, with Thio (1999) arguing that, the 'ASEAN policy (or lack thereof) towards human rights has been one of reticence and nonengagement' (1999:2). Thus, there is a lack of a regional human

rights mechanism responsible for the oversight of these legal instruments including those that involve children. Perusing recommendations of the various ASEAN member states in response to Malaysia's second Periodic Review reflect this stance of non-interference (United Nations, 2013).

The underlying issue of the broader civil and political rights as viewed in Malaysia certainly has an impact on the lives of the child in conflict with the law. There are deep socio-political insecurities and fears that need to be overcome; that greater awareness of rights might empower citizens to recognise breaches and seek accountability or that rights are a Western idea that promotes unchecked wide liberal notions contrary to Malaysian values. From a Malaysian perspective, as suggested above, the issue of child rights and the reservations entered into appear to draw from deeply entrenched socio-religious conceptions of childhood and the adult-child relationships that arise from these norms.

Children themselves do not have a voice to raise issues of breaches. Most children are not aware of their rights and certainly, the boys in the Henry Gurney who were interviewed had no knowledge of their rights. Conversations with stakeholders and the boys suggest that awareness of rights, particularly in relation to dealing with the processes, are acquired from others within the criminal justice system. Further, such knowledge is limited to the specific issues that the child in conflict faces. Opportunities to engage with teaching children broader concepts of constitutionalism and human rights mooted by the Malaysian Bar, have not been pursued by the government. Child participation (as per Article 12 of the CRC) is said to be weak with attempts of including child participation appearing only very recently in legislation.

For example, Section 4(1) (r) as inserted by section 6 of the *Child (Amendment) Act 2016* includes the involvement of two children in the National Council for Children. Yet there are uncertainties as to how these children are to be chosen and the extent to which they would represent the socio-economic and ethno-religious diversity among children in Malaysia. Further, given the prevailing culture of childhood in Malaysia, there are uncertainties if these two children would truly be independent or would

voice their opinions or even if they did, whether the 23 adults in the Council would pay heed to their views.

All other appointees are representatives from the government agencies. There is a danger that child participation in the Council would thus amount to no more than mere tokenism and this is echoed in conversations with stakeholders. The leader of the opposition bloc (Hansard, 6 April 2016, col 1640-1650) raised these issues in Parliament at the second reading of the Bill but the Bill was passed without amendment.

It is also to be noted that Section 4A (1) includes a wide discretionary power in the hands of the Minister to revoke the membership of the child representatives. These powers are not defined and it does present an interesting proposition as to available recourse should a child be aggrieved because of his/her revocation of membership.

In the *Child (Amendment) Act 2016*, due recognition is also given to issues of culture and religion in the formation of the National Council for Children. By virtue of section 4(1) (s) Membership of the Council includes *inter alia* representation of not more than five persons with appropriate experience, knowledge and expertise on matters relating to the welfare and development of children including any person qualified to advise on relevant indigenous, ethnic, cultural or religious factors. At this point, it is uncertain as to the weight to be given to such advice but clearly; such views are deemed important given that they are explicitly provided for in the legislation. However, like the children in the council, such membership is also subject to unilateral revocation. Therefore, the government position in the Council remains secured.

In Malaysia, non-governmental organisations, international human rights agencies like UNICEF, the Malaysian Bar Council and other agencies tread the divide between universalism and cultural relativism with caution. Negotiating issues of child marriages, female genital mutilation, capital punishment, corporal punishment, and the rights of the child in conflict with the law espoused by the CRC often involves sustained efforts in awareness, education and advocacy. These broader aspects of

negotiation are also seen in the process of introducing the right to diversion as expressed in the CRC.

Owing to this process of negotiation and compromise, progress is said to be slow and there are levels of uncertainty about what the future holds. A positive element is that for the moment, there is evidence of a willingness in some areas to engage even with difficult issues of culture and religion. Conversations with stakeholders suggest that this the level of engagement is also seen in plans to introduce diversion.

## **5. Implementing diversion in Malaysia**

As noted in the preceding Chapters, although concepts of diversion feature prominently in the CRC and various other ancillary treaties and obligations, diversion was not introduced in the *Child Act 2001*. In 2006, Malaysia submitted its first (and as it stands, only) periodic review. In its concluding observations, the UN Committee on the Rights of the Child acknowledged the positive measures that the country has taken to promote children's rights but also expressed some areas of concern with respect to children in conflict with the law including the lack of non-custodial alternatives. These concerns were explored in preceding Chapters.

Plans to introduce diversion were introduced following the comprehensive report published by UNICEF in 2013. In the report, it was recommended that a high-level, inter-agency Child Justice Working Group be formed to develop an integrated national Juvenile Justice Reform Strategy and Plan of Action. The inter-agency body is to 'introduce diversion and regulate the types of offences for which diversion may be used, the criteria and procedures for decision-making and the types of diversionary programs that should be available' (UNICEF, 2013:11).

An inter-agency task force began work in 2013 itself and as noted above, awareness building and training have been organized with the Ministry of Women, Family and Community Development and UNICEF working with NGO representatives, the police, the Attorney General's Chambers and other stakeholders. However, as noted in the preceding Chapters, diversion as a measure failed to gain statutory footing, as several issues remain unresolved.

Conversations with stakeholders suggest that identifying the key stakeholders involved and establishing inter-agency partnerships appear to have been easily established. However, there were challenges in developing the legal basis for diverting children, and the jurisdictional issues of the authority to decide whether a child will be diverted or processed through the juvenile justice system. This uncertainty in implementing diversionary practices were reflected in conversations with stakeholders as the distinction between pre-trial and post-trial diversion were treated as the same by stakeholders.

Clearly, there is a need to amend existing legislative provisions that govern police and prosecution powers as well as provisions within the broader criminal justice system. As noted above, stakeholders are supportive of diversion as a measure but are unable to act without the legislative authority. These legislative structures have yet to be implemented.

Awareness and acceptance of diversion among the police, prosecutors and magistrates are part of an on-going activity but as suggested by stakeholders, this requires time and sustained effort beyond one-off training activities. Once again, stakeholders speak of entrenched values and perceptions of children and childhood permeating the police, the prosecution, magistrates and others in the juvenile justice system.

From a Malaysian perspective, it appears that in deciding on the most appropriate model for diversion, consideration was given to the broader national contexts, cultural issues and availability of resources. As noted above, the restorative justice model was deemed unsuitable given concerns of the complex ethnic relationships and the absence of a tradition of community dispute resolution mechanisms.

A pilot study, though planned, has not yet been executed. Certainly, there is a need to ensure the degree of agreement and commitment from local authorities and service providers. Stakeholders suggest that there are challenges in implementation in the initial local setting selected, citing community “buy in” as a challenge. Thus, societal awareness and acceptance (or resistance) of diversion is identified as a challenge. Societal attitudes and norms are, as suggested above, deeply entrenched and it is



therefore not surprising to find stakeholders working towards ameliorating these attitudes even if success does not appear to be forthcoming.

Further, programmes and services for diverted children and their families need to be operational. The relevance of the support services is on the basis that, for diversion to work effectively, diversion requires an appropriate destination that the child is diverted *to* and not merely diversion away *from*, devoid of alternatives (Abramson, 2004). Thus, one of the most urgent reforms is the creation of a diversion system that will provide ‘actual alternatives’ (Abramson, 2004:3).

Presently from a Malaysian context, the position is less than satisfactory. All ten boys from the Henry Gurney School came from broken homes or endured the pressures of poverty. Owing in part to a lack of existing adequate care and protection systems, they have been exposed to the juvenile justice system. So again, there is a paradox of how children are dealt within the criminal justice system, as institutionalised criminal detention in cold and unfriendly environments have become a substitute (arguably a poor one) for adequate care and protection systems. These are perhaps reflective of the view that incarceration of children often result in ‘institutional child abuse’ (Goldson, 2006:463).

In conversations with the boys in the Henry Gurney School, there appears to be a disconnect in pursuing a rehabilitative route to care when for example, Aman is unable to attend his mother’s funeral or where someone like Odeng, already a father, is detained with rehabilitation in mind, yet detention, deprives his own child of a father. These matters merely create the potential for generational cycles of neglect and offending.

The appropriate levels of support needed appear to have been addressed by section 13 of the *Child (Amendment) Act 2016*. Pursuant to a newly inserted Section 7A in the *Child Act 2001*, Child Welfare Teams are to be established throughout Malaysia for the purpose of co-ordinating locally-based services to families and children if children are or are suspected of being in need of protection and rehabilitation; or are found

guilty of any offence.<sup>96</sup> This is similar to the multi-agency Youth Offending Teams established through the *Crime and Disorder Act 1998* in the United Kingdom.

