

**RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS: A
COMPARATIVE ANALYSIS ON THE COMPATIBILITY OF THE
MALAYSIAN JUVENILE JUSTICE SYSTEM WITH THE
STANDARDS OF THE CONVENTION ON RIGHTS OF
CHILDREN (CRC)**

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**This thesis is submitted in fulfilment of the requirements for the degree of
Doctor of Philosophy in Law**

Law School, Lancaster University

December 2016

ABSTRACT

The rights of children in conflict with the law has always been a central subject of juvenile justice which attracts an intense academic, political and media interest and debate. In this respect, the United Nations Convention on Rights of Children (CRC), which was adopted on 20th November 1989, has laid down international standards and legal framework on rights of children under juvenile justice. The CRC's standards on this matter have served as a useful guideline and benchmark to state parties in determining and assessing the rights of children in criminal proceedings. As a country that has ratified the CRC in 1995, Malaysia is duty-bound to strive towards full implementation of the requirements of the CRC. This study will specifically focus on examining the legal rights of children in criminal proceedings under both the CRC's standards and the Malaysian juvenile justice system. Using the CRC's standards as a guideline and a benchmark, the study aims to assess the rights of children in criminal proceedings under the current Malaysian juvenile justice system. The study will attempt to critically and comparatively analyze to what extent the Malaysian juvenile justice system on the rights of children in criminal proceedings measure up with the CRC's standards. The study concludes that legal reform of current legal framework and policy is necessary to improve and strengthen rights of children in criminal proceedings under Malaysian juvenile justice system. Aiming towards full implementation of the CRC's standards on this aspect, the study provides recommendations and suggestions to be considered in respect of certain imprecision and loopholes in laws as well as policy under the existing Malaysian juvenile justice system.

DECLARATION

I, Aminuddin Mustaffa, hereby declare that this thesis is my original work and has not been presented for any degree in any other University.

A handwritten signature in black ink, appearing to read 'Aminuddin Mustaffa', written in a cursive style.

Signature

ACKNOWLEDGEMENT

It would not have been possible to write this thesis without the precious help and support of people around me, to whom I am greatly indebted. I would like to extend my sincere gratitude and appreciation to my esteemed supervisor, Professor Dr. Alisdair Gillespie, who has spent his valuable time to give inspiring guidance, expert opinion, scholarly advice and constant encouragement throughout my study and research.

I would like to thank my beloved wife (Siti Nurul Aziera), and daughter (Aulia Ammara), for their unconditional love, support, understanding and great patience at all times.

I would like to express my deepest thank to my parents, siblings and other family members who have given continuous support and encouragement.

Lastly, I would like to register a special word of thanks to all my friends, universities' staffs and all people who have directly and indirectly assisted me throughout this academic exploration.

DEDICATION

In loving memory of my late mother and sister.

LIST OF ABBREVIATION

AC	Appeal Cases
ALL ER	All England Law Reports
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
Beijing Rules	The Standard Minimum Rules for the Administration of Justice
CLJ	Current Law Journal
CRC	Convention on the Right of the Child
CPC	Criminal Procedure Code
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
EHRR	European Human Rights Reports
ESC	European Social Charter
Havana Rules	Rules for the Protection of Juveniles Deprived of Their Liberty
EWCA	Criminal Court of Appeal (Criminal Division)
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
MACR	Minimum age of criminal responsibility

MLJ	Malayan Law Journal
MRI	Magnetic Resonance Imaging
NLAF	National Legal Aid Foundation
NGO	Non-governmental organizations
OHCHR	United Nations High Commissioner for Human Rights
PINTAS	Malaysian National Action Plan
Riyadh Guidelines	Guidelines for the Prevention of Delinquency
Robben Island Guidelines	Guidelines And Measures For The Prohibition And Prevention Of Torture, Cruel Inhuman or Degrading Treatment or Punishment in Africa
SMRs	The Standard Minimum Rules for the Treatment of Prisoners
SUHAKAM	Human Rights Commission of Malaysia
Tokyo Rules	The Standard Minimum Rules for Non-Custodial measures
UCHR	European Convention on Human Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children’s Fund
UNODC	United Nations Office on Drugs and Crime
US	United States
VCLT	Vienna Convention on the Law of Treaties
WLR	Weekly Law Reports

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FIRST CHAPTER

INTRODUCTION

1.1 Introduction

Children have always formed majority of the world population.¹ According to the United Nations Children's Fund (UNICEF), the world population will peak to nearly ten billion by 2050, with more than 2.6 billion of them being below the age of eighteen years old.² This trend is expected to continue for many more decades. This fact gives a concrete basis for all nations to design a comprehensive plan and policy on children. Among the aspects that should be prioritised is juvenile delinquency. The issue of delinquency is a significant contemporary problem plaguing all nations. The development of juvenile justice across jurisdictions reveals that various approaches have been adopted to tackle juvenile delinquency. Yet, it is evident that not all juvenile justice systems across the countries function the way they were designed.

At the international level, rigorous efforts have been made by relevant international as well as regional bodies such as the United Nations, Amnesty International, the Human Rights Convention, the Council of Europe, the European Convention on Human Rights and others to address the issue of juvenile delinquency. Consequently, there are various international

¹United Nations Children's Fund, (2015). World Population Prospects: key Findings and Advance Tables, [online] UNICEF. Available from: <https://esa.un.org/unpd/wpp/> [Accessed on 25/7/2016].

²United Nations Children's Fund, (2014). *The State of the World's Children 2015: Reimagine the Future Innovation for Every Child*, [online] UNICEF. Available from: <http://sowc2015.unicef.org/> [Accessed on 5/12/2015].

instruments in the form of treaties, declarations, resolutions and others that directly and indirectly concern juvenile justice introduced by these international bodies. Among the most important instruments that directly relate to juvenile justice are the Standard Minimum Rules for the Administration of Justice (the “Beijing Rules”), the Rules for the Protection of Juveniles Deprived of Their Liberty (the “Havana Rules”), the Guidelines for the Prevention of Delinquency (the “Riyadh Guidelines”), the Standard Minimum Rules for Non-Custodial measures (the “Tokyo Rules”), and the Convention on the Right of the Child (the “CRC”). The Beijing Rules were adopted by the United Nations General Assembly in 1985.³ The Rules provide minimum standards for the administration of juvenile justice system and the care of juveniles within the system.⁴ These standards serve as a guideline for the development of a comprehensive framework on juvenile justice systems in all jurisdictions. The Havana Rules were adopted by the United Nations General Assembly in 1990.⁵ These rules provide standards applicable to any child who is confined to any institution or facility. The main aim of these rules is to minimize the detrimental effects of deprivation of liberty on children.⁶ The rules set out minimum standards for children deprived of liberty, which include privacy, access to medical treatment, access to education, access to family, adequate nutrition, clothing, access to recreational activities and others. The Riyadh Guidelines were adopted by the United Nations General Assembly in 1990.⁷ These Guidelines represent comprehensive and proactive policies aimed at preventing and protecting children from offending. According to these guidelines, prevention is regarded not merely as a matter of tackling negative situations, but rather as a means to positively promote general welfare and well-being. The Tokyo Rules were adopted by the United Nations General Assembly in 1990.⁸ The Rules aim

³Adopted by the United Nation General Assembly Resolution 40/33 of 29 November 1985.

⁴Commentary to Rule 2 of the Beijing Rules.

⁵Adopted by the United Nation General Assembly resolution 45/113 of 14 December 1990.

⁶Rule 3 of the Havana Rules.

⁷Adopted by the United Nation General Assembly resolution 45/112 of 14 December 1990.

⁸Adopted by the United Nations General Assembly resolution 45/110 of 14 December 1990.

to promote greater community involvement in the treatment of juvenile offenders under criminal justice, as well to promote a sense of responsibility among them towards society.⁹ The CRC was passed by the United Nations on the 20th November 1989 and came into force in 1990.¹⁰ A rights based approach introduced by the CRC promotes the recognition of children's rights at the international level. It has passed a resolution to recognize the rights of children at the international level which cover civil, political, economic, social and cultural rights. These international instruments are important as they have laid down internationally recognized standards, principles, norms on juvenile justice that serve as guidelines to various legal systems.

Among all these instruments, the CRC is regarded as the most important instrument on child rights due to its binding nature.¹¹ As far as juvenile justice is concerned, the CRC has set out principles and standards which serve as an internationally acceptable legal framework on a juvenile justice system. The Committee on the CRC, which is in charge of its monitoring and implementation, issued the General Comment Number 10 in 2007 which specifically deals with the issue of the administration of a juvenile justice system.¹² The aim of this general comment is to provide the state parties with guidance as well as recommendations for the establishment of the administration of juvenile justice in compliance with the CRC standards.¹³ The General Comment 2007 has outlined specific core elements which should form the basis of a comprehensive juvenile justice system. These elements include prevention of juvenile justice, interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings, the minimum age of

⁹Rule 1.2 of the Tokyo Rules.

¹⁰Adopted by the United Nation General Assembly resolution 44/25 of 20 November 1989.

¹¹Buck, T. (2014). *International Child Law*. 3rd ed. London: Routledge, p 87.

¹²Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007.

¹³*Ibid*, para. 4.

criminal responsibility, the upper age-limit for juvenile justice, the guarantee for a fair trial, and deprivation of liberty including pre-trial detention and post-trial detention.

Similar to other jurisdictions, Malaysia also faces tremendous challenges in tackling the issue of juvenile delinquency. The high volume of criminal cases involving juveniles has become a matter of great concern. Statistics indicate that there were a total of 3,862 and 4,465 cases of juveniles involved in various types of criminal cases recorded in 2009 and 2010 respectively.¹⁴ However, the latest statistics revealed that the number of juvenile cases has escalated drastically. The Royal Malaysian Police disclosed that 7,647 juvenile cases were recorded between January 2013 and October 2013.¹⁵ The number has continuously increased in 2014 with a total of 9,509 juvenile cases recorded between January and October 2014.¹⁶ This figure represents a 24.4% increment of recorded juvenile cases compare to the same period in the previous year. The escalating number of juvenile cases in Malaysia has sparked a scholarly debate on various aspects relating to the current juvenile justice system. Among the issues that have been the subject of main discussion is the adequacy of the Malaysian juvenile justice system in guaranteeing and protecting rights of child suspects and accused during the entirety of the juvenile justice process. Questions have been raised over the compatibility of the Malaysian juvenile justice system with international standards, particularly the CRC, on this aspect.

¹⁴Mohd Yusof, J. Z. and Thambapillay, S. (2012). The Role of the Court for Children in Dealing with Children Involved in Crime. *The Law Review*, 1, p. 2.

¹⁵Lam Thye., L.(2015). Kes Juvana Meningkatkan, Perlu Perhatian Semua Pihak. [online] *Utusan Malaysia*, 27th Feb. Available from: <http://www.utusan.com.my> [Accessed on 9/11/2015].

¹⁶*Ibid.*

The Malaysian Government ratified the CRC on 17th February 1995.¹⁷ Therefore, it is the duty of the Government of Malaysia to ensure that requirements of the CRC are fully complied with and implemented. As a country which is based on the Common Law system, ratification of international treaties does not automatically incorporate it as part of the Malaysian legal system.¹⁸ Instead, rules of international law can operate in a national legal system only if they are deliberately transformed by means of a parliamentary enactment.¹⁹ In other words, the Government of Malaysia needs to enact new legislations to incorporate the requirements of the CRC into domestic law. At the same time, it is also crucial for the Government of Malaysia to review all existing legislations to ensure full compliance with the CRC. The Government of Malaysia has taken progressive measures towards implementation of the CRC, which include the introduction of new laws and policies. In conjunction with the requirement of the CRC, the Malaysian Government has submitted its first periodic report on December 2006. As a response, the Committee on the CRC issued its Concluding Observation which, *inter alia*, contains comments and suggestions on the Malaysian juvenile justice system.²⁰ While acknowledging positive measures taken by the Government of Malaysia to comply with international standards regarding juvenile justice, the Committee has also expressed its concern over certain aspects of the Malaysian juvenile justice system which are not in compliance with the CRC's standards specifically set out under Articles 37 and 40 of the CRC. Briefly, Article 37 concerns the establishment of leading principles regarding the detention of children, which covers the prohibition of torture, or other cruel,

¹⁷Mustaffa, A. and Kamaliah, S. (2010). Evidence by Child in Criminal Proceedings in Malaysian Courts: A Study on Post Ratification of Convention of Rights of Child. *Malaysian Current Law Journal*, 6,p i.

¹⁸Hamid, A.G. (2005). Judicial Application of International Law in Malaysia: A Critical Analysis. In: Harry, L.R., ed., *Asia-Pacific Yearbook of International Humanitarian Law*. Philippines: University of the Philippines Law Center, pp. 196-214, Shuaib, F.S. (2008). The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse. *International Islamic University Malaysia Law Journal*, 16(2), p.194, Haji Yusof, H. (1969). Internal Application of International Law in Malaysia and Singapore. *Singapore Law Review*, 1, p 62.

¹⁹*The Government of the State of Kelantan v The Government of the Federation Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ, 1, 355.

²⁰Committee on the Rights of the Child, *Concluding Observations: Malaysia*, UN Doc. CRC/C/MYS /CO/1, 2 February 2007.

inhuman or degrading treatment or punishment and legal requirements and rights of children deprived of liberty. Whereas Article 40 provides a framework on the fundamental principles relating to children in conflict with the law, which includes procedural guarantees to be accorded to them, the requirement of establishing laws, procedures, authorities, institution and designation alternatives to institutional care.

Both articles form the central pillars of the CRC's standard on juvenile justice, upon which the states parties are required to structure their domestic juvenile law, policy and practice. Among the aspects highlighted by the Committee in their report is the issue of low minimum age of criminal responsibility, the absence of alternative measures in dealing with juveniles, non-comprehensive laws relating to the deprivation of the liberty and right of children to privacy, and delay in the disposal of juvenile cases.²¹ The report has expressly pointed out that certain aspects of the current Malaysian juvenile justice system are not only incompatible with the standards set by the CRC, but are also far from being comprehensive. Pursuant to that, the committee has urged the Government of Malaysia to strive towards the full implementation of the CRC's standards on juvenile justice.²²

In addition, the Child Rights International Network, a global research, policy and advocacy organization grounded in the UN Convention on the Rights of the Child, has recently conducted a study on children's access to justice. The study aims to examine how the law in participating states treats children involved in legal proceedings, the legal means available to challenge violations of children's rights, and the practical considerations in

²¹*Ibid*, paras. 104(a)-(f).

²²*Ibid*, Para. 104.

challenging violations using the legal system.²³ This first ever global study has analysed the extent to which legal systems has empowered children to challenge violations of their rights. The report revealed that Malaysia has been ranked at 130 out of 197 countries.²⁴ The result from the report indicated, among other things, that treatment of children as well as their access to justice under the Malaysian juvenile justice system are restricted and far from satisfactory. In addition, It should be noted Malaysian country consists of 13 different states. While they are governed by the same legal framework, there may be divergences in term of resources, facilities, expertise and practices which in turn may affect extent and effectiveness of implementation of the law in whole country.

Despite this, there is no doubt that the ratification of the CRC has remarkably changed the landscape of the juvenile justice system in Malaysia. As a result of the CRC, the Government of Malaysia has initiated various positive measures to incorporate the CRC's standards on juvenile justice into the Malaysian juvenile justice system. Nonetheless, the Government of Malaysia is still struggling towards full compliance of the CRC's standard of juvenile justice. There are certain aspects of the Malaysian juvenile justice system which are still not up to par with the CRC's standards despite it having been ratified nearly twenty-one years ago. Therefore, it is crucial for the Government of Malaysia to look into this issue seriously as it reflects the accountability, credibility and consistency of this country in complying with the requirements of the CRC, a legally binding international instrument.

²³Children Rights International Network, (2016). *Rights, Remedies and Representation: A global report on access to justice for children.* [online] CRIN. Available from: <https://www.crin.org/en/home/law/access>[Accessed on 21/4/ 2016].

²⁴Children Rights International Network, (2016). *Access to Justice For Children: Malaysia.* [online] CRIN. Available from: <https://www.crin.org/en/library/publications/malaysia-access-justice-children> [Accessed on 22/4/2016].

1.2 Objectives of Research

This research will specifically focus on the compatibility of both substantive and procedural Malaysian juvenile laws pertaining to the rights of children in criminal proceedings with reference to the international standards set by the CRC. This research will attempt to answer the question of the extent to which the provisions of the CRC have been reflected in the sphere of juvenile justice system in Malaysia. Using the CRC's standards as a benchmark, this research will comparatively scrutinize the provisions of relevant local statutes and the application of law by referring to decided cases, procedures and practices for the time being enforced. In addition, the research will also include the discussion on the provisions of the recent amendment to the Child Act 2001, which was gazetted on 25th July 2016.²⁵ By virtue of the amendment, the Act is now titled as the Child Act (Amendment) 2016. The Act is only expected to come into force next year.²⁶ This is to enable various parties including the judges, lawyers and relevant officers and agencies to understand the nature and effects of the amendment. In addition, the delay is also necessary to ensure that all relevant measures and arrangement relating to appointment of staffs, facilities and financial resources could be properly sorted out before the amendment officially come into operation.

In line with that, the research questions for this research are as follows;

- i- To what extent are the rights of children in criminal proceedings recognized under both the CRC as well as Malaysian juvenile justice system?

²⁵Attorney General Chamber's of Malaysia, 2016. Federal Gazette. [online] AGC. Available from: <http://www.federalgazette.agc.gov.my/> [Accessed on 30/7/2016].

²⁶Bernama (2016). Child Act (Amendment) 2016 Gazetted. [online] New Strait Times, 26th July. Available from: <http://www.nst.com.my> [Accessed on 29/7/2016], Bernama (2016). Implement Amendment to Children Act in Sept 2017-Ministry. [online] Malaysian Digest, 17th April. Available from: <http://www.malaysiandigest.com> [Accessed on 2/8/2016].

- ii- To what extent does the Malaysian juvenile justice system comply with the rights of children in criminal proceedings as described by the CRC's standards?
- iii- Are there aspects of Malaysian juvenile justice that require amendment or reform in order to meet the standards of the CRC?

Objectives of this research are as follows:

- i- To identify the rights of children in criminal legal proceedings set out by the CRC as well as the Malaysian juvenile justice system.
- ii- To comparatively analyze the CRC's standards against the rights of children in criminal proceedings under the Malaysian juvenile justice system.
- iii- To propose legal reform of Malaysian juvenile justice system pertaining to the rights of children in criminal proceedings based on the standards set out by the CRC.

1.3 Significance of the Research

There is no doubt that the Malaysian juvenile justice system has undergone several phases of positive developments, especially after the ratification of the CRC. Among the significant outcomes of the CRC on the Malaysian juvenile justice system include the introduction of new legislation as well as the revision of existing legislations to streamline with the standards set by the CRC. Nonetheless, the comments and recommendation made by the Committee on the CRC in its general observation on Malaysia's juvenile justice in 2007 indicate that there are certain aspects of the CRC's standards on juvenile justice which have not yet been fully implemented by the Malaysian Government. The report has been used as an indicator by the Government of Malaysia to strategize plan and measures towards full implementation of the CRC's standards on juvenile justice.

To date, nine years have lapsed since the issuance of the first report by the Committee of the CRC on Malaysia. It is high time that the Government of Malaysia examines the progress that has been made in the past nine years in measuring up with the CRCs' standard on juvenile justice. This issue is significant as failure to comply with the CRC's standards on this matter has imminent repercussions. Firstly, non-compliance with the CRC is deemed as a breach of international law.²⁷ Malaysia, as a country that has ratified the CRC, is duty bound under international law to fully comply with the CRC's standards. Secondly, non-compliance with the CRC's standard also may tarnish the image of the Government of Malaysia in the eyes of international arena. By implication, it indicates a lack of commitment and inconsistency on part of the government to fulfil her international obligations under the international law. More importantly, failure to comply with the CRC's standards on the rights of children under the juvenile justice system also amounts to violation of rights of children. Lastly, failure to comply with CRC's standards may raise questions over the adequacy and comprehensiveness of Malaysian laws, particularly on the subject of rights of children under juvenile justice.

The central aim of this research is to critically analyze the rights of children in criminal proceedings under the Malaysian juvenile justice system and its compatibility with the CRC's standards. The research will highlight detailed accounts of the CRC's expectations against state parties in terms of the rights of children in criminal proceedings. Reference will be made to relevant provisions of the CRC as well as various reports and guidelines laid down by the Committee on the CRC, which sets out principles, norms and measures that state parties need to consider when implementing the CRC's standards. Comparatively, the

²⁷Vienna Convention on the Law of Treaties (1969), UN Doc. A/CONF. 39/26, adopted 23 May 1969, in force 27 January 1980, Article 26.

research will critically scrutinize the rights of children under the existing Malaysian juvenile justice system and its compatibility with the standards of the CRC. It will highlight the experiences of the Malaysian juvenile justice system in implementing the CRC's standards on rights of children in criminal proceedings. The discussion on both pre-trial and trial rights of children under current law will be examined with reference to relevant provisions of the statutes, decided cases and current legal practices.

All in all, this research is a significant contribution of knowledge particularly on the subject of the compatibility of Malaysian law regarding the rights of children in criminal proceedings with the CRC's standards. The lack of thorough literature on this specific legal aspect is identified as one of main challenges faced by the Government of Malaysia in assessing the development of Malaysian juvenile justice. In order to improve the standard of Malaysian juvenile justice, it is crucial to consistently examine the adequacy and contemporaneousness of Malaysian current law and policies with reference to local circumstances as well as international standards. Therefore, in-depth research on the current Malaysian juvenile justice system is much needed to fill in the gap on the lack of literature on this subject matter. It is hoped that the findings presented in this research may contribute toward expediting the process to fully streamline Malaysian law on rights of children under juvenile justice with the international standards fixed by the CRC. In the meantime, it is also hoped that the recommendations proposed in this research may be taken into consideration for the development of a comprehensive Malaysian legal framework on juvenile justice.

Apart from that, this research will contribute academic insight on child rights under juvenile justice. It will supplement and add more knowledge and information regarding the Malaysian juvenile justice system, which in turn may serve as a compelling catalyst for more

local studies on this subject. The findings and ideas advanced in this research also may possibly be utilized for the purpose of a comparative study by interested researchers from other countries. Undoubtedly, a comparative legal study on this subject between countries' juvenile justice models could potentially contribute towards a better understanding on the strength and weaknesses of each system.

Lastly, the findings of this research may also be utilized by relevant interested parties, such as government bodies, non-governmental organizations, children rights' advocacy societies and others in their aim to strengthen the rights of children under various aspects of the Malaysian juvenile justice system.

1.4 Research Methodology

This research employs a combination of doctrinal and comparative analyses. Doctrinal analysis concerns with legal doctrine which consists of the concepts, rules, and principles set out in law books and authoritatively stated in legislation or deduced from judicial decisions.²⁸ The research will fundamentally involve the critical analysis of material from both primary and secondary sources. Primary sources comprise legislation, regulations and rules, and case laws such as statutes, conventions, and treaties. These primary sources will be critical to identifying the relevant body of law as well as governing principles that regulate the rights of children under juvenile justice at the international as well as national levels. Relevant provisions of the CRC and various reports by the Committee on the CRC will be the main focus of analysis to identify governing principles of the CRC's standards on rights of children in juvenile proceedings. Reference will also be made to other relevant

²⁸Cotterrel, R. (1995). *Law's Community: Legal Theory in Sociological Perspective*. New York: Oxford University Press, p 50.

international instruments, reports and cases to grasp a better understanding on international standards on this subject. With regard to the Malaysian juvenile justice system, the main statutes that will be the focus of examination are the Child Act 2001 and the Malaysian Criminal Procedure code. Reference also will be made to decided cases, relevant statutes and reports to examine the practical aspect and application of law.

On the other hand, secondary sources comprise text books, journal articles, historical records, legal encyclopaedias, seminar papers, newspapers and official websites. They will also be referred to keep abreast with the development of law, current issues, academic discussion, data and other relevant information and knowledge on this subject. For example, this research, in the course of discussion, will make reference to the UNICEF report entitled "*The Malaysian Juvenile justice system: A Study of Mechanisms for Handling Children in Conflict with the Law*" as it contains the latest data as well as statistics regarding involvement of children in criminal activities. Reference to this report is important as gaining cooperation from government officers as well as access to official data from different governmental departments in Malaysia for the purpose of academic research is difficult due to bureaucratic constraints.

Apart from that, this research also adopts a comparative analysis method. Comparative analysis of different legal systems or different models of justice may disclose how different responses are developed to address the issues of juveniles.²⁹ Information and knowledge gained from the practice and experience of different legal systems and models of justice may be utilized as a basis to adopt, adapt and develop new responses in the form of

²⁹Reichel, P. (2012). *Comparative Criminal Justice Systems: A Topical Approach*. 6th ed. Upper Saddle River, NJ: Prentice Hall, p 20.

the development of law³⁰ and the legal reform process.³¹ Examination of different approaches from other legal systems's practice and experience is vital as it could enable Malaysia to figure out different means of addressing social issues, including those related to law.³² In the context of this research, it specifically focuses on the comparative analysis between the CRC's standards and Malaysian juvenile justice system. The CRC's standards will be used as a vital benchmark in measuring international standards on rights of children in criminal proceedings. Using the CRC'S standards as a benchmark, the research will assess to what extent the requirements of the CRC on this particular aspect have been complied and reflected in current Malaysian juvenile justice system. In the course of discussion, reference will be made to selected legal systems particularly to exemplify relevant points concerning practical aspects in term of the application of the CRC's requirements.

The adoption of comparative method in this research is useful and appropriate as it may not only disclose adequacy of Malaysian laws on this aspect but also potentially facilitate the development of Malaysian juvenile justice system consistent with the recognized international standards set out by the CRC. Moreover, a comparative analysis may enable the identification of flaws, weaknesses or shortcomings in the existing Malaysian juvenile justice system, which shall then be used as grounds to call for a legal reform in this area.

³⁰Sacco, R. (1991). Legal Formants: A Dynamic Approach to Comparative Law. *American Journal of Comparative Law*, 39(1), p 5.

³¹Kahn-freund, O. (1974). On Uses and Misuses of Comparative Law. *The Modern Law Review*, 37(1), pp.1-2.

³²Yaqin., A. (2007). *Legal Research and Writing*. Kelana Jaya: Malayan Law Journal Sdn Bhd, p 18.

1.5 Structures of the Thesis

The thesis is structured into six chapters as follows;

Chapter 1: This chapter offers a general background of the study, research questions, research objectives, significance and methodology of the study.

Chapter 2: This chapter provides a historical background of the juvenile justice system. It examines the development of different models of juvenile justice to tackle the problem of juvenile delinquency. Special reference is also made to the historical development of the Malaysian juvenile justice system.

Chapter 3: This chapter focuses on the discussion of criminal responsibility of children. It examines the conceptualization of child criminal responsibility, the contribution of science and psychology in determining the age of responsibility, and its legal position under both the CRC and the Malaysian juvenile justice system.

Chapter 4: This chapter examines the CRC's standards on rights of children under juvenile justice. It sets out specific rights accorded to children by the CRC at both the pre-trial and trial stages of the criminal processes. The discussion will analyze the principles governing these rights as specified in the provisions of the CRC as well the reports and guidelines laid down by the Committee on the CRC.

Chapter 5: This chapter examines the legal position on rights of children in criminal proceedings under the Malaysian juvenile justice system. It scrutinizes the adequacy of laws in protecting rights of children at various stages of criminal processes with reference to the provisions of statutes, decided cases and current legal practice.

Chapter 6: This chapter provides a comparative analysis on rights of children between the CRC's standards and the Malaysian juvenile justice system. The analysis critically examines to what extent the current Malaysian juvenile justice compatible with the standards set out by the CRC. It will attempt to identify aspects of child rights under the Malaysian juvenile

justice system which do not measure up with the CRC's standards. This chapter also provides a proposal for the holistic reform of current Malaysian juvenile justice on rights of children to have it streamlined with the CRC's standards.

SECOND CHAPTER

HISTORICAL BACKGROUND OF JUVENILE JUSTICE MODEL; FROM *PARENS PATRIAE* TO CHILD RIGHTS BASED APPROACH

2.1 Introduction

The juvenile justice system is unique as it has continuously derived interesting and vigorous philosophical debates and arguments. A juvenile justice system refers to legislation, norms, standards, guidelines, policies, procedures, mechanisms, bodies and institutions that are specifically applicable to children in conflict with the law or who are over the age of criminal responsibility.¹ The system is complex as it involves a variety of institutions, agencies and bodies that are primarily responsible in dealing with delinquency matters, such as police, prosecutors, judiciary, lawyers, ministries, detention facilities, non-governmental organizations and others.² These institutions, agencies and bodies are accountable to administer legal process, programmes and activities that are specifically designed for children who are in conflict with the law.

¹United Nations Children's Fund, (2011). *Guidance for Legislative Reform on Juvenile Justice*. [online] UNICEF. Available from: http://www.unicef.org/policyanalysis/files/Juvenile_justice_16052011_final.pdf. [Accessed on 27/4/2016].

²Abramson, B. (2006). Juvenile Justice: The 'Unwanted Child': Why the Potential of the Convention on the Rights of the Child Is Not Being Realized, And What We Can Do About It. In: Jensen, E.L. and Jepsen, J., eds., *Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems*. Portland: Hart Publishing, p 23.

This chapter depicts the historical background as well as the evolution of the juvenile justice system which was established in Western countries by the end of the nineteenth century. The discussion in this chapter will be divided into three main parts. The first part focuses on philosophical theories, principles and approaches underpinning juvenile justice systems which influence the development of different models of child justice. The second part focuses on the rights based approach introduced by the CRC, which has revolutionized the development of juvenile justice systems across jurisdictions. The rights based approach model under the CRC will be examined in terms of its concept, principles as well as significance in laying down international legal framework on juvenile justice system. The final part discusses the historical background and development of the Malaysian juvenile justice system. It will highlight to what extent the global evolution and development of the juvenile justice system have influenced the Malaysian juvenile justice system.

2.2 Juvenile Justice Model

Among the central issues in juvenile justice systems is legal treatment of children. This issue is vital as it is essentially a reflection of a society's civility, value and culture system, moral integrity, compassion and humanity.³ While there is overwhelming recognition that children are fundamentally different from adults, there are competing views on the appropriate legal response to child delinquency. The adoption of diverse theoretical and philosophical approaches has significantly led to the implementation of different models of juvenile justice systems across different countries.⁴ Consequently, there is considerable divergence of legal approaches, policies, agencies, institutions and programmes developed by

³Goldson, B. (2009). What "justice" for children in conflict with the law? Some reflections and thoughts. *Criminal Justice Matters*, 76(1), p 19.

⁴Winterdyk, J.A.(2015). Introduction: Juvenile Justice in the International Arena. In: Winterdyk, J.A., ed., *Child Justice: International Perspectives, Models and Trends*. New York: CRC Press, p 7.

different jurisdictions to deal with children involved in legal violations. Broadly, juvenile justice systems are an empirical amalgam of welfare, justice, crime control, diversion and restorative models. These models have been invariably adopted by different jurisdictions across nations and times.

2.2.1 Welfare Model

The development of juvenile justice has been largely characterized by the conflict between the welfare and justice models, between rehabilitating the young offender and punishing her for the offence, between safeguarding children and protecting society. Historically, children were treated much the same as adults.⁵ They were regarded as miniature adults and subjected to the same criminal justice processes as adults. Until the mid-nineteenth century, there was no separate juvenile justice existed under Western legal systems.⁶ However, this position changed in the latter part of the 19th century, where there was an acknowledgement that children are uniquely vulnerable and require special treatment.⁷ The notion that children are not just small adults became more common. This development led to the emergence of a juvenile justice system in Western countries, such as Britain and United States, at around the turn of the twentieth century.⁸ By virtue of the Illinois Child Court Act 1899, the first child court was established in United States. This significant development is usually cited to have marked the emergence of the juvenile justice

⁵Zierdt, C. (1999). The Little Engine That Arrived at the Wrong Station : How to Get Juvenile Justice Back on the Track.*University of San Francisco Law Review*, 33, p 403.

⁶Fortin, J.(2009). *Children's Rights and the Developing Law*. 3rd ed., Cambridge: Cambridge University Press, p 709.

⁷Gardner, M.(1982). Punishment and Child Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders.*Vanderbilt Law Review*,35, p 791.

⁸Jensen, E.L., Jepsen, J. (2006). Introduction. In: Jensen, E.L., Jepsen, J.,eds., *Child Law Violators, Human Rights, and the Development of New Juvenile justice systems*. Portland: Hart Publishing, p 2.

system.⁹ During that point of time, the doctrine of *parens patriae* led to the creation of separate systems for children and adults. This doctrine was originally applied in English Chancery Courts to protect the interest of the Crown in the property of children whose parents passed away and left estates behind.¹⁰ Under this doctrine, the state was regarded as parent of the country and therefore acted as parent for the estates of the children. As a result, the state would take over the management of the property of the children until they reached the age of majority.¹¹ In terms of juvenile justice, the doctrine of *parens patriae* under English Common Law maintains the idea that the King's Chancellor is authorized to make decisions for children separate from the jurisdiction of the English criminal court.¹² It is premised upon the principle that parents, as agents of society, and the state, as the father of the country, have legitimate authority to make decisions in the upbringing of children. Therefore, the state is legitimately empowered to exercise its authority when the best interest of children demands its intervention.

Under the *parens patriae* authority, the aim and approach of the juvenile justice system are different from the criminal justice system. Subscribing to the idea that children require different treatment from adults, the espoused purpose of the juvenile justice system is to rehabilitate and treat children rather than to punish them. It embodies the philosophy that children are developmentally different from adults. This notion, which promotes the protective role of the state in delinquency matters, gave rise to the creation of a separate court for children. The central tenets that guide the child court are rehabilitation and treatment

⁹Junger-Tas, J. (2002). The Juvenile Justice System: Past and Present Trends in Western Society. In: Weijers, I. and Duff, A., eds., *Punishing Children: Principle and critique*. Oxford Portland Oregon: Hart Publishing, p 29.

¹⁰Arthur, R. (2010). *Young Offenders and the Law: How the Law Responds to Youth Offending*. London:Routledge, p 8.

¹¹Bernard, T.J and Kurlychek, M.C. (2010). *The Cycle of Juvenile justice*. New York: Oxford University Press, p 76.

¹²Sabo, S. (1996). Rights of Passage: An Analysis of Waiver of Child Court Jurisdiction. *Fordham Law Review*, 64, p 24.

rather than punishment and retribution. The roles of the child courts are seen as quasi-social welfare institutions which act in the best interest of children. The judges treat children like persons in need of guidance.¹³ The requirement of due process is not given as much attention as children brought before the court are handled using informal processes and the welfare-oriented method of disposition. As such, the apparent rigidities and technicalities of substantive as well as procedural criminal law are not applicable in juvenile proceedings. The welfare model of juvenile justice remained largely intact in most of Western countries until the 1960's and 1970's.¹⁴

2.2.2 Justice Model

The justice model is structured upon the idea of culpability and responsibility. It supports the notion of a strict legal due process system and the proportionality of sanction which focuses on the offence rather than the offender.¹⁵ According to the classicist approach, which supports the justice approach to children, crime is irrational and punishment is necessary in order to show the irrationality of the law-breaking behaviour.¹⁶ Punishment imposed on the offender must also be proportionate to the harm done to violated interests. With regard to the young offenders, the classicist argues that their lack of capacity should only serve as a mitigating factor rather than a complete excuse from criminal liability.¹⁷

¹³Farber, H.B. (2004). The Role of the Parent/Guardian in Child Custodial Interrogations: Friend or Foe. *American Criminal Law Review*, 41, p 1281.

¹⁴Junger-Tas, J., n. 9 above, p 30.

¹⁵Pratt, J. (1989). Corporatism: The Third Model of Juvenile Justice. *British Journal of Criminology*, 29(3), p 239.

¹⁶Jane, P. (2000). Introduction: A New Youth Justice for A New Century?. In: Jane, P., ed., *Youth Justice: Theory and Practice*. London, Sydney: Cavendish Publishing Limited, p xxvii.

¹⁷*Ibid*, p xxvii.

The justice model of juvenile justice gained popularity among various Western jurisdictions beginning in the 1960s.¹⁸ The modern evolution of juvenile justice paved the way for the emergence of the justice model. Societal and legal developments have witnessed gradual changes in juvenile justice approach at the expense of welfare model. The effectiveness of the welfare model in dealing with child delinquency has been the subject of scrutiny by various parties. There has been concern that the welfare model has various shortcomings and weaknesses. The role of child courts, whose function is more to improve the welfare and socialization of children rather than to prevent crime, has been criticized and questioned by various parties, including judges. It has been argued that the welfare model of juvenile justice system fails to give recognition to the right of the child to due process of law.¹⁹ There was concern that the informality of proceedings and lack of procedural protections in the child court proceedings has led to abuse of process and system. As a result, children accused of crimes or even status offences have been unfairly and arbitrarily punished.²⁰ These reasons have affected the legitimacy and efficacy of the welfare approach in governing juvenile justice. Consequently, beginning in the 1960s, the pendulum has gradually swung from the welfare model of juvenile justice toward a justice model in many Western countries.²¹ For example, in the United States, the Supreme Court in the case of *Kent v. United States*²² expressed its concern over criticism against the credibility and performance of child courts in pursuing its goals. In holding that children should be afforded with basic due process rights in order to avoid arbitrariness of decision, the Supreme Court highlighted that there were evidence and grounds for concern that children receive the worst

¹⁸Robertson, C. (2010). *Juvenile Justice: Theory and Practice*. New York: CRC Press, p 33.

¹⁹Jensen, E.L. (2006). A Historical Overview of the American Juvenile Justice System. In: Jensen, E.L. and Jepsen, J., eds., *Child Law Violators, Human Rights, and the Development of New Juvenile justice systems*. Portland: Hart Publishing, p 86.

²⁰Klein, E.K. (1998). Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Child Justice. *American Criminal Law Review*, 35, p 377.

²¹Myers., D.L. (2001). *Excluding Violent Youths from Child Court: The Effectiveness of Legislative Waiver*. New York: LFB Scholarly Publishing LLC, p 18.

²²383 U.S. 541, 556 (1966).

of both worlds. They get neither protection accorded to adults nor care or regenerative treatment.²³ In addition, the relevancy of the *parens patriae* philosophy was further questioned in the case of *In Re Gault*.²⁴ The Supreme Court in this case held that children are entitled to due process rights, which include written notice to charges, right to counsel, right against self-incrimination and the right to cross examine witnesses. The decisions of the courts in these cases have triggered the beginning of the due process revolution in the juvenile justice system of the United States as well as other Western countries.²⁵ These cases have changed the landscape of juvenile justice system from a welfare-oriented model to a more justice-oriented model. This led to the transformation of the informal, non-adversarial and highly discretionary juvenile justice system into a more adversarial and formalized structured system. It also has laid the foundation for the “*get tough*” approach in juvenile justice.

2.2.3 Crime Control Model

The crime control model emphasizes the prevention of crime through deterrence and incapacitation. According to this model, which gives priority on the protection of the public, the offenders must be held duly accountable for their wrongdoing, regardless of their age. This model emerged as the dominant approach in the late 1980s and early 1990s.²⁶ During that period of time, juvenile justice suffered a crisis of public confidence which put it under great pressure to maintain its relevancy.²⁷ There were several grounds which contributed to this problem. Firstly, the escalating number of children involved in serious and violent crime

²³*Ibid*, pp. 555-556.

²⁴387 U.S. 1, 18 (1967).

²⁵Junger-Tas, J., n. 9 above, p 31.

²⁶Krisberg, B. and Austin, J. F. (1993). *Reinventing Juvenile Justice*. London: SAGE Publications, p 50.

²⁷Backus, M.S. (2012). Achieving Fundamental Fairness for Oklahoma’s Children: The Role for Competency in Child Proceedings. *Oklahoma Law Review*, 65(4), p 53.

attracted criticism over the efficacy of child courts.²⁸ The increased number of heinous crimes committed by children was associated with the inadequate response and ineffectiveness of the child court. Apart from that, the performance of child court judges was heavily criticized. The accountability of the informal process of child court as well as the integrity of judges were disputed due to the haste in disposing a voluminous number of cases.²⁹ In addition, critics also pointed out the lack of resources and ineffective programmes purported for child offenders under the welfare approach. It has been contended that ineffectiveness of correctional facilities in curbing child crime implicitly disproved its aim of rehabilitation.³⁰

As a response to public outcry, many jurisdictions have initiated reform measures which witnessed dramatic change to the juvenile justice systems beginning in the late 1980s.³¹ It marked the beginning of the “*get tough*” approach in dealing with children. This approach has seen the transformation of juvenile justice into a modified version of the adult criminal system.³² Under this approach, the juvenile justice system has gradually adopted more and more characteristics of the adult criminal justice system. The reformers embarked on intense legislative activities which tended to shift the focus away from a rehabilitation approach towards punishment in dealing with children.³³ The crime control trend has resulted in the promulgation of harsher and stricter punishments for child offenders. It has

²⁸Wolf, K.C. (2003). Justice by any Other Name: The Right to a Jury Trial and the Criminal Nature of Juvenile Justice in Louisiana. *William & Mary Bill of Rights Journal*, 12, p 281.