By virtue of section 7A (2)-(4), the Child Welfare Team shall consist seven persons with appropriate experience, knowledge and expertise on matters relating to the protection and rehabilitation of children, to be appointed by the Minister, an education officer and a senior police officer. Co-opted members could include any person qualified to advice on relevant indigenous, ethnic, cultural or religious factors.

Establishing the Child Welfare Teams requires political will and adequate state resources to support it. At the time of writing, the specific details of this mechanism have not yet been made known. While there are similarities with the Youth Offending Teams in the United Kingdom, there is no indication if lessons learned from that experience have been fully understood. Of concern is whether the ‘tensions and compromises’ that arise in the multi-agency partnerships as it tries to balance issues of ‘welfare, correctionalism and public protection’ have been adequately appreciated (Gray, 2016:62).

Given the embeddedness of culture and existing norms, arguably the capacity building process must also endeavor to break down entrenched views that potential members of these teams may have towards children and the issue of child rights. Thus, there will be a need for such persons to not only be *aware* of broader child rights issues, but to *accept* them as being part of the broader human rights context. (Emphasis added). Further, potential members of these teams need to recognise and embrace the notion of the ‘foundational’ rights of the child (Hollingsworth, 2013:1046). Thus, a rights-based approach to children in conflict with the law is ideally an approach that is applicable at ‘every stage of the youth justice process’ (Gray, 2016:70) and not limited to fragmented provisions of the system.

As evidenced through conversations with stakeholders, there are challenges in creating awareness and conducting training. The inclusion of co-opted members to advice on indigenous, ethnic, cultural or religious factors in these Youth Teams,

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<sup>96</sup> This replaces “Child Protection Teams” established under the *Child Act 2001*.

suggest that issues of cultural relativism are once again implicitly evident. The government's position *vis-à-vis* the various treaty obligations and the CRC indicate an insistence on preserving the cultural relativism viewpoint. Thus, it is likely that the government's position on cultural relativism will filter down to the micro level of those managing and implementing the system.

As noted above, Malaysia has yet to introduce legislative provisions governing social work and stakeholders suggest that probation officers struggle with workloads. A further aspect on workloads and capacity building is the introduction of community service orders (CSO) within the specific provisions of the *Child (Amendment) Act 2016*. Prior to this, CSO were exercised through Section 293 (1) (e) of the Malaysian *Criminal Procedure Code (CPC)* which was an amendment introduced in 2007. CSO do not divert children away from the juvenile justice system, as in its present form, it serves as an alternative to custodial sentences and therefore is imposed by the Court for Children.

Recent media reports suggest that in applying CSO<sup>97</sup> to young offenders aged 18-21, a total of 17,647 young offenders' social reports were prepared. 4,911 of them were ordered to undergo community service while 3,550 completed the order (Kili, 2017). Given that plans to introduce diversion will have an impact on the additional support services, there are further workload and corresponding cost implications as well. The issue of net-widening has been considered in Chapter 3 and this is a matter that will require a measured response as to how children are to be diverted in Malaysia. Such a response must accept and acknowledge the broader aspects of child rights in order to avoid making the diversion process one that serves as a further mechanism for controlling children.

The effective implementation of diversion is also dependant on the successful partnerships of the various stakeholders involved. Conversations with stakeholders

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<sup>97</sup> These figures represent CSO as applied under the Criminal Procedure Code which includes youthful offenders aged 18-21. The CSO provisions as indicated in the *Child (Amendment) Act 2016* also include adult offenders including the mother, father and guardians of who abuse or neglect their children.

suggest that this has not been easy. Stakeholders speak of difficulties in working with the various government agencies with concerns of agencies working in silos.

Abramson suggests that the juvenile justice system is not a singular system but a 'multiple inter-connected' system where each agency is an 'autonomous bureaucratic unit within the government, with its own objectives, performance standards, ethos, and command structure, and each system is in competition with all the others for its share of the national budget' (2004: 5). These reflections are also apparent in Malaysia as conversations with stakeholders indicate the problems working with the various ministries involved in the juvenile justice system each managing different aspects of the overall juvenile justice system. Stakeholders also describe the lack of resources in allocating separate facilities (detention, custody and courts for example) for the child in conflict with the law.

Thus, although Malaysia has introduced legislation in keeping with some of its obligations under the CRC and other international standards, the application, implementation and enforcement of these norms lag as we struggle with deeper issues of culture and conceptions of childhood and the broader context of how human rights are perceived in Malaysia. There are challenges in capacity building, funding and resources that impact the successful implementation of diversion strategies.

## **6. Whither the rights-based argument for diversion in Malaysia?**

The claim for a rights-based argument for diversion is premised on several considerations. Firstly, treaty obligations place upon member States imperatives to acknowledge and accept the philosophical aspirations of the rights bearing capacity of the child.

Secondly, a rights-based approach is derived from principles that are foundational aspects of the CRC and other human rights treaties and protocols, namely notions of accountability, universality and non-discrimination, indivisibility and participation. This implies that an underlying aim of all UN-led initiatives are to advance the realisation of human rights as laid down in the Universal Declaration of Human Rights and other major human rights instruments.

Finally, therefore, the issue of child rights and specific child-related policies and development goals including issues of diversion, are best pursued within the broader human rights framework. This places on governments, the need to be transparent and accountable in securing the rights and development of children.

However, as noted above these aspirational goals are not entirely met in Malaysia. Arguments about culture and cultural relativity are real and live issues that stakeholders engage with daily. How adults in Malaysia view children have a bearing on the response to treaty obligations. Children themselves are not aware of their rights and even if they are, they have no means to enforce breaches and as noted above the child in conflict is trapped in a rights gap. It is pertinent to note that Malaysia has yet to ratify Optional Protocol 3, which sets out an international complaints procedure for child rights violations.

It appears that plans for diversion are being put in place as a response to treaty obligations as expressed through suggestions following Malaysia's first report and through UNICEF's report of 2013. Perhaps it is a measured response to demonstrate a willingness to engage with some issues involving children in conflict with the law yet at the same time choosing to disengage from other broader issues. Therefore, diversion is seen more as an act of benevolence on the part of the State or merely as a measure fulfilling treaty obligations and not pursued explicitly from a rights perspective.

Some stakeholders agree that diversion is a good and desirable measure, but these views do not appear to acknowledge the broader argument that the child *has* rights. (Emphasis added). The notion of the child having rights has not been adequately acknowledged and this is part due to the manner in which children are socialised. In fact, in many instances there are explicit breaches of child rights where a child in conflict with the law is concerned as illustrated above.

The CRC is premised upon notions of the respect for the dignity of all human beings and thus, every child is the bearer of his or her own human rights. This framework suggests that children do not derive their rights from their parents or are

dependent on adult proxies. The philosophical aspiration of the CRC is therefore to acknowledge the emancipation and empowerment of the child.

This foundational concept is argued by some of the social actors in Malaysia, to be contrary to the existing cultural norms in Malaysia. More importantly, the prevailing culture of childhood is laden with paradoxes. On the one hand, it is not one that readily acknowledges the notion of a child with rights yet, at the same time is willing to recognise that a child can get married or be subject to adult experiences in the juvenile justice system.

An oft-cited argument also suggests that the autonomy perspective of child rights would destroy families as an empowered child it is argued, would favour individual rights over the community interests. The perception this argument creates therefore is that the best interest of the child is served in this communal safe-space. However, the reality is that as far as the child in conflict with the law is concerned, children encounter adult realities that ignore the foundational rights of the child and amplifies the fallacy of this argument.

The plans for the implementation of diversion in Malaysia is premised on fulfilling treaty obligations and on ensuring that government rhetoric of being seen to meet international standards is the accepted discourse. There are however, gaps between the rhetoric and the reality. Based on the evaluation of the existing state of the juvenile justice system, children in conflict with the law are not ranked high on the government's priority. There are broader failures in implementing international standards for upholding the rights of children in the Malaysian juvenile justice system even after ratification of the treaty and the subsequent legislative changes made in 2001 and 2016.

The juvenile justice system is part of the broader political ethos of Malaysia. A rights-based argument to diversion is inseparably contingent on being acknowledged within this existing political ethos. A rights-based argument is built on empowering children, which arguably is a paradigm shift in dealing with children based on their recognition as subjects and bearers of rights in Malaysia. A rights-based argument, as far as child rights are concerned, suggests that their status in law and in society will

recognise the child as rights bearing individuals. Such an approach does not sit well with the existing political hegemony in viewing human rights in Malaysia.

The Universal concepts of human rights and Malaysia's specific social, cultural, and political contexts reveal gaps in applying international norms. A rights-based approach requires a holistic and integrated framework for addressing disparities in the realisation of child rights. Beyond that, child rights need to be viewed within the overall human rights contexts in Malaysia.

These contexts require a commitment to human rights, including the rule of law, transparency of governance, the recognition of civil and political rights and an impartial judiciary. Arguably, these are not universal values viewed through Western-centric lenses but purely necessary fundamental human values. Such a view may not find support from the existing political system in Malaysia. An empowered and child will become an empowered adult. An adult with awareness of his/her rights may not be something that the established political elite values, given the present culture of politics in Malaysia.

Thus, plans to introduce diversion will take time as the existing norms are firmly entrenched. While legislative enactments and policy commitments have been instituted, these piecemeal changes appear to be reactionary in nature. Some treaty obligations are being complied with in part while there are breaches not just of the CRC but also other treaty obligations.

Abramson refers to this as a 'salami approach' to juvenile justice where the broad range of rights in the convention are sliced into individual segments of rights encompassing a range of themes. This approach as argued by Abramson ignores the more appropriate and all-encompassing holistic approach of the Convention (Abramson, 2006:26-27). As considered in this work, violations of the treaty are apparent in the Malaysian juvenile justice system where there are contradictions in applying the broader child rights framework. It therefore comes as no surprise that as suggested by Muncie, the CRC 'may be the most ratified of all international human rights instruments but it is also the most violated' (Muncie, 2008: 111).

Many of the signatories of the treaty include State parties not particularly renowned for their compliance of the broader human rights framework, for example, the Democratic People's Republic of Korea. The United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (COI), in its 2014 report, documents a range of human rights violations noting that the 'gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world' (United Nations, 2014b:15). Nonetheless, the Democratic People's Republic of Korea has legislation<sup>98</sup> that provides for 'principles and issues on fully ensuring the rights and best interest of the child in their social life, education, health, family and justice' (UNICEF, 2016: 24).

Thus, these contested arrangements are not peculiar to Malaysia. As Muncie suggests, 'in many countries it is abundantly clear that it is possible to lay claim to upholding rights whilst simultaneously pursuing policies which exacerbate children's marginalization and criminalization and increase the punitiveness of institutional regimes' (Muncie, 2009b:209).

## **7. Conclusion**

The overarching aim of the study was to contribute to the body of knowledge in the area of juvenile justice in Malaysia particularly where a child is in conflict with the law. The analysis of the existing literature, international conventions, standards, treaties, rules, legislative provisions and judicial pronouncements provided the framework to contextualise these elements with conversations with stakeholders and incarcerated boys in the Henry Gurney School system. These elements afforded an opportunity to develop new perspectives about the role that politics, culture and the socialisation of children play in understanding how the rights of the child in conflict with the law is perceived, understood and realised in Malaysia. The approach taken has been to develop critical academic discourse to influence policy makers in the area of children in conflict with the law to shape a 'principled youth justice informed by international human rights instruments' (Goldson and Muncie, 2006:203).

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<sup>98</sup> DPRK Law on the Protection of the Rights of Children 2010.



At the outset of this thesis, it was suggested that this research sought to explore three fundamental research questions. Firstly, this thesis explored the underlying philosophical approaches in Malaysia in dealing with rights of children in conflict with the law. The norms that underlie the philosophical approaches in Malaysia in dealing with rights of children in conflict with the law indicate a multiplicity of issues of culture, politics, religion, conceptions of childhood and rights. These norms are intricately interconnected and so each cannot be viewed in isolation.

As argued, Malaysia has in place a juvenile justice system that has a stronger emphasis on punitiveness, incapacitation, and offender accountability and these norms have attained a high degree of political legitimacy. This is unique to Malaysia given her specific historical and socio-political context. This also represents the manner in which children are culturally socialised. The challenges in introducing universal concepts of rights in a culturally diverse world are not peculiar to the Malaysian story. This is a global challenge and the consequence is that achieving a consensus takes time and much effort and, in some cases, consensus appears impossible to achieve.

Secondly, this thesis sought to discover the manner in which the rights of the child are perceived and realised. The analysis of the literature and the conversations with stakeholders suggest that there appears to be an obfuscation of the rights of the child and that children are merely treated as objects of concern. Children are not seen as rights-bearing subjects. This is reflected in the formal institutional-based structures and the statutory provisions that govern juvenile justice. Conversation with stakeholders and the boys in the Henry Gurney School indicate that formal police and court-based interventions further amplify the obfuscation of rights. The sense of disenfranchisement was manifest in the boys' experiences as they encountered the various stages of the juvenile justice system. Given the peculiarities of the culture of childhood in Malaysia and how children are socialised, this is not surprising. Children in conflict with the law are seen as offenders first, which in itself is once again a reflection of how children are socially constructed (Goldson et al, 2002). However, this is too not a phenomenon peculiar to Malaysia. As suggested in this study, the manner in which children in conflict are treated in the Malaysian juvenile justice

system is seen with varying degrees of similarity, in other jurisdictions considered in this work.

Thirdly, this thesis explored the points of convergence and divergence in these policies with that of other jurisdictions and its impact on diversion strategies. As noted in this study, there is a blurring of these strategies as stakeholders merge pre-trial and post-trial approaches. The lack of specific diversion strategies are reflective of the complexities in applying the concept of diversion in practice. Further, the underlying norms and the manner in which child rights are construed has certainly impacted diversion strategies in Malaysia.

As evidenced in this thesis, progress has been slow and there is a constant need to take into account the difficulties of entrenched positions. Yet once again, the complexities of applying universal rights in a diverse world are a reality. Malaysia's struggles with the implementation of the CRC are not unique and many signatories to the CRC face similar challenges and encounter varying levels of compliance, for example, in issues of the minimum age of criminal responsibility or in the institutional interventions when a child is in conflict with the law.

The claim to a rights-based argument for the introduction of diversion in Malaysia as explored in this thesis suggests that there are deeper fundamental abstractions in the notion of rights. It is undeniably clear that the ratification of the CRC in Malaysia has yielded a level of impact on child rights. The CRC has clearly become catalyst for change 'stimulating activism in all aspects of society' (Abramson, 2006:17). The level of activism is seen in conversations with stakeholders interviewed in this study who are involved in engaging with issues of child rights. The levels of engagement reveal a constant need to negotiate, to discuss, to build awareness and to avoid being confrontational or in some cases, to *be* confrontational. (Emphasis added). Stakeholders speak about building trust and about developing relationships in order to achieve the objectives of the CRC. Arguably, had it not been for the CRC, many of the changes introduced in Malaysia, weaknesses notwithstanding, would not have found their way into the juvenile justice system.

However, it is evident from the preceding Chapters; there are problems in dealing with the broader context of rights and the corresponding specific issue of child rights. There are problems in meeting the philosophical aspirations of treaty provisions and there are gaps in achieving the promises and assurances made by the government in meeting these obligations. Some of these gaps arise from direct political rejection of notions of civil and political rights on the basis that it represents an antithesis of the existing political culture. These matters have a direct bearing on the manner a rights-based argument is put forward. Such an argument requires serious commitment from political leaders and policy makers. Stakeholders and the general society are obliged to ensure that the best interests of children will guide their actions, plans and programmes.

The reality is that given the embeddedness of issues considered in this study, a rights-based argument to diversion, while certainly ideal, is not likely to be the manner in which it is *implemented*. (Emphasis added). Thus, it does appear that plans for diversion will proceed albeit premised on fulfilling obligations arising from the CRC in *form* but perhaps not in *substance*. (Emphasis added). This obligation is drawn from policies that best serve the state's reputational value in the international arena. Fulfilling all aspects of rights of the child in conflict with the law therefore will continue to be slow as there are unresolved issues that are deeply rooted. These issues as identified in this study reflect the point that, 'the Convention is far more complex and multi-dimensional' and not merely a 'single, unified philosophy of children's rights' (Alston, 1994:2-3).