²⁹Green, S.T. (2005). Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States’ Legislative Abrogation of Juveniles’ Due Process Rights. *Penn State Law Review*, 110(2), p 243.

³⁰Bohland, C. (2011). No Longer a Child: Child Incarceration in America. *Capital University Law Review*, 39, p 201.

³¹Schlossman, M. B. and Welsh, B. C. (2015). Searching for the Best Mix of Strategies: Delinquency Prevention and the Transformation of Juvenile Justice in the “Get Tough” Era and Beyond. *Social Service Review*, 89(4), p 625.

³²Butts, J. A. and Mears, D. P. (2001). Reviving Juvenile Justice in a Get-Tough Era. *youth & Society*, 33(2), p 175.

³³Connor, J. M. O. and Treat, L. K. (1996). Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform. *American Criminal Law Review*, 33, p 1316, Hylton, J. H. (1994). Get Tough or Get Smart? Options for Canada’s Youth Justice System in the Twenty-First Century. *Canadian Journal of Criminology*, 36(3), p 243.

significantly shifted the primary goal of juvenile justice from rehabilitation towards the goals of deterrence, retribution and incapacitation. Public safety, gravity of offences committed by the children, lack of accountability and notion of leniency of sentence were cited as the main justifications for the harsher response and approach against child offenders.³⁴ It was hoped that the crime control model would deter children from committing crimes. The emergence of the crime control model has resulted in a significant erosion of the protection and privileges that previously were catered for children under the welfare-oriented system. The legal reform under the crime control model allowed for easier transfer to adult court, reduced the privacy of proceedings as well as the confidentiality of personal information, decreased the informality of proceedings and provided harsher modes of punishment for children.³⁵

The “*get tough*” approach under crime control model in tackling child delinquency has been subjected to criticism. It is argued that this approach caused an escalation in the number of young offenders incarcerated.³⁶ Consequently, prison has become the normal response to crime committed by children. Apart from that, research also indicated that punitive sanctions against children are ineffective, incurring a huge amount of expenditure while failing to reduce the number of recidivism.³⁷ The “*get tough*” movement under crime control model reached its climax during the late 1990s.³⁸ A new turn of juvenile justice circle, which appeared to favour the return to treatment philosophy, seemed to have taken

³⁴Feld, B.C. (1991). The Transformation of the Child Court. *Minnesota Law Review*, 75, p 697.

³⁵Zierdt, C. (1999). The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Track. *University of San Francisco Law Review*, 33, pp. 415–426, Van Vleet, R.K. (1999). The Attack on Child Justice. *Annals of the American Academy of Political and Social Science*, 564(1), p 203.

³⁶Jordan, K.L. and Myers, D. L. (2011). Child transfer and deterrence: Re-examining the effectiveness of a “Get-Tough” policy. *Crime & Delinquency*, 57(2), p 250.

³⁷Polachek, E.A. (2009). Child Transfer: From: “Get Better” to “Get Tough” and Where We Go From Here. *William Mitchell Law Review*, 35, p 1181, Frazier, C.E. et al. (1999). Children in Criminal Court: Past and Present Research from Florida. *Quinnipiac Law Review*, 18, p 595.

³⁸Bernard, T.J. and Kurlychek, M.C., n. 11 above, p 195.

place towards the end of last century. It marked the re-emergence of growing sentiment that juvenile justice system must avoid a harsh approach in dealing with children.

2.2.4 Diversionary Approach

Apart from the welfare, justice and crime control models, diversion is another legal approach which was developed to address the problem of child delinquency. Diversion refers to a legal process of removing children and young people from formal sanctions of the juvenile justice system.³⁹ Its main objective is to prevent children from being involved in the direct consequences of formal adjudication process by shifting child delinquency policies to more community-oriented treatment programs. The use of the diversionary approach in handling child delinquency is not a novel approach and strategy. In fact, the establishment of separate courts for children in the 19th century marked the first great form of diversion in juvenile justice as it was designed primarily to redirect offending children away from adult courts into a more informal system. However, the new movement of diversion reform occurred during the 1970s when there was a crisis of confidence over the effectiveness of the traditional juvenile justice system.⁴⁰ This crisis triggered major changes in juvenile justice approach across the world, where the reformers started shifting the focus from criminogenic to more humane, community based and effective alternatives in dealing with youthful offenders.

³⁹Chapin, D.A and Griffin, P.A. (2005). Juvenile Diversion. In: Heilbrun, K., Sevin Goldstein, N. E. and Redding, R. E., eds., *Juvenile Delinquency: Prevention, Assessment, and Intervention*. New York: Oxford University Press, p 161.

⁴⁰Hillsman, S.T. (1982). Pretrial Diversion of Youthful Adults: A decade of Reform and Research. *Justice System Journal*, 7(3), p 362.

In practice, there are various forms of diversion adopted by various legal systems. It may differ from one legal system to another, depending on the structures, target groups, implementation methods, populations and others.⁴¹ Broadly, the diversion measures can be divided into two categories, namely non-intervention and intervention.⁴² The former includes the exercise of powers by the authorities which comprise the police, the prosecutor and the court to divert the offender from formal judicial process by way of warning, caution or release. On the hand, the latter refers to the non-judicial alternate programs conducted by various bodies such as youth professional panel or committee, private agencies, non-governmental organizations and others.

There are several advantages of diversion which has made it popular and widely practiced in various legal systems. Firstly, diversion may prevent children from direct consequences of formal court adjudication such as unwarranted labelling⁴³ and stigmatization which may detract them from social integration.⁴⁴ In fact, labelling theory has been cited as the basis that paves way for diversion. Based on labelling theory, a person who is perceived as an offender under the justice system has a tendency to begin to behave in ways in line with that label.⁴⁵ Secondly, diversion is effective in reducing recidivism among children. There are various studies which positively demonstrated the level of its effectiveness, particularly in

⁴¹Hamilton, Z. K., et al. (2007). Diverting multi-problem youth from child justice: Investigating the importance of community influence on placement and recidivism. *Behavioral Sciences and the Law*, 25, p 139, Cuellar, A. E., McReynolds, L. S. and Wasserman, G. A. (2006). A cure for crime: Can mental health treatment diversion reduce crime among youth? *Journal of Policy Analysis and Management*, 25(1), pp. 197-198.

⁴²Wilson, H. A. and Hoge, R. D. (2013). Diverting Our Attention to What Works: Evaluating the Effectiveness of a Youth Diversion Program. *Youth Violence & juvenile Justice*, 11(4), p 314.

⁴³McAra, L. and McVie, S. (2007). The impact of system contact on patterns of desistance from offending. *European Journal of Criminology*, 4 (3), p 340-341.

⁴⁴Dunkel, F. (2009). Diversion: A Meaningful and Successful Alternative to Punishment in European Juvenile Justice Systems. In: Junger-Tas, J. and Dunkel, F., eds., *Reforming Child Justice*. London, New York: Springer, p 159.

⁴⁵Wilson, H. A and Hoge, R.D., n. 42 above, p 314.

reducing the recidivism among the children in conflict with the law.⁴⁶ The research revealed that diverting child to various diversion programs was significantly more effective in reducing recidivism than traditional justice system processing.⁴⁷ The findings also showed that exposing children to direct contact with the formal judicial system can increase the likelihood of reoffending.⁴⁸ Thirdly, diversion also offers a speedier means of case disposal.⁴⁹ A formal adjudication process is time consuming. It normally involves complex legal issues, rigid procedure, complicated legal technicalities and tedious processes. Delay in the disposal of cases may cause harmful effects on children. Lastly, diversion is more cost effective than formal child court process.⁵⁰ The adjudication process incurs a lot of cost on various parties. The parties have to bear the cost of counsels' fees, preparation of documents, transportation, expert witnesses, facilities and others. The utilization of diversion measure may enable parties to save on the cost of the adjudication process. These reasons imply that formal adjudication is ineffective in dealing with children in conflict with the law.

On the other hand, diversion has also been subjected to criticism. Similar to various aspects of child justice, some scholars argued that the practice of diversion has its own weaknesses. It is argued that diversion has the effect of widening the net of social control.⁵¹ From this point of view, the use of diversion has strictly subjected children to be formally processed under the juvenile justice system, regardless of the petty nature of the offence. As a

⁴⁶Lipsey, M. (2009). The primary factors that characterize effective interventions with child offenders: A meta-analytic overview. *Victims & Offenders*, 4, p 125.

⁴⁷Wilson, H.A. and Hoge, R.D. (2013). The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review, *Criminal Justice And Behavior*, 40(5), p 510.

⁴⁸Hayes, H. and Daly, K. (2004). Conferencing and Re-offending in Queensland. *Australian and New Zealand Journal of Criminology*, 37(2), p 186.

⁴⁹Bala, N. (2003). Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders. *Alberta Law Review*, 40(4), pp. 996, Feld, B.C. (1999). The transformation of Child-Part II: Race and the: "Crack Down" on Youth Crime. *Minnesota Law Review*, 84, pp. 350-354.

⁵⁰Bala, N., n. 49 above, p 996.

⁵¹Maclure, R., Campbell, K. and Dufresne, M. (2003). Young Offender Diversion in Canada: Tensions and Contradictions of Social Policy Appropriation. *Policy Studies*, 24(2-3), p 137.

result, more children who would otherwise release on informal caution need to undergo formal diversion process. In addition, concern also has been raised on the due process in the application and enforcement of diversion. It was argued that determination of a diversionary measure is often based on broad discretionary power, resulting in the possibility of inconsistency and the danger of discriminatory application and enforcement.⁵² Lastly, there was also a contention that children may be forced to falsely admit to the alleged offence in a desperate attempt to be diverted to the diversion measure and to avoid the effects of formal adjudication.⁵³

2.2.5 Restorative Approach

The end of twentieth century witnessed the emergence of another alternative approach known as the restorative model. The restorative model of justice is described as the social movement for criminal justice reforms that gained momentum in the 1990s and into the new millennium.⁵⁴ Though the term restorative justice is considered as a new phenomenon, its application and practice are not. There is ample evidence that shows that various societies resort to this method in dealing with crime and deviant behaviour.⁵⁵ For example, the Family Group Conferencing model which has been introduced under the New Zealand legal system was actually originated from the Maori community practice known as a “*Wanau Conference*.”⁵⁶

⁵²Bala, N., Hornick, J.P and Snyder, H.N.(2002). *Juvenile justice systems: An International Comparison of Problems and Solutions*. Toronto: Thompson Educational Publishing, p 170.

⁵³*Ibid*, p 170.

⁵⁴Braithwaite, J. (1998). Restorative Justice. In: Tonry, M., ed., *The Handbook of Crime and Punishment*. New York: Oxford University Press, p 324.

⁵⁵Daniels, G. (2013). Restorative justice: Changing the paradigm. *Probation Journal*, 60(3), p 306.

⁵⁶*Ibid*, p 306.

There is no single definition of restorative justice which is universally acceptable. Generally, restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future.⁵⁷ In contrast with a traditional criminal justice system approach which views crime as wrongful action that entails punishment, restorative justice views crime as a violation of people relationship. Therefore, restorative justice is described as a process that involves the victim, the offender and the community in search for solutions by way of reparation, reconciliation and reassurance.⁵⁸ Under current practice, there are various forms of restorative justice adopted by different jurisdictions. Among the popular forms of restorative justice are mediation, family conference, and youth panel scheme.

The restorative approach offers a different lens for viewing crime and the way that the law should respond to it. The proponents of the restorative justice believe that the conventional criminal justice system's response to crime, which primarily focuses on rehabilitation, retribution and incapacitation of the offenders, is inadequate as they ignore the loss or harm suffered by the victims.⁵⁹ A punishment-focused approach is not an answer for child offenders as it may not enable them to understand the consequences of their wrongful action from the victim's perspectives. It is also contended that a crime should not be viewed solely as a conflict between the offenders and the states.⁶⁰ Rather, it should better be seen as a conflict between offenders and the victims. Overall, restorative justice seeks to restore the loss and harm suffered by all parties who are affected by the crime, namely the offenders, the victims, and the communities. In conjunction with that, the justice process under the

⁵⁷Dignan, J. (2005). *Understanding Victims and Restorative Justice*. Berkshire: Open University Press, p 3.

⁵⁸Zehr, H. (1990). *Changing Lenses: A New Focus for Crime and Justice*. Scottsdale, PA: Herald Press, p 2.

⁵⁹Braithwaite, J. (1999). A Future Where Punishment is Marginalized: Realistic or Utopian. *UCLA Law Review*, 46, p 1737, Zender, L. (1994). Reparation and Retribution: Are They Reconcilable? *Modern Law Review*, 57(2), p 231.

⁶⁰Hirsch, A. Von et al. (2003). *Restorative Justice and Criminal Justice*. Oxford: Hart Publishing, p 47.

restorative justice approach seeks to maximize the involvement and participation of offenders, victims and communities.⁶¹ The interests of all parties should be balanced during the restorative process. Thus, all parties are expected to effectively participate. The outcome of the process should be restorative in the sense that all the key parties mutually agree to accept it as appropriate and satisfactory.

The restorative approach has gained popularity in the modern juvenile justice system due to its advantages. The proponents for the restorative process claim that this approach is beneficial to offenders, victims and society as whole. With regard to the victims, it is argued that this approach may restore them from the both physical and psychological effects of crime.⁶² The studies showed that the restorative process effectively serves as a platform that empowers victims to get some form of healing or reparation, to feel less fearful of re-victimization and to get rid of the negative effects of crime.⁶³ Other research indicates that victims that underwent a restorative process admitted that the process provided them with a high level of satisfaction in the sense that they are given the opportunity to express their feeling of being victimized, to explain the effect and consequences of the offenders' wrongful action against them, to demand an explanation from the offenders for their wrongful actions, to recommend a possible way of amending the mistake, and to redeem the harm on others.⁶⁴ On the other hand, the restorative process is meaningful to the offenders in the sense it

⁶¹Bazemore, G. and Walgrave, L. (1999). Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform. In: Bazemore, G. and Walgrave, L., eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*. New York: Criminal Justice Press, p 45, United Nations Office for Drugs and Crime. (2006). *Handbook on restorative justice programmes. Criminal justice handbook series*. New York: United Nations, p 6.

⁶²Choi, J.J., Bazemore, G. and Gilbert, M.J. (2012). Review of research on victims' experiences in restorative justice: Implications for youth justice. *Children and Youth Services Review*, 34(1), p 35.

⁶³*Ibid*, 37, Hamilton, C.A., Virginia, W. and Justice, C. (2006). Micropolitics of Victim – Offender Mediation. *Sociological Inquiry*, 76(3), p 338.

⁶⁴Strang, H. et al. (2006). Victim Evaluations of Face-to- Face Restorative Justice Conferences- A Quasi-Experimental Analysis. *Journal of Social Issues*, 62(2), pp.302-303, Pelikan, C. and Trenczek, T. (2006). Victim Offender Mediation and Restorative Justice. In: Sullivan, D. and Tiftt, L., eds., *Handbook of Restorative Justice: A Global Perspective*. New York: Routledge, p 79.

provides them with range of opportunities to take responsibility for wrongful action, to apologize for mistakes, to repair the harm and damage done, to compensate the loss, to amend broken relationships and others.⁶⁵ The restorative process can be utilized as a medium to help offenders to have a better understanding of how their wrongful actions may affect those around them, including victims, their own parents and society. It also offers the opportunity to offenders to make reparation for damage or harm caused, which in turn may increase their chances of being reintegrated into the community. Apart from that, various research disclosed that the restorative approach is effective in reducing recidivism among the children.⁶⁶ In addition, the restorative justice approach is said to benefit society in the sense that it brings the community to jointly participate in the decision-making process to repair the harm and damage resulting from the commission of crimes. It offers members of the community the chance to directly contribute towards the achievement of policies and practices that support a safe and liveable society.⁶⁷ The involvement of community also may add a sense of moral authority and legitimacy to the decision-making process.⁶⁸ Participation of community is beneficial as it gives members of the public the opportunity and capacity to regulate themselves.

Though the idea of restorative justice seems to be very attractive and impressive to many parties, it is still the subject of much debate. The effectiveness of restorative justice has been criticized on several grounds. It is claimed that the sanction agreed among the parties during the restorative justice process may not be proportionate to the gravity of the offence.

⁶⁵Crawford, A. and Newburn, T. (2003). *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice*. Devon, Oregon: Willan Publishing, p 52.

⁶⁶Braithwaite, J. (2002). *Restorative Justice & Responsive Regulation*. New York: Oxford University Press, p 55, Rodriguez, N. (2007). Restorative Justice at Work: Examining the Impact of Restorative Justice on Child Recidivism. *Crime & Delinquency* , 53(3), p 371.

⁶⁷Crawford, A. and Clear T.R. (2001). Community Justice: Transforming Communities Through Community Justice? In: Bazemore, G., Schiff, M., eds., *Restorative Community Justice: Repairing Harm and Transforming Communities*. New York: Routledge, p 130.

⁶⁸Johnstone, G. (2002). *Restorative Justice: Ideas, Values, Debates*. Cullompton: Willan Publishing, p 144.

It also may suffer from a lack of consistency.⁶⁹ It is also argued that the agreed sanctions may not measure up with the expectation of the victims. There are researches showing that victims were the least satisfied among participants in the restorative process.⁷⁰ Some of the victims disclosed dissatisfaction with the mechanism of restorative justice, claiming that they experienced feelings of re-victimization during the process.⁷¹

2.3 Rights Based Approach of Juvenile Justice Under the CRC

2.3.1 Introduction

The first important international instrument on the rights of children was passed during the Fifth Assembly of the League of Nations in 1924.⁷² The 1924 Declaration of the Rights of Children, which is also known as the Declaration of Geneva, contains five basic principles that entirely aim at protecting the rights children. The declaration was a non-binding instrument and concerned with the protection rather than the actual notion of child rights. Nevertheless, the Declaration was crucial as it strived to lay down the foundation for the development of future international standards on the concept of children's rights. In 1959, the General Assembly of the United Nations adopted a new text of declaration of the rights of the child.⁷³ This declaration contains ten principles and urges all parties, including national governments, local authorities, organizations and individuals to recognize as well as promote the rights of children in its text. Like its predecessor, the 1959 Declaration was only a

⁶⁹Acorn, A. (2004). *Compulsory Compassion: A critique of restorative justice*. Vancouver: UBC Press, p 70.

⁷⁰Daniels, G. (2013). Restorative Justice: Changing the Paradigm. *Probation Journal*, 60(3), p 303.

⁷¹Zernova, M. (2007). Restorative Justice: Ideals and Realities. Hampshire: Ashgate Publishing, pp. 70-73.

⁷²Declaration on the Rights of the Child, Records of the Fifth Assembly, Supplement No. 23 League of Nations Official Journal (1924).

⁷³Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), 14 GAOR Supplement (No. 16), UN Doc.A/4354 (1959).

statement of principles, with no legally binding force phenomenon in international law. Consequently, the impact of both 1924 and 1959 Declaration was very limited.

In the 1970s, a discussion started on the possibility of formulating a United Nations convention on the rights of children.⁷⁴ There emerged a movement that pushed for separate rights for children, which reflected their needs and interests.⁷⁵ The movement called for the establishment of an international document guaranteeing children's rights as the existing international human rights instruments offered inadequate protection for the children. This movement led to the formal proposal of a convention for children's rights by the Polish Government during the International Year of the Child 1979.⁷⁶ A commission working group was set up to work on the draft proposal of the convention, work that proved to be much more complicated than initially imagined. Since its submission, the draft proposal underwent a lengthy process of drafting between the year 1988 and 1989. The commission's working group on the draft proposal held twenty-three meetings between the year of 1988 and 1989.⁷⁷ After nearly ten years elapsed, the final draft was presented to the Commission on Human Rights for approval in 1989. The Convention on the Right of the Child was adopted by the United Nations on the 20th of November 1989 and came into force in 1990.

⁷⁴Fortin, J., n. 6 above, p 38.

⁷⁵Fottrell, D. (2000). One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children's Convention on the Rights of the Child. In: Fottrell, D., ed., *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child*. The Hague: Kluwer Law International, p 2.

⁷⁶*Ibid*, p 3.

⁷⁷Mower Jr, A.G. (1997). *The Convention on the Rights of the Child: International Law Support for Children*, London: Green wood Press, p 14.

2.3.2 Rights Based Approach

There is a long and rich literature among scholars on the issue of whether children can be right-holders at all. Broadly, there are two competing theories which dominate the argument over the nature and substance of children's rights, namely the will theory and the interest theory.⁷⁸ The former is based on the notion that to have a legal or moral right is to be able to exercise individual choice over the enforcement or waiver of duties imposed on someone else. On the other hand, the latter theory focuses on the protection of an individual's interests by the imposition of duties on others. Fortunately, the philosophical arguments underlying the concept of children's rights do not hinder the continuous and relentless efforts of those who seek to elevate and promote the recognition of children's rights in an international context. The introduction of the CRC brought a new dimension on the development of a rights based approach in dealing with children. The core principle of this approach dictates that rights provide a lens by which all issues relating to children should be reviewed and resolved.⁷⁹ The CRC represents a legally binding international instrument from which the principles of international rights based approach in all matters relating to children should be derived. It is regarded as a comprehensive rights based international instrument specifically designed to enhance the position of children.⁸⁰

The rights based approach propagated by the CRC is significant. The major importance of the CRC is the fact that it officially recognizes the status of children as persons

⁷⁸ Archard, D. (2004). *Children: Rights and Childhood*. New York: Routledge, p 58.

⁷⁹ Tobin, J. (2011). Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations. In: Invernizzi, A. and Williams, J., eds., *The Human Rights of Children: From Visions to Implementation*, Surrey: Ashgate Publishing Limited, p 66.

⁸⁰ Buck, T. (2014). *International Child Law*. 3rd ed. London: Routledge, p 87.

who possess their own independent rights.⁸¹ These rights do not hold any implication of assumption dependent upon other people's rights. Instead, the CRC acknowledges the child as a possessor of rights and are entitled to assert the recognition and implementation of their rights. It has provided a much needed legitimization for the concept of rights of children in the international arena.⁸² Consequently, this approach has put to rest lingering assumptions about parental and state paternalism in respect of children's rights.

Apart from that, the CRC is significant in the sense it lays down an international as well as universal benchmark on the rights of children.⁸³ It strives towards promoting children's rights and represents the starting point for the development of children through freedom, dignity and justice. It represents the most comprehensive instrument in international law to deal with the rights of children. Detrick described the CRC as follows,⁸⁴

“While the Convention on the Rights of the Child may not be the last or complete word on children's rights, it is the first universal instrument of a legally binding nature to comprehensively address those rights. As such, it forms a universal benchmark on the rights of the child a benchmark against which all future claims for evolution will and must be answered”.

The CRC contains fifty-four legally binding articles enshrining the rights of children in various areas of their lives, including social, cultural, political, economic and civil rights.

⁸¹Archard, D., n. 78 above, p 58.

⁸²Bueren, G.V. (1998). *The International Law on the Rights of the Child*. London: Martinus Nijhoff Publishers.

⁸³Arts, K. (2014). Twenty-Five Years of the United Nations Convention on the Rights of the Child: Achievements and Challenges. *Netherlands International Law Review*, p 277.

⁸⁴Detrick, S. (1999). *A Commentary on the United Nations Convention on the Rights of the Child*. London: Martinus Nijhoff Publishers, p 721.

This spectrum of rights can be classified into three categories, namely protection, provision and participation.

i- Protection

The protection provisions of the CRC covers the protection of children separated from their parents (Article 9), the right to privacy (Article 16), protection from violence (Article 19), protection of children deprived of their family environment (Article 20), protection from child labour (Article 32), protection from sexual and other forms of exploitation (Articles 34 and 36), protection from torture, degrading treatment and deprivation of liberty (Article 37), and protection from being involved in armed conflict (Article 38).

ii- Provision

Provision rights include the right to health and healthcare services (Article 24), the right to benefits from social security (Article 26), the right to an adequate standard of living (Article 27), the right to education (Article 28) and the right to leisure, play and culture (Article 31).

iii- Participation

Participation rights include the right to express their views (Article 12), right to freedom of expression (Article 13), freedom of thought, conscience and religion (Article 14), the right to freedom of association and peaceful assembly (Article 15), and the right of access to information (Article 17).

The Committee on the CRC stresses that the CRC comprises of holistic perspective of children's rights which are indivisible and interrelated.

Lastly, the CRC is also significant due to its unique status as a legally binding international instrument.⁸⁵ The CRC's status as a legally binding instrument serves as a catalyst for the development of international as well domestic law on the rights of children. It imposes an obligation on the ratifying state parties to implement the requirement of the CRC. The state parties are obliged to take all appropriate legislative, administrative, and other measures for the implementation of the rights of children as outlined in the Convention.⁸⁶ As far as the administration of juvenile justice is concerned, the CRC can be regarded as a parent instrument in the sense that it acknowledges and recognizes the importance of other non-binding instruments relating to children. The Committee on the CRC specifically emphasized that three international instruments on juvenile justice, namely the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the United Nations Guidelines for the Prevention of Child Delinquency and the United Nations Rules for the Protection of Children Deprived of the Liberty as relevant to the application of the CRC's standard on the administration of child justice.⁸⁷ The principles and norms encapsulated in these instruments are regarded as important to reinforce the interpretation and implementation of CRC's legally binding standards on the administration of child justice.

⁸⁵Bullis, R.K. and Div, M. (1991). The Convention on the Rights of the Child: A Young Legal Regime for the World's Youngest Citizens. *Child and Adolescent Social Work*, 8(3), p 249.

⁸⁶Article 4 of the CRC.

⁸⁷UNCRC (1999), Recommendation adopted by the Committee on the administration of child justice, UN Doc. CRC/C/90, para. 1.

Implementation

The CRC is the most ratified international treaty. To date, 196 state parties have ratified the CRC, leaving United States as the sole country that remain a dissenter.⁸⁸ However, the success of the child rights based approach promoted by the CRC cannot simply be measured by the number of ratifications or accessions. Instead focus needs to be given to the extent of application and implementation of the CRC's requirements and standards by the state parties. Article 4 of the CRC expressly mentions about the duty of state parties to implement the requirements of the Convention. It provides that state parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention. Pursuant to that, the Committee on the CRC issued the General Comment Number 5 on the General Measures of Implementation in 2003.⁸⁹ This guideline elaborated on the measures that need to be followed by state parties in order to ensure the effective implementation of the CRC at the domestic level, including the development of special structures and monitoring, training and other activities in the government, parliament and the judiciary at all levels.

In addition, Article 43 of the CRC provides for the establishment of the Committee on the CRC which is responsible for examining the progress made by state parties in achieving the realization of the obligations undertaken in the Convention.⁹⁰ State parties are under the obligation to submit to the Committee the status of the measures as well as progress they have taken to comply with the requirement of the CRC.⁹¹ The initial report must be submitted

⁸⁸United Nations Human Rights. (2016). *Status of Ratification: Convention on the Rights of the Child*. [online] UNHR. Available from: <http://indicators.ohchr.org/> [Accessed on 16/6/2016].

⁸⁹UN Committee on the Rights of the Child, General Comment No 5, General Measures of Implementation for the Convention on the Rights of the Child UN Doc CRC/ GC/2003/5, 19 September- 3 October 2003.

⁹⁰Article 43(1) of the CRC.

⁹¹Article 44 of the CRC.

within two years of the date the CRC entered into force for that state and thereafter every five years. Upon receiving the report from the state parties, the Committee on the CRC is responsible for examining them thoroughly. The Committee may request the state parties to provide additional information, report or data that it thinks necessary and relevant. The Committee, which sits for three sessions a year in Geneva, shall consider the reports submitted by the state parties in two chambers. Upon examining the periodical reports by state parties, the committee will issue its report, known as “concluding observations.” Concluding observations normally contains the details of the progress of implementation, suggestions and recommendations addressed to the state parties.

Apart from that, the Committee also has periodically organized general discussions which serve as a forum to discuss specific topics and issues relating to the requirements of the CRC. The main purpose of these discussions is to foster a deeper understanding of the contents and implications of the CRC on specific articles or topics.⁹² Pursuant to these discussions, the Committee has periodically published its interpretations and explanations on the requirement of various provisions of the CRC in the form of a report known as “general comments.” Among the general comments issued by the Committee are the role of Independent Human Rights Institutions(2002),⁹³ General Measures of Implementation for the Convention on the Rights of the Child (2003),⁹⁴ Implementing Child Rights in Early Childhood (2005),⁹⁵ the Rights of Children with Disabilities (2007),⁹⁶ the Right of the Child

⁹²Weissbrodt, D., Hansen, J.C. and Nesbitt, N.H. (2011). The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law. *Harvard Human Rights Journal*, 24, p 147.

⁹³ UN Committee on the Rights of the Child, General Comment No 2, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child UN Doc CRC/GC/2002/2, 4 October 2002.

⁹⁴ UN Committee on the Rights of the Child, General Comment No 5, General Measures of Implementation for the Convention on the Rights of the Child UN Doc CRC/ GC/2003/5, 19 September- 3 October 2003.

⁹⁵ UN Committee on the Rights of the Child, General Comment No 7, On Implementing Child Rights in Early Childhood UN Doc CRC/C/GC/7, 1 November 2005.

for Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (2007),⁹⁷ Children's Right in Child Justice(2007),⁹⁸ Rights of the Child to be Heard (2009),⁹⁹ the Right of the Child to Freedom from All Forms of Violence(2011),¹⁰⁰ the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration(2013),¹⁰¹ and others.

Despite its status as the most ratified treaty, the CRC is also known as the most violated treaty. The poor pace and level of implementation by state parties has affected the reputation and credibility of the CRC as a leading international instrument of child right. Though the CRC has outlined mechanisms to monitor implementation of its requirement, full compliance by the state parties has been elusive. Lack of legal force has been identified as a main reason that causes various state parties neglect, refuse or ignore to fully implement the requirements of the CRC.¹⁰² For example, the provision of the CRC clearly demands the state parties submit their periodical reports on the stipulated timeframe. However, the CRC has fallen short in specifically stating sanction for the failure or delay in submitting periodical reports. Reference to rules of procedure provides that that non-submission of report may merely attract the issuance of a warning letter by the Committee to the state parties. Apart from that, the inefficiency of the Committee on the CRC itself in managing the reporting process has

⁹⁶ UN Committee on the Rights of the Child: General Comment No 9, The Rights of Children with Disabilities UN Doc CRC/C/GC/9, 27 February 2007.

⁹⁷ UN Committee on the Rights of the Child: General Comment No 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment UN Doc CRC/C/GC/8, 2 March 2007.

⁹⁸ UN Committee on the Rights of the Child: General Comment No 10, Children's Rights in Juvenile justice UN Doc CRC/C/GC/10, 9 February 2007.

⁹⁹ UN Committee on the Rights of the Child: General Comment No 12, The Right of the Child to be Heard UN Doc CRC/C/GC/12, 20 July 2009.

¹⁰⁰ UN Committee on the Rights of the Child, General Comment No 13, The Right of the Child to Freedom from All Forms of Violence UN Doc CRC/C/GC/13, 18 April 2011.

¹⁰¹ UN Committee on the Rights of the Child, General Comment No. 14, on The Right of the Child to have His or Her Best Interests Taken as a Primary Consideration (Article 3, Para. 1) UN Doc. CRC/C/GC/14, 29 May 2013.

¹⁰² Buck, T., n. 80 above, p 97.

contributed to poor performance of implementation of the CRC.¹⁰³ Extra workload resulting from the reporting procedure caused many delays between the submission of reports and consideration by the Committee. Lastly, poor performance of implementation of the CRC has also been partly attributed to the reporting burden faced by the state parties.¹⁰⁴ Certain state parties have struggled to fulfil their commitment in preparing various reports due to the ratification of a growing number of international human rights treaties.

In short, it is vital to address the ineffective implementation of the CRC. One of the best possible options is to create an international court for children. The creation of this proposed international court would provide a proper channel towards effective implementation of the CRC. The court should be conferred with jurisdiction to try any matter relating to children. It will enable any party to refer legal issues relating to breach of CRC to the international court for determination. The establishment of this proposed court would be a major step forward to force all the ratifying state parties to implement the requirement of the CRC within their own domestic laws.

2.3.3 Juvenile Justice Framework

As far as juvenile justice is concerned, the CRC stresses on the need for state parties to set up a child-centred youth justice system in which children's interests are paramount and the inherent dignity of children is preserved. The Committee has demanded that state parties systematically implement fundamental as well as general principles underpinning juvenile

¹⁰³*Ibid*, p 98.

¹⁰⁴Doek, J.E. (2011). The CRC: Dynamics and Directions of Monitoring its Implementation. In: Invernizzi, A. and Williams, J., eds., *The Human Rights of Children: From Visions to Implementation*. Surrey: Ashgate Publishing Limited, p 107.

justice in the administration of their juvenile justice systems.¹⁰⁵ The CRC's framework on juvenile justice is mainly provided in its fundamental as well as general Articles. Fundamental principles are provided in Articles 37 and 40 of the CRC, whereas general principles can be found in Articles 2, 3, 6 and 12 of the same. Briefly, these principles are as follows;

i- Fundamental principles relating to children in conflict with the law

Article 40 lays down four fundamental principles relating to children in conflict with the law. Firstly, it requires state parties to recognize rights of every child in conflict with the law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.¹⁰⁶ This provision demands that any treatment of children in conflict with the law should take into consideration their age as well as the desirability of promoting their reintegration and their assumption of a constructive role in society. Secondly, this Article guarantees rights of children under juvenile justice. It covers the rights of children in conflict with the law to be presumed innocent until proven guilty, the right to be informed promptly of any and all charges, the right to have the matter determined before a competent, independent and impartial authority or judicial body, the right not to be compelled to give testimony or confession, the right to have a decision reviewed by a competent, independent and impartial authority or judicial body, the right to have the free assistance of an interpreter, and the right to privacy at all stages of the proceedings.¹⁰⁷ Thirdly, this Article mentions the duty of state parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children.¹⁰⁸ This provision aims to ensure that all these rights are rightly implemented. Finally, the Article imposes a duty on state parties to make

¹⁰⁵Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 5.

¹⁰⁶Article 40(1) of the CRC.

¹⁰⁷Article 40(2)(b)(i)-(vii) of the CRC.

¹⁰⁸Article 40(3) of the CRC.

available variety of dispositions as alternatives to institutional care.¹⁰⁹ Any designation of these dispositions should take into consideration of child's wellbeing as well as be proportionate with the nature of the offence.

ii- Torture and deprivation of liberty

Article 37 of the CRC contains leading principles regarding the treatment of children under penal law. It demands the protection of children from being subjected to any kind of torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.¹¹⁰ The provision stresses that neither capital punishment nor life imprisonment without possibility of release shall be imposed on child offenders. In addition, the provision also lays down principles governing procedural rights as well as treatment of children deprived of their liberty. The term deprivation of liberty refers to any form of detention, imprisonment or placement in a public or private custodial setting.¹¹¹ The provision emphasizes that any arrest, detention or imprisonment of a child shall not only be made strictly in accordance with the law, but also used as a measure of last resort and for the shortest appropriate period of time.¹¹² It is also within the legal rights of children deprived of the liberty to get access to appropriate assistance, to challenge the legality of the decision made by the competent, independent and impartial authority and to get a prompt decision on any such issue.¹¹³

¹⁰⁹ Article 40(4) of the CRC.

¹¹⁰ Article 37(a) of the CRC.

¹¹¹ Nowak, M. (2005). *A Commentary on the United Nations Convention on the Rights of the Child: Article 6- The Right to Life, Survival and Development*, Leiden: Martinus Nijhoff Publishers, p 24.

¹¹² Article 37(b) of the CRC.

¹¹³ Article 37(d) of the CRC.

iii- Non-discrimination

Article 2 of the CRC guarantees protection for children from any form of discrimination, irrespective of their colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. With respect to juvenile justice, it is the duty of state parties to ensure that all children in conflict with the law are treated equally and fairly.¹¹⁴ Pursuant to that, the Committee on the CRC has promoted among the state parties to develop rules, regulations or protocols which may not only regulate and enhance equal treatment of child offenders but also provide appropriate redress, remedies and compensation in the event of breach of any of its provisions.¹¹⁵

iv- Best interests of the child

Article 3 of the CRC mentions that the best interest of children shall be the primary consideration in all actions concerning children undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. The term “best interests” is broadly defined as the well-being of a child, which is determined by various factors such as age, environment, level of maturity, experiences and surrounding circumstances.¹¹⁶ In the context of child justice, the principle of the best interest of children requires due consideration to be given to the fact that children are different in terms of physical and psychological development, emotional need and education need. This has implications in determining the appropriate treatment for children in conflict with the law.¹¹⁷

¹¹⁴Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 6

¹¹⁵Ibid, para 6.

¹¹⁶UNHCR, (2008). *UNHCR Guidelines on Determining the Best Interests of the Child*, Geneva.

¹¹⁷Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 10.

These differences mean that there is strong justification for the establishment of a separate juvenile justice system in dealing with children in conflict with the law.

v- The right to life, survival and development

Article 6 of the CRC recognizes that every child has an inherent right to life and it is the duty of state parties to ensure the survival and development of the child. According to the Committee on the CRC, Article 6 demands state parties to create an environment that is conducive to ensure the maximum extent possible for the survival and development of children in a manner compatible with human dignity.¹¹⁸ It covers physical, mental, psychological, spiritual, moral and social development.¹¹⁹ In the context of juvenile justice, the Committee of the CRC states that every policy and programme for the prevention of child delinquency should be guided and inspired by this principle.¹²⁰ State parties are strictly prohibited from imposing any sentence which is contrary to the right of life, survival and development of children, such as the death sentence and life sentence without parole. Similarly, the exercise of any other process of law against children such as arrest, detention, imprisonment and others should be governed by strict standards and principles to ensure that the right of children to life and development are fully respected and upheld.

vi- The right to be heard

Article 12 of the CRC recognizes the right of children to express their views. It provides that all children who are capable of forming views have the right to be heard in all

¹¹⁸Nowak, M., n. 111 above, p 15.

¹¹⁹*Ibid*, p 15.

¹²⁰Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para 11.

decisions affecting them. Their views shall be given due weight in accordance with the age and maturity of the child. This Article is crucial as it addresses both the legal and social statuses of children, who are subjects of rights though lacking full autonomy. It requires state parties to uphold the right of children to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In terms of the implementation of the CRC, the Committee on the CRC has emphasized on the importance of each state party to strive towards full compliance of the CRC's standards on child justice, especially the requirements that are contained in Articles 37 and 40 of the CRC. Pursuant to that, the Committee has issued a General Comment in 2007 on children's rights in juvenile justice with the main aim of providing state parties with guidance for the interpretation and implementation of requirements on juvenile justice.¹²¹ The General Comment 2007 has outlined that a comprehensive juvenile justice system must deal with the following core elements;

- i- Prevention of juvenile delinquency.
- ii- Interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings.
- iii- The minimum age of criminal responsibility and the upper age-limits for juvenile justice.
- iv- The guarantee of a fair trial.
- v- Deprivation of liberty including pre-trial detention and post-trial detention.

These core elements provides the state parties with more elaborated guidance on the content of the comprehensive juvenile justice system.

¹²¹Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007.

2.4 Malaysian Juvenile Justice System

English law greatly influences the Malaysian legal system. The close relationship between English law and the Malaysian legal system can be best explained by the history of British colonization in this country. British colonization established not only centralized administration and governance but also introduced English law across the Malay States. A juvenile justice system is one of the areas of law that was introduced by the British during their colonization of Malaysia. It is vital to trace historical events that led to the introduction of the juvenile justice system in Malaysia, specifically with reference to the legacy of British colonialization.

2.4.1 Historical Background

Historically, Malaysia was under British occupation beginning from the eighteenth century until the country gained independence in 1957.¹²² It began with the occupation of Penang in 1786 by a marine force led by Captain Francis Light in the name of King George III. This was followed by the occupation of Singapore and Melaka in 1819 and 1824 respectively. By 1888, the British had extended its control to the other Malay States of Perak, Selangor, Pahang and Penang via a series of treaties. These states were brought together in a federation, called the Federated Malay States and placed under a British Residential System. The British Residential system was later on extended to other Malay States known as the Unfederated Malay States, which comprise Johor, Terengganu, Kelantan,

¹²²Aun, W. M. (2005). *The Malaysian Legal System*. Selangor: Pearson, p 58.