UNICEF suggests that 'dramatic progress is possible within one generation if we summon the political will to redirect resources towards addressing the basic needs of children' (UNICEF, 2001:102). Evidence drawn from this study suggest that the nuances and complexities of translating the aspirational goals of a rights-based argument are evident in Malaysia's journey in implementing diversion in the juvenile justice system. Thus, this study establishes the argument that the rights of the child and how it is contextualised in Malaysia is a condition precedent to the successful implementation of any plans for diversion. As noted above, a child has a *right* to diversion. Acknowledging this philosophical positioning of the rights of the child

therefore takes on a greater level of importance and hence as noted above, the concept of diversion as explored in this study, fades out of focus.

Since the ratification of the CRC, a generation of children have become adults, many of whom are likely to have children of their own, but progress in acknowledging child rights has been pedestrian, at best. Thus, achieving the full measure of treaty obligations to recognise the foundational rights of the Malaysian child to develop as fully autonomous individuals will be slow. Progress in achieving a rights-based argument for diversion will remain protracted unless there is sufficient political will to support this.

## **8. Postscript**

Much of this study refers to the embeddedness of political culture, a consequence arising from having a single political party in power since Malaysia's independence from the British in 1957. As suggested in the preceding Chapters, Malaysia's political history has left its mark on the norms that underlie the juvenile justice system. The results of the election in May 2018 saw the ruling coalition lose their 61-year hold on government. The ramifications of this are still being felt in the country. Riding on the back of voter dissatisfaction about a multiplicity of issues, the newly elected government has indicated a strong reform-based agenda.

This includes plans to repeal laws deemed harsh, restrictive and oppressive, some of which were explored in this study (Tan, 2018). There is an expression of a commitment to human rights, including the rule of law, transparency of governance, the recognition of civil and political rights and an impartial judiciary (Nijar, 2018). There are plans to introduce constitutionalism and human rights as part of the curriculum for children in schools (Joseph, 2018). There also plans to reform the prison system which the current government views as 'archaic' and 'punitive' (The Star, 2018). These values feature in the foundations of a rights-based agenda and represent a growing movement to redefine the narrative of the culture of politics in Malaysia.

Arguably, it may be premature to predict the outcome of this endeavour as the newly minted government has only been in place for over a month and many of the

norms considered in this study are deeply nestled in the political and socio-cultural ethos. However, the potential to effect change in culture and norms cannot be ignored. The present government will remain in power for at least another five years and will need to garner support from two-thirds of the lower house to secure amendments to the provisions that deal with fundamental liberties in the constitution. It remains to be seen what changes lie ahead in promoting broader rights-based viewpoints as part of the reform agenda but there is a growing sense of optimism that a rights-based agenda will be pursued and that such an agenda will include greater recognition of child rights too.

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Convention on the Rights of the Child 1989.

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Sexual Offences Act 1993.  
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#### **Legislation (New Zealand)**

Children, Young Persons and Their Families Act 1989.

## **Legislation (India)**

Indian Penal Code 1836.

## **Cases (Malaysia)**

*Asri bin Beddu v Public Prosecutor* [2013] 3 MLJ 893.

*Duruvendran a/l Sakajaven v Public Prosecutor* [2016] 5 MLJ 281.

*Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (and anyone having control over Prasana Diksa)* [2015] 7 MLJ 153.

*Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552.

*Koh Wah Koon v PP* [2004] 5 MLJ 174.

*Kok Wah Koon v. PP* [2004] 5 MLJ 193.

*Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 1 MLJ 835.

*Lim Hang Seoh v. PP* [1978] 1 MLJ 68.

*Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 42.

*Low Swee Siong v. Tan Siew Siew* [2011] 2 MLJ 501.

*Mohd Haikal bin Mohd Khatib Saddaly & Ors v Public Prosecutor* [2009] 4 MLJ 305.

*Pathmanathan a/l Krishnan v. Indira Gandhi a/p Mutho* [2016] 4 MLJ 455.

*Public Prosecutor v Khairul Al Sidek bin Lurin & Anor* [2010] 8 MLJ 1.

*Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

*Public Prosecutor v Low Hai Voon* [2010] 8 MLJ 582.

*Public Prosecutor v Low Kian Boon & Anor* [2011] 5 MLJ 595.

*Public Prosecutor v Maznah bt Abdussomad & Anor* [2015] 7 MLJ 518.

*Public Prosecutor v Mohd Turmizy bin Mahdzir* [2007] 6 MLJ 642.

*Public Prosecutor v Ramayah a/l Ramalu and another appeal* [2016] 5 MLJ 355.

*Public Prosecutor v. Azmi Sharom* [2015] MLJU 594.

*State Government of Negeri Sembilan & Ors v. Muhammad Jazaili Mohd Khamis & Ors* [2015] CLJ 13.

*Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214.

*Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* [2014] 4 MLJ.

*ZI Publications Sdn. Bhd. & Anor v. Kerajaan Negeri Selangor* [2016] 1 MLJ 153.

### **Cases (United Kingdom)**

*Airedale NHS Trust v. Bland* [1993] WLR 316 at 355C-D.

*R on the application of TP v. West London Youth Court* [2005] EWHC 2583 Admin.

*R. (on the application of Williamson) v. Secretary of State for Education and Employment* UKHL 15 [2005] 2 A.C. 246.

*Secretary of State for the Home Department ex parte Venables and Thompson, R v.*

*Secretary of State for the Home Department, Ex Parte Thompson* [1997] UKHL 25.

*ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC4.

### **Cases (Australia)**

*Minister for Immigration and Ethnic Affairs v Teoh* [1995]128 ALR 353

### **Cases (United States)**

*Graham v. Florida* 560 U. S. (2010).

*Miller v. Alabama* 567 U. S. (2012).

*Montgomery v. Louisiana* 577 U.S. (2016)

*Roper v. Simmons* 543 U.S. 551 (2005).

### **European Court of Human Rights**

*MS v. Sweden* (1997) 28 EHRR 313

*V v. United Kingdom* Application No. 24888/94

*T v. United Kingdom* Application No. 24724/94.



## APPENDIX 1: SAMPLE PARTICIPATION SHEET - STAKEHOLDERS



### RIGHTS OF THE CHILD: EXPLORING CHILDREN'S RIGHTS TO DIVERSION (2016/2017)

My name is Paul Linus Andrews and I am a research student with Lancaster University, United Kingdom. This information sheet tells you about my research and I hope you find the information useful. If you have any questions please do not hesitate to contact me at: [p.andrews1@lancaster.ac.uk](mailto:p.andrews1@lancaster.ac.uk)

#### **Why is the research being done?**

I am exploring how you view the rights of the child with a particular focus on understanding your views on the rights of the child to diversion out of the criminal justice system in Malaysia. You are being invited to take part in this research project as your experience can help contribute to our understanding and knowledge in these areas. Before you give consent, it is important for you to understand why this research is being done and what it will involve. Please take time to read the following information carefully. Ask questions if anything you read is not clear or if you would like more information. Take time to decide whether or not to take part.

#### **Who will be involved?**

Children in schools and/or in institutional detention schools/centres/juvenile prisons and individuals involved/connected with the juvenile justice system.

#### **What will happen during the research?**

I would like to speak to you individually for up to 45 minutes. If you agree, I will tape record the sessions and type them up later. I am not looking for right or wrong answers, only for what your views are about the issue.

#### **What are the kind of questions will you be asked?**

- We will look at some documents on the rights of the child.
- We will talk about your understanding of these issues.
- We will talk about your experiences (if any) in relation to a child in conflict with the law.
- We will explore your views on diversion and child rights.

#### **Are there any disadvantages in participating in this research?**

There should be no foreseeable disadvantages to your participation. I hope you will enjoy talking with me. If you are unhappy or have further questions at any stage in the process, please address your concerns initially to the researcher if this is appropriate. Alternatively, please contact the person/s listed at the end of this sheet.

#### **Do you have to give consent to participate in this study?**

Participation on this study is entirely voluntary, so please do not feel obliged to give consent. Refusal will involve no penalty whatsoever and you may decide to withdraw from the study by informing the researcher.

**When can you withdraw your consent?**

If you withdraw your consent **within two weeks after your interview/participation** in this research, we will destroy all data obtained. However, if consent is withdrawn beyond this time frame, the data will be used as part of the research.

**Will all my details be kept confidential?**

All information which is collected and stored electronically will be stored on a secure, password-protected server and any mobile device (a laptop or memory stick) used will be encrypted and password-protected and anonymised before the data is presented in the research, in compliance with the *Malaysian Personal Data Protection Act 2010* and ethical research guidelines and principles.

**Deliberate disclosure**

However confidential information will be disclosed if there is evidence that a crime has been committed or about to be committed.

**Will you know the research results?**

I will send you a brief report by December 2017.

**Concerns:**

If you are not satisfied with the manner in which this study is being conducted or if you have any concerns regarding your participation, you may contact (anonymously if you so choose) either:

**Dr. Ian Paylor**  
**Department of Sociology**  
**Bowland North**  
**Lancaster University**  
**Lancaster**  
**LA1 4YN**  
**i.paylor1@lancaster.ac.uk**

**Dr Luca Follis**  
**Law School**  
**Bowland North**  
**Lancaster University**  
**Lancaster**  
**LA1 4YN**  
**l.follis@lancaster.ac.uk**

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*The project has been reviewed by the University Research Ethics Committee [Ref: RS2015-66].*

*Thank you for reading this information sheet.*

## APPENDIX 2: SAMPLE CONSENT FORM - STAKEHOLDERS



I am seeking your consent if you would like to take part in a research project on *Exploring Children's Rights to Diversion in Malaysia (2017)*. Before you consent to participating in the study I ask that you read the participant information sheet and mark each box below if you agree. If you have any questions or queries before signing the consent form, contact Paul Linus Andrews at [p.andrews1@lancaster.ac.uk](mailto:p.andrews1@lancaster.ac.uk)

- Please tick (✓)  
each box*
1. I confirm that I have read the information sheet and fully understand what is expected of me within this study
  2. I confirm that I have had the opportunity to ask any questions and to have them answered.
  3. I understand that my interview will be audio recorded and then made into an anonymised written transcript.
  4. I understand that my participation is voluntary and that I am free to withdraw but I am aware that data may still be used in certain circumstances
  5. I consent to information and quotations from the interview being used in the study.
  6. I understand that any information given will remain strictly confidential and anonymous unless there is a need for information to be revealed.
  7. I consent to taking part in the above study.

Name: \_\_\_\_\_  
Signed: \_\_\_\_\_  
Date: \_\_\_\_\_

Paul Linus Andrews  
Signed: \_\_\_\_\_  
Date: \_\_\_\_\_

**APPENDIX 3: AMENDED PARTICIPATION INFORMATION SHEET HENRY  
GURNEY: JULY 2017**



**RIGHTS OF THE CHILD: EXPLORING CHILDREN'S RIGHTS TO DIVERSION  
(2017)**

My name is Paul Linus Andrews and I am a research student with Lancaster University, United Kingdom. This information sheet tells you about my research and I hope you find the information useful. If you have any questions please do not hesitate to contact me at [p.andrews1@lancaster.ac.uk](mailto:p.andrews1@lancaster.ac.uk)

**Why is the research being done?**

I am trying to find out how you view your rights. I am also keen to know what you think about what should happen when children commit crimes. I am going to give you information and invite you to be part of a research study. You can choose whether or not you want to participate. You may discuss anything in this form with your parents or friends or anyone else you feel comfortable talking to. You can decide whether to participate or not after you have talked it over. You do not have to decide immediately. There may be some words you don't understand or things that you want me to explain more about because you are interested or concerned. Please ask me and I will take the time to explain.

**Who will be involved?**

Children who are in schools and in institutional detention schools/centres/juvenile prisons and adults involved/connected with the juvenile justice system.

**What will happen during the research?**

I would like to speak to you individually for up to 45 minutes. If you agree, I will record the sessions and type them up later. I am not looking for right or wrong answers, only for what you think about these issues.

**What will you be asked?**

- We will look at some documents on the rights of the child.
- We will talk about your understanding of these issues.
- We will talk about your experiences (if any) in relation to these issues and what you think.
- We will explore your views on what should happen if children commit crimes.

**Are there any disadvantages in participating in this research?**

It is normal for you to feel worried about being asked questions but there are no expected disadvantages to your participation. I hope you will enjoy talking with me. If you are unhappy or have further questions at any stage in the process, please let me know or if you are not comfortable doing that, please contact the person/s listed at the end of this sheet.

**Do you have to take part in this research?**

You do not have to be in this research. No one will be upset or disappointed with you if you say “No”. It’s your choice. You can think about it and tell me later if you want. You can say “Yes” now and change your mind later and it will still be okay.

**Can I change my mind?**

Well, if you say “Yes” now, you can still say “No” later. If you let me know within **two weeks** of us talking, I will destroy all the data. But if you decide to say “No” after that, the data will still be used as part of the research.

**Can you choose not to answer questions?**

If you are uncomfortable during the interview and wish to stop talking, I will stop and you can say you do not want to be part of the interview at that point. It is okay if you choose to do so.

**Will anyone know I have been involved?**

I will not tell other people that you are in this research and I won’t share information about you to anyone who does not work in this research study. However, I may have to share the transcript of our conversations with the Malaysian Prison Department if they ask me to do so.

All information which is collected and stored electronically will be encrypted and password-protected. I will not use your name or other personal details when the data is presented in the research. The research is in compliance with the *Malaysian Personal Data Protection Act 2010* and ethical research guidelines and principles.

**When might information be revealed?**

If what is said in the interview makes me think that you, or someone else, is at significant risk of harm, I will have to inform someone about this. If possible, I will tell you if I have to do this.

**Will you know the research results?**

I will send you a brief report by December 2017.

**Concerns:**

If you are not happy with how this study is being conducted or if you have any worries regarding your participation, you may also contact (*you do not need to write your name or details*) either:

**Dr. Ian Paylor**  
Department of Sociology  
Bowland North  
Lancaster University  
Lancaster  
LA1 4YN  
i.paylor1@lancaster.ac.uk

**Dr Luca Follis**  
Law School  
Bowland North  
Lancaster University  
Lancaster  
LA1 4YN  
l.follis@lancaster.ac.uk

---

*The project has been reviewed by the University Research Ethics Committee [Ref: RS2015-66].*

***Thank you for reading this information sheet.***

#### APPENDIX 4: AMENDED CONSENT FORM HENRY GURNEY



I am seeking your consent if you would like to take part in a research project on *Exploring Children's Rights to Diversion in Malaysia (2017)*. Before you consent to participating in the study I ask that you read the participant information sheet and mark each box below if you agree. If you have any questions or queries before signing the consent form, contact Paul Linus Andrews at [p.andrews1@lancaster.ac.uk](mailto:p.andrews1@lancaster.ac.uk)

1. I confirm that I have read the information sheet and fully understand what is expected of me within this study.
2. I confirm that I have had the opportunity to ask any questions and to have them answered.
3. I understand that my interview will be audio recorded and then made into written transcript without my name.
4. I understand that my participation is voluntary and that I can say 'No' but I am aware that data may still be used in certain circumstances
5. I consent to information and quotations from the interview being used in the study.
6. I understand that any information given will remain strictly confidential and anonymous for purposes of this research.
7. I understand that transcripts of my conversation may be handed to the Malaysian Prison Department if requested by them.
8. I consent to taking part in the above study.

Name: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Paul Linus Andrews

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

**APPENDIX 5: REJECTION LETTER FROM THE PRISON DEPARTMENT  
MALAYSIA (AS TRANSLATED).**

**HEADER:**

Malaysian Prison Department  
Ministry of Home Affairs  
Malaysian Prison Headquarters  
Bukit Wira Kajang

Our Ref: JP/BDK/Rd//96/1 Jld. 6 (61)  
Date: 24 November 2016

Paul Linus Andrews,  
28 Faber Indah Condominium  
Jalan Desa Cantik  
Taman Desa  
**58100 KUALA LUMPUR**  
Email: [paullinus@sunway.edu.my](mailto:paullinus@sunway.edu.my)

Dear Sir,

**Re: Application to conduct research on child rights to alternative sentencing approaches.**

Your letter refers.

2. The Malaysian Prison Department wishes to thank you for selecting our Department to conduct your research entitled, ‘Children in Conflict with the Law: Is There a Basis for a Rights Based Argument for Diversion in Malaysia?’
3. However, regretfully, we are unable to accommodate this request. This is primarily because the respondents are presently being subjected to other studies.

Thank you.

“In service of the nation”

SUPRI BIN HASHIM  
Deputy Commissioner General (Policy)  
Malaysian Prison Department  
c.c

Deputy Commissioner General (Management).