Kedah and Perlis. British Residents were assigned to the states of Kelantan and Terengganu in 1910, Johor in 1914, Kedah 1923 and Perlis 1930.¹²³

On 1st April 1946, the British incorporated the Federated Malay States, Unfederated Malay States, Penang and Melaka into a unitary state, known as the Malayan Union. The Malayan Union was later replaced with the Federation of Malaya on the 1st February 1948. In 1956, a delegation from Malaya attended a Constitutional Conference with the British Government in London to negotiate for independence. An agreement was reached between the parties and an independent constitutional commission was set up to draw up a constitution for an independent federation. Finally, the Federation of Malaya gained its independence on 31st August 1957. In 1961, the formation of Malaysia, a bigger federation which consists of Malaya, Singapore, Brunei, Sabah and Sarawak was proposed. After long negotiations, Malaya, Singapore, Sabah and Sarawak finally agreed to sign an agreement for the formation of Malaysia. The Federation of Malaysia officially came into being on 16th September 1963. However, Singapore left the Federation of Malaysia on 9th August 1965 to become an independent republic.

2.4.2 Reception of English Law

English law has been recognized as being part of Malaysian law. Article 160 of the Malaysian Federal Constitution expressly defines law to include “*the common law in so far as it is in operation in the Federation or any part thereof*”. Before the British occupation, the law applicable in Malay States was Malays customary law modified by the principles of

¹²³Hamzah, W.A.and Bulan, R. (2007). *An Introduction to the Malaysian Legal System*. Selangor: Oxford Fajar, pp. 107-110.

Islamic law.¹²⁴ The British occupation in Malaysia marked the introduction and reception of the English law in various legal aspects. Penang was the first Malay state occupied by the British. English law was formally introduced in Penang by virtue of the First Charter of Justice in 1807.¹²⁵ The charter was significant as it provided for the establishment of a Court of Judicature, which was to exercise the jurisdiction of the court in England as far as circumstances admitted. In 1826, the British administration had incorporated Penang, Malacca and Singapore into the Straits Settlements. In conjunction with that, the Second Charter of Justice was introduced with the effect of statutory reception of English in the Straits Settlements.

With regard to the Federated Malay States, the Civil Law Enactment 1937 was passed by the Federated Malay States Council to introduce the common law of England and rules of equity. The Civil Law (Extension) Ordinance of 1951 extended the reception of English law to the Unfederated Malay States. After the Federation of Malaysia was formed, both Acts were repealed and replaced with the Civil Law Ordinance 1956 which was applicable to the whole federation. When the Federation of Malaysia was formed in 1963, the Civil Law Act 1956 (revised 1972) was introduced with the effect of incorporating all of the earlier statutes. This Act statutorily provides for the application of English law for the whole of Malaysia. Section 3 of the Civil Law Act 1956 (revised 1972) explains the extent to which English law is applicable in Malaysia. It provides that the application of English Law as administered in England on the 7th day of April 1956 for West Malaysia so far as the local circumstances permit and subject to such qualifications as local circumstances render necessary.¹²⁶ With

¹²⁴*Jainah bt Semah v Mansor bin Iman & Anor* [1951] 17 MLJ 62, *Shaikh Abdul Latiff & Others v Shaikh Elias Bux* [1915] 1 FMLS 204.

¹²⁵Ibrahim, A. (1992). *Towards a History of Law in Malaysia and Singapore*. Kuala Lumpur: Dewan Bahasa dan Pustaka.

¹²⁶*Yong Joo Lin v Fung Poi Fong* [1941] MLJ, 54, *Syarikat Batu Sinar v UMBC Finance* [1990] 2 CLJ, 691.

regard to Sabah and Sarawak, the cut-off date for the application of English law and equity is 1st December 1951 and 12th December 1949 respectively. Regarding the application of English law made after such specified dates, it is still of a persuasive nature and the discretion is left to the wisdom of the Malaysian judiciary.¹²⁷

2.4.3 Malaysian Juvenile Justice System

Before colonization, children-related matters in Malaysia were governed by the community, which provides for care and protection. Customary law modified by Islamic law was used to govern conflict and social issues in the society, including child delinquency.¹²⁸ There was no formal or written law on the administration of child delinquency cases in existence then. The modern Malaysian juvenile justice system only came into existence after British colonization.¹²⁹ Specifically, the need for a special law and policy on child delinquency was only given attention by the British administration after World War II. The growing concern over the involvement of children in criminal activities led the British administration to set up a special committee to look into this matter. The special committee was formed on 18th November 1946 to study the problem of delinquency among children and young persons.¹³⁰ Based on the study, the committee expressed its concern over the issue of children involvement in criminal activities, particularly gambling, pickpocketing, stealing bicycles and breaking into homes. Pursuant to that, the committee recommended the creation of specific legislation to govern the problem of child delinquency. Acting on the

¹²⁷*Jamil bin Harun v Yang Kamsiah* [1984] 1 MLJ 217, *Lee Kee Choong v Empat Nombor Ekor* [1976] 2 MLJ 93.

¹²⁸Mohd Awal, N.A. (2009). Hak Kanak-Kanak di Malaysia: Ke Arah Mana? *Malayan Law Journal*, 2, p. lxxxviii.

¹²⁹*Ibid.*

¹³⁰Abdul Rahim, A. (2012). *Jenayah Kanak-Kanak dan Undang-Undang Malaysia*. Kuala Lumpur: Dewan Bahasa dan Pustaka, p 36.

recommendation of the committee, the British administration ordered the formulation of the Child Court Act 1947.¹³¹ Like other legislations, this Act was drafted based on the English legislation on juvenile justice. It extended the influence and the application English law in the area of juvenile justice in Malaysia. The introduction of the Child Court Act 1947 was very significant as it was the first enacted written law on juvenile justice in this country. The Act was a cornerstone that marked the beginning of the modern era of the juvenile justice system in Malaysia. The impact of the Act was enormous as it introduced and regulated the administration of the juvenile justice system. Among the crucial aspects of this Act was the establishment of a special court to deal with children known as the “Child Court”. The Act continued to govern all criminal matters relating to children until it was repealed by the Child Act 2001.

2.4.4 Ratification of the CRC

The Malaysian Government ratified the CRC in 1995.¹³² As a country that adopts the Common Law system, ratification of the CRC does not automatically make it part of Malaysian legal system. Instead, it is the duty of the Malaysian Government to incorporate the CRC into domestic law by both formulating new legislations as well as reviewing existing ones to ensure full compliance with the convention. The process of reviewing domestic law with the requirement of the CRC is not a straightforward exercise. Due to the complexity in reconciling domestic laws and national policies with the provisions of the CRC, the Malaysian Government decided to place reservations to twelve articles of the CRC after the

¹³¹*Ibid*, p 36.

¹³²Mustaffa, A. and Kamaliah, S. (2010). Evidence by Child in Criminal Proceedings in Malaysian Courts: A Study on Post Ratification of Convention of Rights of Child. *Current Law Journal*, 6, p i.

ratification.¹³³ In due course, some of these reservations have been gradually lifted up by the Government of Malaysia. Currently, the number of Articles which are still under reservation has been reduced to five, namely Article 2 (Non- discrimination), Article 7 (name and nationality), Article 14 (freedom of thought, conscience and religion), Article 28(1)(a) (Free and compulsory education) and Article 37 (right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment).

Nevertheless, the ratification of the CRC activated a new phase of progressive development of the Malaysian juvenile justice system. Among remarkable developments in the Malaysian Juvenile justice system after the ratification of CRC was the introduction of the Child Act 2001. It took a long process before the Child Act 2001 finally came into existence. Following the ratification of the CRC, the Government of Malaysia geared up efforts to actively focus on issues relating to the protection and welfare of children. In line with this development, the Ministry of National Unity and Community Development introduced the Malaysian National Action Plan (PINTAS) in 1997 with the aim of studying and reviewing relevant laws and policy relating to social aspects.¹³⁴ Among the areas which were given main focus in PINTAS was the revision of law on protection of children. The report on PINTAS was presented to the Cabinet Committee on 15th April 1997.¹³⁵ Based on the proposal made in the report on PINTAS, the cabinet committee decided that it was necessary to reform the law relating to child protection and juvenile justice. Acting on the proposal, the government formed a special committee consisting of a group of experts from various fields to revise and analyse all existing laws relating to children, particularly the Child Court Act

¹³³Dusuki, F.N. (2009). The UN Convention on the Rights of the Child and The Administration of Juvenile Justice: An Examination of the Legal Framework in Malaysia. *Asia Law Quarterly*, 1, p 142.

¹³⁴Mohd Awal, N.A., n. 130 above, p. lxxxviii.

¹³⁵Majid, M.K. (2002). Akta Kanak-Kanak 2001: *Cadangan Pindaan Undang-Undang Berkenaan Gejala Sosial*. In: Jamaluddin, S.Z., Talib, N. and Mohd Yusoff, J.Z., eds., *Siri Undang-Undang Mimi Kamariah: Akta Kanak-Kanak 2001*. Kuala Lumpur: Penerbit Universiti Malaya, p 2.

1947, the Women and Young Girls Protection Act 1973, and the Child Protection Act 1991.¹³⁶ Based on the study, the special committee recommended to the government to enact a new comprehensive statute governing child laws. The Committee closely worked together with the Attorney General's Chamber of Malaysia in drafting a newly proposed Child Act. The proposed bill of the Child Act 2001 was tabled in parliament on 16th October 2000. It was passed by the parliament and gazetted on 1st March 2001. Eventually, the Child Act 2001 came into force on 1st August 2002.¹³⁷

Among the main objectives of the Child Act 2001 is to streamline Malaysian juvenile justice system with the requirements of the CRC and international standards and practice. It incorporates the core principles of non-discrimination, the best interests of the child, the right to life, survival and development as well as respect for the view of the child.¹³⁸ The Act repealed three previous Acts, namely the Child Courts Act 1947, the Women and Young Girls Protection Act 1973 and the Child Protection Act 1991. As far as juvenile justice matters are concerned, Part X and XI of the Child Act 2001 provide for the specific criminal process for children in conflict with the law. The act provides for the establishment of a special court for children known as the Child Court. The court has jurisdiction to try and hear various applications pertaining to children in conflict with the law. Part X of the Child Act 2001 provides provisions pertaining to criminal procedure in court for children. This part consists of four chapters which cover charge and bail and others (chapter 1), trials (chapter 2), power of the Court for children at the conclusion of the trial (chapter 3) and probation

¹³⁶Majid, M.K. (2002). *Pendekatan Undang-Undang untuk menangani Masalah Kanak-Kanak dan Remaja di Malaysia*. In: Jamaluddin, S.Z., Talib, N. and Mohd Yusoff, J.Z., eds., *Siri Undang-Undang Mimi Kamariah: Akta Kanak-Kanak 2001*. Kuala Lumpur: Penerbit Universiti Malaya, p 21.

¹³⁷Majid, M.K., n. 135 above, p 17.

¹³⁸Pillai M.G, K. (2011). *Protection of Children*. Kuala Lumpur: CLJ Publication, p 56.

(chapter 4). In addition, Part XI of the Child Act 2001 provides provisions relating to pre-trial process, which consists of investigation, arrest, search and seizure.

The introduction of the Child Act 2001 expressly indicated both serious effort and commitment by the Government of Malaysia to streamline Malaysian's juvenile justice with the standards set by the CRC. Compared to the repealed Child Court Act 1947, the Child Act 2001 laid down a better and more structured legal framework for the juvenile justice system. This effort is commendable as it has, to a certain extent, elevated Malaysian juvenile justice system to a new level. However, it does not mean that the Child Act 2001 is comprehensive as close examination of the Child Act 2001 discloses that there is still room for improvement.

In conjunction with the requirement of the CRC, the Malaysian Government submitted its first periodic report in December 2006. The Committee has thoroughly examined the initial report of Malaysia at its 1216th and 1217th meetings held on 25 January 2007. As a response, the Committee on the CRC issued its concluding observation which, *inter alia*, contains comments and suggestions for the improvement of the Malaysian juvenile justice system.¹³⁹ While acknowledging positive measures taken by the Government of Malaysia to comply with the international standards regarding juvenile justice, the Committee has made the following recommendations:

- (a) Urgently raise the minimum age of criminal responsibility at least to the age of twelve and continue to increase it to a higher age level;
- (b) Develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort;

¹³⁹Committee on the Rights of the Child, *Concluding observations: Malaysia*, UN Doc. CRC/C/MYS /CO/1, 2 February 2007.

- (c) Amend the existing laws, including the Child Act 2001 (Act 611), in order to ensure that the deprivation of liberty is in full conformity with articles 37 and 40 of the Convention and take the necessary measures, for example suspended sentencing and early release. This is to ensure that deprivation of liberty is limited to the shortest time possible;
- (d) Take efficient legislative and administrative measures to abolish delays in the disposal of cases involving children;
- (e) Encourage and promote the positive involvement of the media in the reporting on children in conflict with the law and ensure that the media fully respect the right of the child to privacy;
- (f) Seek technical assistance from the United Nations Interagency Panel on Child Justice, which includes the United Nations Office on Drugs and Crime (UNODC), the United Nations Children's Fund (UNICEF), the United Nations High Commissioner for Human Rights (OHCHR) and non-governmental organizations (NGO).¹⁴⁰

The observation report by the Committee on the CRC deliberately highlights various aspects of Malaysian law which still do not measure up with the requirements of the CRC. It conveys a serious message that more progressive measures and actions need to be taken by the Government of Malaysia to ensure that that the current juvenile justice framework complies with the CRC's requirements. The report also points out the shortcomings of the governing statute on Malaysian child law, the Child Act 2001, in providing comprehensive provisions on various aspects of juvenile justice. Therefore, it is crucial for the Government of Malaysia to re-evaluate the current legal framework on juvenile justice and reform it accordingly.

¹⁴⁰*Ibid*, para 104.

2.5 Conclusion

This chapter has examined the historical background and development of the juvenile justice system. It shows that there are considerable and divergent models of juvenile justice that were adopted by various jurisdictions in addressing the problem of children. The approaches and objectives of each model is different from one another as they are characterized by diverse philosophical and theoretical principles. The adoption of different models of juvenile justice by various jurisdictions has resulted in the formulation of different sets of rules, principles, procedures, policies and mechanisms. This examination shows that the juvenile justice model in the past century was predominantly a feud between the welfare and justice approaches. This resulted in the cycle of juvenile justice approach and policy changing interchangeably from lenient treatment to harsh punishment and vice versa. Nevertheless, the end of last century has witnessed the development of other approaches such as diversion, restorative justice and a rights-based approach. The development of these models has broken new ground for a more flexible approach in tackling the issue of child delinquency.

The discussion in this chapter also has pointed out the importance as well as the impact of the CRC on the development of juvenile justice. The introduction of the CRC revolutionized the juvenile justice system across different countries through the introduction of the child rights based approach. It has also set up internationally accepted standards on juvenile justice that serve as a guideline to all state parties. The status of the CRC as a binding international instrument is key in ensuring that countries streamline their juvenile

justice systems to the standards set by the convention. As far as the Malaysian juvenile justice system is concerned, ratification of the CRC has not only changed but also promisingly paved the way towards a better system. The next chapters will analyse the compatibility of the Malaysian juvenile justice system with the standards fixed by the CRC.

THIRD CHAPTER

CRIMINAL RESPONSIBILITY OF CHILDREN

3.1 Introduction

One of the most controversial areas of juvenile justice policy lies in the determination of the minimum age of criminal responsibility. Legally, the concept of criminal responsibility refers to the criteria attributed to a person who has committed an offence against the law with certain sanctions.¹ In the context of children's criminal liability, it refers to the age at which a child can be held accountable for his or her criminal actions. The determination of the minimum age of criminal liability is central to the principles of any juvenile justice system as it represents how a society and its system views the status of childhood. It also reflects the characteristics, both progressive and repressive, of each juvenile justice system.² Research into various juvenile justice systems across the world reveals that there is a divergence of policies and practices adopted when determining the minimum age of criminal responsibility of children. Considerable attention and discussion have been directed towards the principles and rules governing the imposition of the minimum age of criminal responsibility for children.

This chapter intends to focus the discussion on criminal responsibility in relation to children. It will examine the question of the conceptualization of criminal responsibility in light of existing theoretical insights and scientific findings on child development. It will also

¹Maher, G. (2005). Age and Criminal Responsibility. *Ohio State Journal of Criminal Law*, 2, p 495.

²Jaime, F. (2010). The Significance of the Age of Criminal Responsibility Within the Irish Youth Justice System. *Galway Student Law Review*, 4, p 22.

comparatively examine the CRC's standards as well as Malaysian law's position concerning legal regulations, principles and practice on criminal responsibility of children. The chapter will conclude on to what extent current Malaysian laws on this aspect comply with the standards set by the CRC.

3.2 Definition of Child

It is crucial to have a comprehensive definition of a child as it determines the rights, obligations and legal remedies available upon him or her. Literally, the Oxford Dictionary of Law defines the word child as a person who has not attained the age of majority.³ Technically, there is no universally unanimous definition for the word children. The difficulty in fixing a uniform definition of children is mainly contributed to the fact that the term is differently constructed, expressing the divergent gender, class, ethnic or historical locations of particular individuals at particular moments in the development of their societies.⁴ In addition, the use of various legal terms to refer to children is another reason that causes non-uniformity of its definition. Among these terms are child, young person, infant, adolescent, youth and minor. These words are used interchangeably to refer to the child in various legal contexts and aspects of discussion. According to the CRC, the most authoritative international instrument on children, the term child refers to a person who is below the age of eighteen unless under the law applicable to the child, the age of majority is attained earlier.⁵ The definition provided by the CRC is clearly not conclusive as its proviso permits the age of majority to be set at an earlier stage by virtue of the federal, state or personal laws of the country. It means that the state parties have the discretion to permit the child to obtain legal

³Martin, A., E. (1996). *Oxford Dictionary of Law*, 3rd ed. New York: Oxford University Press, p 62.

⁴Franklin, B. (2002). *The New Handbook of Children's Rights: Comparative Policy and Practice*. London: Routledge, p 17.

⁵Article 1 of the UNCRC defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

capacity in various matters at an earlier age than eighteen years, depending on various factors.⁶ Reference to other relevant international instruments on children disclosed different terms used to refer to them. For example, the Beijing Rules employs the word “juvenile” instead of the word “child” in its provisions. According to the Beijing Rules, a juvenile refers to a young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.⁷ However, the rules refuse to deliberate the age bracket for the juvenile as it views that this matter should be left to the discretion of each legal system, taking into consideration economic, social, political, and cultural norms.⁸ Similarly, the Havana Rules also prefers to use the term juvenile in its provisions.⁹ On another hand, the Riyadh Guidelines employ the term delinquency in describing the young child’s acts.¹⁰

The inconsistency in employing legal terms to refer to children in international instruments resulted in confusion and vagueness. As such, it is crucial to harmonize non-uniformity of definition under current international instruments. While it is accepted that the definition of children is a social construct shaped by a range of social, religious, cultural, situational, economic, value, historical and other factors, there is a need to have a clear and comprehensive definition on this term. A conclusive definition is necessary to draw a clear line on who the child is and when the concept of childhood begins and ends. This is vital to ensure the uniformity and consistency of practice universally to children across the world. Consistency and uniformity of practice are important to ensure all the rules, regulations, guidelines and policies relating to children can be effectively implemented.

⁶Goonesekere, S. (1998). *Children, Law and Justice: A South Asian Perspective*. New Delhi: SAGE Publications, p 283.

⁷Rule 2.2(a) of the Beijing Rules.

⁸Commentary of Rule 2.2 of the Beijing Rules.

⁹See for example Section 11(2) of the Havana Rules.

¹⁰See for example section 1 and 2 of the Riyadh Guideline.

3.3 Child Criminal Liability

The criminal justice system plays a vital role in maintaining peace and order in a society. It refers to a legal framework by which a person who violates the criminal law shall be dealt with from beginning till the end. Basically, there are four pillars which form the foundation of the criminal justice system. These four pillars are the substantive criminal law, criminal responsibility, criminal process, and criminal punishment.¹¹ The second element, which is criminal responsibility, is the focus of discussion under this topic. The concept of criminal responsibility refers to the criteria attributing a person who has committed an offence against the law with certain sanctions.¹² It requires a person who voluntarily commits a wrongful act to possess certain degree of capacity. Otherwise, he or she cannot be held accountable on the ground of lack of capacity.

With regard to children, criminal responsibility refers to the age at which the child can be held accountable for his criminal action. Unlike adults, the issue of child criminal responsibility is very complex. This is because not all children who are in conflict with the law can be considered as accused and subjected to criminal liability. The law has drawn a demarcation line between the child below the minimum age of criminal responsibility (MACR) and the child above it. In the context of criminal responsibility, children can be divided into two categories, namely;

¹¹ Maher, G., n. 1 above, p 501.

¹² *Ibid*, p 501.

i- Children below the MACR

The first category consists of children who are below the MACR. It is a well-established principle that children below a certain age, known as minimum age of criminal responsibility, are exempted from criminal responsibility.¹³ The law specifically provides children below the MACR with absolute protection from any criminal liability, regardless of the nature or gravity of the offence committed by them. This position is grounded on the premise that children below the MACR lack the capacity to form criminal intention as well as to fully understand the legal and moral consequences of their actions. Therefore, no legal punishment can be imposed on this category of children. Though certain legal systems allow this category of children to be subjected to certain appropriate measures, they cannot be regarded as mode of punishments. Rather, these measures serve as non-legal and re-educational programmes that aim to prevent and re-educate them from being involved in criminal activities in the future.

ii- Children over the age of the MACR

The second category consists of children over the minimum age of criminal responsibility. Under criminal law, this category of children is responsible for their criminal actions. They are normally termed as children. The term child is defined as a young person who has not yet attained the age at which he or she should be treated as an adult for purposes of criminal law.¹⁴ Like adults, children under this category can be charged, tried and penalized for their criminal action. However, in practice, most of the countries provide a

¹³Hamilton, C. (2011). *Guidance for Legislative Reform On Child Justice*. [online] Children's Legal Centre and United Nations Children's Fund (UNICEF). Available from http://www.childrenslegalcentre.com/index.php?page=international_research_projects [Accessed on 3/4/2015].

¹⁴Black, H.C. (1999). *Black's Law Dictionary*, 6th ed. St. Paul Mint: West Publishing Co, p 232.

separate justice system for the child and the adult accused. Special procedures as well as substantive laws are formulated to deal with children in conflict with the law under this category.

3.4 Conceptualization of Criminal Liability in Relation to Children

Though it is legally justified that children below the MACR should be exculpated from any criminal responsibility, there is no agreement as to the exact age when the child is entitled to such exemption.¹⁵ Reference to various legal systems reveals that a different age is fixed as a minimum age of criminal responsibility. The question is how does the system determine the child's age of criminal responsibility? How does the law determine the minimum age of responsibility by looking at the age of the child? In order to answer these questions, it is pertinent to refer to the theories underpinning the conceptualization of child criminal responsibility. The discussion can be broadly divided into at least two categories. The first category emphasizes the discussion on the capacity of the child while the second category chooses to focus on the wider picture, which is the philosophy underlying the concept of the juvenile justice system.

3.4.1 Capacity of Child

Some legal scholars believe that criminal liability of children depends on their capacity.¹⁶ It is argued that the age of criminal responsibility should be determined by looking at the capacity of children. It means that a child cannot be held criminally liable unless it can be proven that he or she has sufficient capacity to understand the nature and consequences of his

¹⁵Reid, S.A. (2011). Age of Responsibility. In: Chambliss, W.J., ed., *Child Crime and Justice: Key Issues in Crime and Punishment*. SAGE Publications. p 2.

¹⁶Raymond, A. (2012). Rethinking the Criminal Responsibility of Young People in England and Wales. *European Journal of Crime, Criminal Law and Criminal Justice*, 20, p 14.

or her act. This cardinal principle of criminal law is based on the legal maxim “*Actus reus non facit reum nisi mens sit rea*”, which means an act is not an offence unless coupled with a guilty mind.¹⁷ *Actus reus* refers to physical act of a person which goes against the law. On the other hand, *mens rea* refers to guilty mind or intention of a person while committing crime. In order for a person to be held accountable for his action, both element of *actus reus* and *mens rea* must be present. It must be proven that the *mens rea* of a person’s action corresponds with the exact nature of the *actus reus*.¹⁸

As far as the element of *mens rea* is concerned, it closely relates to the mental capacity of a person to form a guilty mind. Lack of mental capacity is a ground that may prevent a person from being liable under criminal law. It may be attributed to various reasons that have an effect on mental functioning, such as mental disorder, mental illness, intellectual disability, and physical disorders.¹⁹ Capacity is founded on two main elements, namely cognitive and volitional.²⁰ While the former refers to the ability of a person to understand the requirements of law as well the nature and consequences of his action, the latter is concerned with the ability of a person to have full control of his action and behaviour with reference to the requirement of law. It is a well-established principle of criminal law that both elements of capacity must be proven before a person can be held liable for any criminal act.²¹ Hart explained this concept as follows;

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it

¹⁷Smith, J. (1999). *Smith and Hogan: Criminal Law*. 9th ed. London: Butterworths, p 31.

¹⁸Hoarder, J. (1997). Two Histories and Four Hidden Principles of Mens Rea. *Law Quarterly Review*, 113, p 95.

¹⁹Loughnan, A. (2012). Mental Incapacity Doctrines in Criminal Law. *New Criminal Law Review*, Vol. 15(1), p 2.

²⁰McDiarmid, C. (2007). *Childhood and Crime*. Glasgow: Dundee University Press, Lacey, N. (2001). In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory. *Modern Law Review*, 64, pp. 352-353.

²¹*Brend v Wood* [1946] 175 LT 306.

*forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent.... the moral protest is that it's morally wrong to punish because 'he could not have helped it', or 'he could not have done otherwise' or 'he had no real choice'.*²²

With regard to the child criminal liability, it is argued that a child of a certain age is lacking in mental capacity and therefore incapable of forming a *mens rea* or guilty intention.²³ Children under this category are regarded as unable to even distinguish between right and wrong, let alone to argue on the reason of their action. Lack of capacity renders children incapable of forming wrongful intention or *mens rea*. At the same time, they can neither fully contemplate the consequences of their actions. Instead, their choices tend to be impulsive. Therefore, children under this category cannot be held accountable under criminal law.

In addition, it is also argued that lack of capacity on the part of children may prevent them from appropriately participating in the proceedings brought against them.²⁴ Most people are not familiar with the complexity of the legal process. Even professional adults find the legal process extremely hard to comprehend as it involves complicated substantive law and strict procedure and rules of evidence. Children of a certain age are incapable of participating in complex legal proceedings due to a lack of mental and physical capacities.

However, conceptualization of child criminal liability based on capacity has its own setback. The main shortcoming of this approach is that it is practically difficult to draw a demarcation line between the child who reaches the age of capacity and the child who has yet

²²Hart, H. L. A. (1968). *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Clarendon Press, p 152.

²³Ward, C. V. (2006). Punishing Children in Criminal Law. *Notre Dame Law Review*, 82(1), p 435.

²⁴Sutherland, E. (2002). The Age of Reason Or the Reasons for an Age? The Age of Criminal Responsibility. *Scots Law Times*, p 3.

to reach that level. This is due to the fact that children develop their capacity gradually but at an unsteady and inconstant rate. The development of capacity varies from one person to another, depending on various relevant factors such as culture, history, social, religion, political situation and others. At this juncture, it is worthwhile to turn to the findings of psychologists and scientists on the relationship between age and capacity development. These findings may serve as a useful guide in determining the appropriate age of child responsibility based on the capacity approach. Yet, even with assistance from such findings, so far it is still practically impossible to single out a specific age as a standardized age of capacity that is applicable to all children.

In short, some legal scholars perceived that criminal responsibility of children can be determined on the basis of capacity. Children with lack of capacity cannot be held accountable for their criminal action and vice versa. However, there is no hard and fast rule that can be used in determining the definite age at which a child gains capacity, as its development varies from one individual to another.

3.4.2 Immunity from Prosecution

The conceptualization of criminal responsibility of children may also be founded on the principle of immunity from prosecution. This principle is not concerned much with the requirement of capacity but emphasizes on the goals and aims of the juvenile justice system.²⁵ Instead of focusing on the complex process of determining the capacity of a child concerned, this principle put a specific limit as the age of immunity from prosecution. It means that the child below the specified age is automatically absolved from any criminal

²⁵Goldson, B. (2013). 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales. *Youth Justice*, Vol.13(2), p 116.

liability without the need to inquire into his or her capacity. Conversely, any child above the specified age is answerable to the criminal charge, same as adults.

The proponents for this approach believe that the criminal liability of children cannot depend on the criminal capacity of the child. It is argued that the decision not to hold the child accountable for criminal responsibility can neither be based on psychological or philosophical considerations nor on the age of moral development of the child. Instead, this decision should be founded on conscious criminal policy and societal experience in dealing with children as offenders.²⁶ The focus should be given on the values of the juvenile justice system.²⁷ It is this value that overrides the approach of treating children as responsible agents based on *mens rea* or capacity.

This view, which attempts to disconnect the age of criminal responsibility of a child from the element of capacity, is the subject of various criticisms. Among the main grounds raised for the objection of this approach is that the approach of immunity from prosecution prevents children from appearing in the court, but it does not give any concrete justification for doing so.²⁸ It just absolves the child below the age of immunity from prosecution, those who commit crime without even questioning their capacity, motive and reason. In contrast, the age of criminal responsibility linked to the capacity clearly identifies lack of mental development as a solid ground for absolving the accountability of children.²⁹ Secondly, the concept of immunity from prosecution, which expires once the relevant age is attained, is also criticized on the grounds that it may contribute to the possibility of prosecution for offences

²⁶Sasso, P. (2009). Criminal Responsibility in the Age of “Mind-reading”. *American Criminal Law Review*, 46(2), p1243.

²⁷Maher., G., n. 1 above, p 509.

²⁸McDiarmid, n. 20 above, p 95.

²⁹*Ibid*, p 95.

committed while he was a child.³⁰ It should be noted that there are certain legal systems which allow the determination of criminal responsibility to be based on the date of prosecution, not the date of commission of the offence.³¹ For example, a child commits theft at the age of nine, which is below the age of immunity from prosecution. If the prosecution charge him in court when he has already above the age of immunity from prosecution, he would be answerable to the court. He could no longer invoke the defence of immunity from prosecution because he is now above the age of immunity from prosecution. The consequence would be different under the approach of capacity, where he could not be charged if it can be proven he lacks of capacity.

While there is justifiable basis for this argument, the reasons put forward by the scholars who opposed this approach are not convincing and rebuttable. As to the argument that there is no concrete justification for absolving the child below the age of immunity from prosecution, it is inaccurate and misleading. It is clear from the argument of those who support the view of immunity from the prosecution approach that the value and goal of the juvenile justice system overrides the need to punish the child.³² The child is exculpated under this approach not because the law does not acknowledge his action as being wrong, but because the law thinks that it is unfair, unsuitable and improper to criminalize the child at that age level, taking into consideration his or her physical, mental and intellectual ability. This is in line with the goal of the juvenile justice system which aims to rehabilitate, re-educate and reconcile the child rather than to punish him. Exposing the child of early age to the criminal system may potentially pave the way to a criminal career. The earlier that children exposed to

³⁰*Ibid*, p 95.

³¹For example, the Supreme Court of India in the case of *Arnit Das v State of Bihar* [2000] AIR SC 2264 has decided that the date of the commission of one offence is irrelevant in determining whether the alleged offender is a child.

³²Goldson, B., n. 25 above, p 116.

the criminal justice system, the more damaged they become, and the less likely they are to desist from offending.³³

In addition, the second ground for objection is also subject to rebuttal, namely concerning the possibility of prosecution of the child for his wrongful action done before he attains the age of immunity from prosecution. It is submitted that this possibility can be avoided by putting a timeframe, in the form of statutory requirement or practice direction, for the investigation and prosecution of the child. This requirement will oblige the police and the prosecutor to speed up the criminal process involving children. It will prevent any delay or possibility of prosecution of the child for the wrongful act done before he reaches the age of immunity from prosecution. Besides, it must also be borne in mind that immunity from prosecution merely provides protection from the criminal justice process. It does not prevent the authority from approaching and dealing with the problematic child in the form of counselling service, re-education and others.

The above discussion shows that the age of criminal responsibility can be founded either on the approach of capacity or immunity from the prosecution. These two approaches have their own strength and weaknesses. Though it is difficult to identify which approach is preferable, it can be concluded that both approaches irresistibly point out to the same conclusion, that the child at a certain age should be exonerated from criminal liability. The difference between these two approaches only lie on the rationale and goal which govern the principle behind the exculpation of children's criminal responsibility.

³³Reid, S.A., n. 15 above, p 8.

3.5 Contributions from Psychology and Science

Determining child criminal responsibility, either based on the concept of capacity or immunity from prosecution, must be made after careful examination of relevant factors. Undoubtedly, the findings of the scientists and psychologists are one of the prime factors in determining criminal responsibility of children. For many years, psychologists and scientists have continuously explored the development of children. The findings of their research have generated remarkably comprehensive literature on various aspects of the development of children such as physical, mental, psychological, and emotional development, as well as brain maturation, cognition, maturity and others. With the advancement of recent technology and science, scientists and psychologists have managed to produce more useful and vital discoveries on the relationship between the age and development of children's capacity. It is interesting to examine the importance of the recent findings of scientists and the psychologists and to assess their impact in the changing legal landscape and perspective of child justice, particularly on the issue of the criminal responsibility of children.

3.5.1 Findings of Psychologists

In terms of the psychological development of children, there are numerous studies conducted by the psychologists who explore the possibility of holding them accountable for their actions and behaviour. Among them, Jean Piaget³⁴ is regarded as the renowned psychologist in this area. His theory on the cognitive development of children is arguably the most influential theory of child development.³⁵ Though Piaget's theory has been frequently

³⁴Piaget, J. (1932). *The Moral Judgment of the Child*. London: The Free Press Publications.

³⁵Delmage, E. (2013). The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective. *Youth Justice*, Vol.13(2), p 135.

challenged and criticized by later psychologists, it has not been negated. In fact, later approaches and theories are found to be merely identifying additional important aspects of development, or modification of Piaget's theory.³⁶

According to Piaget,³⁷ cognitive development can be classified into four main phases;

1-Sensorimotor stage (birth - 2 years of age)

At this stage, the child begins to process the information that he receives from his physical relationship with the objects around him. He starts to build a set of concepts regarding reality and how it works.

2-Preoperational stage (ages 2-7)

At this stage, the knowledge of a child starts to expand further. However, the child does not yet conceptualise abstractly and needs concrete physical situations. He develops language rapidly and uses words, symbols and images to interact with the environment.

3-Concrete operations (ages 7-11)

At this stage, a child develops his physical and mental development to conceptualise. The child also begins to gain the capacity to solve abstract problems.

4-Formal operations (beginning at ages 11-15)

At this stage, cognitive structures of the child become similar to those of an adult, including conceptual reasoning. The child now is capable of developing abstract reasoning and hypothesis.

Based on the Piaget's theory, the child at the age of seven is said to have the ability to think and make decisions independently. However, the child is only capable of forming

³⁶Flavell, J. H. et al. (1993). *Cognitive Development*. NJ:United States: Prentice-Hall, Ferreira, N. (2008). Putting the Age of Criminal and Tort Liability into Context: A Dialogue Between Law and Psychology. *International Journal of Children's Rights*, 16, p 33.

³⁷Piaget, J. (1971). The Theory of Stages in Cognitive Development. In: Green, D.R. et al., eds., *Measurement and Piaget*. New York: Mc Graw-Hill, pp. 1-4.

abstract reasoning when he reaches the age of eleven. The theory also indicates that only the child at the stage of formal operations, which comprises the age of between eleven and fifteen, has reached the level of maturity that is equal to an adult.

Apart from Piaget, the theory of moral responsibility pioneered by Kohlberg is also very popular in relation to the discussion of child development and responsibility. According to Kohlberg,³⁸ each person undergoes three phases of moral development, namely the pre-conventional, conventional and post-conventional phases. Based on the Kohlberg theory, children that reach the conventional morality stage have attained the minimum level of maturity. Children at this stage, from eleven and above, are capable of differentiating between right and wrong.

In addition, there is considerable evidence from psychologists that indicate that adolescents are much less capable of making sound decisions and easily succumb to stressful conditions and peer pressure.³⁹ Other research disclosed adolescents' lack of future orientation about the consequences of their actions choices.⁴⁰ The findings showed that they tend to focus on the immediate rather than long term effects and consequences of their choices and decisions.

³⁸Kohlberg, L., (1976). Moral Stages and Moralisation: The Cognitive-Developmental Approach. In: Lickona, T., ed., *Moral Development and Behaviour: Theory, Research, and Social Issues*, New York: Holt, Rinehart and Winston, pp. 31-34.

³⁹Dolcos, F. (2006). Brain Systems Mediating Cognitive Interference by Emotional Distraction. *Journal of Neuroscience*, 26(7), pp.2077–2078, Aronson, J.D. (2009). Neuroscience and Juvenile Justice. *Akron Law Review*, 42, p 925.

⁴⁰Scott, E.S. and Grisso, T. (2005). Developmental Incompetence, Due Process, And Juvenile Justice Policy. *North Carolina Law Review*, 83, p 815.

3.5.2 Findings of Scientists

Besides psychologists, remarkable findings by scientists have also contributed to new insights on child development. For example, scientists found that cognitive functioning and the physical brain of a child develop continuously before and after puberty until into the early twenties.⁴¹ Other research by scientists concluded that the capacity of young people to form judgments continues to develop until they reach their early twenties.⁴² Further, the research on brain development and the cognitive functioning of adolescents revealed that parts of the brain concerned with judgement, impulsive behaviour and foresight develop in the twenties rather than the teen years.⁴³ With regard to the development of the pre-frontal cortex, parts of the brain responsible for emotional processing mature during early adolescence, which is particularly important for decision-making and impulse control. This part of the brain was found to be one of the slowest areas to develop.⁴⁴ In addition, findings by neuroscientists disclose that two key developmental processes, namely myelination and the pruning of neural connections, continue to develop during adolescence into adulthood. Myelination refers to the disposition of a layer tissue around nerve fibres, which provide the insulation to transfer electrical signals from one neuron to another.⁴⁵ In recent years, scientists have managed to develop techniques and methods in identifying the cognitive structural development during adolescence.

⁴¹Blakemore, S.J. and Choudhury, S. (2006). Development of the Adolescent Brain: Implications For Executive Function and Social Cognition. *Journal of Child Psychology and Psychiatry and Allied Disciplines*, 47(3-4), pp. 300–308.

⁴²Cauffman, E. and Steinberg, L. (2000). Immaturity Of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults. *Behavioral Sciences and the Law*, 18(6), pp.756-757.

⁴³Gur, R.C. (2005). Brain maturation and the execution of children, *University of Pennsylvania Gazette*, p 103.

⁴⁴Bateman, T. (2012). New Insights into Brain Development May Have Implications for the Age of Criminal Responsibility. *Youth Justice*,12(1), p 65.

⁴⁵Aronson, J.D., n. 39 above, p 922.

Apart from that, the invention of non-invasive brain imaging techniques, particularly Magnetic Resonance Imaging (MRI), has enabled scientists to examine detailed three-dimensional images of the living human brain.⁴⁶ The MRI technique provides data regarding the on-going maturation of the frontal cortex into adolescence. It also enables scientists to study the changes in the frontal and parietal regions of brain in relation to the cognitive development.⁴⁷ The studies based on these MRI techniques disclose dramatic changes of brain occurred during teenage phases of development, which in turn affect their function and ability to respond to information.⁴⁸ As a result, teenagers are more likely to have poor impulse control, succumb to peer pressure, be short sighted and influenced by emotions.⁴⁹ These factors may affect the ability of teenagers to make rational decisions. It is interesting to note that technological advancement has enabled them to explore various techniques in analysing the correlation between capacity development and responsibility.

The above discussion disclosed important findings and theories by psychologists and scientists on child development. They point out that there is a significant variation between individuals in acquiring developmental skills, and they evidently demonstrate widespread agreement that children's brain development, capacity, and maturity are less developed compared to adults. In addition, they also strongly indicate that children of a young age do not possess the experience and emotional maturity to control their impulsivity and to understand the nature and consequences of their actions. Therefore, it is unreasonable, inappropriate and unsafe to impose criminal responsibility on children.

⁴⁶Choudhury, S, Blakemore, S.J. and Charman, T. (2006). Social Cognitive Development During Adolescent. *Social Cognitive and Affective Neuroscience*, p 165.

⁴⁷Sowell, E.R. et al. (1999). Localising Age Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping. *NeuroImage*, 9, p 587.

⁴⁸Giedd, J.N. et al. (1999). Brain Development During Childhood and Adolescence: a Longitudinal MRI Study. *Nature Neuroscience*, 2(10), pp.861–863.

⁴⁹Backus, M.S. (2012). Achieving Fundamental Fairness for Oklahoma's Children: The Role for Competency in Child Proceedings. *Oklahoma Law Review*, 65, p 55.