**APPENDIX 6: APPROVAL LETTER AND CORRESPONDING APPENDICES FROM  
THE PRISON DEPARTMENT MALAYSIA (AS TRANSLATED)**

**HEADER:**

Malaysian Prison Department  
Ministry of Home Affairs  
Malaysian Prison Headquarters  
Bukit Wira Kajang

Our Ref: JP/BDK/Rd//96/1 Jld. 13 (22)  
Date: 21 June 2017

Paul Linus Andrews,  
Sunway University

Dear Sir,

**Re: Your appeal against our decision to reject your earlier application to conduct research on child rights to alternative sentencing approaches.**

Your email refers.

2. Your appeal to conduct research on ‘Children in Conflict with the Law: Is There a Basis for a Rights Based Argument for Diversion in Malaysia?’ has been **approved**. The approved research is to be conducted at the Henry Gurney School, Puncak Borneo, Sarawak on 19<sup>th</sup> July 2017 from 9.30am to 3.30pm. The respondents are 10 juveniles (Malaysian citizens) and 2 senior officers.
  
3. The approved researchers are:
  - 3.1.1. Paul Linus Andrews Principal Researcher
  - 3.1.2. Fam Jia Yuin Research Assistant  
(trained in psychology as required by the Prison Department)
  
3. This approval is subject to the conditions listed in Appendix A. You are to ensure that the respondents consent to the research as per Appendix B. This approval is strictly for research purposes only. **At no time must the identity of the respondents be revealed (Taking photographs, audio recording or any attempt to reveal the identity of the respondent is prohibited).\***
  
4. All further inquiries should be addressed to:

---

\* The duplication of number 3 appears in the original.



The Director  
Henry Gurney School  
KM 23 Jalan Puncak Borneo  
93250 Kuching  
Sarawak.  
Tel: 082-614066

5. Enclosed, please find documents that require your attention. Please read the information carefully as they contain conditions by which you are obliged to abide by. If you agree to these conditions, please return the signed documents to us.

Thank you.

“In service of the nation”

SUPRI BIN HASHIM  
Deputy Commissioner General (Policy)  
Malaysian Prison Department

c.c

1. Deputy Commissioner General (Management).
2. Director of Prisons, State of Sarawak.
3. Director, Henry Gurney School, Sarawak.

- *Please provide support to the researcher and ensure that security is maintained throughout the research period*
- *Please also ensure that the researcher submits two copies of his research findings to the Institution as well as the Policy Division, Malaysian Prison Dept.*
- *Please ensure that all duly completed consent forms (Appendix B), are kept in the juvenile's personal file. Remand prisoners are not subject to this research.*
- *Please also find the proposed interview questions.*

**CONDITIONS APPLICABLE TO THE CONDUCT OF  
RESEARCH/PRACTICUM/PROGRAMMES IN THE MALAYSIAN PRISON  
DEPARTMENT**

1. The approved number of researchers are to be observed. Any increase in the number of researchers requires prior approval from the Department or the Ministry.
2. Any equipment to be used is subject to inspection. Researchers are not permitted to bring in/remove any prohibited item/equipment.
3. Researchers are to list all items used in conjunction with the research before any research is conducted and seek approval beforehand.
3. In order to maintain safety and security, researchers are to abide by all rules/directions imposed by the prison authorities as per the Prison Act 1995 and the Prisons Rules 2000.\*
4. In the interest of personal safety, researchers are advised to remain in approved locations within the prison.
5. Researchers are prohibited from recording by any means, conversations with inmates or from taking photographs of the inmates or the physical structure of the prison.
6. Research findings are not to be shared with any third party without prior written approval of the Department.
7. Researchers are not allowed to use any part of the coverage/interview/article for purposes of broadcast or publication without the prior written consent of the Prison Department.
8. Any information obtained in relation to the prison itself, officers or inmates cannot be published unless written consent is obtained from the Prison Department.
9. The Prison Department reserves the right to withdraw the approval granted or the results of the research carried out in the event of non-compliance with any prescribed procedure. A decision once arrived at, is final.
10. A copy of the research results shall be handed over to the Prison Management Division of the Prison Department Headquarters and the Director of the relevant prison.

Policy Division  
**Prison Department Malaysia.**

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\* The duplication of number 3 appears in the original.

**LETTER OF UNDERTAKING**

I \_\_\_\_\_ ID \_\_\_\_\_ residing at \_\_\_\_\_ agree to abide by all laws, rules, instructions and conditions presently in force in relation to this research. Further, I hereby agree to undertake that: -

- i. I will only use information obtained specifically for this research and not for purposes of broadcast or publication;
- ii. I will not use information obtained for purposes of publicity or use such information in any seminar, forum, conference, symposium or academic journal or any other medium that would facilitate other parties obtaining such information;
- iii. I will not use information obtained for my own self-interest or in the interests of third parties;
- iv. I will not take photographs by any means/device of the prisoners or of the physical structure of the prison or of any part of the prison.
  - v. I will not publish, receive, obtain, copy, keep, collect, record or broadcast wholly or partly any item, document or information so obtained without the written permission of the Commissioner General of the Prisons Department;
- vi. I will not adversely affect the image of the Prisons Department, the Ministry of Home Affairs and the Government of Malaysia;
- vii. I will abide by all conditions as stipulated in Appendix A.

I am fully aware that if I breach this Letter of Undertaking, I am liable to be subject to the full extent of the Official Secrets Act 1972 and/or any other law in force at the material time.

Applicant's Signature

Witness' Signature

\_\_\_\_\_  
Name:  
ID:  
Telephone:  
Date:  
Date of submission of report:

\_\_\_\_\_  
Name:  
ID:  
Telephone:  
Date:  
Rank:

Verified by:  
Name:  
Rank:

## DECLARATION UNDER THE OFFICIAL SECRETS ACT 1972

My attention has been drawn to the provisions of the Official Secrets Act 1972, which are set out here. I am fully aware of the serious consequences that may follow any breach of those provisions.

I understand that the sections of the Act cover material published in a speech, lecture, or radio or television broadcast, or in the Press or in book form. I am aware that I should not divulge any information obtained by me as a result of my appointment to any unauthorised person, either orally or in writing, without the previous official sanction in writing of the Department appointing me, to whom two copies of the proposed publication be forwarded for scrutiny.

I also understand that I am liable to be prosecuted if I publish without official sanction any information I may acquire in the course of my tenure of an official appointment (unless it has already officially been made public). I am aware that I am liable to be prosecuted if I retain without official sanction any sketch, plan, model, article, note or official documents no longer needed for my official duties. I am aware that these provisions apply not only during the period of my appointment but also after my appointment has ceased. I also understand that I must surrender any documents etc., if I am no longer in service, save such as have been issued to me for my personal retention.

Signed

\_\_\_\_\_  
Name:

ID:

Post:

Department:

Date:

Witnessed by:

\_\_\_\_\_

**PARTICIPANT CONSENT FORM (ISSUED BY THE PRSION DEPARTMENT)**

I \_\_\_\_\_ ID \_\_\_\_\_

voluntarily agree to be a participant in the research entitled

\_\_\_\_\_ conducted by \_\_\_\_\_ (ID \_\_\_\_\_ )  
from \_\_\_\_\_

2. I am aware that I am involved in the following method of data collection:  
\_\_\_\_\_
  
3. I am aware that all information that I provide will be subject to confidentiality and will only be used for purposes of this research.

Thank you,

Yours sincerely,

Witnessed by;

\_\_\_\_\_  
(Signed/Thumbprint)  
Institution:

\_\_\_\_\_  
Name & Post:  
ID

**APPENDIX 7: ORIGINAL LETTERS FROM THE PRISON DEPARTMENT  
MALAYSIA (IN THE MALAY LANGUAGE)**



**JABATAN PENJARA MALAYSIA  
KEMENTERIAN DALAM NEGERI  
IBU PEJABAT PENJARA MALAYSIA  
BUKIT WIRA, 43000 KAJANG  
SELANGOR**

Telefon : 603-87328000  
Faks : 603-87368545  
<http://www.prison.gov.my>



Rujukan Tuan:  
Your Ref :  
Rujukan Kami JP/BDK/Rd/96/1 Jld. 6 (61)  
Our Ref :  
Tarikh: 24 November 2016  
Date :

En. Paul Linus Andrews  
28 Faber Indah Condominium  
Jalan Desa Cantik  
Taman Desa  
**58100 KUALA LUMPUR**  
Emel: [paullinus@sunway.edu.my](mailto:paullinus@sunway.edu.my)

Tuan,

**PERMOHONAN KEBENARAN MENJALANKAN KAJIAN PENYELIDIKAN  
TENTANG HAK KANAK-KANAK TERHADAP HUKUMAN ALTERNATIF DI  
KALANGAN KANAK-KANAK YANG TERLIBAT DALAM JENAYAH**

Dengan hormatnya merujuk kepada surat tuan berhubung dengan perkara di atas.