There is no doubt that these findings and theories have so far provided useful guidelines in assessing the age of child criminal responsibility. In fact, these findings and theories have served as the main source of guidance for society's laws and policies on child's criminal responsibility. To illustrate this, United States courts' decision for example acknowledge the importance and impact of psychological and scientific findings on legal principles pertaining to children. In recognizing these findings, the Supreme Court in the case of *J.D.B v. North Carolina* came to the conclusion that children are different from adults in the sense that they lack maturity in their judgment, problem solving and decision-making capabilities.⁵⁰ Therefore, children should no longer "*be viewed as miniature adults.*"⁵¹ Legal recognition on the scientific and psychological evidence on development of children has convincingly persuaded the courts to re-evaluate child law in United States, which consequently led to the abolishment of the child death penalty,⁵² mandatory life imprisonment without parole for homicide⁵³ and life imprisonment without the possibility of parole for non-homicide crimes.⁵⁴ These decisions marked the acknowledgement of scientific and psychological findings in bringing about change to juvenile justice.

It is submitted that the findings and theories of scientists and psychologists based on recent sophisticated and advanced technology should be regarded as crucial pieces of evidence. These findings have convincingly established the fact that children are fundamentally different from adults in terms of psychological, physical, intellectual and mental development as well as maturity. The impact of these findings is enormous to the extent they are supposed to be treated as changing the legal landscape and the perspective on

⁵⁰131 S. Ct. 2394 (2011).

⁵¹*Ibid*, p 2404.

⁵²*Roper v. Simmons*, 543 U.S. 551 (2005).

⁵³*Miller v. Alabama*, 132 S. Ct. 2455, 2460 U.S.(2012).

⁵⁴*Graham v. Florida*, 130 S. Ct. 2011 (2010).

child criminal responsibility under criminal law. Specifically, it is submitted that evidence from scientists and psychologists should serve as a concrete basis for the reform of various principles of juvenile justice, including redefinition of criminal responsibility of children, reformulation of a comprehensive and separate justice system and others.

3.6 The CRC's Standards on the Minimum Age of Criminal Responsibility

The CRC regards the minimum age of criminal responsibility as one of the core elements of the juvenile justice. It has laid down its requirement on this matter, which can be found in Article 40(3) (a). In addition, there are further guidelines on the interpretation as well as implementation of the requirement on minimum age of criminal responsibility provided by the Committee on the CRC. These guidelines, in the form of reports, comments and observations by the Committee, can be used as references to understand the legal framework of the CRC on the minimum age of criminal responsibility. Briefly, the CRC's standards on the MACR are as follows;

3.6.1 Duty of State Parties to Set MACR

Article 40 (3) (a) of the CRC specifically emphasizes that it is a mandatory requirement for each state party to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. This provision imposes the duty on each state party to fix a minimum age of criminal responsibility for children in order to protect them from any criminal prosecution. Each state party is given discretionary power to set the MACR, taking into consideration various factors such as social and cultural development, history, religion, political status, experience and others. Unfortunately, the

CRC is silent on the exact minimum age of responsibility. Reference to the records showed that there was no detailed discussion of the age requirement made during the drafting process of the CRC.⁵⁵ The only reference made by the drafters on this issue was that state parties should acknowledge that children who are accused as being in conflict with penal law should not be considered criminally responsible before reaching a specific age according to national law, and hence should not be incarcerated. For this purpose, the drafters recommended that the age of criminal responsibility shall not be fixed too low, taking into consideration circumstances of emotional, mental and intellectual maturity and stage of growth.⁵⁶ However, the final text of the CRC on the MACR, which is in fact article 40(3), omitted the prohibition of the child in conflict with law from incarceration and the recommendation to consider circumstances of emotional, mental and intellectual maturity and stage of growth. Therefore, the current provision of the CRC on the MACR envisaged in the Article 40(3) is regarded as loosely defined, ambiguous and open to wide conceptual interpretation without any substantive guidance.⁵⁷ It merely requires the state parties to set the age of MACR, without providing a specific age bracket. The provision also is silent on the guideline for state parties to handle and deal with children below and above the age of MACR who are found to be in conflict with the law. The definition of the CRC on the MACR is not sufficiently descriptive and practical to serve as a conceptual foundation for forceful legal provision. This has led certain countries to disregard and ignore the requirements of its provisions.⁵⁸

Nevertheless, guidelines on the implementation of the MACR can be found in various periodical reports and general comments issued by the Committee on the CRC. The

⁵⁵Detrick, S. (1992). *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires*, Dordrecht: Kluwer Law. p. 471-477.

⁵⁶*Ibid*, p 445.

⁵⁷Cipriani, D. (2009). *Children's Rights and the Minimum Age of Criminal Responsibility A Global Perspective*. Farnham: Ashgate Publishing Ltd, p 56.

⁵⁸*Ibid*, pp. 57-58.

Committee on the CRC has closely monitored the implementation of the requirement of the MACR by state parties. Between 1993 and 2008, the Committee has made 160 comments and suggestions on the MACR to 117 states parties.⁵⁹ The Committee also has specifically addressed the issue of the MACR in the Committee's General Report on the *Children's Rights in Juvenile Justice* issued in 2007 for the reference of each state party.⁶⁰ The report, inter alia, recommended that the age of twelve and above is the appropriate age for the MACR. Therefore, the state parties should not set the MACR below the age of twelve for their respective countries. The Committee elaborated this point as follows;

“Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. In line with this rule the Committee has recommended States parties not to set a MACR at a too low level and to increase an existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.”⁶¹

The absence of detail and comprehensive provision on the MACR in the CRC has both positive and negatives impacts. On one hand, the absence of provision indicates the flexibility of the CRC in terms of implementing this requirement. It indicates that discretion is given to state parties to determine the minimum age requirements for their respective

⁵⁹*Ibid*, p 56.

⁶⁰Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, paras. 30–39.

⁶¹Committee on the Rights of the Child of the General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 32.

countries based on societal conditions, local circumstances, culture, history and others. On the other hand, the absence of a specific provision in the CRC has a negative impact in the sense that there is no uniformity of practice among state parties with regard to the minimum age of responsibility. Various legal systems have chosen different minimum ages of criminal liability for their respective states, ranging from seven to eighteen years old.⁶² For example, in Belgium the minimum age of criminal responsibility is eighteen, in Cuba, Argentina, the Russian Federation and Hong Kong it is sixteen, in Denmark, Sweden and Finland, Norway, Czech Republic it is fifteen, in Germany, Italy, Hungary, Latvia, Spain and Australia, Mongolia, Korea, Azerbaijan, Bulgaria, Lithuania and China it is fourteen, in France, Poland and Greece it is thirteen, and in Canada, Ecuador, Lebanon and Turkey it stands at twelve.⁶³ While it is acceptable that each state has its own considerations in determining the age of responsibility, a wide disparity between one state to another state raises confusion on the appropriateness of the fixed age. For example, one may ask question why a child at the age of ten years old in England⁶⁴ is subjected to criminal liability while the fellow child at the age as high as fifteen years old in Sweden⁶⁵ is completely exculpated from any criminal liability.

Other international documents

In addition to the CRC, reference on the international standard of the MACR can be found directly and indirectly in other international instruments. Among these international documents, the Beijing Rules can be regarded as the document which provides the most detailed guidelines on the MACR. Article 4 of the Beijing Rules clearly requires the state parties not to fix the age of criminal responsibility at too low an age level, taking into

⁶²Parkes, A. (2013). *Children and International Human Rights Law the Right of the Child to be Heard*. New York: Routledge, p 152.

⁶³Goldson, B., n. 25 above, p 118.

⁶⁴Section 50 of the Children and Young Person Act 1933.

⁶⁵Section 6 of the Belgian Penal Code.

consideration of the facts of emotional, mental and intellectual maturity.⁶⁶ Though the Beijing Rules do not specifically mention the exact age of criminal liability, it sets out guidelines in determining that matter. The absence of a specific age of criminal liability in the Beijing rules positively reflects its flexibility in the sense that it gives full discretion to the state parties to determine it. This stand is taken in appreciation of the fact that the development of child differs from one place to another place, depending on various factors such as social and culture development, history, religion, political status, experience and others.⁶⁷ Undoubtedly, these factors have direct effects in influencing the development of physical, mental and intellectual capacity of children. Acknowledging this fact, the Beijing Rules leave the state parties with discretionary power to determine the minimum age of responsibility. The flexibility provided by the Beijing Rules is however subjected to the requirement that the age of criminal responsibility shall not be fixed too low. The commentary to Article 4 of the Beijing Rules stresses that fixing the age of responsibility too low may render the notion of responsibility to become meaningless.

Apart from the CRC and the Beijing Rules, reference to other international documents indicates that there is no direct provision made to the minimum age of child criminal responsibility. However, several general provisions of these documents may still be taken into consideration as indirect guidelines in setting the minimum age of child criminal responsibility. Provisions relating to right to fair trial⁶⁸, the right of children to special protection⁶⁹, the prohibition from any torture and discrimination⁷⁰ as outlined in the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the UDHR and the European Social Charter (ESC) can be used as

⁶⁶Article 4(1) of the Beijing Rules.

⁶⁷The official commentary to article 4 of the Beijing Rules.

⁶⁸Article 14 of the ICCPR, article 6 of UCHR, article 10 of the UDHR.

⁶⁹Article 24 Of the ICCPR, article 17 of the ESC.

⁷⁰Article 7 of the UDHR, article 3 of the UCHR.

general guidelines in determining the minimum age for child criminal responsibility. Despite the absence of a specific provision on the MACR, the Committees responsible for the implementation of these international instruments have issued various comments to state parties on the issue. For example, the Committee on the ICCPR, in its concluding observation on Kenya, commented that the MACR in Kenya which is fixed at eight years old is too low. The committee recommended that the MACR in Kenya should be increased in line with the requirement of Article 24 of the ICCPR.⁷¹ Besides that, the Committee responsible for the European Charter of Justice commented that the MACR in England which is fixed at the age of ten years old is manifestly low and therefore not in conformity with the Article 17 of the Charter.⁷²

3.6.2 Applicability of MACR to All Offences

The CRC's requirement on the state parties to set a specific age of the MACR is intended to be a single standard which is applicable in all offences and cases without any exceptions. The CRC strongly objects to any idea and practice which attempt to provide a different MACR applicable to the child based on the gravity or nature of the offence. The Committee on the CRC has expressed its concern over certain countries that provide statutory exception to the applicability of single MACR for the offences, such as Malaysia⁷³ New Zealand⁷⁴ and Mexico.⁷⁵ For example, the Committee observed that the practice of dual MACRs in New Zealand based on the seriousness and gravity of the offences and described it

⁷¹ICCPR Committee Concluding observations on Kenya, CCPR/CO/83/KEN, 29 April 2005.

⁷²European Committee of Social Rights Conclusions XIX-4 (2011) (United Kingdom).

⁷³Committee on the Rights of the Child, *Concluding observations: Malaysia*, CRC/C/MYS /CO/1, 2 February 2007, paras. 102–103.

⁷⁴Committee on the Rights of the Child, *Concluding Observations: New Zealand*, CRC/C/15/Add.71, 24 January 1997, para. 23.

⁷⁵Committee on the Rights of the Child, Summary Record of the 106th Meeting: Mexico, CRC/C/SR.106, 14 January 1994.

as being against the standard of the CRC's standards. Expressing its concern over this matter, the Committee suggested that the minimum age for being charged with very serious crime offences to be reviewed as a matter of priority.⁷⁶

In addition, the CRC also regards the practice of certain countries which provide statutory exception to the application to the MACR for offences under anti-terrorism or emergency laws as undermining the international legal standards. For example, the Committee on the CRC also expressed its concern on Nepal's Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) which set no minimum age at all. Commenting on this, the Committee observed as follows;

*"The Committee is also concerned by the reports of persons under eighteen held under the Terrorist and Disruptive Activities (Control and Punishment) Ordinance (TADO) which has no set minimum age and grants security forces wide powers to arrest and detain any person suspected of being associated with the armed groups, including children."*⁷⁷

Similarly, the Committee also expressed its grave concern over the provisions of India's Prevention of Terrorism Act 2002⁷⁸ which clearly allows the prosecution to charge the child below the MACR in violation of the the requirement of the CRC. Based on these, it is explicit that the legal principle relating to MACR shall not be subjected to exceptions by separate, existing or future special legislations, such as martial laws, anti-terrorism legislations, emergency legislations, state and provincial laws.

⁷⁶Committee on the Rights of the Child, n. 72 above, para. 23.

⁷⁷Committee on the Rights of the Child, *Concluding Observations: Nepal*, U.N. Doc. CRC/C/15/Add.260, 21 September 2005, para. 98.

⁷⁸Committee on the Rights of the Child, *Concluding observations: India*, U.N. Doc. CRC/C/15/Add.228, 26 February 2004, para. 78

3.6.3 Date of Commission as a Determining Factor

It is also a feature of the CRC's standard on the MACR that the determining date of the child criminal liability must be based on the date of the commission of the offence, not the date the child is arrested, investigated or charged in court.⁷⁹ It means that if the child commits any criminal offence while he has not yet attained the MACR, he is automatically exonerated from criminal liability though the investigation or the prosecution was brought against him after he reaches the MACR. Based on this principle, the Committee on the CRC expressed its concern over the decision of the Supreme Court of India in the case of *Arnit Das v State of Bihar*⁸⁰ that decided that the date of the commission of one offence is irrelevant in determining whether the alleged offender is a child.⁸¹ Therefore, the Committee has specifically recommended India to amend its penal law in conformity with the requirement of the CRC which holds that determination of the child's criminal liability depends on the date of the trial, not the date of the commission of the offence.⁸²

3.6.4 Legal Position of Child in Conflict with the Law Younger than MACR

The CRC recommends that each state party provides special measures in dealing with children in conflict with the law who are below the age of MACR.⁸³ Among the main importance of the MACR is that it draws a demarcation line between children who can be

⁷⁹Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 31.

⁸⁰AIR 2000 SC 2264.

⁸¹Committee on the Right of Child, *Concluding observations: India*, U.N. Doc. CRC/C/15/Add.228, 26 February 2004, para. 78.

⁸²*Ibid*, para. 80(a).

⁸³For example, the Committee on the CRC has issued recommendation to Jordan and Chile on this matter. Reference can be made to the Committee on the Right of Child, *Concluding observations: Jordan*, U.N. Doc. CRC/C/15/Add.21, 25 April 1994, para. 16 and Committee on the Right of Child, *Concluding Observations: Chile*, U.N. Doc. CRC/C/CHL/CO/3, 2 February 2007, para. 8.

subjected to criminal liability and children who are completely exonerated from any criminal liability. The MACR marks the age threshold when children are answerable to their criminal action. On the other hand, children below the age of the MACR are exculpated from any criminal liability. The CRC obligates state parties to ensure the establishment of laws, procedures, authorities and institutions specifically applicable to the child below the MACR who is in conflict with the law.⁸⁴ State parties are required to provide a variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education, vocational training programmes and other alternatives to institutional care to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.⁸⁵ These alternative measures are not regarded as penal sanctions or punishments on the child in conflict with the law. Rather, they are perceived as protective measures which aim to re-educate or re-habilitate the child. In other words, children younger than the MACR at the time of alleged offenses cannot be deprived of their liberty, and cannot be formally charged or subject to penal law procedures via either child or adult criminal court except under special circumstances.⁸⁶

Based on the above discussion, it can be summed up that there is inconsistency among countries across the world on various issues relating to the MACR legal framework. Though there are guidelines in the form of recommendations laid down by the Committee responsible for the implementation of the CRC, they are not comprehensive and lack legal force as they are not binding on state parties. As a result, the recommendations of the Committees are simply ignored by some state parties. This in turn questions the effectiveness of international standards, particularly on the MACR, in protecting the children's rights. Therefore, it is high time now to incorporate comprehensive and specific provisions on legal framework of the

⁸⁴ Article 40(3) of the CRC.

⁸⁵ Article 40(4) of the CRC.

⁸⁶ Cipriani, D., n. 57 above, p 64.

MACR into the CRC as well as other international documents. These comprehensive and specific provisions should act as authoritative guidelines requiring each state party to act immediately and uniformly without exception.

3.7 MACR Framework under Malaysian Law

3.7.1 Minimum Age of Criminal Responsibility

Malaysian child law is based upon English Law. Therefore, it incorporates similar legal principles contained in the English law. The Common Law doctrine of *doli incapax*, which has already been abolished in England, still remains the governing principle in determining criminal responsibility under Malaysian law. With regard to the criminal responsibility of children, the relevant provisions can be found in the Penal Code. Basically, the criminal responsibility of children under Malaysian law can be divided into two categories:

i- Children below the age of ten

Under Malaysian law, children below the age of ten years old are conclusively regarded as incapable of committing crime. They are completely absolved from any criminal responsibility. This irrebuttable presumption is provided for under section 82 of the Penal Code. This section states that:

“Nothing is an offence which is done by a child under ten years of age”

This position incorporates the principle of *doli incapax* is similar to the position under English law. It should be noted that previously this section fixed the age of seven as the age of irrebuttable presumption. However, by virtue of an amendment to the Penal Code in 1976,

the age of seven was raised to ten.⁸⁷ Therefore, currently the age of ten marks the beginning the age of criminal responsibility in Malaysia. Any child below ten is conclusively presumed as incapable of committing crime.

ii- Children above the age of ten and below the age of twelve years old

With regard to the criminal responsibility of children above ten and below the age of twelve, they are presumed as incapable of committing crime. However, this presumption is rebutted by producing evidence to the contrary. Section 83 of the Penal Code provides a rebuttable presumption of criminal responsibility. It states:

“Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion”

It should be noted that section 83 is included in Chapter IV of the Penal Code, which provides for general defence to criminal charges. It means that the rebuttable presumption under section 83 operates as a defence. The burden of proof is on the defence to prove that the child is incapable of committing crime.⁸⁸ It is the duty of the court to evaluate the evidence tendered by the defence in order to determine whether the child has attained sufficient capacity or not. If the court finds that that particular child has not attained the age of capacity, he or she will be exempted from any criminal responsibility. On the other hand, if the court finds that the child has attained sufficient maturity of understanding to realize what he or she is doing, or to judge the nature and consequences of their conduct, the court

⁸⁷Abdul Rahim, A. (2012). *Jenayah Kanak-Kanak dan Undang-Undang Malaysia*. Kuala Lumpur: Dewan Bahasa dan Pustaka, p 80.

⁸⁸Section 105 of the Evidence Act 1950.

will proceed and determine his or her liability based on the evidence. In determining the defence's *doli incapax*, Malaysian courts are guided by the principle of English law which is the test of mischievous discretion.⁸⁹ Among the factors taken into consideration in determining this matter include the conduct of the child accused, his or her family background, evidence obtained during the police investigation, education background, expert evidence and others.

Based on the above observation, it can be concluded that the MACR in Malaysia is currently fixed at the age of ten years old. The Penal Code merely absolves the children below the age of ten years old from any criminal responsibility. With regard to the child above the age of ten years old and twelve years old, they are subjected to the rebuttable presumption of *doli incapax*. The child under this category is presumed as incapable of committing a crime unless proven otherwise. The child above the age of twelve years old is subjected to full criminal responsibility similar to an adult. A comparison between international standards and Malaysian law reveals that the current Malaysian legal framework is not in line with requirements of the CRC. The CRC consistently recommends that the minimum age of criminal responsibility to be set at least at the age of twelve years or any age higher than that. By using this age as a benchmark, it is obvious that the current MACR under Malaysian law which is ten years old is explicitly below the CRC's standard. Though Malaysian law currently adopts the rebuttable presumption of *doli incapax* to be used to determine the criminal liability of the child between the age of ten and twelve years old, it is still below the international standard as this presumption is rebuttable. It means that protection from criminalization provided for the child between the age of ten and twelve years old is not absolute.

⁸⁹Abdul Rahim, A., n. 87 above, pp. 175-176.

3.7.2 Application of Law Relating to MACR is Subjected to Reservation

It is a feature of the CRC's framework on the MACR that its principle should be made applicable to all offences without any condition. It prevents application of a different set of principles relating to the MACR based on the gravity or nature of the offence. Unfortunately, the current position of Malaysia shows that the principle of the MACR, which is provided under Sections 82 and 83 of the Penal Code, is only applicable to criminal offences listed under the Penal Code and relevant statutes. This principle has no application to certain offences which are particularly classified as security and emergency offences under specific statutes. Among the statutes that provides for security and emergency offences are the Essential (Security Cases) Regulation 1975, the Security Offences (Special Measures) Act 2012, the Prevention of Crime Act 2013 and Prevention of Terrorism Act 2015. Regulation 3(3) of the Essential (Security Cases) Regulation 1975 states that;

“Where a person is accused of or charged with a security offence, he shall, regardless of age, be dealt with and tried in accordance with the provisions of these regulations and the Child Act 2001 shall not apply to this person.”

This provision expressly provides for the superiority of the Essential (Security Cases) Regulation 1975 over any other Statutes by permitting prosecution of a child of any age for security offences under this Act.⁹⁰ Unlike the Essential (Security Cases) Regulation 1975, there is no specific provision in the Security Offences (Special Measures) Act 2012, Prevention of Crime Act 2013 and Prevention of Terrorism Act 2015 which expresses superiority of these Acts over other statutes. However, the decision of court affirmed that the provision of the statutes that provides for security and emergency offences prevails over other

⁹⁰*PP v Lim Hang Sioh* [1978] 1 MLJ 68.

statutes. In the case of *Superintendent of Pulau Jerejak & Anor v Wong Cheng Ho*,⁹¹ the issue arose as to whether the accused, a child, could be detained under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Section 4 of the said ordinance authorized the Minister to issue a detention order against “*any person*” who in his view acts in a manner prejudicial to public order. The counsel contended that the detention of the accused under the Ordinance was unlawful as it contrary to the section of the Child Court Act 1947, which provides that no child shall be arrested, detained and tried except in accordance to that Act. The Federal Court held that the order of preventive detention issued against the child under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 was valid. In holding that the provision of the Ordinance overrides the Child Court Act 1947, the court interpreted the word ‘*any person*’ in the Ordinance applies to all people without any qualification as to age. The decision clearly affirmed the superiority of the provision of the statutes that provides for security and emergency offences, which prevails over any other statutes, including the Penal Code and the Child Act 2001. It renders the provision of Section 82 of the Penal Code, which absolves children below ten years old under from any criminal responsibility, not applicable to offence classified as security and emergency cases under specific statutes. Obviously, these provisions are in violation of the CRC’s standards on the MACR which insist that this principle should not be subjected to any reservation or condition.

⁹¹[1980] 1 MLJ 154.

3.7.3 The Pertinent Moment for Considering a Child's Age is at the Moment of the Alleged Offence, not at the Time of Arrest, Trial, Sentencing, or Execution of Sanctions.

It is a requirement of the international standards on the MACR that the determining age for criminal responsibility should be the date of commission of the offence, not the date of the arrest, trial, sentencing or execution of sanctions. It means that the child can only be held responsible if he is above the MACR at the commission of the offence. With regard to the position of Malaysian law on this aspect, it is in line with the requirement of the CRC. There is no question that the date for determination of criminal responsibility under Malaysian law is the date of commission of the offence. The Penal Code provides that any child will be automatically absolved from criminal responsibility if he or she is found to be below the age of ten at the time of commission of the offence.

3.7.4 Legal Position of Child in Conflict With The Law Younger than MACR

Under Malaysian law, the MACR is ten years old.⁹² Therefore, as far as criminal liability is concerned, children below the age of ten are conclusively exonerated from criminal liability. In other words, the law provides that no criminal sanction can be imposed on the child in conflict with the law that is younger than MACR. With regard to alternative measures that may be imposed on this category of children, there is no direct provision under Malaysian statutes which specifically elaborates on that. The Child Act 2001, the governing statute for children, does not mention the alternative sanctions that may be imposed on children below ten years old who commit criminal offences. Though the Act provides that the

⁹²Section 82 of the Penal Code.

court may, upon application of the protector or police officer, allow the application for the temporary custody of children in need of care and protection, it is vague on whether this provision is applicable to children below ten years old. This is because there are other provisions under the Child Act 2001 which exclude the application of its provision on children below ten years. For example, Section 66 prevents children below the age of ten to be sent to a probation hostel,⁹³ an approved school⁹⁴ or imprisonment.⁹⁵ In addition, unlike certain juvenile justice systems, there are also no guidelines or rules for the police, the court or the welfare department to deal with unruly children below the age of ten years. In practice, children will be discharged unconditionally without having to face any alternative measures in any form of educational, reconciliation or others.⁹⁶

In other words, the sanctions provided for children under the Malaysian juvenile justice system are not comprehensive. Obviously, there is a glaring loophole in the Malaysian child system as there are neither specific alternative measures nor guidelines or rules provided for the court, prosecution, police, welfare department and other related parties to deal with unruly children below the MACR. Left unattended, leaving unruly children in conflict with the law would send a wrong signal to them. It implicitly amounts to an approval of wrongful act and behaviour.

⁹³Section 61(2) of the Child Act 2001.

⁹⁴Section 66 of the Child Act 2001.

⁹⁵Section 96 of the Child Act 2001.

⁹⁶Abdul Rahim, A., n. 87 above , p 92.

3.7.5 *Doli Incapax* Principle and its Relation to Minimum Age of Criminal Liability

As mentioned above, the common law doctrine of *doli incapax* still remains the overarching governing principle in determining criminal liability of children under Malaysia law. Though this doctrine has been abolished in England, reference to its principles remains relevant to Malaysian law which still maintains its application. The words “*doli incapax*” is a Latin word which literally means “incapable of wrong.”⁹⁷ This principle is based on the notion that children at a certain age are incapable of discerning between evil and good. Therefore, it is unfair and improper to impose liability on this category of children. Based on this premise, the principle of *doli incapax* provides protection for children from criminal liability. It provides a legal presumption that children are incapable of committing crime unless it can be proven otherwise. Historically, the age of criminal liability of children under English law began at the age of ten years old. The Pre-Norman Laws of Ine as early as the eighth century contained provisions which provided that the child at the age of ten could be held liable for criminal offences.⁹⁸ In the 15th century, there was a change made to the law of child criminal responsibility, whereby the age of child criminal responsibility was reduced to seven years old. During the period of King Edward III, the principle of *doli incapax* was introduced.⁹⁹ Later, in 1933, the amendment was made to the Children and Young Persons Act 1933. Section 50 provides that the minimum age of criminal responsibility is raised from seven to eight years old. In 1963, an amendment was made to the Children and Young Persons Act 1963. This amendment was made in response to the recommendation suggested by the Ingelby Committee 1960. Though the Committee recommended that the age of

⁹⁷Garner, B.(1999). *Black's Law Dictionary*, 7th ed. St. Paul, Minn: West Group, p 499.

⁹⁸Kean, A.W.G. (1937). The History of Liability of Children. *Law Quarterly Review*, p 366.

⁹⁹*Ibid.* p 365.

criminal responsibility of children should be increased to twelve, the Act merely raised it to the age of ten.¹⁰⁰ The year 1998 marked a significant change to the English juvenile justice system. By virtue of the Crime and Disorder Act 1998, the Common Law principle of *doli incapax* was abolished.

Before the abolishment, the presumption of *doli incapax* under English Law could be divided into two categories, namely irrebuttable and rebuttable presumptions.¹⁰¹

i- Irrebuttable presumptions

The principle of irrebuttable presumption provides that any child below the age of ten is presumed as incapable of committing crime. It means that any child below the age of ten will be absolutely exempted from any criminal liability. There is not much controversy surrounding the application of irrebuttable presumption. The application is clear and straight forward. If any child below the age of ten is found committing any offence under criminal law, the criminal process shall not be imposed on him.¹⁰²

ii- Rebuttable Presumptions

On another hand, the principle of rebuttable presumption states that any child between the age of ten and fourteen is presumed incapable of committing crime unless proven otherwise. The presumption is not absolute as it can be rebutted by bringing evidence to show that the child understands the nature and consequence of his action. The burden is on the prosecution to satisfy the court beyond reasonable doubt that the child knows and

¹⁰⁰Section 16 (1) of the Children and Young Persons Act 1963.

¹⁰¹Garner, B. (1999). *Black's Law Dictionary*. 7th Ed. St. Paul, Minn:West Group, p 499.

¹⁰²Section 16(1) of the Children and Young Person Act 1963.

understands that his action was gravely wrong, not merely mischievous or naughty. The test of “*mischievous discretion*” is used in determining this issue. According to this test, the prosecutor must prove that the child possesses a mischievous discretion, which enables him to differentiate between good and evil. It must be proven that the child knows that his action is gravely wrong, not merely naughty or mischievous.¹⁰³ In order to meet the requirement of this test, the prosecution may rely on direct as well as circumstantial evidence. Among the factors that may be taken into consideration by the courts are age,¹⁰⁴ type of offence,¹⁰⁵ conduct of the child before and after the commission of crime,¹⁰⁶ family background,¹⁰⁷ evidence given by the child during the investigation stage,¹⁰⁸ previous conviction reports¹⁰⁹ and others.

3.7.5.1 Controversy surrounding the application of *doli incapax*

Despite of its existence for centuries, the principle of *doli incapax* is not free from controversy and has been subjected to vehement criticism. There were various instances where legal scholars and judges opposed the application of this principle and questioned its relevancy.

Those who supported the abolition of *doli incapax* argued that the principle is no longer relevant in the modern era. For example, Glanville Williams described this principle as a reflection of ‘*an outworn mode of thought*’ and as being ‘*steeped in absurdity,*’

¹⁰³*Rex v Gorrie* [1919] 83 JP 136

¹⁰⁴*B v R* [1958] 44 Cr App R 1.

¹⁰⁵*C v DPP* [1995] 2 ALL ER.

¹⁰⁶*A v DPP* [1992] Crim LR 34, *T v DPP* [1996] 2 Cr App R 255.

¹⁰⁷*F v Padwick* [1959] Crim LR 439.

¹⁰⁸*L v DPP* [199]2 Cr App R 501, *JM v Runeckles*[1984] 79 Cr App R 255.

¹⁰⁹*B and A* [1979] 9 Cr App R 362.

considering the way the children were dealt with by the criminal system.¹¹⁰ The criticism also could be found in the ruling of the courts in various decided cases. In the case of *C (A Minor) v DPP*,¹¹¹ Laws J opined that the application of the *doli incapax* principle is necessary under the previous draconian law since the punishment provided were harsh and cruel. However, this principle was no longer relevant under the modern juvenile justice system in which the punishments are rehabilitative or restorative in nature. To sum up, Laws J described the principle of *doli incapax* as contrary to good sense, illogical, divisive and perverse.¹¹² In addition, the contention that children in the modern society develop quicker than before due to the advancement of technology and the education system was also cited as a reason to justify its abolishment.¹¹³ Apart from that, there was also an argument that the *doli incapax* principle caused difficulty on part of the prosecution in proceeding with the case.¹¹⁴ This difficulty resulted in the discharge or discontinuance of prosecution, which in turn affected the interest of justice and the victims. Based on these reasons, the principle of *doli incapax* was also alleged to be out-dated and no longer necessary.¹¹⁵

On the other hand, those who objected to the abolishment of *doli incapax* maintained that it should be retained because it effectively provides protection for the child. It was argued, *inter alia*, that the presumption served to divert children from the potential negative effects of criminalisation.¹¹⁶ The claim the *doli incapax* could cause difficulty for the prosecution, resulting in the discharge and discontinuance of the child, was argued as being baseless as the practice proved that the presumption was often rebutted. Reference to the

¹¹⁰William., G. (1954). The Criminal Responsibility of Children. *Criminal Law Review*, p 495.

¹¹¹[1994]3WLR 888.

¹¹²*Ibid*, pp. 894-898.

¹¹³This view was expressed by Forbes J in the case of *JBH and JH v O'Connell* [1981] Crim Lr 632.

¹¹⁴Crofts, T. (2002). *The Criminal Responsibility of Children and Young Person: A comparative of English and German law*. England: Ashgate Publishing Limited, pp. 60-69.

¹¹⁵William., G., n. 110 above, p 495.

¹¹⁶Bandalli, S. (1998). Abolition of the Presumption of Doli Incapax and the Criminalisation of Children. *The Howard Journal*, 37(2), pp.117-118.

decision of courts in various decided cases proved that the presumption could be easily rebutted by direct and circumstantial evidence.¹¹⁷ Apart from that, the claim that children in modern society develop quicker due to compulsory education was described as unreliable and seriously doubtful as it was found to be made without thorough examination of the facts¹¹⁸ and sharply negated scientific and factual findings.¹¹⁹ In fact, there was massive scientific evidence pointed out that the child in the modern era are more protected, less autonomous and emotionally less mature.¹²⁰

In response to this issue, the newly formed labour government at that time had published a consultation paper entitled ‘*Tackling Youth Crime*’ which aimed to modernize *doli incapax*.¹²¹ Acting on the recommendations made in the consultation paper, the government had introduced Section 34 of the Crime and Disorder Act 1998 which abolished the application of *doli incapax*.¹²²

The above discussion shows the importance and role of the Common Law vis-à-vis the *doli incapax* principle in determining the criminal responsibility of the child under English juvenile justice system. The principle, which was previously regarded as being well-established, started to gradually lose its relevancy in the modern era of juvenile justice system. Despite conflicting views among legal scholars on its relevancy, the decision of the

¹¹⁷Fortin, J. (1998). *Children's Right and The Developing Law*, London; Butterworths, p 688.

¹¹⁸Croft, T. (2009). Catching up with Europe: Taking the Age of Criminal Responsibility Seriously in England, *European Journal of Crime, Criminal Law and Criminal Justice*, 17(4), p 285.

¹¹⁹Goldson, B. (2010). The Sleep of Criminological Reason: Knowledge-Policy Rupture and New Labour's Youth Justice Legacy. *Criminology and Criminal Justice*, 10(2), pp. 170-171.

¹²⁰Ferreira, N. (2008). Putting the Age of Criminal and Tort Liability into Context: A Dialogue between Law and Psychology. *International Journal of Children's Rights*, 16, p 44.

¹²¹Fonda, J. (1999). New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998. *Criminal Law Review*, 36, p 37, Cavadino, P. (1997). Goodbye Doli, Must We Leave You? *Child and Family Law Quarterly*, 9(2), p 165.

¹²²Fonda, J., n. 121 above, p 38.

highest court, the House of Lords, in the cases of *DPP v P*¹²³ and *R v T*¹²⁴ put the last nail on the coffin of the principle of *doli incapax*.

In short, the low minimum age of criminal responsibility in England remains controversial. It has been subject of concern among the international and national scholars. Despite numerous criticisms and suggestions made by various legal scholars, academicians and experts, the ruling government refused to review the current position of the minimum age of child criminal responsibility. Refusal of the government to accede to pressure from various parties implies that politics have much to do with the current legal status of this issue.

3.7.5.3 Present status of *doli incapax* in Malaysia

Despite the abolishment of *doli incapax* by its country of origin, this principle is still widely applied in many Commonwealth countries such as Malaysia, Australia, Canada, Hong Kong, Singapore and New Zealand. In Malaysia, its juvenile justice system was rooted from the English Law. Therefore, it incorporates similar legal principles relating to children as contained in English law, including the Common Law principle of *doli incapax*.

Under current Malaysian law, the child below the age of ten years old is conclusively regarded as incapable of committing crimes.¹²⁵ They are completely absolved from any criminal liability. This position, which incorporates the principle of irrebuttable presumption of *doli incapax*, is similar to the former position under English law. It should be noted that previously this section fixed the age of seven as the age of irrebuttable presumption. However, by virtue of amendment to the Penal Code in 1976, the age of seven was raised to

¹²³[2008]1 WLR 1005.

¹²⁴[2008]EWCA Crim 815.

¹²⁵Section 82 of the Penal Code.

the age of ten years old.¹²⁶ Therefore, ten marks the beginning age of criminal liability in Malaysia.

With regard children between ten and twelve years old, Section 83 of the Penal Code provides that he or she is incapable of committing crimes. However, this presumption is rebuttable by producing evidence to the contrary. It should be noted that Section 83 is included under Chapter IV of the Penal Code, which provides for a general defence to criminal charge. It means that the irrebuttable presumption under Section 83 operates as a defence. Therefore, if any child between the age of ten and twelve years old is alleged of committing any criminal offence, the prosecution may charge him or her at court without any restriction. He or she is deemed as capable of committing crime. The defence cannot raise a preliminary objection at the early stage of trial to challenge his ability to commit crime. Instead, the child accused is only permitted to raise the defence of *doli incapax* in the event the court calls him to enter his defence. If called to enter defence, the child may raise the defence of *doli incapax* to rebut the presumption of *doli incapax*. The defence may bring all relevant evidence to prove this fact. If the defence manages to prove to the satisfaction of the court that the child does not possess sufficient maturity of understanding to commit crime, then the court shall order the child to be acquitted. The burden of proof is on the defence to prove that the child lacks the capacity to commit crimes.¹²⁷ The standard of proof required on the part of the defence is on the balance of probabilities.¹²⁸ It is the duty of the court to evaluate the evidence tendered by the defence to determine whether the child has attained sufficient capacity or not. If the court finds that the child has not attained the age of capacity, he or she will be exempted from any criminal liability. On the other hand, if the court finds

¹²⁶Majid, M.K. (2002). Akta Kanak-Kanak 2001: Cadangan Pindaan Undang-Undang Berkenaan Gejala Sosial. In: Jamaluddin, S.Z., Talib, N. and Mohd Yusoff, J.Z., eds., *Siri Undang-Undang Mimi Kamariah: Akta Kanak-Kanak 2001*. Kuala Lumpur: Penerbit Universiti Malaya, p. 3.

¹²⁷Section 105 of the Evidence Act 1950.

¹²⁸*Mohamed Radhi bin Yaakob v PP* [1991] 3 MLJ 169.

that the child has attained sufficient maturity of understanding to realize what they are doing or to judge the nature and consequences of their conduct, the court will proceed and determine their liability based on the evidence. In determining the defence of *doli incapax*, Malaysian court follows the principle of English law, which is to test mischievous discretion.¹²⁹ Among the factors taken into consideration in determining this include the conduct of the child accused, his family background, evidence obtained during the police investigation, education background, expert evidence and others.¹³⁰

In summary, the principle of *doli incapax* is still applicable under Malaysian law to determine the criminal liability. Close examination reveals that that its position is almost the same with former English law before the abolishment in 1998, except on the age level and nature of defence. Under Malaysian law, rebuttable presumption of *doli incapax* is applicable to children between the age of ten and twelve years old. On the contrary, under former English law, it was applicable to children between the age of ten and fourteen years old. In addition, the scope of *doli incapax* under Malaysian law is narrower than it was under English law. Under the former, the defence of *doli incapax* can only be invoked merely as a defence. The burden of proof lies on the defence, on balance of probabilities, to prove that the child has not attained sufficient capacity to commit crime. In contrast, former English law allows the issue of *doli incapax* to be both determined at the preliminary stage as well as at the defence stage. It is the duty of the prosecution to prove at the early stage of trial proceedings that children possesses relevant capacity to commit crime and to stand for criminal charge. The burden of proof required of the prosecution is beyond reasonable doubt. In the event that *doli incapax* is raised as a defence, the burden is on the defence to prove on balance of probabilities that the child is incapable of committing crimes.

¹²⁹ Abdul Rahim, A., n. 87 above, p 174.

¹³⁰ *Ibid*, p 175.

Further analysis of Malaysian law relating to the doctrine of *doli incapax* disclosed that the position and application of *doli incapax* principle in Malaysia is almost similar to English law before its abolishment, except on several aspects. Reference to decided cases shows that the Malaysian Court simply adopted the Common Law principle of *doli incapax* applied under English Law without paying much attention on the need to further deliberate or improve the concept to suit local circumstances and conditions. Therefore, the application of the *doli incapax* principle in Malaysia faces the same criticisms and challenges that used to be encountered by English law before the abolishment of the principle. The issue of ill-defined doctrine, vagueness of procedure and inconsistency of practice are among the criticisms raised by scholars. Many suggestions have been expressed by legal scholars on this issue. While some scholars recommended the abolishment of *doli incapax* doctrine¹³¹ or replacement with other alternative mechanism,¹³² others insisted on the retention of this doctrine with modification or improvement.¹³³ It is clear that the current application of *doli incapax* in Malaysia is in dire need of reform. The current law, which exposes a child as young as tenyears old to criminalization, is obviously in violation of international standards of criminal responsibility. In addition, the ill-defined concept and vagueness of the principles of the doctrine of *doli incapax* under the current law have rendered its application controversial and subjected to various criticisms. As such, it is high time now for the legislature to revise and reform the doctrine of the *doli incapax* under Malaysian law.

¹³¹Elliot, C. (2011). Criminal Responsibility and Children: A New Defence required to Acknowledge the Absence of Capacity and Choice, *Journal of Criminal Law*, Vol.75(4), p 290.

¹³²Maier, G., n. 1 above, p 512.

¹³³Croft., T., n. 118 above, p 290, Delmage, E., n. 35 above, p 109.

3.8 Conclusion

This chapter examined the definition, concept and principles underpinning criminal responsibility of children. In addition, this chapter also comparatively analysed the legal framework on criminal responsibility of children under both the CRC as well as the Malaysian juvenile justice system. The analysis disclosed that certain aspects of the Malaysian legal framework on criminal responsibility of children are still not compatible with the CRC's standards. Current MACR under Malaysian law which is set at the age of ten years old is apparently low and definitely violates the requirement of the CRC. The chapter highlighted that current law on the determination of child criminal responsibility, which is governed by the principles of the doctrine of *doli incapax*, has been heavily criticized due to its ill-definition, ineffectiveness, lack of clarity, vagueness and outdatedness. Apart from that, this chapter also identifies inconsistencies and discrepancies in the application of the law relating to criminal liability of children under Malaysian child justice, which do not measure up with the legal framework outlined in the CRC. It is high time for the Malaysian Government to reform the law in this area to meet the international standards. The possible proposal for reform of Malaysian child law on criminal responsibility of children will be discussed in chapter six of this thesis.

FOURTH CHAPTER

THE CRC'S STANDARDS ON RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS

4.1 Introduction

The introduction of the CRC was considered to be a major legal breakthrough in human rights as it broke new ground by being the first legally binding international instrument that recognizes children as possessing rights. More importantly, it does not only determine that children are possessors of rights, but also have the power to assert them through judicial, legislative and administrative proceedings. State parties are obliged to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the CRC.¹ As far as rights of children in conflict with the law are concerned, Article 40 of the CRC emphasizes that state parties shall seek to promote the establishment of a special set of laws and procedures to deal with children who are alleged or accused to be in conflict with the law.² The requirement on this aspect encompasses various aspects of criminal proceedings, beginning from the moment they come into contact with the justice system until the disposal of their cases. The existence of this requirement reflects that the CRC explicitly acknowledges the fact that children in conflict with the law are particularly vulnerable members of society that require special protection of their rights. This chapter focuses on the CRC's standards on rights of children at both pre-trial and trial stages of the criminal process. It will examine the scope, governing principles

¹Article 4 of the CRC.

²Article 40 (3) of the CRC.

and guidelines on rights of children outlined by the CRC with reference to the relevant practical issues and challenges relating to this matter.

4.2 Pre-Trial Rights of Children

As far as the pre-trial process of juvenile justice is concerned, it refers to criminal process before a child is formally charged in court for any offence. It consists of arrest, remand, pre-trial detention, interrogation, diversion, bail and others.

4.2.1 Arrest

Arrest is one of the most important issues as far as the juvenile justice system is concerned. This is because arrest is the first step where any child will come into contact with the formal criminal justice process. The arrest decision also marks the curtailment of fundamental liberty of the child under the law. Generally, the law permits any arrested child to be subjected to various rigorous processes of investigation by the police authority. While the process undeniably aims to maintain public order and justice, it may turn out to be a terrifying event for children, who are known for their physical and mental vulnerability. Due to this, it is important to have comprehensive legal principles on both substantive and procedural laws relating to any arrest of children.

Reference to the CRC reveals that it has set out specific and strict principles pertaining to the fundamental liberties of children, which are specifically provided for under Article 37. Firstly, the CRC provides that no child shall be deprived of his or her liberty

unlawfully or arbitrarily.³ The word “arbitrariness” has a wide legal connotation to include an element of inappropriateness, injustice, lack of predictability and lack of due process of law.⁴ This simply means that any arrest or detention of children must not only be lawful but also reasonable in all circumstances.⁵ It requires the process of arrest to be effected in accordance with procedural requirements and due process of law. It should be noted that similar requirements are also provided in other relevant international instruments for children, such as the Beijing Rules,⁶ the Tokyo Rules,⁷ and the Havana Rules.⁸

Secondly, the CRC stresses that the arrest of a child shall be used only as a measure of last resort⁹ and for the shortest appropriate period of time.¹⁰ This requirement strictly demands that any arrest must pass a specific double test, namely as a measure of last resort and for the shortest appropriate period of time, in order to be legally justified. These tests impose a burden on the enforcement authorities to firstly prove whether the intended arrest is really a measure of last option without alternatives which interfere less with the child’s right. If the answer is affirmative, the next test to be applied is what would be an appropriate time frame, with the implicit duty to regularly assess the situation and consider its continued justification.¹¹ In other words, the requirement of this provision strongly emphasizes that the police or other enforcement officers should, as much as possible, avoid from putting children under arrest and detention. In the event that arrest or detention is necessary, then extra

³Article 37(b) of the CRC.

⁴Human Right Committee in the case of *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, para. 9.8.

⁵Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 79.

⁶Rules 17.1(b) and 17.1(d) of the Beijing Rules.

⁷Rule 3 of the Tokyo Rules.

⁸Rules 68 and 70 the Havana Rules.

⁹Article 37(b) of the CRC, Rule 2 of the JDL, Rule 19.1 of the Beijing Rules.

¹⁰Article 37(b) of the CRC.

¹¹Schabas, W. and Sax, H. (2006). Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty. In: Alen, A. et al., eds., *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff Publishers, p 85.

caution should be adopted to ensure that it is only for the shortest period of time. Commenting on this requirement, the Committee on the CRC explain that every child arrested should be brought before a competent authority to determine its legality within twenty-four hours.¹² In case a conditional release of the child is not possible, he or she should be formally charged with the alleged offence before a competent authority or judicial body not later than thirty days after detention takes effect.¹³ However, these provisions fall short of explaining what measures, both substantive and procedural, are to be taken in order to ensure those requirements can be effectively safeguarded and implemented, leaving each respective state party to determine them.

Thirdly, the CRC promotes for the maximum involvement of parents or guardian in any proceedings that involve children.¹⁴ The involvement of parents or guardian in this respect does not mean that they should act in defence of children or be involved in the decision-making process. Instead, their involvement should be viewed as general psychological and emotional assistance to the children.¹⁵ Pursuant to that, the Committee on the CRC recommends that children deprived of their liberty should be detained in a facility that is as close as possible to the place residence of their family.¹⁶ This is to enable them to maintain contact with their family through correspondence and visits. The CRC does not contain a provision that requires the police to notify parents or guardian upon the arrest of any child. However, guideline on this requirement is provided in the Beijing Rules. The Beijing Rules demand police to notify parents or guardians of the child immediately upon the

¹²Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 83.

¹³*Ibid.* para.83.

¹⁴Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 54.

¹⁵Commentary Rule 15 of the Beijing Rules and Article 53 of the CRC.

¹⁶Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 87.

arrest or within the shortest possible time thereafter.¹⁷ The police are also expected to communicate relevant information and details of the arrest to the parents or guardian. The notification of arrest and communication of relevant details to parents or guardians within the shortest possible time is pertinent as it provides them with the opportunity to promptly engage legal counsel to act in the interest of the arrested child at the earliest stage of the criminal process.

Unfortunately, many countries failed to provide adequate protection for children on the issue of arrest. The observation by the Committee on the CRC revealed that the principles of last resort and shortest period of time have been violated by certain state parties on numerous occasions.¹⁸ This implicitly indicates that certain jurisdictions have no consistent or special procedures in handling arrest and detention of children despite the fact that they possess unique characteristics which require them to be dealt differently.

Similarly, the requirement on the maximum involvement of parents or guardian in any proceedings that involve children has not been fully implemented by certain state parties. The Committee on the CRC has identified the practice of certain state parties which restrict the application of this right under their respective juvenile justice systems.¹⁹ This fact leads to the

¹⁷Rule 10.1 of the Beijing Rules.

¹⁸Reference on this point can be found in various Concluding Observations, such as Committee on the Rights of the Child, *Concluding Observations: New Zealand*, UN Doc. CRC/C/15/Add.216, 27 October 2003, para. 49, Committee on the Rights of the Child, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc. CRC/C/15/Add.209, 4 July 2003, para. 45, Committee on the Rights of the Child, *Concluding Observations: Madagascar*, UN Doc. CRC/C/15/Add.218, 27 October 2003, paras. 67, 69, Committee on the Rights of the Child, *Concluding Observations: Sri Lanka*, UN Doc. CRC/C/15/Add. 207, 2 July 2003, para. 52.

¹⁹Reference on this point can be found in various Concluding Observations, such as Committee on the Rights of the Child, *Concluding Observations: Russian Federation*, UN Doc. CRC/C/15/Add.4, 18 February 1993, para. 14, Committee on the Rights of the Child, *Concluding observations: Nigeria*, UN Doc. CRC/C/15/Add.61, 30 October 1996, para. 23, Committee on the Rights of the Child, *Concluding observations: Morocco*, UN Doc. CRC/C/15/Add.211, 10 July 2003, para. 68, Committee on the Rights of the Child, *Concluding Observations: Burkina Faso*, UN Doc. CRC/C/15/Add.193, 9 October 2002, paras. 60 and 62, and Committee on the Rights of the Child, *Concluding Observations: Pakistan*, UN Doc. CRC/C/15/Add.217, 27 October 2003, para. 81.

conclusion that the requirement for parents and guardians of the detained children to be directly involved is only meaningful if it is made mandatory.

4.2.1.1 Issues

Generally, guidelines provided by the CRC are laudable as they emphasize the protection of liberty and security of children. The inclusion of specific provisions relating to arrest under the CRC is obviously meant to provide extra protection for children. Nonetheless, further scrutiny of the CRC discloses that its provisions on the protection of fundamental liberty of children lack clarity, especially on the procedural aspect. These provisions merely reiterate the principles on the protection of fundamental liberties provided by the law to adults, and they extend the same to children. There are no details or special guidelines which specifically differentiate principles and procedures between arrest or deprivation of liberty of adults and children. There are no guidelines detailing out circumstances under which children should be arrested, the method of arrest, handling of children during the period of arrest and detention, special requirements on officers responsible in conducting arrest and others. In practice, the decision to arrest or detain children under custody is not a mechanical process but rather involves complicated consideration. The decision is regarded primarily as a police decision. In dealing with children suspected of committing crime, the police have to determine the next appropriate response by taking into consideration the nature and seriousness of the suspected criminal action, the circumstances in which it is committed, the age of the child suspect and others. However, should it be solely a police decision to take into custody a child who is in danger of leading a dissolute life when broad jurisdictional power is invoked? The broad and discretionary jurisdiction given to the police may lead to the possibility of hazardous abuse if

left unchecked. Therefore, there is a need to have an exhaustive legislation particularly on procedures to take children into custody.

In addition, there is no specific provision under the CRC that specifically addresses the right to be informed of the grounds of arrest. Instead, the CRC merely mentions about the right of children to be informed of the charge against them. Failure of the CRC to explicitly make a clear reference on the information right of children upon arrest has attracted criticism from scholars.²⁰ In the absence of specific provisions, reference on this matter has to be made to the international as well as regional instruments which apply equally to children and adults, such as the ICCPR,²¹ the ECHR,²² the Tokyo Rules,²³ the African Charter on the Rights and Welfare of the Child (ACRWC),²⁴ the American Convention on Human Rights (ACHR),²⁵ the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,²⁶ the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,²⁷ and others. While these provisions equally guarantee the right of children to be informed of the ground of arrest immediately after arrest, they do not specifically provide a special procedure on how this right to be informed of grounds of arrest can be explained to children. So the issue here is how this right can be best explained to children? In what manner should it be explained to them? Who is the most qualified person to explain it to children? It is insufficient for international instruments to merely guarantee the right of children to be informed of the ground of arrest in general without providing specific procedures on how it can be effectively communicated. Most children, due to their

²⁰Schabas, W. and Sax, H., n. 11 above, pp. 39–40.

²¹Article 9(2).

²²Article 5(2).

²³Rule 7.1.

²⁴Article 2 (c)(ii).

²⁵Article 7(4).

²⁶Article 10 and 12.

²⁷Article 5.

immaturity, may face difficulties in understanding the grounds as well as the nature and cause of their arrest. Without duly understanding the grounds of arrest, children cannot be expected to exercise their legal rights, such as the right to remain silent or the right to engage legal counsel. Therefore, it is important for the CRC to clearly set out specific guidelines on principles as well as procedures relating to the right of children to be informed of their grounds of arrest. There is a need to provide guidelines to enable children to duly understand not only all the essential legal and factual grounds relating to arrest but also the consequences that may follow afterwards. The guidelines should also provide a comprehensive mechanism to protect the rights of children deprived of liberty from any possibility of discrimination, manipulation or abuse of power.

Obviously, the lack of specific guidelines in the CRC on certain matters relating to the arrest of children may convey a wrong signal in the sense that they simply allow the extension of the same principles applicable to adults to children without the need of necessary modification. This apparently does not coincide with the fundamental principle of the juvenile justice system which demands special treatment of children. In fact, it does not reflect the requirement of international instruments themselves, particularly Article 40 of the CRC, which acknowledges the need for the special treatment of children. The implication of a lack of guidelines in this matter can be explained by referring to the existing practice of juvenile justice systems, where the same standards of rules and procedures for both adults and children have been widely adopted.

4.2.2 Pre-Trial Detention

Pre-trial detainees are persons awaiting trial or finalisation of their trial. They have not been convicted of the charges brought against them. Pre-trial detention, which punishes a person before he is proven guilty, is regarded as a draconian law as it violates the theory of punishment.²⁸ The record shows that 3.2 million people are in pre-trial detention worldwide.²⁹ Studies have identified various reasons, such as lack of coherence over how the presumption of innocence should be balanced against the need to protect the public as being one of the main factors for pre-trial detention. Poverty, lack of education, lack of coordination between criminal agencies, ineffectiveness and inadequate resources of criminal justice systems also contribute to the excessive use of pre-trial detention.³⁰ Detention of children at the pre-trial stage has many harmful impacts and far reaching effects, which include deprivation of social life, health care and personal development, denial of educational opportunities, stigmatization, interference on the right to be cared for by the parents and impairment of the ability to prepare their legal defences.³¹

The CRC views the issue of pre-trial detention of children as a matter of great concern. As a general principle, Article 37(b) the CRC stresses that the detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.³² Commenting on this requirement, the Committee on the CRC recommends that state parties should as much as possible ensure that children detained at the pre-trial stage should be

²⁸Appleman, L.I. (2012). Justice in the Shadowlands : Pretrial Detention, Punishment, & the Sixth Amendment. *Washington & Lee Law Review*, 69, p 1304.

²⁹Schonteich, M. (2013). The Overuse of Pre-Trial Detention: Causes and Consequences. *Criminal Justice Matters*, 92(1), p 18.

³⁰*Ibid*, p 18.

³¹Mccarthy, B.R. (1987). Preventive Detention and Pretrial in The Child Court Custody. *Journal of Crime and Justice*, 15, p 186.

³²Rule 19.1.

released, and if necessary under certain conditions.³³ State parties are encouraged to formulate adequate legislative as well as alternative measures to effectively reduce the use of pre-trial detention. In addition, the Committee on the CRC also demands that criminal process involving children should be given priority, especially in cases where children are placed under detention pending trial. It is important to note that the Committee proposed a timeframe to be set by state parties to ensure that cases that involve pre-trial detention of children are handled expeditiously. In this respect, the Committee recommended that state parties ensure that cases involving pre-trial detention of children should not exceed thirty days at the latest.³⁴ It also urges state parties to ensure that the judicial body of competent authority to make a final decision on the charges against children within six months after the case is formally presented.³⁵ In the same vein, the Havana Rules provides that all relevant bodies, particularly the courts, the prosecutors and the investigators are required to give the highest priority to expediting the process to ensure the shortest possible period of detention.³⁶

Apart from that, the CRC also insists that the legal principles of criminal law should be strictly adhered to in dealing with children under pre-trial detention. Children detained while awaiting trial are presumed innocent and must be treated as such.³⁷ The presumption of innocence applies during the pre-trial process in the sense that it restrains any forms of coercion that the authority can use against a child suspect before trial.³⁸ In the event that pre-trial detention is inevitable, Article 37 of the CRC dictates that arrested children also must be detained in a separate place from adults, unless it is considered in the child's best interest not

³³Committee on the Rights of the Child, General Comment No 10: Children's Rights in Child Justice, CRC/C/GC/10, 25 April 2007, para. 81.

³⁴*Ibid*, para. 83.

³⁵*Ibid*, para. 83.

³⁶Rule 17 of the Havana Rules.

³⁷Article 40(2)(b)(i) of the CRC.

³⁸Stewart, H. (2014). The Right to be Presumed Innocent. *Criminal Law and Philosophy*, 8(2), p 416.

to do so.³⁹ It is the duty of state parties to set up separate facilities with child-centred staff, as well as policies and practices to accommodate the detention of children.⁴⁰ In this respect, reference can also be made to the provisions of other international instruments. For example, the JDL recommends the establishment of open detention facilities with no or minimal security measures in order to ensure the best interest of children is upheld.⁴¹ In addition, the JDL and the Beijing Rules also stipulate that children detained at the pre-trial stage must be given opportunities to continue their education or training. In addition, they must be afforded with care, protection and all necessary assistance such social, educational, vocational, psychological, and medical that they may need in view of their age, sex and personality.⁴²

4.2.2.1 Issues

In practice, there are various issues relating to pre-trial detention of children which remain controversial. The emerging unanimity among legal systems on the policy that pre-trial detention and imprisonment of children should be avoided or at least used as a measure of last resort alone is not sufficient to curb this problem. Despite the effort by various legal systems to inculcate the approach restricting that pre-trial detention of children into their legislation, they have failed to prevent the unacceptable level of children languished in detention centre or prison, including at the pre-trial stage.⁴³ Apart from that, the issue of separation between children and adult detainees at detention centres has also attracted attention from various parties. Though the CRC as well as other international instruments have strictly stated that children and adults shall be detained separately at the detention

³⁹Similar requirement is provided in article 10(2) of the ICCPR, Rule 85 of the Standard Minimum Rules for the Treatment of Prisoners, rule 13.4 of the Beijing Rules and rule 17 of the Havana Rules.

⁴⁰Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25th April 2007, para. 85.

⁴¹Rule 30 of the JDL.

⁴²Rule 17 and 18 of the JDL and Rule 13 of the Beijing Rules.

⁴³Goldson, B. (2005). Child Imprisonment: A Case for Abolition. *Youth Justice*, 5(2), p 79.

centres, certain state parties still fail to comply.⁴⁴ The Committees on the CRC have expressed their concern over the practice of certain countries which permit children under detention to mix with adults.⁴⁵ It is very surprising to find that many countries, including Austria, Finland, Ireland, Germany, Portugal and Switzerland, disregard the requirements of the international instruments and continue to detain children with adults.⁴⁶ In Ireland, for example, the United Nations Committee on the Rights of the Child,⁴⁷ the Council of Europe Commissioner for Human Rights,⁴⁸ the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment⁴⁹ and the European Committee of Social Rights⁵⁰ have criticized the practice which allows children to mix with adults in the same place of detention and demanded the state party to take necessary steps to ensure immediate cessation of such practice.⁵¹

In addition, the treatment of pre-trial children detainees at the detention centre or prison has also received criticism from various parties. Various studies have disclosed that the treatment received by detainees at the detention centre or prison is no better, and often worse, than the treatment experienced by those who have already been convicted for criminal

⁴⁴Schabas, W. and Sax, H., n. 11 above, pp. 39-40.

⁴⁵Among concluding observations issued by the Committee to relevant state parties on this matter are Committee on the Rights of the Child, *Concluding Observations: Russian Federation*, UN Doc. CRC/C/RUS/CO/4-5, 25 February 2014, para 69, Committee on the Rights of the Child, *Concluding Observations: Kyrgyzstan*. UN Doc. CRC/C/KGZ/3-4, 7 July 2014, paras. 66, 67, Committee on the Rights of the Child, *Concluding Observations: Myanmar*, UN Doc. CRC/C/MMR/3-4, 14 March 2012, para. 93, Committee on the Rights of the Child, *Concluding Observations: Iceland* UN Doc. CRC/C/ISL/3-4, 23 January 2012, paras. 56, 57.

⁴⁶Goldson, B. and Muncie, J. (2012). Towards a global “child friendly” child justice? *International Journal of Law, Crime and Justice*, 40(1), p 52.

⁴⁷United Nations Committee on the Rights of the Child, *Concluding Observations: Ireland*, UN Doc. CRC/C/IRL/CO2, 29 September 2006, paras. 72-73.

⁴⁸Council of Europe, (2008), Report of the Council of Europe Commissioner for Human Rights Thomas Hammarberg on his Visit to Ireland 26-30 November 2007, CommDH (2008), paras. 68-72.

⁴⁹Council of Europe, Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010, CPT/Inf (2011) 3, para. 26.

⁵⁰Council of Europe, European Committee of Social Rights Conclusions 2011 (Ireland), Articles 7, 8, 16, 17, 13 and 27 of the Revised Charter, p 19.

⁵¹Goldson, B. and Kilkelly, U. (2013). International Human Rights Standards and Child Imprisonment: Potentialities and Limitations. *International Journal of Children's Rights*, 21, p 348.

offence.⁵² There are also reports which exposed inhumane living conditions, inadequate medical facilities and lack of professionally trained staffs in children's detention facilities.⁵³ Such poor treatment received by children is simply unacceptable as it is against their presumption of innocence.⁵⁴

Lastly, the practice of certain state parties which restrict and limit access of family to detained children is also considered to be a serious problem.⁵⁵ To make it worse, legislation in some state parties do not even contain any requirement on the part of the police or enforcement officer to inform the families about the pre-trial detention of children.⁵⁶ Apart from depriving families from giving physical and emotional support for children in preparing for the trial, denial or restriction on children's right to contact the families during pre-trial detention may also implicate various aspects of their life.

In short, the issue of pre-trial detention of children needs to be addressed as a matter of urgency. It is incomprehensible to detain any child who has not yet been found guilty in the same manner with one who has been found guilty. Therefore, it is time to remedy this oversight. The unacceptable number of children languishing in prison pending trial suggests that the approach, strategy and policy to keep children as much as possible away from prison are not as straightforward as they seem. It is not simply a question of drawing up policy or

⁵²Appleman, L.I., n. 28 above, p 1312, Lippke, R.L. (2014). Preventive Pre-trial Detention without Punishment. *Res Publica*, 20(2), p 112, Miller, M. and Guggenheim, M. (1990). Pretrial Detention and Punishment. *Minnesota Law Review*, 75, p 369.

⁵³Winfield, E.N. (2008). Judicial Policy Making and Child Detention Reform: A Case Study of Jimmy Doe et al. v. Cook County. *Journal of Gender, Race & Justice*, 12, p 237, Dale, M.J. (1998). Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Child Detention Centers. *University of San Francisco Law Review*, 32, p 687.

⁵⁴Tribe and Lawrence H. (1970). An Ounce of Prevention: Preventive Justice in the World of John Mitchell. *Virginia Law Review*, 56, p 407.

⁵⁵Committee on the Rights of the Child, *Concluding Observations: Russian Federation*, UN Doc. CRC/C/15/Add.4, 18 February 1993, para. 14, Committee on the Rights of the Child, *Concluding Observations: Nigeria*, UN Doc. CRC/C/15/Add.61, 30 October 1996, para. 23.

⁵⁶Committee on the Rights of the Child, *Concluding Observations: Burkina Faso*, UN Doc. CRC/C/15/Add.193, 9 October 2002, paras. 60 and 62.

legislating regulation.⁵⁷ Instead, it is about getting the context right, which requires an integrated approach comprising of the formulation of measures, legislation of the statutes, and efficiency of implementation by various parties. In other words, it is insufficient for the government to focus on amendment or legislation of new law to tackle this issue. Instead, emphasize also should be given to other important aspects, such as establishment of sufficient number of separate detention centres for children, recruitment of professionally trained staffs, introduction of informal alternative measures and programmes, involvement of parents and community and others.

4.2.3 Interrogation

Investigation is considered to be one of the crucial stages of the criminal process. It refers to the process of compiling evidence to determine the liability of a suspect for the alleged crime. During the process of investigation, any suspected child may be subjected to various modes of questioning, interview and examination with a purpose to obtain evidence and confession for an alleged crime.⁵⁸ The law permits any evidence elucidated during the process of interrogation to be used as evidence against the suspect provided that all the stipulated conditions are fulfilled. This imminent repercussion raises the concern over the adequacy of the law in protecting children during interrogation process. This is because there is huge possibility that any child, due to various factors such as lack of understanding and being placed in a state enormous pressure, may involuntarily choose to give self-incriminatory evidence or false confession.

⁵⁷Bateman, T. (2005). Reducing Child Imprisonment: A Systemic Challenge. *Youth Justice*, 5(2), p 103.

⁵⁸Kassin, S.M. et al. (2010). *Police-Induced Confessions: Risk Factors and Recommendations*. [online] Available from: <http://www.ncbi.nlm.nih.gov/pubmed/19603261> [Accessed on 18/9/2015].

Reference to the CRC reveals that it has set out important principles that aim to protect the rights and interests of children during the interrogation process. Article 40 of the CRC explicitly provides that children shall not be compelled to testify against themselves or to confess to a crime.⁵⁹ Commenting on this requirement, the Committee on the CRC strictly prohibits any use of torture, cruel, inhuman or degrading treatment against child suspect for the purpose of obtaining confession.⁶⁰ The Committee also emphasizes that any confession obtained under such circumstances shall be wholly unacceptable as it amounts to an infringement of the right of children not to be compelled to give testimony.⁶¹ Therefore, any evidence obtained under such circumstances shall not be admissible in law. In addition, the committee further expresses concern over the issue of false confession among children during interrogation. The age of the child, his development, the length of the interrogation, the child's lack of understanding and the fear of unknown consequences or of a suggested possibility of imprisonment have been identified by the Committee on the CRC as relevant factors that may lead the child to give a false confession.⁶² Therefore, the court and other judicial bodies are expected to carefully consider totality of the circumstances to determine that the confessions given by children are voluntarily given.⁶³ In addition, Rule 7 of Beijing Rules reinforces the procedural protection of children under CRC by stating their entitlement to the right to silence during interrogation. This right prevents adverse inference being drawn against children for silence and refusal to answer question during the interrogation. The Beijing Rules also stipulate that parents or guardians shall be allowed to participate in the proceedings at any stage except in certain circumstances where denial is necessary to protect the interests of children. In this respect, the Committee on the CRC has recommended the

⁵⁹Article 40(3)(iv) of CRC.

⁶⁰Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25th April 2007, para. 56

⁶¹*Ibid*, para 56.

⁶²*Ibid*, para. 57.

⁶³*Ibid*, para. 58.

national laws to allow the presence of parents or guardians of children during any questioning by the police or enforcement authority.⁶⁴

Despite the above-mentioned guidelines, there are many instances when national laws fail to measure up to the requirements set out by the CRC on the protection of children's rights during interrogation. For instance, the Committee on the CRC, in concluding its observation report for Turkmenistan, has expressed its deep concern over the use of torture and ill-treatment against children with a view to extracting a confession or information.⁶⁵ Pursuant to that, the Committee recommended Turkmenistan to amend its national law to ensure that any statement made by children as a result of violence or coercion should be rendered as inadmissible evidence in any proceedings.⁶⁶ The comment and recommendation pertaining to same issue can also be found in various concluding observation reports made by the CRC against other countries, such as Ukraine,⁶⁷ India,⁶⁸ and Romania.⁶⁹

Similarly, the requirement of the CRC which encourages the participation of parents at the interrogation stage of proceedings has not been comprehensively implemented by certain state parties. The evidence on this point can be found in the concluding observation reports made by the Committee on the CRC. For example, the Committee expressed its concern over the issue of lack of family access in its observation reports for Russia⁷⁰, Burkina

⁶⁴*Ibid*, para. 53.

⁶⁵Committee on the Rights of the Child, *Concluding Observations: Turkmenistan*, UN Doc. CRC/C/TKM/1, 2 June 2006, para. 36.

⁶⁶*Ibid*, para. 70(d).

⁶⁷Committee on the Rights of the Child, *Concluding Observation; Ukraine*, UN Doc. CRC/C/UKR/3-4, 21 April 2011, para. 41.

⁶⁸Committee on the Rights of the Child, *Concluding Observation; India*, UN Doc. CRC/C/15/Add.228 26 February 2004, para. 43(b).

⁶⁹Committee on the Rights of the Child, *Concluding Observation; Romania*, UN Doc. CRC/C/ROM/CO/4 30 June 2009, para. 91(b).

⁷⁰Committee on the Rights of the Child, *Concluding Observations; Russian Federation*, UN Doc. CRC/C/15/Add.4, 18 February 1993, para. 86(h).

Faso⁷¹ and Pakistan.⁷² Limited access given to parents of detained children may prevent them from actively participating in the child proceedings. However, close scrutiny discloses that this problem is partly due to the lack of clarity of the provision of the CRC itself. For example, Articles 40(2) (b) (ii) of the CRC merely imposed the duty to inform parents or guardians promptly of the charges.⁷³ It means that the duty to inform parents or guardians arises only after the police or enforcement officer ascertains the nature of the charge against children. There is no duty on the police or enforcement officer to inform parents or guardians on the arrest or apprehension of children. Consequently, delay in informing parents or guardians of the arrest of children may prevent them from participating in the interrogation process of children, which normally takes place after the arrest. In addition, the provision on the participation of parents and guardians contains an exception clause, which permits the national law to exclude them in the interest of children. Furthermore, wide interpretation of the term “interest of child” may be adopted to limit the participation of parents and guardians during the interrogation process.

4.2.3.1 Issues

In practice the issue of protection of children during interrogation has been subject to various discussions. The discussions mainly revolve around the issues of protection of children against self-incriminatory evidence and false confession. With regard to the issue of false confession, various studies revealed that children have a tendency to give a false confession during the interrogation.⁷⁴ Children who are physically, mentally and

⁷¹Committee on the Rights of the Child, *Concluding Observations; Burkina Faso*, UN Doc. CRC/C/BFA/CO/3-4, 9 February 2010, para. 76(g).

⁷²Committee on the Rights of the Child, *Concluding Observations; Pakistan*, UN Doc. CRC/C/15/Add.217, 27 October 2003, para. 100(g).

⁷³Bueren, G. V. (2006). *Article 40: Child Criminal Justice. A Commentary on the United Nations Convention on the Rights of the Child*. Leiden, Boston: Martinus Nijhoff Publishers, p 14.

⁷⁴Garrett, B.L. (2010). The Substance of False Confessions. *Stanford Law Review*, 62, p 1093.

psychologically vulnerable are undeniably susceptible to the inherently coercive nature of custodial interrogation conducted by the police and other authority figures. More often than not, their lack of life experience and foreshortened sense of the future than adults induce them to place more weight on the short term rather than long term effects of their decisions.⁷⁵ Despite this factual reality, there is convergent evidence that the police often use the same tactics when interrogating adults and children, without making any distinction.⁷⁶ Studies show that modes of investigation by the police normally involve elements of confrontation, isolation, accusation and psychological manipulation.⁷⁷ In some instances, the police have resorted to various tactics of interrogation including deception, false promise, fabrication of evidence and others to pressure the suspect to give evidence.⁷⁸ For example, there were many reported cases which revealed that children have been prompted to make false confessions due to the aggressive mode of interrogation applied by the police.⁷⁹ The employment of these inappropriate techniques, has led to children who are physically, cognitively and emotionally and socially susceptible to hastily make false confessions without duly understanding the long term and far reaching consequences of their actions. They often choose to make false confessions to the police simply to get rid of the gruelling process of interrogation, naively thinking that they can undo the damaging effect their action later.⁸⁰

⁷⁵King, K.J. (2006). Waiving Childhood Goodbye: How Child Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights. *Wisconsin Law Review.*, (2), p 472, Houle, S.R. (2011). Juvenile justice is Not Just Kid Stuff: The Forgotten Side of Fairness and Due Process. *Dartmouth Law Journal*, 9(3), p 99.

⁷⁶Redlich, A.D. (2010). The Susceptibility of Children to False Confessions and False Guilty Pleas. *Rutgers Law Review*, 62, p 952.

⁷⁷Redlich, A.D., Summers, A. and Hoover, S. (2010). Self-Reported False Confessions and False Guilty Pleas Among Offenders With Mental Illness. *Law and Human Behavior*, 34(1), p 79, Kassin, S.M. et al., n.57 above.

⁷⁸Scott-Hayward, C.S. (2007). Explaining Child False Confessions: Adolescent Development and Police Interrogation. *Law & Psychology Review*, 31, p 55.

⁷⁹Birckhead, T.R. (2008). The Age of the Child: Interrogating Children After *Roper v. Simmons*. *Washington & Lee Law Review*, 65, p 415.

⁸⁰Drizin, S.A. and Luloff, G. (2007). Are Child Courts a Breeding Ground for Wrongful Convictions?. *Northern Kentucky Law Review*, 32(3), p 272.

Apart from that, the issue of protection of children from self-incriminating statements during interrogation has also been the subject of concern from various parties. Though most of the legislation acknowledge the right of children against self-incrimination, this right is stated broadly without any distinction between adults and children. Merely stating the broad right of children against self-incrimination into the legislation is obviously inadequate to protect their right as the legislation provides that this right can be waived by them. In the context of children, this position is problematic and unsatisfactory. The ability to exercise this right independently, voluntarily and in a valid manner is questionable due to several grounds. Firstly, children may not be able to adequately understand their right against self-incrimination due to their lack of maturity and intellectual capacity. Some children might not be able to even fully understand the nature and importance of the right against self-incrimination under the law, let alone appreciate its consequences and effects. Even if they broadly understand this right, their low level of maturity, lack of psychological and mental strength, unstable emotions, lack of future orientation, and vulnerability to pressure may prevent them from making correct and proper decisions.⁸¹ In addition, the technique and tactic of interrogation applied by the police in elucidating evidence from the children may cause them to heed to pressure to give self-incriminating statements. More often than not, police are inclined to use similar techniques when interrogating adults and children, despite various calls that children need to be treated differently. Knowing children are particularly susceptible to the coerciveness of interrogations, the interrogators may take advantage to apply manipulative techniques of interrogation, such as subjecting child suspects to long-hours of questioning, lying to them about non-existent evidence against them, imposing physical custody and isolation and others.⁸² These techniques, which are inherently coercive

⁸¹King, K..J., n. 75 above, p 443.

⁸²Kohlman, kay, A. (2012). Kids Waive the Darndest Constitutional Rights: The Impact of J.D.B V. North Carolina on Child Interrogation. *American Criminal Law Review*, 49, p 1633.

in nature, can have powerful impacts and influence children to give self-incriminatory evidence to the police during the interrogation process.⁸³

In short, there are various issues relating to the interrogation of children that require further attention and action. Children's false confession and self-incriminatory statement are among the serious problems during interrogation that may result in miscarriages of justice.⁸⁴ Child advocates and scholars have suggested a pre-interrogation screening process to determine the ability of children to understand their rights. Other measures include standardizing and simplifying the caution applied to children, making the presence of legal counsel and parents or guardians mandatory during the interrogation process, as well as videotaping it.⁸⁵ Regardless of whatever measures taken by any jurisdiction to protect the child's rights and interests during interrogation, it is important to give due consideration to the prevailing circumstance that children vulnerable, susceptible and have less control over their own environment. Failure to consider these factors may render the implementation of any measure or approach as being incomprehensive, ineffective and erratic.

4.2.4 Diversion

Diversion refers to the process of removing children and young people from formal sanctions of the juvenile justice system.⁸⁶ It serves to shift child delinquency policy more

⁸³Feld, B.C. (2006). Police Interrogation of Children: An Empirical Study of Policy and Practice. *Journal of Criminal Law & Criminology*, 97, p 297.

⁸⁴Lore III, J.C. (2009). Pretrial Self-Incrimination in Child Court: Why a Comprehensive Pretrial Privilege Is Needed to Protect Children and Enhance the Goal of Rehabilitation. *University of Louisville Law Review*, 47, p 442.

⁸⁵Birckhead, T.R. (2013). Closing the Widening Net: The Rights of Children at Intake. *Texas Tech Law Review*, 46, p 180, Boyd, N.F. (2004). I Didn't Do It, I Was Forced to Say That I Did: The Problem of Coerced Child Confessions, and Proposed Federal Legislation to Prevent Them. *Howard Law Journal*, 47, p 424.

⁸⁶Dunkel, F. (2009). Diversion: A Meaningful and Successful Alternative to Punishment in European Juvenile Justice Systems. In: Junger-Tas, J. and Dunkel, F., eds., *Reforming Child Justice*, London, New York: Springer, p 148.

towards community oriented treatment programs. The primary goal of diversion is to avoid direct consequences of formal court adjudication on children and young people such as unwarranted labelling,⁸⁷ stigmatization⁸⁸ and recidivism.⁸⁹ In addition, diversion also offers a speedier way of case disposal. It is also more cost effective than formal child court process.⁹⁰

The CRC promotes state parties to develop alternative measures to deal with children in conflict with the law without resorting to formal judicial proceedings. Article 40 of the CRC advocates that state parties shall, wherever appropriate and desirable, deal with children without resorting to judicial proceedings.⁹¹ In addition, Article 37 indirectly corroborates the same requirement by stating that children should be arrested only as a measure of last resort. Apart from that, the Commentary to the Beijing Rules recognizes that the effectiveness of formal and informal practices of diversion in many legal systems serves to hinder the negative effects of subsequent proceedings in juvenile justice administration such as the stigma of conviction and sentence. The Committee on the Rights of the Child, in its observation on this point, recommended that diversion from the criminal justice system should be a core objective of every youth justice system and this should be explicitly stated in legislation.⁹² The same recommendation can also be found in the Beijing Rules which states that consideration should be given, wherever appropriate, to dealing with child offenders without resorting to formal hearings. In particular, it identifies the importance of the role of

⁸⁷Scharf, P. (1978). Towards a Philosophy for the Diversion of Child Offenders. *Journal of juvenile & Family Courts*, 29, p 15.

⁸⁸Gavazzi, S.M. et al. (2000). The Growing Up Fast Diversion Program: An Example of Juvenile Justice Program Development for Outcome Evaluation. *Aggression and Violent Behavior*, 5(2), p 164.

⁸⁹Wilson, H.A. and Hoge, R.D. (2013). The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review. *Criminal Justice And Behavior*, 40(5), p 510.

⁹⁰Feld, B.C. (1999). The Transformation of the Child Court - Part II: Race and the "Crack Down" on Youth Crime. *Minnesota Law Review*, 84, pp. 350-354.

⁹¹Article 40.3(b) of the CRC.

⁹²Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25th April 2007, para. 24.

the police and prosecutors in disposing of cases in this way.⁹³ It also encourages the devising of new and innovative measures to avoid such detention in the interests of the well-being of children.⁹⁴ There is a variety of dispositions recommended by international instruments as alternative measures to formal judicial proceedings. These include reprimands, discharges, bind overs, community service, compensation, restitution fines, care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes. These are deemed to be appropriate to children's well-being and proportionate both to their circumstances and the offence.⁹⁵

In practice, the importance and effectiveness of diversion have been widely recognized as effective in dealing with children. Many countries across the world have adopted and implemented diversion as part of their juvenile justice systems. Broadly, diversion measures can be divided into two categories, namely non-intervention programs and formal interventions.⁹⁶ The former includes the exercise of powers by authorities comprising the police, the prosecutor and the court to divert the offender from formal judicial processes by way of warning, caution or release. On the hand, the the latter refers to alternate, non-judicial programs conducted by various bodies such as youth professional panels or committees, private agencies, and non-governmental organizations. Both non-intervention and formal intervention may take place at the pre-charge stage as well as the post-charge stage. While pre-charge diversion refers to the process of diverting youth with no official

⁹³Paragraph 11 of the Beijing Rules.

⁹⁴ Rule 13.1 of the Beijing Rules.

⁹⁵Article 40(4) of the CRC and para. 18 of the Beijing Rules.

⁹⁶Wilson, H. A, and Hoge, R.D. (2013). Diverting Our Attention to What Works: Evaluating the Effectiveness of a Youth Diversion Program. *Youth Violence & juvenile Justice*, 11(4), p 314, Maclure, R., Campbell, K. and Dufresne, M. (2003). Young Offender Diversion in Canada: Tensions and Contradictions of Social Policy Appropriation. *Policy Studies*, 24(2-3), p 138.

charge out of the justice system completely, post-charge diversion requires an official charge or conviction prior to referral of the offender to any form of intervention programs.⁹⁷

The police, prosecutor and the court may invoke the power to divert children from judicial proceedings. These parties should be given the authority and discretion to exercise it whenever necessary and appropriate depending on the nature and circumstances of each case. In this respect, Rule 5 of the Tokyo Rules specifically recommends that the police and the prosecution should be given the power to divert the child in conflict with the law whenever appropriate and compatible with the legal system. It also states that the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.⁹⁸ Most legal systems confer the police with the authority to dispose criminal cases involving children by way of diversion, though diversion measures may vary from one country to another. This is understandable as a child's involvement with the justice system normally begins with police contact. The police are normally authorized by legislation to minimize direct contact between child and the formal judicial process by adopting various modes of diversion such as warning, reprimand, caution and others, except in serious cases where stronger measures are required to protect the safety of the public.

Apart from that, certain legislation confers discretionary power to the prosecutor to divert children from the formal judicial process. The role of the prosecutor under juvenile justice system is vital. Deemed as a gatekeeper to the juvenile justice system, the prosecutor is responsible to determine whether the child should be charged in court or diverted from

⁹⁷Wilson, H. A, and Hoge, R.D., n. 96 above, p 313.