2. Jabatan Penjara Malaysia mengucapkan ribuan terima kasih di atas kesudian tuan memilih Jabatan ini untuk menjalankan kajian yang bertajuk: *Children in conflict with the law: Is there a basis for a rights based argument for diversion in Malaysia?*

3. Walau bagaimanapun dukacita dimaklumkan bahawa permohonan ini tidak dapat dipertimbangkan kelulusannya. Ini adalah kerana terdapat beberapa kajian lain yang sedang dijalankan dan melibatkan responden yang sama.

Sekian, terima kasih.

**“BERKHIDMAT UNTUK NEGARA”**

Saya yang menurut perintah,

  
**(TIMBALAN KOMISIONER SUPRI BIN HASHIM)**  
Timbalan Pengarah Dasar Kepenjaraan (Dasar)  
b.p. Komisioner Jeneral Penjara  
Malaysia

s.k Timbalan Komisioner Jeneral (Pengurusan)



**1**

“Memperkasakan Medal Insan”  
“Kebajikan Diutamakan, Organisasi Dimartabatkan”

Galeri Produk Penjara Ibu Pejabat Penjara Malaysia - Tel: 03 87328000/ Faks: 03 87340545, Galeri Produk Penjara Alor Setar, Kedah - Tel: 04 7302544/ Faks: 04 7326094, Galeri Produk Penjara Ayer Keroh, Melaka - Tel/ Faks: 06 2316854, Galeri Produk Penjara Kota Kinabalu, Sabah - Tel: 088 231342/ Faks: 088270460.



Certified to ISO 9001:2008  
Cert. No.: MY-AR-4747



JABATAN PENJARA MALAYSIA  
KEMENTERIAN DALAM NEGERI  
IBU PEJABAT PENJARA MALAYSIA  
BUKIT WIRA, 43000 KAJANG  
SELANGOR

Telefon : 603-87328000  
Faks : 603-87368545  
<http://www.prison.gov.my>

Rujukan Tuan :  
Your Ref :  
Rujukan Kami : JP/BDK/Rd//96/1 Jld. 13 (32)  
Our Ref :  
Tarikh : 21 Jun 2017  
Date :

En. Paul Linus Andrews  
Sunway University  
5 Jalan Universiti  
47500 Bandar Sunway  
SELANGOR  
Emel: [paulinus@sunway.edu.my](mailto:paulinus@sunway.edu.my)

Tuan,

**RAYUAN TERHADAP PENOLAKAN PERMOHONAN MENJALANKAN KAJIAN  
PENYELIDIKAN TENTANG HAK KANAK-KANAK TERHADAP HUKUMAN  
ALTERNATIF DI KALANGAN KANAK-KANAK YANG TERLIBAT DALAM JENAYAH**

Dengan hormatnya saya diarah merujuk kepada emel tuan berhubung dengan perkara di atas.

2. Dimaklumkan bahawa rayuan permohonan tuan untuk menjalankan kajian yang bertajuk "Children in conflict with the law: Is there a basis for a rights based argument for diversion in Malaysia?" adalah **diluluskan**. Kajian akan dijalankan pada 19 Julai 2017 (Rabu) jam 9.30 pagi hingga 3.00 petang bertempat di Sekolah Henry Gurney, Puncak Borneo, Sarawak. Responden adalah terdiri daripada 10 orang juvana (warganegara Malaysia) dan 2 orang pegawai kanan.

3. Pegawai Penyelidik adalah seperti mana berikut:

- |     |                        |   |                     |
|-----|------------------------|---|---------------------|
| 3.1 | En. Paul Linus Andrews | - | Penyelidik Utama    |
|     | No. Kad Pengenalan     | - | 681008-01-5829      |
| 3.2 | En. Fam Jia Yui        | - | Pembantu Penyelidik |
|     | No. Kad Pengenalan     | - | 891010-04-5061      |

3. Kelulusan ini tertakluk kepada syarat-syarat seperti di lampiran 'A'. Di samping itu, adalah diingatkan bahawa kajian ini terikat kepada persetujuan banduan yang perlu diperolehi terlebih dahulu sebelum penyelidikan ini dijalankan (Lampiran B). Kelulusan ini adalah khusus untuk tujuan penyelidikan sahaja dan bukan bagi maksud hebahkan. **Rakaman gambar, audio atau pengenalan individu yang sebenar adalah tidak dibenarkan.**

...2/-



1

"Memperkasakan Modal Insan"  
"Kebajikan Diantamaka, Organisasi Dimartabatkan"

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( 2 )

4. Segala urusan lanjut berhubung perkara ini hendaklah dibincangkan terlebih dahulu dengan Pengarah Penjara berkenaan:

4.1 Pengarah  
Sekolah Henry Gurney Puncak Borneo  
KM 23 Jalan Puncak Borneo  
93250 Kuching  
Sarawak  
No. Tel: 082-614066

5. Bersama-sama ini disertakan Surat Aku Janji untuk dibaca dan difahami serta ditandatangani oleh tuan sekiranya bersetuju mematuhi segala syarat-syarat yang ditetapkan. Borang yang telah ditandatangani hendaklah dikembalikan kepada Bahagian Dasar Kepenjaraan, Ibu Pejabat Penjara Malaysia untuk tujuan rekod. Sekiranya Surat Aku Janji ini tidak dikembalikan, pihak Jabatan Penjara Malaysia beranggapan bahawa pelajar tidak berminat dan berhak menarik balik kelulusan yang telah diberikan.

Sekian, terima kasih.

**“BERKHIDMAT UNTUK NEGARA”**

Saya yang menurut perintah,

**(TIMBALAN KOMISIONER SUPRI BIN HASHIM)**  
Timbalan Pengarah Dasar Kepenjaraan (Dasar)  
b.p Komisioner Jeneral Penjara  
Malaysia  
P.C.H.M

s.k:

1. Timbalan Komisioner Jeneral Penjara (Pengurusan)
2. Pengarah Penjara Negeri Sarawak
3. Pengarah Sekolah Henry Gurney Puncak Borneo, Sarawak
  - *Sukacita sekiranya pihak tuan dapat membantu penyelidik tersebut untuk tujuan ini dan menitikberatkan kawalan keselamatan sepanjang kajian ini berjalan.*
  - *Kerjasama tuan juga diminta untuk melantik seorang penyelia bagi memastikan penyelidik menyerahkan dua salinan penghasilan mereka kepada institusi dan satu salinan dipanjangkan ke Bahagian Dasar Kepenjaraan, Ibu Pejabat Penjara Malaysia.*
  - *Bersama-sama ini disertakan sesalinan Borang Persetujuan Peserta Kajian untuk tindakan pihak tuan selanjutnya (Lampiran B). Borang yang telah dilengkapkan hendaklah disimpan di dalam rekod banduan terlibat. Kajian sama sekali tidak melibatkan pesalah reman.*
  - *Disertakan juga soalan-soalan temubual untuk perhatian pihak tuan.*



**SURAT AKU JANJI**

JP/BDK/Rd/ 96/1 Jld. 13( )

Saya, \_\_\_\_\_ No. Kad Pengenalan \_\_\_\_\_  
beralamat di \_\_\_\_\_

berjanji untuk mematuhi semua peruntukan undang-undang, peraturan, arahan dan syarat yang berkuatkuasa dalam menjalankan latihan praktikal tersebut. Saya juga dengan sesungguhnya berjanji bahawa saya:-

- (i) akan menggunakan maklumat yang dibekalkan khusus untuk tujuan pembelajaran sahaja dan bukan bagi maksud hebahan sama ada media cetak/elektronik serta tidak boleh disebarikan kepada mana-mana pihak termasuklah media massa ;
- (ii) tidak akan menggunakan maklumat yang diperolehi atau mana-mana bahagian hasil kajian bagi maksud penyiaran/ hebahan atau pembentangan dalam persidangan, seminar, forum, konferens, symposium atau penulisan rencana akademik dan lain-lain yang membolehkan pihak lain mendapat maklumat ini;
- (iii) Tidak akan menggunakan maklumat yang diperolehi untuk kepentingan individu atau pihak lain;
- (iv) tidak akan merakam imej banduan, penjara atau mana-mana bahagian penjara menggunakan apa-apa jua perkakas fotografi;
- (v) tidak akan menyampaikan, menerima, mendapatkan, menyalin, menyimpan, mengumpul, merakamkan atau menyiarkan sama ada kesemuanya atau sebahagiannya dan sama ada benda, suratan atau maklumat itu sendiri atau isi, natijah atau perihalnya sahaja disampaikan, diterima, didapatkan, disimpan, dikumpul, dirakamkan atau disiarkan tanpa kebenaran bertulis Komisioner Jeneral Penjara;
- (vi) akan sentiasa memelihara imej Jabatan Penjara, Kementerian Dalam Negeri dan Kerajaan Malaysia; dan
- (vii) Mematuhi semua syarat-syarat seperti di Lampiran A.