⁹⁸Rule 5(1) of the Tokyo Rules.

prosecution. Exercise of such discretionary power does not only require the prosecutor to possess enormous legal expertise but also a high level of consistency, integrity and accountability. Balance has to be struck between the need to consider the interests of the child and the interests of society. The decision by the prosecutor to divert children from the formal child legal process should be based upon all of the available facts and evidence.⁹⁹ Among the factors that shall be taken into consideration are the seriousness of the alleged offense, the nature of the offence, the role of the child in that offence, the age of the child at the time of commission of the offence, previous record of the commission of the offence, the availability of appropriate treatment or services, the gravity of the offence, provision of financial restitution to victims and recommendations of the referring agency, victim, and advocates for the children.¹⁰⁰ In practice, the role and power of the prosecutor to divert children from the formal child process differs from one legal system to another. For example, in Germany, the prosecutor has the power of diversion in most criminal proceedings. There are various forms of diversion measures that may be imposed by the prosecutors on the child, including community service, mediation, educative measures and others.¹⁰¹ In a less serious case involving the first time offender, the case against the child may be dropped with warning.

Though the efficiency of diversion programmes continues to be a topic of great debate, there are various studies which positively demonstrate the level of its effectiveness, particularly in reducing the recidivism among the children.¹⁰² Research revealed that diverting children to various diversion programs is significantly more effective in reducing

⁹⁹Backstrom, J.C. and Walker, G.L. (2006). The Role of the Prosecutor in Child Justice: Advocacy in the Courtroom and Leadership in the Community. *William Mitchell Law Review*, 32, p 965.

¹⁰⁰*Ibid*, p 972.

¹⁰¹§ 45 (3) of the Germany Juvenile Justice Act 1923.

¹⁰²Lipsey, M.W. (2009). The Primary Factors that Characterize Effective Interventions with Child Offenders: A Meta-Analytic Overview. *Victims & Offenders.*, 4(2), p 126.

recidivism than the traditional justice system's process.¹⁰³ The findings also showed that exposing children to direct contact with the formal judicial system can increase the likelihood of reoffending.¹⁰⁴

4.2.5 Right to Challenge Validity of Pre-Trial Detention Before a Court or Other Competent, Independent and Impartial Authority

Any arrested person shall be entitled to be brought before a judicial authority or other authorised officer without unnecessary delay. This is to enable the arrested person to challenge the lawfulness of deprivation of liberty. This right must be made effectively available immediately after the arrest or detention. The safeguard on this fundamental right is clearly provided under various international and regional instruments.¹⁰⁵

With regard to children, there are several provisions which concern with their right to challenge the validity of pre-trial detention before a court or other competent, independent and impartial authority. The CRC specifically provides that any child detained or arrested shall be brought promptly before a judge, court or other competent, independent and impartial authority authorised by law to exercise judicial power.¹⁰⁶ This right is automatic and does not depend neither upon request of the detainee or discretion of the detaining authority.¹⁰⁷ The main reason for this requirement is to provide the child with an opportunity

¹⁰³Wilson, H. A and Hoge, R.D., n. 89 above, pp. 509–510.

¹⁰⁴McAra, L. and McVie, S. (2007). Youth Justice: The Impact of System Contact on Patterns of Desistance from Offending. *European Journal of Criminology*, 4(3), p 340.

¹⁰⁵Article 9 (3) of the ICCPR, Article 11, 37 and 38 of the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Article 6.3 of the Tokyo Rules, Rule 70 of the Havana Rules, Article 5 (3) of the ECHR, Article 27 of the Guidelines and Measures for The Prohibition and Prevention of Torture, Cruel, Articles 14, 15, 16 and 18 of the Council of Europe, Recommendation (2006) and others.

¹⁰⁶Article 37(d).

¹⁰⁷Human Rights Committee, Concluding Observations: Republic of Korea, CCPR/C/79/Add.114, 1 November 1999, para. 13, ECtHR, Case of *McKay v. the United Kingdom* (App. No. 543/03), judgment 3 October 2006, para. 34.

to challenge the validity of the arrest or detention. There is no specific timeframe within which the arrested child shall be brought before the judicial authority provided under the international instruments. However, the Committee on the CRC has recommended that the child deprived of his liberty should be brought before a competent authority within twenty-four hours to determine the validity of the deprivation.¹⁰⁸ The judicial authority empowered to consider the legality of the arrest must, without undue delay, consider the matter and promptly decide its lawfulness.¹⁰⁹ According to the Committee of the CRC, the right to a “prompt decision” means that a decision must be delivered as soon as possible, that is within or not later than two weeks after the challenge is made.¹¹⁰ In addition, the judicial authority is also required to give reasons for decisions allowing or rejecting the request for arrest. This is to enable the child or the detaining authority to exercise their right of appeal against the decision to a higher judicial authority.¹¹¹

Despite the guidelines provided by the international instruments, the observation by the CRC Committee revealed that there are various instances where the state parties failed to comply with the requirement of international instruments on pre-trial detention. For example, the CRC Committee has expressed its concern over the situation in Bolivia, where a child may be detained in custody for a long period of forty–five days before the legality of his or her detention is decided upon.¹¹² This practice obviously amounts to a blatant violation of the fundamental rights of children since it unfairly denies their right to challenge the validity and appropriateness of arrest and detention. The review process by the competent judiciary body

¹⁰⁸Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25th April 2007, para. 83.

¹⁰⁹Article 37(d) of the CRC, Rule 10.2 of the Beijing Rules.

¹¹⁰Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25th April 2007, para 84.

¹¹¹Rule 7.1 of the Beijing Rules, Article 70 of the Havana Rules.

¹¹²Committee on the Rights of the Child, *Concluding Observations: Bolivia*, UN Doc. CRC/C/15/Add.1, 18 February 1993, para. 11.

or authorised officer should be viewed as remarkably important as it provides a safeguard against abuses of power and arbitrary detention. The fact is that a pre-trial child detainee has not yet been convicted and therefore should not be treated in a manner which is against a cardinal principle of presumption of innocence under criminal law.¹¹³ Since a delay or deprivation of child detainee from seeking a review process before a judiciary body or authorized officer is obviously in stark contrast with the principle of presumption of innocence, it must be avoided at all costs.

Apart from determining the validity and lawfulness of the detention, the judicial body or authorized officer is also responsible to determine and grant judicial remedy to children in the event it finds that the detention is unlawful or illegal. It is surprising to find out that the CRC is silent on the right of children to claim remedy for unlawful detention.¹¹⁴ However, the absence of this provision in the CRC does not preclude children from receiving the right of remedy since other international instruments such as the ICCPR, which applicable to both adult and children, allow the claim of remedy and compensation for illegal detention.¹¹⁵ Failure to provide an effective remedy for the violation of rights is itself deemed as a violation of international human rights law.¹¹⁶

4.2.6 Legal Representation

Right to legal counsel is one of the fundamental elements of fair trial.¹¹⁷ This right is universally acknowledged as one of the most essential and basic rights of every individual.

¹¹³Tribe and Lawrence H., n. 54 above, p 374.

¹¹⁴Schabas, W. and Sax, H., n. 11 above, p 40.

¹¹⁵ Article 9 of the ICCPR.

¹¹⁶ *IACtHR, Case of Castillo Petruzzi et al. v. Peru, Judgment of May 30, 1999, at para. 185.*

¹¹⁷*Saidova v. Tajikistan, CCPR/C/81/D/964/2001 (20 August 2004), § 6.8, Shukurova v. Tajikistan, CCPR/C/86/D/1044/2002 (26 April 2006), § 8.5.*

As far as criminal proceedings are concerned, the role of legal counsel is undoubtedly vital. Most people are not familiar with the complexity of the legal process. In the eyes of a layman, the legal process is complicated, strict, technical and tedious. Due to this, every person is entitled to be represented by legal counsel through all stages of criminal proceedings. In case of criminal proceedings which involve children, the need of assistance from legal counsel becomes even more necessary. It is absurd to expect children to know the process of criminal proceedings, which even adults hardly understand. The right of a person to obtain counsel is enshrined in a range of international instruments.¹¹⁸

The CRC guarantees the right of children for legal counsel at various stages of the criminal process. With regard to the right to counsel at the pre-trial stage, the CRC specifically stresses that this right commences immediately after arrest, regardless of whether the police investigation has not yet been completed. Article 37 of the CRC provides that any child shall have prompt access to legal assistance immediately upon arrest. In addition, the CRC also imposes a duty on state parties to provide every child with legal assistance in preparation and presentation of his or her cases.¹¹⁹ Any arrested child shall be entitled to the assistance of legal counsel at the earliest possible time after the arrest. Questioning or interrogation should not commence before the child is given opportunity to meet and consult the counsel.¹²⁰ A legal counsel appointed for children may not only be responsible to give them advice, but may also monitor whether the whole process of criminal justice against children is exercised strictly in accordance to rules, regulations and procedures. This requirement is laudable as it enables to the counsel to brief children on the legal process and

¹¹⁸Article 11.1 of the Universal Declaration of Human Rights, Article 14.3(b) and (d) of the International Covenant on Civil and Political Rights, Article 6.3(b) and (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8.2(c) and (e) of the American Convention on Human Rights, Article 7 (c) of the African Charter on Human and Peoples' Rights and others.

¹¹⁹Article 40(2)(b)(ii) of the CRC.

¹²⁰Article 40(2)(b)(vii) of the CRC.

their rights. Allowing children to consult legal counsel at early stage of criminal process may prevent them from being subjected to any possibility of unnecessary element of abuse, pressure, manipulation and oppression. It may prevent the police from using unlawful methods of investigation to obtain information, confession, admission and other types of evidence.

Unfortunately, the children's right to the counsel enshrined in Article 40(2) of the CRC is qualified by the phrase "*unless it is considered to be in the interest of the child*" provided under the same section.¹²¹ This vague qualification seems to permit state parties to exercise discretion to limit the right of children to counsel, particularly at the pre-trial stage, in their national legislations to suit local circumstances and condition. This qualification may unwittingly open to the risk of failure to adhere to the required level of international standards themselves. For example, Scotland's national legislation allows children to be deprived of liberty seven days prior to attending a children's hearing. Though children are entitled to the right of access to counsel during this period, legal representation is not allowed at the children's hearings proceedings.¹²²

4.3 The CRC Standards on Rights of Children During Trial

4.3.1 Introduction

The trial process is an important aspect in the administration of criminal justice. With regard to children, this process begins when a formal charge is brought against them before the court. Every child charged with criminal prosecution is guaranteed of the right to receive

¹²¹Article 40(2)(b)(iii)

¹²²Refer to the reservation of the United Kingdom to Article 37(d) by which it '*reserves its rights to continue the present operation of children's panels*'. See United Kingdom of Great Britain And Northern Ireland's report, UN Doc. CRC/C/11/Add.1, 28 March 1994, pp. 113-114.

a fair trial, which is a fundamental element of the criminal process. The recognition of the child's right to a fair trial is illustrated in international as well as regional instruments. There are various decided cases which acknowledge the entitlement of children to a fair trial. Among the most celebrated cases on this point is the case of *In Re Gault*.¹²³ The Supreme Court in this case unequivocally upheld the right of children to due process of law during trial, which comprises the right to counsel, the privilege against self-incrimination and opportunity for cross-examination of witnesses and others. In addition, reference can also be made to the judgement of the European Court of Human Rights in the case of *T v United Kingdom*.¹²⁴ In holding the right of children to receive a fair trial, the court stated that the procedures put in place to assist understanding and participation of two boys tried for murder were deliberately inadequate. Therefore, the court held that the conviction of these two boys could not be sustained as they were denied the right to a fair trial. Undoubtedly, the decisions of international as well as regional courts in various cases explicitly recognize the right of children to a fair trial.

However, mere recognition of the children's right to a fair trial is insignificant unless it can be effectively translated and implemented into international and national legal practice. To assess this point, it is pertinent to examine the international legal standards set by the most significant international instrument on the right of children, namely the CRC, which serves as a benchmark on this matter. The CRC is very concerned with the rights of children charged with criminal offences in court. It uncompromisingly emphasizes that any child charged with a criminal charge should be tried in a just and fair manner. To achieve this objective, the CRC requires each state party to establish a comprehensive child criminal justice system, covering both substantive and procedural aspects. This is important to ensure

¹²³387 U.S. 1, 21 [1967].
¹²⁴[2000] 30 EHRR 121.

that the criminal justice process involving children is conducted smoothly without any element of bias, discrimination or violation of the rights of children. The CRC sets certain standards that need to be given consideration by state parties in designing criminal judicial process involving children, to cater their level of maturity and ability. The main question is what are the standards of fair trial of children set by the CRC? How comprehensive are the provisions of the CRC to sufficiently guide the state parties in implementing right of children to fair trial into their respective national laws? This section will examine the rights of children during the trial process fixed by the CRC and to what extent it may enable them to effectively function as criminal defendant or accused.

4.3.2 Separate Court and Procedure

The debate on the appropriate forum for children has prolonged for decades.¹²⁵ The underlying philosophy between welfare and justice models has led to different approaches in determining the proper forum for the trial of children in criminal cases. While some legal systems prefer a separate court system for children,¹²⁶ others maintain that there is no necessity to do the same.¹²⁷ However, the last thirty years have shown that there is a shift in the juvenile justice approach taken by various legal systems.¹²⁸ Many countries have adopted the trend to toughen juvenile justice by shifting the policy from rehabilitation to punishment.¹²⁹ The “getting tough” policy for children has decreased access to the protective

¹²⁵Feld, B.C. (1999). *Bad Kids: Race and Transformation of the Juvenile Court*, New York: Oxford University Press, p 79.

¹²⁶Chao, R. (2005). A Commentary From Crouse to Roper: Children Continue to Deserve Separate Court. *Children's Legal Right Journal*, 25(2), p 36.

¹²⁷Bueren, G. V., n. 73 above, p. 16.

¹²⁸Birckhead, T.R. (2008). The Age of the Child: Interrogating Children After Roper v. Simmons. *Washington & Lee Law Review*, 65, p 388.

¹²⁹Backus, M.S. (2013). Achieving Fundamental Fairness for Oklahoma's Children: The Role for Competency in Child Proceedings. *Oklahoma Law Review*, 65, p 53.

confines of the juvenile justice system and increased the availability for them to stand for trial in adult courts.¹³⁰

The CRC promotes each juvenile justice system to formulate special rules and procedures for the trial of children. It provides that state parties shall seek to promote the establishment of a special set of laws and procedures to deal with children who are alleged or accused to be in conflict with the law.¹³¹ This requirement obliges state parties to formulate special rules and procedures that will be applicable to children at any stage of the criminal proceedings. It also imposes a duty on state parties to maintain a balance between the informality of proceedings and the protection of the fundamental rights of the child. The rationale for the establishment of separate procedures for children is to cater the specific needs of children and to ensure the fulfilment of the aim of child justice. However, the CRC has fallen short of explaining the specific meaning of the requirement of separate procedure and juvenile justice system. As a result, the interpretation on this requirement is solely left to state parties. State parties are left with the discretion to formulate and decide how this requirement can be integrated and implemented in their respective national laws. Consequently, there are different practices among state parties in this respect. In pursuing this requirement, some countries have provided special procedures and a specialized court system for children.¹³² On the other hand, some countries maintain that there is no requirement under international instruments to establish a separate court system for children. Instead of establishing a specialized court system for children, these countries maintain that the trial of children in

¹³⁰Jordan, K.L. and Myers, D.L. (2011). Juvenile Transfer and Deterrence: Reexamining the Effectiveness of a “Get-Tough” Policy. *Crime & Delinquency*, 57(2), p 248, Myers, D. L. (2003). Adult Crime, Adult Time: Punishing Violent Youth in The Adult Criminal Justice System. *Youth Violence & juvenile Justice*, 1(2), p 174.

¹³¹Article 40 (3) of the CRC.

¹³²Chao, R., n. 126 above, p 36.

normal courts is equally valid.¹³³ In addition, there are some legal systems which allow children who commit certain criminal offences to be transferred to an adult court based on certain criteria, such as the nature of the offence or through discretion exercised by court or prosecutor.¹³⁴

4.3.2.1 Trial and transfer of children to adult criminal courts

The issue of trying and transferring children to adult criminal courts is controversial. In practice, there are two conflicting views among scholars on this issue. Some scholars view this practice as justifiable, while others perceive it to be insignificant. Proponents of transferring children to an adult criminal court rely on the claim that an outdated and ineffective juvenile justice system, ineffective programs and services designed to handle children, a moral requirement, and the need to protect society validate such strong action towards children in conflict with the law.¹³⁵ In addition, the inconsistent disposition of cases and the unsafe condition of child institutions are also identified as factors which attract heavy criticism on child courts.¹³⁶ Apart from that, the contention that the need to respond proportionately to serious offences for the benefit of the larger community outweighs the desire to treat children as less culpable than adults is also cited as a ground to justify the transfer of children to adult courts.¹³⁷

¹³³Parkes, A. (2013). *Children and International Human Rights Law: The Right of the Child to be Heard*. London: Routledge, p 158.

¹³⁴Rossiter, M.J. (2006). Transferring Children to Adult Criminal Court: How to Best Protect Our Children and Society. *Journal of juvenile Law*, 27, p 125.

¹³⁵Kupchik, A. (2006). *Judging juveniles: Prosecuting adolescents in adult and juvenile courts*. New York: New York University Press, pp. 161-164.

¹³⁶Feld, B.(1987). The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes, 78 *J. Criminal Law & Criminology*, p 471, Rosenberg, I.M. (1993). Leaving Bad Enough Alone: A Response to the Child Court Abolitionists. *Wisconsin Law Review*, p 170.

¹³⁷Jensen, E.L. (1994). The Waiver of Children to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change. *Idaho Law Review*, 31, p174.

On the other hand, some scholars have heavily objected and criticized the practice of transferring children to adult criminal courts.¹³⁸ This practice has not only been viewed as an inappropriate treatment of children but is also deemed contrary to the requirement of the CRC, which stresses on the need to create a separate system for children. Among the main grounds relied on by those who object this practice is the child's lack of adjudicative competency.¹³⁹ Adjudicative competency refers to the ability of children to function effectively as criminal defendants in criminal or delinquency proceedings.¹⁴⁰ It requires children to adequately comprehend the due process of law, which expects them to understand the meaning of the charge, the nature of the proceedings, the due process of adjudication, the procedure of the trial, as well as the ability to instruct their counsel. It is argued that children, due to their immaturity, are incompetent to be tried in adult courts.¹⁴¹ Therefore, the trial of children in adult courts simply amounts to a violation of their right not to be tried while being deemed incompetent. In order to support this argument, various researches indicate that children are less capable trial participants than adults due to developmental immaturity. For example, research shows that children are more likely to underestimate the likelihood of risks or negative implications, be less aware or less effective in making choices, as well as fixate on an initial possibility in the decision-making process.¹⁴² In addition, the findings of the research also reveals that children encounter difficulty in understanding the consequences of punishment and the disposal of cases by court against them.¹⁴³ Some other studies disclose

¹³⁸Sanborn, J.B. (2009). Children' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence. *Journal of Criminal Law & Criminology*, 99(1), pp. 212-213.

¹³⁹Backus, M.S. (2012). Achieving Fundamental Fairness for Oklahoma's Children: The Role for Competency in Juvenile Proceedings. *Oklahoma Law Review*, 65, p 42.

¹⁴⁰Scott, E.S. and Steinberg, L. (2008). *Rethinking Child Justice*. London: Harvard University Press, p 152.

¹⁴¹Wingrove, T.A. (2007). Is Immaturity a Legitimate Source of Incompetence to Avoid Standing Trial in Child Court?. *Nebraska Law Review*, 86, p 503.

¹⁴²Aronson, J.D. (2009). Neuroscience and Juvenile Justice. *Akron Law Review*, 42, p 922, Sanborn, Jr., J.B. (2009). Children' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence. *Journal of Criminal Law & Criminology*, 99(1), p 151, Redding, R.E. (1997). Children Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research. *Utah Law Review*, p 727.

¹⁴³Goldstein, N.E. et al. (2002). Advocating a Functional Approach to Determining Adjudicative Competency in Juveniles. *Journal of Forensic Psychology Practice*, 2(2), p 93.

that children tend to make different decisions than accused adults,¹⁴⁴ are unable to resist the influence of others to change their mind¹⁴⁵ and face difficulty in comprehending the duty and role of counsel.¹⁴⁶ Apart from that, scientific research on brain development disclosed that children and adults are developmentally different. Research findings revealed that brain development and cognitive functioning continues to grow significantly before puberty and into the early twenties.¹⁴⁷ All these findings and theories support the rationale for a separate child system, and they reinforce the argument that adults and children should be treated differently under the law. They also irresistibly point out to the conclusion that children are less capable trial participants than adults. In contrast to adults, the reality of developmental immaturity of children deter them from adequately comprehending the due process of law. It is this adjudicative competency that justifies the need to have a separate court and procedure. Forcing incompetent children to stand trial in adult adult courts breaches the basic elements of fairness in the administration of criminal justice.

In addition, enormous negative consequences are another reason that compel many scholars to object to the transfer and trial of children in adult criminal courts.¹⁴⁸ Unlike any child tried in child court, those who are transferred to adult criminal courts are exposed to harsher modes of punishments. The full force of adult conviction and modes of punishment such as incarceration, stricter treatment and condition may be imposed, in excess of what they

¹⁴⁴Scott, E.S. and Grisso, T. (1997). The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform. *Journal of Criminal Law & Criminology*, 88, p 160.

¹⁴⁵Scott, E.S. and Grisso, T. (2005). Developmental Incompetence, Due Process, And Juvenile Justice Policy. *North Carolina Law Review*, 83, p 816.

¹⁴⁶Grisso, T. et al. (2003). Children' competence to stand trial: A Comparison of Adolescents' and Adults' Capacities As Trial Defendants. *Law and Human Behavior*, 27(4), p 358.

¹⁴⁷Blakemore, S.-J. and Choudhury, S. (2006). Development of The Adolescent Brain: Implications for Executive Function and Social Cognition. *Journal of Child Psychology and Psychiatry and Allied Disciplines*, 47(3-4), pp. 302-308.

¹⁴⁸Carroll, J.E. (2010). Rethinking the Constitutional Criminal Procedure of Child Transfer Hearings: Apprendi, Adult Punishment, and Adult Process. *Hastings Law Journal*, 61, p 223.

could have received in a child court.¹⁴⁹ The imposition of these modes of punishment, which were originally designed to address the crimes of adults, is contrary to the philosophy of juvenile justice and its objectives. In addition, children tried in an adult criminal court also may not receive the privileges afforded to those charged in a child court, such as privacy of proceedings, informality of the trial process, swiftness of sanctions, rehabilitative opportunities and others.¹⁵⁰ Apart from that, research also indicates that a higher recidivism rate among transferred children compared to non-transferred children.¹⁵¹ The result of these various studies highlight that transferred children have a tendency to re-offend more quickly, at higher rates, involving more serious crimes compared to their counterparts who are tried in child court.¹⁵² Last but not least, the transfer of children to an adult court may send the wrong signal as it implies that children are not in need of the special protections and support as available under the juvenile justice system.¹⁵³ This message in turn gives a negative impression that children are incorrigible, indefensible and morally inexcusable, to the extent that they are not eligible to any consideration of forgiveness or leniency in sentencing. All these negative and far reaching effects show that it is inappropriate to try children in an adult criminal court.

In short, the practice of certain legal systems which allows for the trial or transfer of children to adult criminal courts is contrary to the requirement of the CRC of juvenile justice system. Though there is no clear and absolute provision in CRC which prohibit trial or transfer of children to adult criminal courts, the disapproval of this practice can be inferred by

¹⁴⁹Arya, N. (2011). Using *Graham v. Florida* to Challenge Child Transfer Laws. *Louisiana Law Review*, 71, p 107.

¹⁵⁰Klein, E.K. (1998). Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Child Justice. *American Criminal Law Review*, 35, p 402.

¹⁵¹Johnson, K., Lanza-Kaduce, L. and Woolard, J. (2011). Disregarding Graduated Treatment: Why Transfer Aggravates Recidivism. *Crime & Delinquency*, 57(5), p 770.

¹⁵²Lanza-Kaduce, L. et al. (2005). Child Offenders and Adult Felony Recidivism: The Impact of Transfer. *Journal of Crime and Justice*, 28(1), p 71, Fagan, J. (1996). The Comparative Advantage of Child Versus Criminal Court Sanctions on Recidivism Among Adolescent Felony Offenders. *Law & Policy*, 18, p 83.

¹⁵³Carroll, J.E., n. 148 above, p 223.

referring to the provisions which emphasize the best interest of children in any matter that affects them. At this juncture, it is also recommendable for the Committee on the CRC to specifically address and issue guideline to clear the air on this vagueness. It is hoped that the Committee would firmly and expressly recommend for the prohibition of transfer of children to adult court. Given the enormous collateral consequences that flow from the transfer, forcing children to face trial in adult courts is inappropriate and contrary to the principle of the best interest of children. This practice is obviously inimical to the best interest of the children and vehemently denies children the dignity and respect which they are due. Therefore, the practice of transferring children to adult criminal courts should be abolished.

4.3.3 Right to be Represented

The right to legal representation is universally acknowledged as one of the basic rights and fundamental features of fair trial.¹⁵⁴ The provisions on the right of children to be represented can be found in Article 12 of the CRC. Article 12 of the CRC recognizes the right of children to be heard in any proceedings which affects their interest. The Article also imposes duty on state parties to provide necessary means and procedures to enable the children to express their view in both legal and administrative proceedings, either directly or through a representative. In a legal context, the word “*shall assure*” employed in the provision is considered to be strongly worded, which means that it is mandatory for state parties to comply. Applying this requirement in the context of child legal proceedings, this provision implicitly acknowledges the right of children to be represented by legal counsel. The counsel is responsible to ensure the wishes and interest of children to be properly presented in court during legal proceedings.

¹⁵⁴ *Saluda v. Turkey* (Application no. 36391/02), ECtHR (2008), § 51.

Besides, affording children to get access to legal assistance is also in line with the CRC's requirement on the dignity of children. The CRC has put much emphasis on the theme of dignity in the treatment of children.¹⁵⁵ The provision of the CRC requires that state parties treat every child accused of having infringed penal law in a manner consistent with the promotion of the child's sense of dignity and worth.¹⁵⁶ In the context of child justice, the mandate of child dignity under CRC is materialized in practice by provisions that guarantee children the right to be presumed innocent until proven guilty, the right to get legal assistance, the right to be tried before competent, independent and an impartial authority or judicial body, and the right to be treated equally without discrimination. In other words, appointing legal counsels for children is critical to respecting their right to participate in judicial proceedings.¹⁵⁷ Therefore, failure to afford children with the right to legal assistance would run against the CRC's standards on their dignity.

There are several grounds which justify the children's need for legal assistance at the trial stages. Firstly, children lack understanding of the complex criminal justice process.¹⁵⁸ They need the assistance of legal counsel to explain to them their rights under the law. Children who are formally charged before the court need legal advice from counsels to explain to them the charge against them and the whole trial process that might follow after that. If children choose to plead guilty, there is a need to ensure that the guilty plea is not given under misconception or without entirely understanding their rights and consequences of the plea. If

¹⁵⁵Henning, K. (2010). Denial of the Child's Right to Counsel, Voice, and Participation in Child Delinquency Proceedings. *Child Welfare*, 89(5), p 123.

¹⁵⁶Article 40(1) of the CRC.

¹⁵⁷Duquette, D.N. and Darwall, J. (2012). Child Representation in America: Progress Report from the National Quality Improvement Center. *Family Law Quarterly*, 46(1), p 91.

¹⁵⁸Pokempner, J.K. et al. (2012.) The legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters. *Harvard Civil Rights-Civil Liberties Law Review*, 47, p 533.

children opt to claim for trial, they need to be informed of their various rights such as the right to make representation, the right to plead guilty, the right to claim for trial, the right to plea bargain, the right to challenge the admissibility of evidence tendered by the prosecution, the right to call witness, the right to give sworn testimony, to give unsworn statements, the right to remain silent, the right to appeal against the decision, the right to apply for revision, and the right to mitigate for a lenient sentence. Besides, legal counsels appointed for children may not only be responsible for giving them advice but may also monitor that the whole process of criminal justice against children is exercised strictly in accordance to rules, regulations and procedures.¹⁵⁹ Assistance of counsels also may provide protection against erroneous adjudication and safeguard the due process of the administration of law.¹⁶⁰

In short, the complexity of the evidence, the substantive and procedural rules of the legal justice system suggests that children must have assistance from the counsel in order to present their case effectively before the court.

4.3.2.2 *Legal aid*

Article 40(2) (b) (ii) of the CRC provides for the right of children to have legal or other appropriate assistance in the preparation of their defence. Elaborating on this matter, the Committee on the CRC provides that it is left to state parties to determine the mechanism to provide legal assistance for children, but it should be free of charge.¹⁶¹ The provision pertaining to the right to free legal aid for children is also provided in other international instruments. For example, the Beijing Rules provide that children have the right to be

¹⁵⁹Wilson, L. C.(2003). The Youth Criminal Justice Act: The Role of Counsel in the Youth Criminal Justice Act, *Alberta Law Review*, 40(4), p 1034.

¹⁶⁰Quinn, M.C.(2014). Giving Kids Their Due : Theorizing a Modern Fourteenth Amendment Framework for Juvenile Defense Representation. *Iowa Law Review*, p 2214.

¹⁶¹Committee on the Rights of the Child, General Comment No 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25th April 2007, para. 49.

represented by a legal advisor or to apply for free legal aid where there is provision for such aid in the country in any legal proceeding.¹⁶² In a similar vein, the Havana Rules provides that where children are detained under arrest or awaiting trial, they have a right to legal counsel and are to be able to apply for free legal aid where such aid is available.¹⁶³

It is unfortunate that the CRC is silent on the standard and ethical requirement for the counsels who intend to represent children. However, the guideline on the requirement is mentioned in the Vienna Guidelines. The Vienna Guidelines recommend each legal system to set a minimum requirement on the quality standards for legal counsels who represent the children.¹⁶⁴ In order to ensure high quality of representation for children, the Vienna Guidelines recommend the relevant authority in any legal system to impose minimum requirements in terms of experience and necessary training on the legal counsels before they are eligible to represent children.

To sum up, the CRC emphasizes the importance of the right to counsel for children during criminal proceedings. This right is regarded as the basic and fundamental right of the child accused. For that reason, the CRC has set standards governing the right of children to counsel in criminal proceedings, which include the entitlement to appoint counsel of their own choice, the privacy of consultation and the entitlement to adequate facilities for the purpose of consultation. However, the absence of provision in the CRC on the requirement of ethical and quality standards is undesirable. It is pertinent for the CRC to clearly insert new provisions, or at least come out with special guidelines on this matter so that it can serve as a standardized benchmark for state parties. Failure to provide specific provisions on these

¹⁶²Rule 15.1 of the Beijing rules.

¹⁶³Rule 18 (a) of the Havana Rules.

¹⁶⁴Para 16 of the Vienna Guidelines.

requirements in the CRC may lead state parties to grossly undermine its importance and neglect its inclusion in their national legislations.

4.3.4 Right to Participate in Judicial Proceedings

The CRC guarantees the right of children to participate in various judicial proceedings. It provides children with the opportunity to make their voices heard in matters that affect them, including legal and judicial proceedings. Article 12 of the CRC states:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

This provision is very general as it merely mentions about the right of children to be heard. It does not elaborate on the steps and procedures to be followed by state parties in implementing its requirement. The generality of the provision, to a certain extent, has conferred state parties with the discretion as well as a measure of flexibility to identify appropriate manners in which the voice of children can be heard in judicial proceedings. However, a lack of guidelines on this matter has resulted in a variety of approaches and practices adopted by state parties in their attempt to implement the requirements of this provision. In order to resolve uncertainty over this matter, the Committee on the CRC has issued a specific general comment on the requirement of this provision in 2009. According to

the Committee on the CRC, Article 12 requires the views of children who are capable of forming their own views to be seriously considered, not merely listened. The Committee also stresses that Article 12 imposes a strict obligation on state parties to fully implement the right of children to be heard, leaving no room for discretion.¹⁶⁵ In fact, it does not authorize state parties to enact procedural rules to restrict or limit the child's right to be heard.¹⁶⁶

Though Article 12 of the CRC recognizes the right of children to be heard, this right is not absolute. Firstly, the word "*capable of forming*" their own view forms the qualification attached to this right. It signifies that this right is only exercisable by children who have the capability to form their own views. Indirectly, this qualification requires the competency of children to form their opinion to be assessed before they are allowed to exercise their right. Secondly, Article 12 also is silent on to what extent the view given by children shall be taken into consideration. This Article merely mentions that "*due weight*" shall be given to views given by children. The word "*due weight*" implicitly imposes a restriction on the application of this Article. It merely requires state parties to give due weight to children's view in proportionate with their age and maturity.¹⁶⁷ However, they are not obliged to treat such views as determinative or conclusive. The existence of qualifications in the application of Article 12 is very unfortunate as it could be possibly exploited in order to not treat the views of children with the seriousness that is due to them. In addition to Article 12, Article 40 (2) (b) (IV) of the CRC guarantees the right of children accused of committing crime to participate in criminal proceedings. Among other things, this Article acknowledges the right of any child defendant or accused to remain silent as well as to examine witnesses.

¹⁶⁵Committee on the CRC, General Comment No. 12 (2009), The Right of the Child to Be Heard, CRC/C/GC/1220 July 2009, para 18

¹⁶⁶Parkes, A. (2013). *Children and International Human Rights Law the Right of the Child to be Heard*. New York: Routledge, p 31.

¹⁶⁷*Ibid*, p 35, Fortin, J. (2009). *Children's Rights and the Developing Law*. 3rd ed. Cambridge: Cambridge University Press, p 43.

In practice, there are various challenges in formulating the best measure to enable children to be heard in court and to give their best evidence. In their struggle to achieve this, many legal systems encounter difficulty in balancing the need to allow children to give evidence in a way that affords them a sufficient level of protection and the need to protect the rights of other adverse parties to the trials. While there are procedural and legislative differences across various legal systems, the issues that have been clouding the right of children to be heard in a criminal trial are strikingly similar.¹⁶⁸

4.3.4.1 Right to give evidence

There are various issues surrounding the right of children to give evidence in criminal proceedings. Among these issues are the capacity of children to give evidence, the admissibility of evidence, the method of giving evidence, the weight of evidence and others. These issues are more evident in countries that use adversarial adult oriented systems.¹⁶⁹ More often than not, the discussion and debate on issues relating to the right of children to give evidence mainly focuses on the position of children who become witnesses for the prosecution. This has resulted in the exclusion of accused children or defendants from receiving similar protection as well as privileges of special measures accorded to child witnesses for the prosecution.¹⁷⁰ This position is much regretted as child defendants who appear before both child and adult courts are often in the most disadvantaged position and in dire need of special measures to enable them to defend themselves compared to child witnesses for the prosecution. Therefore, it is important for any legal system to equally

¹⁶⁸Bala, N. (1999). Child Witnesses in the Canadian Criminal Courts: Recognizing Their Capacities and Needs. *Psychology, Public Policy, and Law*, 5(2), p 353.

¹⁶⁹Parkinson, P. and Cashmore, J. (2007). What Responsibility Do Courts Have to Hear Children's Voices?. *International Journal of Children's Rights*, 15(1), p 43.

¹⁷⁰Fortin, J., n. 167 above, p 665.

extend protection and special measures afforded to child witnesses for the prosecution to the child accused or defendants.

While some legal systems have amended the law and taken appropriate measures to support the right of children to give evidence in legal proceedings, others are still struggling to overcome this matter. In the United Kingdom for example, legal amendments have been made to enable children to have a better at being be heard in criminal proceedings. Various amendments such as the abolishment of the requirement which bans the court from convicting the accused based on the uncorroborated evidence of unsworn children,¹⁷¹ the abolishment of the judicial requirement that requires the court to warn juries of the danger of convicting the accused on the uncorroborated evidence of children in sexual cases,¹⁷² and the proclamation that all persons, regardless of their age, are competent to give evidence. This has effectively removed the previous requirement that a child must show that he or she understands the duty of speaking the truth before being eligible to give evidence.¹⁷³ The relaxation of the rule against hearsay evidence,¹⁷⁴ and the acceptance of child evidence by way of live video link¹⁷⁵ also are among the improvements that have been made to afford children with better opportunity to be heard in criminal proceedings. These sorts of improvements in the process of taking children's evidence can also be seen in various countries with adversarial systems such as Australia and New Zealand. Despite various positive improvements, there are certain issues relating to the child's evidence which remain controversial.

¹⁷¹Section 34 of the Criminal Justice Act 1988.

¹⁷²Section 33 of the Criminal Justice and Public Order Act 1994.

¹⁷³Section 53 of the Youth Justice and Criminal Evidence Act 1999.

¹⁷⁴Section 114(1)(d) of the Criminal Justice Act 2003.

¹⁷⁵Section 32 of the Criminal Justice Act 1988.

One of the hotly debated issues is cross-examination of the child who takes the stand as a witness. In recent years, there is an inclination among juvenile justice systems to adopt the approach which enables children to give direct evidence in court. Special provisions of law relating to child evidence have been inserted in legislation to facilitate children to give direct evidence in a comfortable, calm and less stressful manner. Nonetheless, they are still subject to cross examination. There is various research that firmly indicate that children face particular difficulties and problems when appearing as witnesses.¹⁷⁶ The application of traditional cross-examination techniques are unsuitable for children as it exposes them to unnecessary intimidation, manipulative in nature, confusing and tend to diminish the accuracy and cogency of their evidence.¹⁷⁷ Despite various special measures taken to improve traditional examination techniques, which include the use of screen, video-recorded examination-in-chief, engagement of intermediaries and child experts, relaxation of formality of proceeding and training for the practitioners and judges, their impact is still limited. These measures are still ineffective to completely resolve the problems relating to cross-examination of children.¹⁷⁸

It is believed that there is far more that could be done towards improving the direct evidence of children. Among the suggestions is to dispense with the requirement that child witnesses attend cross-examination. In England, the *Pigot* Committee recommended that cross-examination of child witnesses be conducted in advance of trial and then played in court.¹⁷⁹ This way, the requirement of attendance is completely dispensed with. In 1999, the parliament of the United Kingdom acted on the recommendation by amending the Youth

¹⁷⁶Riding, A. (1999). The Crown Court Witness Service: Little Help in the Witness Box. *The Howard Journal*, 38(4), p 411.

¹⁷⁷Keane, A. (2012). Cross-Examination of Vulnerable Witnesses Towards a Blueprint for Re-professionalization. *International Journal of Evidence & Proof*, 16, p 176.

¹⁷⁸Keane, A. (2012). Towards a Principled Approach to the Cross-Examination of Vulnerable Witnesses. *Criminal Law Review*,(6), p 407.

¹⁷⁹Report of the Advisory Group on Video Evidence, Home Office, London December 1989.

Justice and Criminal Evidence Act 1999. Section 28 of the Act permits the possibility of holding the cross-examination of children in advance of trial. It is argued that this method has great potential in facilitating more productive and less traumatic testing of children's testimony.¹⁸⁰ Despite receiving widespread support, the implementation of this provision in practice has also been objected to in certain quarters. The groups that strongly objected to its implementation has argued that it would be unfair to the opposing litigant.¹⁸¹ It was contended that the provision is a lack of practicality as the issues that the opposing litigant might decide to raise during cross-examination could only be certainly determined during the ongoing process of trial, after the prosecution completely tenders relevant evidence for their case.¹⁸² Apart from that it is argued that pre-recording cross examination also put the defence in an advantageous position in the sense that they have to reveal their case theory, list of witnesses and possible line of cross examination before the trial.¹⁸³ In addition, the pre-trial cross-examination is also criticized on the ground that it violates the fundamental principle that prosecution must call their evidence before the defence.¹⁸⁴ Nevertheless, three pilot schemes for pre-recorded cross examination have been in operation at Crown Courts in Leeds, Liverpool and Kingston-Upon-Thames.¹⁸⁵ The operation of these pilot schemes marked a remarkable sea-change in this aspect as it is expected to pave the way for the implementation of pre-trial cross examination to all courts across the United Kingdom.

¹⁸⁰Hoyano, L. (2015). Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants. *Criminal Law Review*, 2, p 108.

¹⁸¹Hoyano, L. and Keenan, C. (2010). *Child Abuse: Law and Policy Across Boundaries*. Oxford: Oxford University Press, p 642.

¹⁸²Spencer, J.R. (2011). Child Witnesses and Cross-Examination at Trial: Must It Continue?. *Archbold Review*, (3), p 8.

¹⁸³Hoyano, L. and Keenan, C., n. 181 above, p 642.

¹⁸⁴*Ibid*, p 642, Spencer, J.R. (2010). Children's Evidence: The Barker Case, and the Case for Pigot. *Archbold News*, 3, p 5.

¹⁸⁵Stevenson, M. and Valley, H. (2014). Pre-Recorded Cross-Examination. *Criminal Law and Justice Weekly*, 178, p 312.

In addition, it is interesting to note that the law in several states in Australia allow cross-examination to be conducted in advance of trial, without the necessity to require attendance of children before the court. In fact, full pre-recording of cross-examination has been successfully implemented and widely practiced in several states in Australia, particularly Western Australia,¹⁸⁶ Queensland,¹⁸⁷ the Northern Territory¹⁸⁸ and South Australia.¹⁸⁹ The practice in these states proves that the implementation of full pre-recording of children's entire evidence has efficiently increased the quality of their evidence, reduced stress and improved the trial process.¹⁹⁰ It also positively rebuts the contention that the practice of full pre-recording of cross-examination of child evidence will unfairly work to the disadvantage of the opposing litigant.

Apart from that, there are some other possible reforms that may be potentially implemented to improve the collection of evidence from children. Among these alternative measures are requiring effective intervention of judges in handling the cross examination-process, setting appropriate professional standards, rules and practices for lawyers to prevent inappropriate tactics and strategies of questioning, expanding more flexibility use of written evidence and convening court at the child's home.¹⁹¹

In short, there are various persisting legal issues pertaining to the treatment and reception of child evidence. It is crucial for each legal system to attend to these theoretical and applied legal issues as they relate to the reliability and credibility of children's testimony.

¹⁸⁶Section 106I of the Evidence Act 1906, (Western Australia).

¹⁸⁷Section 21AK of the Evidence Act 1977 (Queensland).

¹⁸⁸Section 21B(2)(b) of the Evidence Act 1977(North Territory).

¹⁸⁹Section 13A(2)(b) and 13C(1)(a) of the Evidence Act 1929(South Australia).

¹⁹⁰Henderson, E., Hanna, K. and Davies, E. (2012). Pre-Recording Children's Evidence: The Western Australian Experience. *Criminal Law Review*, 1, p 6.

¹⁹¹Burton, M., Evans, R. and Sanders, A. (2007). Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales. *International Journal of Evidence & Proof*, 11(1), p 21.

It is also equally importance to ensure the discussion on this subject, which normally focuses on the position of the child as witness, is further expanded to the position of the child as accused.

4.3.4.2 Effective participation

There are several measures introduced by the CRC in order to ensure effective participation of children in criminal proceedings. Firstly, the CRC stresses on the need to create children-friendly environment and facilities in order to ensure children accused of having infringed criminal law to effectively participate in the trial process.¹⁹² It imposes a duty on state parties to take necessary steps and measures to ensure effective participation of children in the trial process. Emphasizing on this requirement, the Committee for the CRC stipulates that environments and working methods should be designed to suit children's capacities and needs. Due consideration needs to be given to the fact that children require different levels of support, depending on their age and evolving capacities. Similarly, the Beijing Rules states that trial proceedings involving children should be conducted in an atmosphere that allows the child to effectively participate and express themselves freely.¹⁹³ There are various steps that can be taken by state parties in implementing this requirement. Among the important steps is to create informality in various aspects of court procedures. The court should be equipped with child friendly facilities, different from a normal court. Formal attire for judges and lawyers may also be dispensed with, and a special waiting room for the children accused could be equipped with high technology facilities and specially trained staff.

¹⁹²Committee on the Rights of the Child, General Comment No 10: Children's rights in Juvenile justice, CRC/C/GC/10, 25th April 2007, para. 46, Committee on the CRC, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/1220 July 2009, para. 60.

¹⁹³Rule 14 of the Beijing Rules.

Apart from that, there are several other provisions of the CRC which aim to ensure the effective participation of children. For example, Article 40(b)(iii) of the CRC promotes the presence of parents or guardian of children during the trial process.¹⁹⁴ The same requirement is also provided in the Beijing Rules, which states that the parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of children.¹⁹⁵ However, the court may use its discretion to exclude the attendance of parents or guardian under exceptional circumstances in which their presence is deemed not to be in the interest of justice. In addition, the CRC also emphasizes that state parties shall provide a free interpreter for any child who cannot understand or speak the language used.¹⁹⁶ The service of an interpreter is vital as it is not uncommon for children to face difficulty in understanding the language used in court. Those are among the measures outlined by the CRC to ensure effective participation of children in the trial proceedings.

In practice, many legal systems have acknowledged the effectiveness of certain measures in enabling children to participate in legal proceedings and minimising negative impacts deriving from them.¹⁹⁷ They have amended their juvenile justice systems by incorporating provisions which aim to implement international standards. Undoubtedly, measures such as the presence of parents or guardians, the assistance of an interpreter, the engagement of child experts as intermediaries, informality of courtroom arrangement and procedures may maximize the effectiveness of children's participation in proceedings as well as reduce unnecessary and harmful effects on them. As a result of this, many countries have introduced legislation, policy and guidance aimed at accommodating children during the legal

¹⁹⁴ Article 40(b)(iii) of the CRC.

¹⁹⁵ Rule 15.2 of the Beijing Rules.

¹⁹⁶ Article 40(2)(b)(vi) of the CRC.

¹⁹⁷ Hoyano L and Keenan C., n. 181 above, p 640.

proceedings.¹⁹⁸ Despite this positive development, continuous efforts to improve and upgrade the support system and facilities to children are still needed. A comprehensive evaluation and research of what is and is not working should be continuously carried out to strive for the betterment the existing system and facilities.

4.3.5 Privacy of Proceeding

The CRC also recognizes the right of children to have their privacy respected at all stages of the proceedings.¹⁹⁹ The Committee on the CRC specifically emphasizes that criminal proceedings of children should be conducted behind closed doors.²⁰⁰ In addition, the Beijing Rules stresses that any information which may lead to the identification of children should not be published.²⁰¹ Another facet of the right to privacy provided by the Beijing Rules requires state parties to strictly keep records of child offenders confidential and accessible only to authorized persons.²⁰² This requirement assures children on the confidentiality of the legal proceedings and protects their identity from being exposed to the public. The primary rationale behind this requirement is to protect children from unnecessary harms and consequences that may be caused by the unwarranted publicity.

Despite the requirement of the CRC as well as other international instruments, the controversy over public access to child proceedings remain an open debate.²⁰³ In line with the punitive trend on children adopted by various jurisdictions, there is a growing call for the

¹⁹⁸Hayes, D. and Bunting, L. (2013). “Just be Brave”: The Experiences of Young Witnesses in Criminal Proceedings.in Northern Ireland. *Child Abuse Review*, 22(6), p 420.

¹⁹⁹Article 40(2)(b)(vii) of the CRC.

²⁰⁰Committee on the CRC, General Comment No. 12, The right of the child to be heard, CRC/C/GC/1220 July 2009, para. 61.

²⁰¹Rule 8(2) of the Beijing Rules.

²⁰²Rule 21.1 of the Beijing Rules.

²⁰³Crecco, K. (2013). Striking a Balance: Freedom of the Press Versus Children’s Privacy Interests in Child Dependency Hearings. *First Amendment Law Review*, 11, p 498.

elimination of privacy and confidentiality in child courts. Among the grounds cited by the proponents who support elimination of privacy and confidentiality is to keep the community safe. It is argued that the public has the right to know the identities of serious, violent and habitual offenders who commit crimes in their communities, regardless of their status of the offenders.²⁰⁴ Therefore, the identities of the offender, including the child offender, need to be revealed to the public for the sake of their interest. In other words, the need to protect the interest and safety of community is greater than the need to protect the interest of the children. Apart from that, the proponents of this view also rely on the argument of deterrence to support the idea of ending privacy and confidentiality. It is contended that children tend to commit crimes because they believe that they will be shielded by the juvenile justice system.²⁰⁵ Therefore, public scrutiny of the juvenile justice process is much needed to efficiently deter children from delinquent activity. Lastly, some alarmed observers argue that elimination of privacy and confidentiality in child court proceedings is a useful method to increase the effectiveness of the child courts.²⁰⁶ Based on this argument, permitting public access to the juvenile justice process would render the court to be accountable and acts as a check against elements of biasness and unfairness. Public scrutiny also may prevent abuse of power by judges, prosecutors, probation officers and other public officials. In contrast, denial of public access to the child court process would prevent the public from making informed decisions about administration of juvenile justice system and obscure the need for constitutional reforms.

On the other hand, the proponents against the elimination of privacy and confidentiality of child proceedings claim that the disclosure of identity and sensitive

²⁰⁴Siddiky, L. (2011). Keep the Court Room Doors Closed So the Doors of Opportunity Can Remain Open: An Argument for Maintaining Privacy in the Child. *Howard Law Journal*, 55, p 218.

²⁰⁵*Ibid*, p 230.

²⁰⁶Pollack, D. (2010). International Legal Note: Opening Child Proceedings to The Public and the Media: An International Social Work Perspective. *International Social Work*, 53(6), p 837.

information may cause collateral damage to children. It is argued that public access to child court process may seriously impair the opportunity of child offenders to be reintegrated into society as well as jeopardize the rehabilitative goal of the juvenile justice system.²⁰⁷ Exposing the adjudication process of children to public may lead to disclosure of their personal information and identity. Consequently, this will alienate them from society and impede any chance of reintegration. In other words, unrestricted public access may adversely affect prospects of rehabilitating children. In addition, it is also argued that the disclosure of identity as well as sensitive information of children to the media and the public may have dramatic effects on children such as stigmatization, humiliation, labelling, emotional harms and others.²⁰⁸ For example, public access to child court process may lead the public to excessively label the child offender as “*delinquent*”. According to labelling theory, alienation and rejection from the public may cause children to view themselves as enemies of the society and consequently encourage them to commit further delinquent acts.²⁰⁹ The unrestricted disclosure of identity and information may open the door for the mass media to excessively sensationalize such cases in their reports. Exaggeration and overly dramatization of reports may cause children to suffer from stigmatization and humiliation. In addition, eliminating restriction on privacy and confidentiality of juvenile justice processes may jeopardize children’s opportunity to get education and employment.²¹⁰ In the absence of strict rules on privacy and confidentiality, criminal records of children can be easily disseminated to other members of the public by various means, such as newspaper reports, internet webpages, magazines and other search engines. The availability of the criminal record of children to the

²⁰⁷Metzgar, E. (2007). Neither Seen nor Heard: Media in America’s Child Courts. *Communication Law and Policy*, 12(2), p 193, Trasen, J.L. (1995). Privacy v. Public Access to Child Court Proceedings: Do Closed Hearings Protect the Child or the System?. *Boston College Third World Law Journal*, 15, p 370.

²⁰⁸Tanenhous, D.S. (2004). Before the Doors Closed: A Historical Perspective on Public Access. *Connecticut Public Interest Law Journal*, 4, p 2.

²⁰⁹Flint, J. (2007). Who Should Hold the Key?: An Analysis of Access and Confidentiality in Juvenile Dependency Courts. *Journal of Juvenile Law*, 28, p 60.

²¹⁰Walker, M.C. (2002). Revealing Mississippi Youth Court: The Consequences of Lifting Confidentiality Requirements on Juvenile justice in Mississippi. *Mississippi Law Journal*, 71, p 1007.

public will enable universities, colleges or employers to unveil previous records of child offenders for the purpose of recruitment. The existence of children's previous criminal record may decrease their chance of being recruited as students or employees.

In short, as far as international law is concerned, the CRC has consistently maintained on the requirement of the privacy and confidentiality of the juvenile justice process. Therefore, it is important for state parties to maintain the traditional hallmark of the juvenile justice system by restricting the revelation of identity, sensitive information and the presence of public and non-related persons in courtrooms during the juvenile justice process. In the meantime, the debate over public access to the juvenile justice process remains unresolved. The clash among scholars revolves around the determination to balance the best interests of the children with the interest of the society. It is submitted that the fundamental philosophy underpinning the juvenile justice system promotes the idea of rehabilitation and reintegration in dealing with the act of delinquency. Obviously, publishing the identity and confidential information of children may seriously impede the rehabilitative and integrative prospects as it tends to expose them to stigmatization, labelling and emotional humiliation. The elimination of privacy and confidentiality of information also runs contrary to the fundamental principle of juvenile justice as it allows a person's life to be continuously haunted by his or her child mistakes.

4.4 Conclusion

This chapter examines the CRC's standards on rights of children in criminal proceedings. It analyses scopes, requirements and principles governing rights of children at both pre-trial and trial stages based on provisions as well as relevant reports issued by the

Committee on the CRC. It also scrutinizes relevant practical issues surrounding these rights in justifying the importance and the need for the state parties to strictly comply with the the international standards set by the CRC. Apart from that, this chapter also attempt to point out lack of clarity and vagueness of particular provisions of the CRC relating to the rights of children in criminal proceedings. It is submitted that further guidelines are needed from the Committee on the CRC on these particular provisions in order to enable state parties to effectively comply with its requirements.

Overall, the CRC's standards on rights of children in criminal proceedings are very much applauded as they essentially lay down an international legal framework on this aspect. They unequivocally emphasize the need to recognize and accord children with specific rights in criminal proceedings. Undoubtedly, the standards have not only crucially served as influential guidelines for all state parties but also paved the way towards achieving standardized legislation on rights of children in criminal proceedings among all juvenile justice systems.

FIFTH CHAPTER

RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS UNDER THE MALAYSIAN JUVENILE JUSTICE SYSTEM

5.1 Introduction

The issue of children in conflict with the law has always been regarded as a significant contemporary social problem. The fact that there is a considerable divergence of approaches among different juvenile justice systems in dealing with children has attracted discussions, controversial debate and competing analysis from various parties. Similar to other jurisdictions, Malaysia has developed its own juvenile justice system to deal with children. The main statutes which govern juvenile justice in Malaysia are the Child Act 2001 and the Criminal Procedure Code (CPC).¹ The Child Act 2001 is a specific statute which governs all matters relating to children, including the criminal aspect. As far as the criminal process is concerned, the provisions on this matter are specifically provided in Part X and Part XI of the Child Act 2001. These parts provide provisions relating to criminal process such as investigation, arrest, search, seizure, charge and bail, trial and others. It should be noted that provisions on criminal process in the Child Act 2001 are not comprehensive. Due to that reason, the Child Act 2001 expressly provides provisions which explicitly warrant the applicability of the CPC on certain criminal matters. For example, Section 11(6) of the Child Act 2001 explicitly provides that criminal procedure pertaining to criminal proceedings provided under the CPC shall apply to Court for Children in the absence of specific provision which provides for special or different procedure. Therefore, reference has to be made to the

¹1935 (F.M.S. Cap. 6).

CPC, the general statute governing criminal procedure under Malaysian criminal law in the absence of specific or clear provisions on any matter relating to the criminal process. The CPC comprises of 444 sections which are divided into XLIV chapters. As a main governing statute on criminal procedure, the CPC provides that all criminal offences under Malaysian laws shall be inquired into and tried according to its provisions, unless specifically provides otherwise by any specific written law.²

Apart from the Child Act 2001 and the CPC, there are several other relevant statutes that provide governing principles relating to juvenile criminal proceedings. Among these statutes are the Evidence Act 1950 and the Evidence of Child Witness Act 2007, which provides provisions relating to child evidence.

This chapter examines the rights of children under the Malaysian juvenile justice system in criminal proceedings. The main objective of this chapter is to examine the adequacy of current Malaysian laws in recognizing, protecting and upholding the rights of children at both the pre-trial and trial stages. This chapter will resort to systematic analysis of governing principles as well as current legal practice pertaining to rights of children with reference to relevant provisions of statutes, decided cases, and contemporary Malaysian legal practice on this aspect.

² Section 3 of the CPC.

5.2 Pre-Trial Rights of Children under Malaysian Juvenile justice system

5.2.1 Arrest

Section 83 of the Child Act 2001 provides that any child who is alleged to have committed an offence shall not be arrested, detained or tried except in accordance with this Act. This provision provides general principles on the applicability and superiority of specific provisions of the Child Act 2001 over other relevant statutes relating to criminal matters. Contradictorily, close scrutiny of the Child Act 2001 on matters relating to arrest discloses that it is not comprehensive. This renders the provision on the superiority of the Child Act 2001 provided under section 83 has only minimal impact. Consequently, reference on procedures relating to arrest need to be made to the CPC to fill the gap left by the Child Act 2001.

There is no specific provision in the Child Act 2001 on the circumstances and manner of arrest of children. The Child Act 2001 does not specifically elaborate under what circumstances arrest of children may be justified. Therefore, the general provisions of the CPC will be automatically applicable on this matter. According to the CPC, there are two types of arrest, namely arrest without warrant and arrest with warrant.³ An arrest without warrant may normally be effected if a person is suspected of committing a seizable offence.⁴ It may be effected by four categories of people, namely police officers, *penghulus*,⁵ private citizens and magistrates or Justices of Peace. On the other hand, arrests with warrant are

³Section 2(1) of the CPC.

⁴Section 2(1) of the CPC defines seizable offence as an offence in which a police officer may arrest without warrant. It normally refers to offence which is punishable with 3 years' imprisonment and above.

⁵A Penghulu is a community leader for a small district appointed by the Government.

applicable to non-seizable offences.⁶ They may only be affected by police officers or any authorized officials upon receiving a warrant of arrest in writing issued by a Session Court, Magistrate's Court or its Registrar. With regard to mode of arrest, the CPC provides that arrest may be effected by actually touching the body of the person to be arrested, by confining the body of the person to be arrested, or by word or action on the part of the person to be arrested.⁷ It further states that the person effecting an arrest is entitled to use all means necessary to effect arrest.⁸ However, it does not give the person a right to cause the death of another who is not accused of an offence punishable with death or with imprisonment for life.⁹

It can be observed that current Malaysian laws do not make any distinction between arrest of adults and children. The laws do not provide a different set of principles and procedure on circumstances in which children may be arrested. There is no legal requirement that arrest of children should be guided by special principles that are considerate with the interest of children. For example, there is no provision that states that the arrest of children should be restricted to exceptional circumstances and exercised only as a measure of last resort, as recommended by international legal standards. Similarly, current laws do not expressly specify the discretionary power of police not to arrest children, especially in criminal cases that are trivial or minor in nature. In addition, neither the Child Act 2001 nor the CPC provides specific procedures on the manner in which arrest of children can be affected. For example, current laws do not mention anything about when and under what circumstances the use of handcuff is permissible and justifiable in effecting the arrest of children. There is also no provision or guideline that demands the use of physical contact or

⁶It normally refers to offence which is punishable with 3 years imprisonment and below.

⁷Section 15 of the CPC.

⁸Section 15 (2) of the CPC.

⁹Section 15(3) of the CPC.

force to be avoided as much as possible especially when children submit themselves and give full co-operation to the police.

Apart from that, Section 85 of the Child Act 2001 provides special provisions on the place of detention of arrested children. It states that the child detained at any stage of the criminal proceeding shall not be detained or allowed to associate with the adult suspect or the accused. This requirement shall be applicable to a pre-trial process, the trial process as well as a post-trial process. It aims to protect children from any negative impacts which may arise from the association with adult arrestees. However, in terms of practical application, the issue of lack of facilities has put a limit to the effectiveness of this legal requirement. This is because current design of police stations do not include separate cells for children which may completely prevent them from having direct or indirect contact with adult suspects.¹⁰ Though a child suspect is detained in a separate cell, but this does not prevent him to have a contact with the adult suspect, which may be placed beside or opposite to his cell. This shortcoming has been specifically highlighted in the report prepared by the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police.¹¹ The Commission has expressed its concern on the weaknesses of the police in dealing with children related cases, including arrests. The Commission has highlighted under-resourcing of police stations and police lock-up and insensitivity to child suspects when affecting arrests as the main issues which need to be given attention by the government. Despite the recommendation by the Commission, this issue of lack of specialized and separate detention places for children has not been given adequate response from the government. The statistics reveal that only 46% of children at the pre-trial stage are detained at specialized detention centres operated by the

¹⁰UNICEF, (2013). *The Malaysian Juvenile justice system: A Study of Mechanisms for Handling Children in Conflict with the Law*. Kuala Lumpur, p 47.

¹¹Royal Malaysian Police, (2005). *Report of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police*. Kuala Lumpur.

welfare department while the rest are detained at prisons together with the adults.¹² This issue was highlighted again in the report by the Malaysian Human Right Commission (SUHAKAM) which expressed its concern over the issue of children that have been detained together with adult detainees in the same cells.¹³

In addition, Section 87 of the Child Act 2001 provides a mandatory requirement for the police to inform the child's parents or guardians and the probation officer immediately after the arrest. The requirement of this provision is commended as it aims to protect the interest and welfare of arrested children. However, there is room for improvement on this requirement, particularly in terms of compliance by the police. The Act is silent on the effect of failure on part of the police to comply with this requirement. There is also no monitoring system which can be utilized to ensure this legal requirement is strictly implemented.

5.2.1.1 Arrest more than twenty-four hour pending investigation

The Child Act 2001 provides that any child arrested shall not be detained more than twenty-four hours without court authority.¹⁴ If the police intend to detain any arrested child for more than twenty-four hours for the purpose of investigation, they must obtain a remand order from the court. The police officer must bring the child suspect before a Magistrate to obtain an order that the suspect be further detained to enable the police to complete their investigation. Such an order granted by the Magistrate is invariably known as a "remand order".

¹² UNICEF, n. 10 above, p 45.

¹³Human Rights Commission of Malaysia(SUHAKAM), (2014). *Human Rights Commission of Malaysia Annual Report 2014*. Kuala Lumpur. p 56.

¹⁴Section 84 of the Child Act 2001.

However, the Child Act 2001 does not provide specific provisions with respect to the remand procedure. Nor does it mention anything regarding the length of time of remand period in which children may be held in police custody for investigation. As a result, reference on this matter needs to be made to the CPC. Provisions regarding the procedure of remand is provided under Section 117 of the CPC. Section 117 requires the police to produce an arrested person before the magistrate during the application for remand. This is to enable the magistrate to see that the remand is necessary and also to enable the prisoner to make any representations he may wish to make in the matter.¹⁵ The duty of Magistrate during the remand application is to decide at this stage whether there are grounds for believing that the accusation or information against the arrested person is well founded. In order to determine this, it is pertinent for the Magistrate to refer to the investigation or police diary. Therefore, it is mandatory for the police to enclose a police diary to the written application of remand made before a Magistrate.¹⁶ The investigation diary must describe adequately the diligence and state of investigation and explain why the remand of the suspect is necessary.¹⁷ It is vital for a Magistrate to duly record his reasons for authorizing or rejecting the remand application by the police. The reason for such a requirement is to enable the High Court to review the order if the occasion should arise, and when an application for extension of remand is made.¹⁸ It could also be argued that failure to do so may gravely prejudice the person so remanded.¹⁹ A child suspect is entitled to be represented during the remand application. This is clearly provided under paragraph (5) of Section 117 of the CPC, which clearly states that the court shall allow the suspect to be represented by the counsel of his own choice during the remand application. With regard to the period of remand, it is based on the maximum punishment for offences being investigated. If the offence investigated is punishable with imprisonment of

¹⁵*Saul Hamid v PP* [1987]2 MLJ 736.

¹⁶*PP v Andrey Keong Mei Cheng* [1997]3 MLJ 477.

¹⁷*Re Syed Mohammad bin Syed Isa & 3 Ors* [2001]3 AMR.

¹⁸*Re Syed Mohammad bin Syed Isa & 3 Ors* [2001]3 AMR.

¹⁹See also the case of *PP v Rajisegar A/I Munusamy* [2006] 2 MLJ 43.

less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application. On the other hand, if the offence investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application the detention shall not be more than seven days on the second application.²⁰

Based on the above observation, it is obvious that current Malaysian law fails to provide specific provisions for remand on children. This has resulted in the application of similar procedures for remand of both children and adults. In the case of *PP v N (A Child)*,²¹ the issue arises as to whether the procedure for remand of adults provided under Section 117 of the CPC is similarly applicable to the child. The Court of Appeal held that Section 117 of the CPC is equally applicable to the child since there was no specific procedure for remand application provided under the Child Act 2001. Accordingly, the procedure stipulated under Section 117 must be followed in the application for remand of children. Obviously, this practice is inappropriate and ineffective in dealing with children in conflict with the law. The SUHAKAM, a prominent non-governmental organization on human rights, has raised this problem in its report.²² It acknowledged that a volume of complaints had been received on the inappropriate treatment of children and abuse of remand procedures. In order to overcome this problem, it is pertinent to provide a special provision on the procedure and treatment of children while under remand in the Child Act 2001. In line with the requirement of international instruments which stress that the deprivation of a child's liberty should be a last resort, the Child Act 2001 should provide a provision which prohibits children from being detained for minor or less serious offences. In addition, it is also noteworthy to implement the

²⁰Section 117(2) of the CPC.

²¹[2004] 2 MLJ 299.

²²Human Rights Commission of Malaysia (SUHAKAM), (2008). *Human Rights Commission of Malaysia Annual Report 2008*. Kuala Lumpur, p 48.

SUHAKAM's recommendation on the establishment of specialised police units to deal with accused children or suspects. The establishment of these specialized police units with trained officers will not only ensure speedier handling of the cases but also that child suspects are treated in a proper way.

Furthermore, current law does not provide specific provisions on the period of detention for children for the purpose of investigation. Presently, the law makes no distinction between the period of remand for children and adults, which is up to maximum period of fourteen days for investigation. In line with the requirement of international standards which specifically emphasizes that the arrest or detention of children should be for the shortest period of time possible, it is pertinent to restrict the remand of children to an appropriate period of time. There is also a need to include a specific provision that will require the police to give the highest priority to expediting the process of investigation for children placed under remand.

5.2.1.2 Preventive detention

As discussed in the preceding paragraph, the police cannot detain a person, including a child, more than twenty-four hours. If the investigation cannot be completed within twenty-four hours, any arrested child shall be brought before a court to apply for a remand order. Children are entitled to challenge the validity of arrest before a court during the remand application. However, there are exceptions to this requirement. Any child who is arrested and detained under preventive detention order is not entitled to be brought before the court within twenty-four hours. Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is

proved to have committed an offence punishable under certain provisions of the penal law.²³ There are several statutes which confer power to the police, the authorized board or the Minister to issue a preventive order of detention for a specific period on the grounds of prevention of terrorist activities or security offences. Among these statutes are the Security Offences (Special Measures) Act 2012, the Prevention of Crime Act 2013 (Amendment and Extension) and the Prevention of Terrorism Act 2015. The Security Offences (Special Measures) Act 2012 authorizes police officers to arrest any individual for twenty eight days on the ground of involvement in security offences.²⁴ The Prevention of Crime Act (Amendment and Extension) 2013 permits a person to be detained for a period not exceeding two years, and may be renewed for a further period not exceeding two years, if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime.²⁵ The Prevention of Terrorism Act 2015 authorizes the Board to issue detention order against any individual based on involvement in terrorist activities. The Board may order detention of up to two years and further renew the term if it deemed necessary.²⁶

It should be noted that provisions of these specific statutes override the other statutes, including the Child Act 2001. In the case of *Chong Boon Pau v the Minister of Home Affairs & 3 Ors*,²⁷ the Federal Court held that provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 superseded the provisions of the Child Courts Act 1947. Therefore, order of detention without trial issued by the Minister of Home Affairs under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 was valid.²⁸ It

²³*Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min*[1976] 1 LNS 129.

²⁴Section 4(5) of the Security Offences (Special Measures) Act 2012.

²⁵Section 19A of the Security Offences (Special Measures) Act 2012.

²⁶Section 13 of the Prevention of Terrorism Act 2015.

²⁷[1980] 1 MLJ 154.

²⁸*Chong Boon Pau v Timbalan Menteri Dalam Negeri* [2004] 4 CLJ 838, *Lee Kew Sang v Timbalan Menteri Dalam Negeri* [2005] 3 CLJ 914.

means that a child can be a subject of a detention order without trial issued by the authorized police officer or Minister, regardless the provision of the Child Act 2001. In other words, children detained pursuant to a preventive order detention are not subjected to the requirements of the Child Act 2001 or the CPC. Consequently, the police or authorities may detain them for a stipulated period without the need to apply for a remand order before the expiry of the twenty-four hour period.

The preventive detention of individual on the grounds of prevention of terrorism, security offences or crime under Malaysian law is controversial. The application of this draconian law has been hotly debated and criticized by scholars on the grounds that it is oppressive, abuses the process of law and is in violation of personal liberty which is enshrined under the Federal Constitution.²⁹ For example, the Security Offences (Special Measures) Act 2012 gives police officers the power to arrest any individual for twenty-eight days if there is a reason to believe that he or she is involved in security offences. The provision has been heavily criticized on grounds that it merely requires the police officer concerned to ‘*have reason to believe*’ that the person involved in the security offence is justified to be detained.³⁰ In addition, the provision also permits the police officer concerned to act merely upon the belief or suspicion of the suspected person’s “*involvement*” in the offence, not on the commission of offence.³¹ It was also argued that the application of this

²⁹Gan, C. (1995). The Implementation of the Internal Security Act of Malaysia: An Analysis of the Protective Measures Available and Their Effectiveness. *Current Law Journal*, p 1, Pei Keng, Y. (1995). Preventive Detention Under ISA-Unlawful For Non-Violent Peaceful Activities: The effect of the Recent Important Federal Court decision in Chor Phaik Har v. Farlim Properties Sdn. Bhd. on Statutory Interpretation. *Current Law Journal*, 1, p cxv, Masum, A. (2010). The Doctrine of Judicial Review: A Cornerstone of Good Governance in Malaysia. *Malayan Law Journal*, p 6, pp.cxiv–cxxxix, Loganathan, K. (2005). The Shifting Sands of Judicial Minds in Relation to Article 8 of the Federal Constitution. *Current Law Journal*, 5, p i.

³⁰Wood, S. (2014). The Operation of the Security Offences (Special Measures) Act 2012 and a Comparison with the Old Internal Security Act 1948. *Heralding a New Democratic Era, or Old Wine in a New Bottle?*. *International Journal of Technical Research and Applications*, 10, p 82.

³¹*Ibid*, p 81, Suara Rakyat Malaysia, (2012). *Pass of the Security Offences Bill (Special Measures) 2012, Will Cause More Travesty of Justice and Violations of the Rights of Malaysian Citizens for Years to Come*. [online] SUARAM. Available from: <http://www.suaram.net/?p=2716> [Accessed on 25/4/2016].

provision is unconstitutional as it deprives a detained person from exercising rights and procedural protection provided under the Federal Constitution and the CPC.³² Similarly, the introduction of the Prevention of Terrorism Act 2015 was also heavily criticized by the scholars for blatantly undermining the fundamental liberty of an individual and breaching the Federal Constitution.³³ The Act allows for detention without trial of a suspected person for a period of two years with further possible renewal of the term if deemed necessary. In addition, a person detained under the Act is neither guaranteed legal representation nor provided assurance that they will be informed of the grounds of arrest. The Act also deliberately states that any decision of the police officer or the Board which is made pursuant to this Act cannot be subjected to any judicial review in any court. Describing the Act as a serious violation of the right to equality and equal protection before the law which are guaranteed by the Federal Constitution, the SUHAKAM has strongly urged the government to review the Prevention of Terrorism Act 2015.³⁴

The only remedy available to children detained under preventive detention provided in other statutes is to file a writ of *habeas corpus* application, except for detention under the Prevention of Terrorism Act 2015 which is not subjected to any challenge before the court.³⁵ It is a writ which requires a person detained by the authorities to be brought before the court so that the legality of the detention may be examined.³⁶ Its purpose is to set free any person who is subjected to unlawful detention. However, it appears that the scope of *habeas corpus*

³²Thomas, T. (2012). Is the Security Offences Bill constitutional? [online] *The Malaysian Insider*, 21th Apr. Available from: <http://www.themalaysianinsider.com> [Accessed on 29/4/2016].

³³Cher, L.S. (2015). Putrajaya Snubbed International Calls to Halt POTA, Says Bar President, [online] *The Malaysian Insider*, 5th Aug. Available from: <http://www.themalaysianinsider.com> [Accessed on 28/4/2016], Sivalingam, J. (2015). Bar Begins Campaign to Repeal Anti-Terror Law. [online] *The Star*, 16th May. Available from: <http://www.thestar.com.my/> [Accessed on 25/4/2016].

³⁴Human Rights Commission of Malaysia (SUHAKAM), (2015). *Human Rights Commission of Malaysia Annual Report*, Kuala Lumpur, p 28.

³⁵Shair Mohamed, M.A. and Ahmad, A.S. (2013). Habeas Corpus and the Malaysian Courts: Strange Bedfellows? *The Malaysian Court's Approach to Issues Pertaining to Detention. Law Review*, p 357.

³⁶*Ibid*, p 357.

application has been interpreted narrowly by Malaysian courts. Relying on the doctrine of separation enshrined in the Federal Constitution, the courts prefer not to interfere with the decision of the executive to issue the order of detention without trial against any person.³⁷ The decision of courts in various decided cases evidently indicates that the courts have adopted a literal and restrictive view that the power of executive to issue the detention order is not subjected to judicial review.³⁸ This restrictive view was well-explained by the Federal Court in the case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*.³⁹ Suffian FJ(as he was then) stated the principle as follows:

“Whether or not the fact on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.”

The court in this case adopted the view that the executive has complete discretion and it is not for the court of law to question the sufficiency or relevancy of those allegations. In other words, the power of the executive to issue a detention order is not subject to review by court. Instead, the duty of the court is merely confined to the procedural aspect of the exercise of the executive discretion. Reference to decided cases indicate that courts have continued to cling on to outmoded ideas and principles in determining the application of *habeas corpus*.⁴⁰ It is submitted that courts should depart from their reluctance in challenging and invalidating

³⁷Khaira, H. S. (2007). Preventive Detention: Part I Constitutional Rights And The Executive. *Malayan Law Journal*, 1, p lxiii.

³⁸Shair Mohamed, M.A. and Ahmad, A.S. (2014). The Quest for the Protection of Liberty and Executive Detention: The Constitution and the Constitutional Remedy. *Law Review*, p 30, Khaira, H. S. (2007). Preventive Detention: Part II. *Malayan Law Journal*, 4,p cxxxii.

³⁹[1969] 2 MLJ 129.

⁴⁰*Sajad Husin Wani v Ketua Pengarah Imigresen & Satu Lagi*. [2008] 2 CLJ 403, *Mohd Faizal Harris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309 *Uthayakumar a/l Ponnusamy v Menteri Keselamatan Dalam Negeri & Anor* [2004] 5 CLJ 328, *Noor Ashid bin Sakib v Ketua Polis Negara* [2001] MLJ 393.

executive actions in issuing preventive detention orders. In a country which upholds the supremacy of the Federal Constitution, the courts should be more ready to assert its judicial review power to examine the executive's order on the grounds of unconstitutionality or breach of rules of natural justice. Judicial tradition demands the court to uphold and protect individual rights and liberties enshrined in the Federal Constitution.

In short, certain statutes under Malaysian law allow children to be subjected to preventive detention without trial for a specific period of time. It is submitted that subjecting children to preventive detention without trial amounts to a violation of fundamental rights and breach of natural justice. The time has come for the Government of Malaysia to review and abolish the application of preventive detention on children.

5.2.1.3 Right to be informed of the grounds of arrest

An arrested child has right to know the grounds of arrest. Though there is no specific provision on this requirement in the Child Act 2001, the right of children to be informed the grounds of arrest is guaranteed under the Federal Constitution and the CPC which are applicable to all citizens. Article 5(3) of the Federal Constitution mentions that an arrested person has the right to be informed as soon as possible of the grounds of his arrest. Further, Section 28A (1) of the CPC also provides that an arrested person shall be informed as soon as possible of the grounds of his arrest. Definitely, these provisions unconditionally impose the duty on the arrestor to inform the ground of arrest to the arrested person, including a child. In the case of *Rahman v Tan Jo Koh*⁴¹ the court held that a person arrested on suspicion of committing an offence, is entitled to know the reason for his arrest and that if the reason was withheld, the arrest and detention would amount to false imprisonment, until the time he was

⁴¹[1968] MLJ 205.

told the reason. It would follow from this proposition that a person arrested without being told the reason is entitled to resist the arrest and any force used to overcome the resistance would amount to assault. With regard to the interpretation as to the meaning of the word “*as soon as may be*” contained in the Federal Constitution, the courts hold that it is subjective and depends on the facts of each case.⁴²

Unfortunately, the Child Act 2001 does not specifically provide for the right of children to be informed of the grounds for arrest as well as the relevant procedure. Though the absence of the provision in the Child Act 2001 does not automatically take away the right of children to be informed the ground of arrest as it is guaranteed by the Federal Constitution, procedural issues related to it could still be raised. The main issue here is how do the authorities ensure that the ground of arrest and its importance are duly explained to arrested children? How do they also ensure that children understand the reason for arrest as well as their accompanying rights? Merely explaining the ground of arrest to children without ensuring they fully understand its legal importance is an exercise of futility. In order to ensure the purpose of explaining the grounds of arrest to a child achieves its objective, a qualified or trained person should be employed using a language understandable them. For example, the police may set up a special unit consisting of officers who are professionally trained and equipped to deal with children. Alternatively, the service of support persons such as interpreters and child specialists may be engaged. Without their assistance, it is doubtful that arrested children may sufficiently and independently understand the ground of arrest and the rights attached to them.

⁴²The court in the case of *Aminah v Superintendent of Prison, Pengkalan Chepa Kelantan*[1968] 1 MLJ 92 and held that the words “*as soon as may be*” in Article 5(3) of the Federal Constitution means as nearly as is reasonable in the circumstances of the particular case.

5.2.2 Interrogation

The Child Act 2001 does not provide any provision on the interrogation process of children. As such, reference needs to be made to the general procedure provided under the CPC which is equally applicable to both adults and children. Section 112 of the CPC provides that a police officer may examine orally any person acquainted with the facts and circumstances of the case. Such a person is bound to answer all questions put to him truthfully, except any question which would have a tendency to expose him to a criminal charge or penalty or forfeiture.⁴³ Previously, the repealed Section 113 of the CPC allowed for any statement under Section 112 of the CPC made by any person who is charged with any offence shall be admissible as evidence, provided it is made in the presence of any police officer of or above the rank of inspector and voluntarily given by the accused. Such a statement shall not be admissible if it can be proven that it is obtained by way of inducement, threat or promise, or without the proper administration of caution. In the case of *PP v Chan Choon Keong & Ors* for example,⁴⁴ the accused was handcuffed and subjected to thirty-six hours interrogation. The evidence showed that that the accused was made to stand in front of air conditioner and water was poured on him during the investigation. The court held that the statement made by the accused was inadmissible as he was put under great physical and mental torture to force him to make the statement. In the case of *PP v Kamde bin Raspani*,⁴⁵ the court decided that the statement made by the accused was inadmissible as the accused was subjected to seventeen hours of interrogation and two occasions of physical assault.⁴⁶

⁴³Section 112(2) and (3) of the CPC.

⁴⁴[1989] 2 MLJ 427.

⁴⁵[1988]3 MLJ 289.

⁴⁶Other examples on this point can be found in other decided cases such as *Dato Mokhtar Hashim & Anor v PP* [1983] 2 MLJ 232, *PP v Chong Boo See* [1988] 3 MLJ 292, *PP v Mohd Fauzi bin Wan Teh & Anor* [1989] 2 CLJ 252.

In addition, it is also mandatory for the police officer to caution the suspect in a language understandable to him of his right to remain silent and not to answer any questions before his statement is recorded. For example, in the case of *Poon Heong v PP*⁴⁷, the accused was charged under the Emergency Regulations 1948. The police officer omitted the words “*answer any question*” while administering caution on him. The court decided that the omission of such words might give the impression that the accused was not obliged to answer any question posed to him by the recording officer. It was held that the statement made by the accused was not admissible on the ground that the caution administered on him was defective.⁴⁸

It should be noted that the accused in all the above-mentioned cases were adults. Though there have been no reported cases in Malaysia of a child accused being subjected to inducement, threat or promise during the investigation process, it may not completely reflect what happens in reality. The fact that both children and adults are governed by the same procedures of interrogation raises concern over the possibility of unfair or abusive treatment of children during interrogation.

Fortunately, the legal position regarding a statement by the accused has undergone a major change 2006 by virtue of an amendment made to the CPC. The amendment prohibits statements made by a person during investigation to be tendered as evidence in court, except in exceptional circumstances. The main ground for the abolition of this provision is due to frequent abuses by the police in recording the statement, forcing the court to reject its admission as evidence on grounds of it being improperly and involuntarily obtained.⁴⁹ On one

⁴⁷[1949]15 MLJ 114.

⁴⁸Further reference on this point can be found in decided cases such as *PP v Salleh bin Saad*[1983] 2 MLJ 164, *Krishnan v PP* [1987] 1 MLJ 292, *PP v Chan Choon Keong & Ors* [1989] 2 MLJ 427.