Saya sesungguhnya faham bahawa jika saya melanggar Aku Janji ini, saya boleh dikenakan tindakan undang-undang di bawah Akta Rahsia Rasmi 1972 atau mana-mana undang-undang lain yang terpakai.

**Tandatangan Pemohon**

**Tandatangan Saksi**

.....	.....
(Nama : .....)	(Nama : .....)
No. K/P : .....	No. K/P : .....
No. Telefon:.....	No. Telefon:.....
Tarikh : .....	Tarikh:.....
Tarikh Jangkaan Laporan Dihantar.....	Jawatan : PENYELIA

..... diisi oleh Jabatan Penjara Malaysia .....

**Disahkan Oleh :**

.....	.....
(Nama : .....)	Cop Rasmi Jabatan Penjara
Jawatan : .....	

**SYARAT-SYARAT  
MENJALANKAN KAJIAN/ LATIHAN PRAKTIKUM/ PROGRAM  
DI JABATAN PENJARA MALAYSIA**

1. Jumlah dan nama pengkaji yang terlibat perlu dikemukakan dan ditetapkan. Tambahan nama pengkaji hanya boleh dibenarkan dengan kelulusan Jabatan Penjara Malaysia atau Kementerian Dalam Negeri.
2. Pengkaji atau pemohon yang terlibat serta peralatan yang dibawa boleh diperiksa semasa masuk dan keluar dari penjara. Mana-mana pengkaji atau pemohon yang didapati membawa masuk atau membawa keluar barang larangan atau barang yang tidak mendapat kelulusan boleh tidak dibenarkan masuk ke penjara;
2. Pengkaji atau pemohon hendaklah menyenaraikan peralatan atau bahan yang akan dibawa masuk semasa permohonan atau sebelum kajian dibuat.
3. Bagi tujuan keselamatan dan mematuhi ketetapan Akta Penjara 1995 serta Peraturan-Peraturan Penjara 2000, pengkaji atau pemohon adalah tertakluk kepada arahan dan tatacara kawalan yang ditetapkan oleh pengurusan penjara terlibat sepanjang tempoh berada di penjara berkenaan;
4. Bagi tujuan kawalan keselamatan pengkaji atau pemohon hanya dibenarkan berada di lokasi-lokasi yang ditetapkan oleh pihak penjara dan sebarang pergerakan ke lokasi-lokasi berkenaan perlu dalam pengetahuan oleh pihak penjara;
5. Dilarang merakam percakapan dengan menggunakan alat perakam, imej banduan dan struktur fizikal penjara menggunakan apa-apa jua perkakas fotografi;
6. Hasil kajian atau sebahagian maklumat berhubung hasil kajian tidak boleh diberikan kepada lain-lain pihak bagi apa-apa maksud kecuali dengan kebenaran Jabatan Penjara Malaysia;
7. Hasil kajian atau sebahagian hasil kajian tidak boleh digunakan bagi maksud apa-apa penerbitan atau penyiaran tanpa kelulusan oleh Jabatan Penjara Malaysia.
8. Begitu juga maklumat berhubung penjara atau banduan atau pegawai penjara yang diperolehi tidak boleh disebar kepada mana-mana pihak tanpa kebenaran Jabatan Penjara Malaysia;
9. Jabatan Penjara Malaysia boleh pada bila-bila masa atas apa-apa alasan yang difikirkan wajar dan munasabah, menarik balik kelulusan yang diberi atau hasil kajian pihak tuan dan keputusan sedemikian adalah muktamad dan tidak boleh dipertikaikan.
10. Pihak pengkaji/ pemohon bertanggungjawab mengemukakan hasil kajian/ laporan praktikal kepada Jabatan Penjara Malaysia.

Bahagian Dasar Kepenjaraan  
**Ibu Pejabat Penjara Malaysia**

**BORANG PERSETUJUAN SEBAGAI PESERTA KAJIAN/ PENYELIDIKAN**

Saya.....  
No K/P.....bersetuju secara sukarela untuk  
menjadi peserta penyelidikan bertajuk  
“.....”  
yang dijalankan oleh pengkaji; .....  
(KP:.....) dari .....

2. Saya sedia maklum bahawa saya akan terlibat dalam proses kutipan data, iaitu melalui kaedah .....

3. Segala maklumat peribadi yang diberikan oleh saya perlu dirahsiakan dan digunakan hanya untuk tujuan kajian ini sahaja.

Terima kasih.

Yang benar,

Saksi;

.....  
(Tandatangan/ Cap Jari)

.....  
Nama & Jawatan:

Institusi:

No. Kad Pengenalan:

**PERAKUAN UNTUK DITANDATANGANI OLEH PENYELIDIK  
BERKENAAN DENGAN AKTA RAHSIA RASMI 1972**

Adalah saya dengan ini mengaku bahawa perhatian saya telah ditarik kepada peruntukan-peruntukan Akta Rahsia Rasmi 1972 dan bahawa saya faham dengan sepenuhnya akan segala yang dimaksudkan dalam Akta itu. Khususnya saya faham bahawa menyampaikan, menggunakan atau menyimpan dengan salah, sesuatu benda rahsia, tidak menjaga dengan cara yang berpatutan sesuatu rahsia atau apa-apa tingkahlaku yang membahayakan keselamatan atau rahsia sesuatu benda rahsia adalah menjadi suatu kesalahan di bawah Akta tersebut, yang boleh dihukum maksimum penjara seumur hidup.

Saya faham bahawa segala maklumat yang saya perolehi dalam perkhidmatan Seri Paduka Baginda Yang di-Pertuan Agong atau perkhidmatan mana-mana Kerajaan dalam Malaysia, adalah milik Kerajaan dan tidak akan membocorkan, menyiarkan, atau menyampaikan, sama ada secara lisan atau dengan bertulis, kepada sesiapa jua dalam apa-apa bentuk, kecuali pada masa menjalankan kewajipan - kewajipan rasmi saya, sama ada dalam masa atau selepas perkhidmatan saya dengan Seri Paduka Baginda Yang di-Pertuan Agong atau dengan mana-mana Kerajaan dalam Malaysia dengan tidak terlebih dahulu mendapat kebenaran bertulis pihak berkuasa yang berkenaan. Saya berjanji dan mengaku akan menandatangani suatu akuan selanjutnya bagi maksud ini apabila meninggalkan Perkhidmatan Kerajaan.

Tandatangan : .....

Nama dengan huruf besar : .

No.Kad Pengenalan :

Jawatan :

Jabatan :

Tarikh : .....

Disaksikan oleh: .....

(tandatangan)

Nama dengan huruf besar :

No.Kad Pengenalan :

Jawatan :

Jabatan :

Tarikh : .....

Cop Jabatan : .....

**APPENDIX 8: SEMI STRUCTURED INTERVIEW QUESTIONS FOR THE BOYS IN THE HENRY GURNEY SCHOOL, PUNCAK BORNEO, SARAWAK.**



1. Would you like to share some information about yourself? Perhaps where you are from? How long have you been here?
2. Would you like to share the reasons for your detention?
3. Tell me about your daily routine.
4. Which aspect of the routine do you like the best and which do you not like at all?
5. What do you think is the purpose of these activities?
6. If it is okay, I would like to ask you about children and crime.
  - a) If a child commits a crime, should they be treated differently from adults?  
Why? What was your experience?
  - b) What was your experience when dealing with the police? How did you feel?
  - c) What happened when you were detained on remand?
  - d) Tell me about your experience in court?
  - e) Do you discuss how you feel with anyone?
  - f) How do you feel about your detention here in Henry Gurney?
7. What do understand from the notion of diversion? (Explain if necessary)
8. Do you think that a child should have a right to diversion?
9. Under what circumstances would you suggest that it be used?
10. Is there anything else you would like to add?
11. What are your plans for the future?