⁴⁹Sidhu, B.S. (2008). *Criminal Litigation Process*. Kuala Lumpur: Marsden Law Book, p 239.

hand, the amendment is good as it purportedly aims to resolve the issue of illegally obtained statements from the suspect being used. By virtue of the amendment, the prosecution is no longer able to rely on statement of suspects obtained by way of inducement, threat or promise. Through this way, it is hoped that the police, out of desperation, would not be forced to use illegal means to elicit evidence from the suspect. On the other hand, the amendment has given rise to several negative repercussions. The amendment has completely taken away procedural requirements which were previously needed to be complied during the process of recording a statement from the suspect. Consequently, the abolishment of these requirements has landed the suspect, especially the child, in a very unsatisfactory position on several grounds. Firstly, the amendment makes no mention of the right of silence or of the duty of the officer to inform the suspect of it.⁵⁰ As a result, it is argued that current law has taken away or at least diminished the right of the child accused to remain silent, which is considered a fundamental right entrenched under Common Law. Secondly, the current provision of Section 113 of the CPC also has abolished the requirement of caution to be administered before a statement is recorded. The abolishment of the requirement of caution has serious repercussions on the accused, especially children. Without being given a caution, children may never know that they have right to remain silent as well as not to give any self-incriminatory statements during the investigation. This position may open up the opportunity for abuse of power by the police during the interrogation process. Therefore, it is a matter of urgency to amend the current unsatisfactory position of law on this point in order to protect the rights of children from being violated.

In addition, neither the CPC nor the Child Act 2001 provides provision on the participation of parents, guardians or probation officers during investigation and interrogation

⁵⁰Rafique, S.T.D. (2009). Arrest & Investigation of Offences and Amendments of the Criminal Procedure Code. *Current Law Journal*, 1, p i.

stage. There is no specific requirement which allows parents, guardians, probation officers or other support persons to be present while a child is being questioned by the police, despite its importance. Their presence may not only offer emotional support to child but also may also deter any possible use of unlawful methods such as oppression, threat, inducement and others by the police in the process of elucidating evidence.

5.2.3 Right to be Represented

There is no special provision under the Child Act 2001 relating to the right of children to counsel. Therefore, reference has to be made to the provision of the Federal Constitution and the CPC. Article 5(3) of the Federal Constitution confers on every person the right to consult a legal counsel of his own choice. This right is applicable equally to children under arrest. In addition, provisions relating to right of arrested persons, including children, to consult legal counsel can also be found in the CPC. Section 28A of the CPC provides that a police officer, before commencing any form of questioning or recording on the arrested person, must inform the arrested person that he may communicate or attempt to communicate with a legal practitioner.⁵¹ Whenever the person arrested wishes to communicate or attempt to communicate with a legal counsel, the police officer must allow him to do so. In the event the arrested person has requested to consult a legal practitioner, the police must allow a legal practitioner to be present for the purpose of consultation.⁵² In order to facilitate the process of consultation, it places the duty on the police to provide reasonable facilities for that purpose.⁵³ Nonetheless, Section 28A of the CPC provides certain exceptional circumstances in which the police may deny the right of the arrested person to

⁵¹Section 28A(2)(b) of the CPC.

⁵²Section 28A(4) of the CPC.

⁵³Section 28A(7) of the CPC.

legal counsel. Para (8) to section 28A provides a qualification in the application of Section 28A. It states that the police officer does not have to comply with the requirements under subsections (2), (3), (4), (5,) (6) and (7), which ,*inter alia*, stipulate the requirement to inform the relative or a friend and the right to legal counsel, if the police officer reasonably believes that it will result in an accomplice absconding, concealing, fabricating or destroying evidence, or intimidating witnesses. The discretionary power to invoke Para (8) can only be exercised by the police officer not below the rank of the Deputy Superintendent. Written explanation for invoking this provision must be recorded. In practice however, there have been a number of reports wherby the police have treated the discretionary power under Para 8 of Section 28A more as prerogative power. A study disclosed that the provision of 28A has been routinely ignored by the police and such violations are not being subjected to any sanction by the courts.⁵⁴

In practice, there are divergent views on the earliest moment the right to counsel can be exercised. References to the decided cases implies that the commencement of the accused right to legal counsel depend on facts and circumstances of the cases. In determining this, the court prefers the approach of striking a balance between the right of the accused to legal counsel and the right of the police to conduct investigations. In the case of *Ramli Bin Salleh v Inspector Yahya bin Hassim*,⁵⁵ the issue arose as to whether the right of a person who is arrested and remanded in police custody to consult and be defended by a legal practitioner of his own choice commences immediately after arrest or within a reasonable time before the police investigation is completed. The court decided that the right to counsel commences immediately after the arrest. In interpreting Article 5 of the Federal Constitution, Syed Agil Barakbah J held that the right of a person who is arrested in police custody to consult and be

⁵⁴Rafique, S.T.D., n. 50 above, p i.

⁵⁵[1973] 1 MLJ 54.

defended by a legal practitioner of his own choice commences right from the day of his arrest even though police investigation has not yet been completed. However, the decisions of court in later cases suggested the right to consult counsel is not automatic. Instead, the balance has to be struck between the right of an arrested person to consult his counsel and the right of the police to investigate the case. In the case of *Ooi Ah Phua v Officer in Charge, Criminal Investigation Kedah/Perlis*,⁵⁶ the court held that the right to counsel cannot be exercised immediately after arrest. The court stressed that balance has to be struck between the right of arrested person to be defended and the right of police to investigate in deciding whether the arrested person is entitled to get access to legal counsel. The issue was raised again in the case of *Saul Hamid v PP*.⁵⁷ In deciding this issue, the court tried to reconcile between the conflicting views among the judges in the previous cases on the right to be defended after arrest. The court stated that there is no doubt that an arrested person concerned in a detention proceeding is entitled to be represented by a counsel. Unless the police can show that interference will occur in the course of investigation if an arrested person is allowed to consult a counsel immediately after the arrest. The burden of proof is on the police to show that the investigation of the police would be disturbed if an arrested person is allowed to consult the counsel. Failure to provide this proof will render the refusal of the right of the suspect to consult his counsel as unlawful.

The decisions in these cases indicate that the courts consistently maintained the approach of striking the balance between the right of the accused to legal counsel and the right of the police to conduct their investigation in determining the earliest moment the right to counsel can be exercised. These decisions also point out that the police are legally entitled to refuse

⁵⁶[1975]2 MLJ 198.

⁵⁷[1987]2 MLJ 736.

the right of suspects to counsel immediately after arrest if it can be proven that permitting access to counsel would hinder and jeopardize the investigations.

It is submitted that this legal position, which allows the police to deny right of child suspects to immediate access to legal counsel is undesirable as it would put them in disadvantaged position. To merely state that children have the right to be represented in the statute without providing a proper mechanism for children to get access to it may defeat its purpose. A lot of factors such as immaturity, lack of understanding and lack of financial resources may prevent children to independently engage any counsel to represent them. In view of the requirement of the international instruments, it is pertinent to provide special provisions relating to the right of children to counsel in the Child Act 2001. Therefore, it is noteworthy to include the provision in the Child Act 2001 which makes it mandatory for children to be represented in any criminal cases. In the event that the parent or guardian of the child suspects or accused is unable or refuses to appoint counsel for them, the government should intervene and engage a lawyer for them. The special centre funded by the government should be set up to administer this matter properly and smoothly. In addition, the Malaysian Bar Council and NGOs can also be roped in to contribute to the manpower and resources of the department.

5.2.4 Right to Bail

Generally, bail means setting aside or releasing a person from custody or arrest in return for that person and or other persons agreeing to guarantee his later attendance at court. This guarantee is given by the persons in question signing a bond and paying a sum of money

in the event of his non-appearance.⁵⁸ Section 84 of the Child Act 2001 provides that if a child is arrested with or without a warrant, the child shall be brought before a court for children within twenty-four hours, exclusive of the time necessary for the journey from the place of arrest. If it is not possible to bring a child before such a court within the time specified mentioned above, the child shall be brought before a Magistrate who may direct that the child be remanded in a place of detention until such time as the child can be brought before the Court for Children.⁵⁹ The Court for Children shall inquire into the case brought before it. As a general principle, the court shall allow the child to be released on bail, unless the case involved is that of murder or other grave crime whereby it is necessary in the best interests of the child arrested to remove him from association with any undesirables, or the Court for Children has reason to believe that the release of the child would defeat the ends of justice. If the court decides to release the child on bail bond, the court may determine the reasonable amount of bail which shall be executed by the parents, guardian or other responsible person.⁶⁰

Based on the observation above, it can be concluded that the provision on bail provided by the Child Act 2001 is too general and inadequate. While it allows the court to grant bail, the Act specifically permits the court to refuse bail under certain circumstances. Unlike adults who may be released on their own recognisance, The Act strictly requires the bail of children to be executed by parents or guardians. The absence of an alternative mode of execution of bail other than cash money also limits the opportunity of children, especially from poor families, from being released on bail. For example, there is an instance where a

⁵⁸*Yusof bin Mohamed v PP* [1995] 3 MLJ 66.

⁵⁹Section 84(2) of the Child Act 2001.

⁶⁰Section 84(3) of the Child Act 2001.

child had been detained for over nine months pending trial of a charge of stealing RM20 because his mother was unwilling to pay for bail.⁶¹

In addition, the Child Act 2001 allows the court to refuse to grant bail charged with certain types of offences. Firstly, right of bail may be refused for the child who is charged with murder, grave offence or if the release would defeat the ends of justice. Secondly, there are several statutes under Malaysian law which provides for unbailable offences, where bail cannot be granted under any circumstance. It means if any person is charged for committing unbailable offence, he will be automatically detained until the case is over. Among the specific statutes which provide for unbailable offences are the Essential (Security Cases) Regulations 1975,⁶² the Firearms (Increased Penalties) Act 1971⁶³ and the Dangerous Drug Act 1952.⁶⁴ Since the Child Act 2001 is silent on the right of children relating to unbailable offences, it means that children charged for this type of offences will not be entitled to bail at all.

5.2.5 Diversion

Currently, there is no formal diversion for children incorporated in any legislation under Malaysian law.⁶⁵ The absence of a specific provision on this matter has deprived the police, the prosecutor or the court from effectively resorting to diversion or alternative measures. Though the provision of the CPC confers discretionary power to the police or prosecutor to dispose minor cases without initiating formal criminal proceedings under

⁶¹UNICEF, n. 10 above, p 43.

⁶²Regulation 9 of the Essential (Security Cases) Regulations 1975.

⁶³Section 12 of the Firearms (Increased Penalties) Act 1971.

⁶⁴Section 41B of the Dangerous Drug Act 1952.

⁶⁵Mustaffa, A. (2016). Diversion Under Malaysian Juvenile Justice System: A Case of Too Little Too Late? *Asian Journal of Criminology*, 11(2), p 146.

exceptional circumstances, it is quite rarely invoked against children due to its generality and lack of clarity. The CPC provides two circumstances where the police may exercise their discretion not to proceed with investigation, namely, when the offence is not of a serious enough nature to warrant an investigation and when it appears that there is no sufficient ground to further proceed with the matter.⁶⁶ More often than not, the discretion not to proceed with the investigation or prosecution of case is only exercised based on insufficiency of evidence. Under other circumstances, the power not to investigate or to prosecute hardly occurs.

So far, there is no specific provision which formally gives the power to police, prosecutor or the court to divert children from formal methods of adjudication. It is very unfortunate for children in Malaysia not to be given opportunity to be dealt by way of diversion or alternative measures, methods which are commonly practiced under various legal systems. This position is unsatisfactory and contrary to the requirement of the international instruments which promote diversion and alternatives programmes⁶⁷ and emphasize that the formal judicial process should only be used as a last resort against child.⁶⁸

In conjunction with that, various parties including legal practitioners, academics and non-governmental organizations have expressed their concern over the unsatisfactory position of the current law relating to children, calling for the government to adopt a new approach that can be beneficial to child.⁶⁹ There are several grounds cited by proponents that urge for the introduction of diversion. Among the main reasons put forward is the escalating

⁶⁶Section 110 of the CPC.

⁶⁷United Nations Committee on the Rights of the Child, General Comment No. 10 (2007): *Children's rights in juvenile justice*, para 24, Rule 13.1 and rule 18 of the Beijing Rules.

⁶⁸Article 37 and 40 of the CRC.

⁶⁹Samuri, M.A., et al. (2013). The Rehabilitation Theory in Adjudicating Child Offenders and Its Application in Malaysia. *Asian Social Science*, 9(15), p 163, Mousavi, S., Rastegari, B., Nordin., R. (2013). Improving The Legal Protection Of Child In Conflict With The Law: Reintegration And Rehabilitation Into Society. *Current Law Journal*, 1,p ix, Jalil, S. (2011). Taskforce to Look into Restorative Justice System. [online] *The Star*: 8th Dec. Available from: <http://www.thestar.com.my> [Accessed on 26/3/2015].

number of juvenile cases under the current Malaysian criminal justice system. According to Royal Malaysian Police statistics, the number of recorded criminal cases in Malaysia keeps escalating year on year. The statistics disclose that 4,465 juveniles cases were recorded in 2010.⁷⁰ The number of recorded juvenile cases has increased sharply in 2014 whereby a total of 9,509 cases were recorded between January and October.⁷¹ It is argued that the escalating number of juvenile cases has, to a certain extent, pointed out the ineffectiveness of the current Malaysian juvenile justice system which focuses on the formal method of handling children in conflict with the law.⁷²

In addition, a high number of children incarcerated is another reason relied on by proponents to justify their call for the introduction of diversion. According to them, the application of formal adjudication method to deal with children in conflict with the law under the current system are ineffective and inappropriate as it has evidently resulted with high number of children incarcerated in prisons and detention centres.⁷³ For example, a study shows that there were 646 children sentenced to imprisonment between 2004 and 2006.⁷⁴ In addition, there was a total number of 1,414 children detained at approved schools in 2009.⁷⁵ The proponents of the diversion and alternative measures suggested that the high number of child incarcerations could be potentially controlled by introducing diversion into the current juvenile justice system.⁷⁶

⁷⁰ Mohd Yusof, J. Z., and Thambapillay, S. (2012). The Role of the Court for Children in Dealing with Children Involved in Crime. *Law Review*, 1, p 4.

⁷¹ Lam Thye., L. (2015). Kes Juvana Meningkatkan, Perlu Perhatian Semua Pihak. [online] *Utusan Malaysia*, 27th Feb. Available from <http://www.utusan.com.my> [Accessed on 9/11/2015].

⁷² Azlinda, A. and Mohd Taufik, M. (2007). Crime Victims Support System and Restorative Justice: Possible Implementation in Malaysia. *Journal of Arts and Humanities*, 1(2), p 23.

⁷³ Mustafa, A., n. 65 above, p 144.

⁷⁴ UNICEF, n. 10 above, p 106.

⁷⁵ *Ibid*, p 110.

⁷⁶ Mustafa, A., n. 65 above, p 144.

Apart from that, the proponents of diversion also raised the problem of delay in the disposal of cases involving children encountered by the current Malaysian juvenile justice system. They have argued that this problem is partly attributed to the use of the formal adjudication method in dealing with children.⁷⁷ According to the study, 51% of children under detention pending trial of cases were detained for six months as at May 2009.⁷⁸ 11% or twenty-four children were detained for less than six months whereas 7% or fourteen children were detained between twelve and twenty four months.⁷⁹ The study also revealed that some children detained pending the disposal of their cases were detained for committing less serious and nonviolent offences. For example, a report by SUHAKAM revealed that a sixteen year old child had been detained for six months while awaiting trial for the offence of selling pirated VCD at the night market.⁸⁰ In another case, a child who had been charged for not carrying his identification card had been detained for six month before the case was finally adjudicated.⁸¹ The unreasonable delay questions the effectiveness of the current formal adjudication in handling children's cases.

Based on the above-mentioned grounds, various parties have strongly urged the government to introduce diversion programmes in various forms such as warning, caution, mediation, family group conferences and others as alternative measures in dealing with children in conflict with the law under the Malaysian juvenile justice system.⁸² These kinds of diversion programmes, which are restorative in nature, potentially enable children in conflict with the law to be reintegrated back into the community. Therefore, it is timely for

⁷⁷ Ibid, p 145.

⁷⁸ UNICEF, n. 10 above, p 46.

⁷⁹ Ibid, p 46

⁸⁰ Nayagam, J. (2012). Strengths and Weaknesses of the Protection Mechanism and Support System for Reintegration of Children in Conflict with the Law. *Malaysian Journal on Human Right*, 6, p 69.

⁸¹ Ibid, p 69.

⁸² Mustaffa, A., n. 65 above, p 147, pp. 18–26, Zuan, C.M. (2010). Keadilan Restoratif (Restorative Justice) dan Pentadbiran Keadilan Jenayah Kanak-Kanak di Malaysia. *Malayan Law Journal*, 2, p Ixxi.

the Malaysian legislative to re-look into the current approach adopted in dealing with the children.

5.3 Rights of Children during Trial Proceedings under Malaysian Law

5.3.1 Right to Separate Court and Procedure

The Child Act 2001 provides for the establishment of the Court for Children, which shall have jurisdiction to try criminal proceedings involving children. The Court for Children shall consist of a Magistrate, who in the exercise of his functions in a Court for Children, shall be assisted by two advisers appointed by the Minister from a panel of persons resident in the State.⁸³ It is a mandatory requirement under the Act that one of the two advisers shall be a woman.⁸⁴ The functions of the advisers are to inform and advise the Court for Children with respect to any consideration affecting the order made upon a finding of guilt or other related treatment of any child brought before it and to advise the parent or guardian of the child. The Court for Children is a closed court. It means that no person shall be present at any sitting of a Court for Children except members and officers of the Court, the children who are parties to the case before the Court, their parents, guardians, advocates and witnesses, and other persons directly concerned in that case and such other responsible persons as may be determined by the Court.⁸⁵

In terms of jurisdiction, the Court for Children shall have jurisdiction to try all offences except those punishable with death.⁸⁶ The words conviction and sentence are not used in relation to a child dealt with by the Court for Children and any reference in any written law to

⁸³Section 11(2) of the Child Act 2001.

⁸⁴Section 11(3) of the Child Act 2001.

⁸⁵Section 12(3) of the Child Act 2001.

⁸⁶Section 11(5) of the Child Act 2001.

person convicted, a conviction and a sentence shall in the case of a child be construed as child found guilty, a finding of guilt and order made upon a finding of guilt.⁸⁷ The Child Act 2001 provides special powers of sentencing for the Court for Children. Section 91 lists down type of sentences that may be made by the Court for Children against convicted children, namely;

- i- Admonish and discharge;
- ii- Release the child on a bond of good behaviour and to comply with such conditions as may be imposed by the Court;
- iii- order the child to be placed in the care of a relative or another fit and proper person;
- iv- order the child to pay a fine, compensation or costs;
- v- make probation order;
- vi- order the child to be sent to an approved school or Henry Gurney School;
- vii- order the child, if a male, to be whipped with not more than ten strokes of a light cane;
- vi- impose any term of imprisonment which could be awarded by a Sessions Court.

The Child Act 2001 also provides that a sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.⁸⁸

Exceptions

As a general principle, the Child Act 2001 confers wide jurisdiction to the Court for Children. It provides that the Court for Children shall have jurisdiction to try all offences except offences punishable with death.⁸⁹ At a glance, it seems that the only limitation to the Court for Children is cases punishable by death. However, close examination of the Child Act

⁸⁷Section 91(2) of the Child Act 2001.

⁸⁸Section 97(2) of the Child Act 2001.

⁸⁹Section 11(5) of the Child Act 2001.

2001 discloses several exceptional cases where children may be charged in adult courts. In other words, there are several categories of case which do not fall within jurisdiction of Court for Children.

Firstly, the Court for Children shall have no jurisdiction to offences punishable by death.⁹⁰ Among the offences punishable by death in Malaysia are murder,⁹¹ drug trafficking,⁹² discharging a firearm with intention to cause death or hurt⁹³, and waging war against the Ruler.⁹⁴ Any child charged with offences punishable with death sentence shall be tried before the High Court. It means that the child shall be transferred to the High Court for the purpose of trial.

Secondly, the Court for Children also shall have no jurisdiction over cases that are tried under the Essential (Security Cases) Regulations 1975. The Essential (Security Cases) Regulations 1975 provide that any person who is charged with offences classified as a security case or a security offence shall be tried in accordance with the special rules of procedure and evidence before a competent court.⁹⁵ Regulation 5 of the Essential (Security Cases) Regulations 1975 provides that a case certified as a security case shall be heard before the court of competent jurisdiction, either High Court or subordinate court.⁹⁶ However, the Court for Children is not considered a competent court for the purpose of the Essential (Security Cases) Regulations 1975. This is due to the reason that trial under the Essential (Security Cases) Regulations 1975 requires special rules and procedures, and is normally

⁹⁰Section 11(5) of the Child Act 2001.

⁹¹Section 302 of the Penal Code.

⁹²Section 39B of the Dangerous Drug Act 1952.

⁹³Section 3 of the Firearms (Increased Penalties) Act 1971.

⁹⁴Section 121 of the Penal Code.

⁹⁵Regulation 3 of the Essential (Security Cases) Regulations 1975.

⁹⁶Regulation 3(3) of the Essential (Security Cases) Regulations 1975.

considered as public interest cases. As such it requires the cases to be tried before experienced Session Court or High Court judges.

Lastly, the Court for Children also shall have no jurisdiction to try cases where the child is jointly charged with adult accused.⁹⁷ If any child is jointly with adult accused, the trial shall be conducted in an adult criminal court. It means that a child who is jointly tried with an adult accused may no longer enjoy similar advantages offered to children tried before the Court for Children.

Disadvantages of trial of children before adult court

The trial and transfer of children to adult courts under the current Malaysian laws have various negative impacts on children. Trial in adult courts means that children are no longer automatically entitled to advantages that are afforded to children who are tried in the Court for Children. For example, any child tried before adult courts is no longer entitled to procedural advantages of the Court for Children. In the case of *PP v Buri Hemna*,⁹⁸ the issue arose as to whether the High Court judge in murder trial involving the child was obliged to appoint two advisors to assist the court, which is a mandatory requirement for a trial in the Court for Children. The child in this case was charged with drug trafficking under Section 39B (1) (a) which is punishable with the death sentence. It was held that the High Court is not bound by the requirement of the Child Act 2001 which requires the appointment of advisors to assist the court. Therefore, the trial of children before the High Court was conducted without the attendance of two advisors. Similarly, any child tried in adult criminal court will

⁹⁷Section 83(4) of the child Act 2001.

⁹⁸[1998]2 CLJ 296.

not be entitled to other procedural advantages such as the compulsory attendance of parents, informality of proceedings and others.

In addition, children tried in adult courts also do not automatically enjoy privacy of proceedings. Trial in the Court for Children is a closed proceeding, which means that only certain relevant persons are allowed to be present in court. In contrast, any trial before adult criminal courts is open to the public. Although judges in adult courts may order the trial to be held in camera, it is not mandatory and left to the discretion of the trial judge whether to invoke it or not.

Lastly, children tried before adult courts can be subjected to harsher modes of sentences than those who are tried before the Court for Children. The Court for Children provides special modes of punishment for children found guilty for committing criminal offences. Punishment such as admonishment, bond for good behaviour and detention at an approved school are specially tailored for children with the aim to rehabilitate and to reintegrate them into society rather than to merely punish them. Even though the Court for Children has the jurisdiction to impose sentences of imprisonment, there are restrictions and conditions that must be complied with before it can be exercised. The Child Act 2001 provides that imprisonment shall not be imposed on any child under the age of fourteen years.⁹⁹ With regard to child offenders aged fourteen and above, they shall not be ordered to be imprisoned by the court if they can be suitably dealt with in any other ways whether by probation, fine, being sent to a place of detention, an approved school or the Henry Gurney School¹⁰⁰ or otherwise.¹⁰¹ The restrictions imposed by the Child Act 2001 imply that

⁹⁹Section 96(1) of the Child Act 2001.

¹⁰⁰Henry Gurney School refers to rehabilitation centre for juvenile offenders between the age of between fourteen and twenty-one years old handled by the Prison Department of Malaysia. The school was name after the

imprisonment should not be imposed on child offenders except as a measure of last resort. Reference to decided cases shows the courts have given due consideration to the age of the child to either avoid imposing imprisonment sentence or to reduce the term of imprisonment imposed on them, even in serious criminal cases. More often than not, the courts prefer to impose other alternative punishments in dealing with them. In the case, of *PP v Saiful Afikin bin Mohd Firdaus*,¹⁰² the sixteen-year old child was charged and convicted with culpable homicide not amounting to murder under section 304 of the Penal Code. The High Court held that imprisonment was inappropriate and ordered him to be sent to Henry Gurney School until he attained the age of twenty-one years. Similarly, in the case of *PP v The Offender*,¹⁰³ the Session Court convicted a fourteen year-old child for possession of drugs under the Dangerous Drug Act 1952 and sentenced him to the punishment of five years imprisonment and ten strokes of whipping. Upon appeal, the High Court judge reversed the punishment and ordered the child to be detained at an approved school.

However, as discussed earlier, the jurisdiction of the Court for Children is limited in the sense it has no jurisdiction to try cases which provides for death penalty sentence, cases which are classified as security cases under the Essential (Security Cases) Regulations 1975 and cases where a child is jointly tried with an adult. As such, in these types of cases, the trial shall be held in the High Court or Session Courts. Though Section 97(1) of the Child Act 2001 provides that the courts have no power to impose capital sentence upon the conviction of child offenders, the courts shall order them to be detained during the pleasure of the Ruler for indefinite period. In other words, instead of being punished with capital punishment, the children found guilty for committing offence punishable with capital sentence shall be

previous British High Commissioner in Malaysia, Sir Henry Gurney, who inaugurated the first school on 19th July 1950.

¹⁰¹Section 96(2) of the Child Act 2001.

¹⁰²[1996] 4 MLJ 309.

¹⁰³[1998] 4 MLJ 152.

detained at the pleasure of the Ruler. There is no time limit specified for this type of detention. It means the period of detention is indefinite. The period of detention may only be commuted if the convicted children receive a pardon by the Ruler. Due to this, the practice of allowing the detention of children at the pleasure of the Ruler for indefinite period has been heavily criticized as being unfair and unconstitutional not only by the scholars but also judges. In the case of *Public Prosecutor v Kok Wah Kuan*,¹⁰⁴ the respondent who was twelve years old at the time of commission of offence, was charged with murder punishable with death penalty under section 302 of the Penal Code. At the end of the trial, the court found the respondent guilty and convicted him. Since Section 97 (2) of the Child Act 2001 prohibits the imposition of the death penalty on children, the court had ordered the convicted child to be detained at the pleasure of the Ruler. The respondent appealed to the Court of Appeal against the decision on the ground, *inter alia*, that Section 97 of the Child Act 2001 was unconstitutional. The Court of Appeal allowed the appeal and held that the order of detention at the pleasure of the Ruler is invalid on the ground that it contravenes the doctrine of separation of powers enshrined in the Federal Constitution. In the ground of judgment, the learned judge opined on the appropriateness of this sentence for children and likened it to the sentence of life imprisonment. The decision of the Court of Appeal was well praised as it undoubtedly supports the call from various parties for the abolishment and replacement of sentence of indefinite detention of children during the pleasure of the Ruler with a more appropriate punishment.¹⁰⁵ Nevertheless, the Federal Court reversed the decision of the Court

¹⁰⁴[2008] 1 MLJ 1.

¹⁰⁵UNICEF, n. 10 above, p 89, Child Rights International Network, 2013. *Inhuman Sentencing of Children in Malaysia*, [online] CRIN. Available from: https://www.crin.org/sites/default/files/crin_upr17_malaysia.pdf [Accessed on 25/5/2016].

of Appeal and held that the order of indefinite detention at the pleasure of the Ruler is valid and constitutional.¹⁰⁶

In addition, it is surprising to note that there is a special exception to Section 97(1), which prohibits the imposition of the death penalty on convicted children. The children charged with security offences under the Essential (Security Cases) Regulations 1975 still can be sentenced to death. In the case of *PP v Lim Hang Seoh*,¹⁰⁷ the fourteen-years old child was convicted under the Essential (Security Cases) Regulations 1975 and sentenced to death by the court. Nevertheless, the death sentence was not carried out as the Ruler commuted it to detention in an approved school. This fact shows that children tried in adult courts face the possibility of being sentenced either to indefinite period or death sentence, harsher punishments compare to those tried in Court for Children.

To sum up, though current Malaysian law provides for a separate court system for children, the jurisdiction of court for children is limited. The current law still permits children to be transferred and tried before adult courts under certain circumstances. This practice is undesirable as it deprives children from receiving various advantages afforded to those tried before the court for children, such as privacy and informality of proceeding. Apart from that, children who are tried before adult courts can be subjected to greater mode of punishment. This is contrary to those who are charged in a Court for Children, where the mode of punishment is more lenient as it aims to rehabilitate and reintegrate them. Obviously, the practice of trial of children in adult courts has various disadvantages and causes collateral damages to the children. This practice is contrary to the requirement of the CRC which

¹⁰⁶Refer also to the cases of *Asri Beddu [2012] 1 LNS 807*, *KWK (A CHILD) v. PP [2003] 4 CLJ 51*, *PP v KK [2009] 1 LNS 578*, *PP v Saiful Afikin bin Mohd Firus [1996] 4 MLJ 309* and *PP v Sangkar a/l Ratnam [2007] 7 MLJ 353*.

¹⁰⁷[1978] 1 MLJ 68.

consistently emphasize on the principle of the best interest of children. In addition, this practice also runs contrary to the philosophy and goal of juvenile justice. Based on the above-mentioned reasons, it is submitted that the practice of allowing trial of children in adult courts under current Malaysian law should be re-evaluated. It is suggested that trial of children, regardless of nature and gravity of offences, should be held in the Court for Children. The trial of children in the Court for Children will automatically ensure that children be afforded with the privileges attached to it. As such necessary amendments need to be made to the provisions of the relevant statutes on this matter.

5.3.2 Right to Give Evidence

Current Malaysian laws recognizes the right of children to give evidence in legal proceedings. The right of children to give evidence is governed by two main statutes, namely the Evidence Act 1950 and the Evidence of Child Witness Act 2007. The Evidence Act 1950 is the main statute law relating law of evidence. It provides general provisions relating to rules and procedures that govern the evidence of all witnesses, including children. The Evidence Act 1950 also provides a specific provision relating to the admissibility of child evidence, which is provided under section 133A. In addition, the Children Witness Act 2007 is designed specifically to govern the procedure of child witnesses giving evidence. However, it is worthy to note that the right of children to give evidence under Malaysian laws is not absolute. Instead, there are restrictions or conditions imposed on this right.

5.3.2.1 Entitlement to give evidence

Under current Malaysian law, not every child is entitled to give evidence in court. Unlike adults, Malaysian law on right of children to testify in court is not absolute and subject

to certain qualifications. Section 133A of the Evidence Act 1950 states a child has to pass a competency test before he or she is eligible to give evidence. The same principle is applicable to a child accused who opts to give evidence in the event that they are called to enter defence by the court. It is the duty of court to determine the competency of the child to give evidence by holding a preliminary inquiry.¹⁰⁸ It should be noted that it is mandatory for the court to hold a preliminary inquiry to assess level of understanding and maturity of children. Failure to conduct one does not merely amount to irregularity, but fatal to the admissibility of the evidence of children.¹⁰⁹ The inquiry was conducted by the court questioning the child questions that revolve around the children's understanding of sworn testimony, the duty of speaking the truth while giving evidence, the impact of not telling the truth, the role of witnesses and so on.¹¹⁰

The result of preliminary inquiry conducted by the court shall determine whether the child is eligible to give sworn evidence, unsworn evidence or in fact is incompetent to give evidence. If the court decides that the child is eligible to give evidence under oath, he or she will be allowed to give testimony from the witness box and the evidence can be challenged through the process of cross-examination. On the other hand, if the court forms a view that the child is not eligible to give sworn evidence, his or her evidence may still be accepted if the court is satisfied that he or she possesses sufficient intelligence to justify the reception of the evidence. In principle, the sworn testimony of children can stand on its own and is not subject to the requirements of supporting evidence. Lastly, the court may refuse to allow children to give evidence if it finds that they are incompetent to give either sworn or unsworn evidence.

¹⁰⁸ *Tajudin bin Salleh v PP* [2008] 1 MLJ 397.

¹⁰⁹ *Yusaini Bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582.

¹¹⁰ *Sidek Bin Ludan v PP* [1995] 3 MLJ 178.

Based on the above discussion, it clearly shows that current Malaysian law still relies on the rule of competency in determining eligibility of children to give evidence. This requirement, which is provided under section 133A, has limited the right of certain children to give evidence.¹¹¹ Any child who fails to pass the test of competency conducted by the court shall be deprived from the opportunity to be heard during the trial proceeding. It is submitted that the deprivation of the right of children to give evidence based on a competency test is unfair and discriminatory to them. In case of the child accused, deprivation of the right to give evidence may affect their defence, especially when their defence mainly based on their oral testimony. It is submitted that lack of maturity should not automatically be used as a ground to deprive children from giving evidence. Instead, it should only affect the weight or quality of the evidence. In other words, the court, regardless of the level of maturity of the accused child, should allow them to give evidence. The fact that they lack maturity will only affect the court's evaluation on the quality, trustworthiness and weight of their evidence.

5.3.2.2 Corroboration of evidence

In addition, Section 133A of the Evidence Act 1950 also provides that the admissibility of unsworn evidence of children, particularly those who give evidence on behalf of the prosecution is conditional upon corroboration of evidence. This provision elaborates that no accused shall be convicted of the offence based on unsworn evidence of children unless that evidence is corroborated by some form of independent material evidence.¹¹² The main reason cited by the court in justifying the need of corroboration is to mitigate the possibility of concoction of a story by the child, as a child may sometime have difficulties to

¹¹¹Mustaffa, A. and Moharani, S.N.A (2012). Isu-Isu dan Permasalahan Keterangan Kanak-Kanak di Bawah Undang-Undang di Malaysia; Satu Penilaian. *Kanun Jurnal Undang-Undang Malaysia*, 24(1), p 60.

¹¹²*PP v Mohd Noor Abdullah* [1992] 1 CLJ 702.

differentiate between fantasy and reality.¹¹³ In a Court of Appeal decision of *Mohd Yusof Rahmat v PP*,¹¹⁴ James Foong JCA (as he then was), explained the reason for the need for corroboration of an unsworn child evidence in the following terms:

*“... We must not forget that we are here dealing with the evidence of a child of tender years who is involved in an allegation of rape where even if she is an adult requires corroboration because a woman has a temptation to exaggerate an act of sexual connection, and for a child of tender years for his or her known aptitude to confuse fact with fantasy”*¹¹⁵

It should be noted that the mandatory requirement of corroboration provided in Section 133A of the Evidence Act 1950 is specifically applicable to children who become witnesses for the prosecution. The provision is silent on the requirement of corroboration of unsworn evidence for children who stand accused. It implies that no such requirement is required in the case of children accused of giving unsworn evidence. Nevertheless, the fact that the act imposes a requirement of mandatory corroboration for admissibility of unsworn evidence of children in general infers that their evidence lacks probative value and weight. It reflects the position of child evidence under Malaysian law as a whole, irrespective whether the evidence is given as on behalf of prosecution or defence. Therefore, it is submitted that subjecting unsworn evidence of children to rule of corroboration may affect the course of justice. It strictly prevents the court from acting on the uncorroborated evidence of children though the court believes the evidence given by them.¹¹⁶ Pursuant to that, it is desirable that Section 133A of the Evidence Act 1950 should be re-evaluated. Conditional requirement for corroboration on admissibility of children’s evidence should be abolished as it is not only

¹¹³*Din v PP* [1964] MLJ 300 FC.

¹¹⁴[2009] 2 CLJ 673.

¹¹⁵*Ibid*, p 680.

¹¹⁶Mustaffa, A. and Moharani, S.N.A., n. 111 above, p 63.

discriminatory in nature but also denies the right of children to give evidence in any trial. This requirement simply contravenes the right of children to be heard and to participate in judicial proceedings.

5.3.2.3 Privileges

Currently, Malaysian laws provide certain privileges to child witnesses. For example, the Evidence of Child Witness Act 2007 permits a special setting for children to testify, the setting up of a special screen for the purpose of obstructing his view from the accused, the use of video recording or tape recording as a mode of giving evidence, the use of live-link evidence to enable the child to give evidence from a separate location or outside the courtroom, the use of the intermediary and others. However, the issue arises as to whether these privileges can be extended to the child accused. This is because the Evidence of Child Witness Act 2007 is only applicable to a child witness. Section 2 of the Evidence of Child Witness Act 2007 defines the term “*child witness*” as any witness under age of sixteen years old who is called to give evidence, and it does not include the accused. This provision excludes the privileges afforded to child witness from being offered to the child accused.¹¹⁷ The exclusion of the child accused from enjoying these privileges is much regretted. This is due to the fact that child accused are equally in dire need of these privileges as much as the child witnesses since their liberty and future are at stake.

5.3.2.4 Cross-examination of children

One of the main features of the adversarial trial system is that each witness will go through the process of cross-examination by the counsel and the prosecutor during the trial.

¹¹⁷Mohd Alias, N. (2015). Justice for All: The Need for Proper Interpretation of Vulnerable Accused in Malaysian Criminal Trials-A Proposal for Reform. *Current Law Journal*, 1, p xxv.

The right to cross-examine witnesses is one of the utmost important rights in any trial process.¹¹⁸ The aim of this cross-examination session is to provide the opportunity for both parties to present and challenge the authenticity and truthfulness of the evidence presented by the witnesses.¹¹⁹ With regard to the cross-examination of the child accused or witness, the issue arose as to the appropriate method of cross-examination by counsel against them during the trial process. Not all children manage to cope with the pressure and tense environment of cross-examination process. Some children may find the process of cross-examination intimidating, uncomfortable and stressful. It thus may affect the focus and concentration of children. Consequently, there is the probability of a child being unable to answer questions accurately, not remembering facts clearly or being unable to directly answer questions due to discomfort, fear, restlessness or confusion. Such experience may result in a traumatic experience.

The Evidence of Child Witness Act 2007, which is applicable to child witnesses, allows the process of examination of children to be conducted in the form of video recording.¹²⁰ However, the children need to be present to court for cross-examination before such evidence can be admitted by court.¹²¹ With regard to the cross examination of children accused, currently there is no provision which allows for the cross-examination process to be conducted in advance of trial. For comparison, there are several states in Australia, such as Queensland,¹²² Northern territory¹²³ and South Australia¹²⁴ that have successfully implemented pre-recorded cross-examination of children. Its implementation has various

¹¹⁸Dennis, I. (2010). The Right to Confront Witnesses: Meanings, Myths and Human Rights, *Criminal Law Review*, 4, p 255.

¹¹⁹*PP v Wong Yee Sen & Ors* [1990] 1 MLJ, 187.

¹²⁰Section 6 of the Children Witness Act 2007.

¹²¹Section 6 (1) of the Children Witness Act 2007.

¹²²Section 21AK of the Evidence Act 1977 (Queensland).

¹²³Section 21B(2)(b) of the Evidence Act 1977(North Territory).

¹²⁴Section 13A(2)(b) and 13C(1)(a) of the Evidence Act 1929(South Australia).

advantages, such as an increase in the quality of evidence, reduction in stress and trauma, enabling a smooth process of trial.¹²⁵ It has also convincingly brushed aside the argument that pre-recording a child's entire evidence will cause disadvantages and threaten the opposing party's right to a fair trial. The law in these states permits cross-examination of children to be conducted in advance of trial. In view of that, it is recommended that similar mechanism to be introduced under Malaysian law as it offers a more effective way to overcome the difficulties, stress and trauma faced by the child accused if the cross-examination process is executed directly.

5.3.2.5 Effective participation

In line with the requirement of the CRC, Malaysian laws recognize the right of children to effectively participate in judicial proceedings. The Child Act 2001 has provided several other provisions which aim at maximizing the effective participation of children. For example, the Child Act 2001 stipulates a mandatory requirement for the attendance of the children's parents or guardian at the Court for Children during all stages of the proceedings.¹²⁶ Failure on the part of parents or guardians to comply with this requirement amounts to an offence which is punishable with a fine not exceeding RM 5000 or imprisonment for a term not exceeding two years or both.¹²⁷

However, an examination of the Child Act 2001 as a whole reveals that the existing provisions of the Child Act 2001 are not all encompassing and not comprehensive to ensure the effective participation of children. For example, in terms of the place of adjudication, the

¹²⁵Henderson, E., Hanna, K. and Davies, E. (2012). Pre-Recording Children's Evidence: The Western Australian Experience. *Criminal Law Review*, 1, p 8.

¹²⁶Section 88(1) of the Child Act 2001.

¹²⁷Section 88(2) of the Child Act 2001.

Child Act 2001 provides for the establishment of the Court for Children. Therefore, any proceedings that fall under the jurisdiction of the Court for Children shall be held there. This requirement indicates the need to set up an exclusive court for children equipped with relevant facilities which is separate from normal adult court. Unfortunately, so far only the Kuala Lumpur Court Complex in the Federal Territory has set up exclusive court rooms consigned as Court for Children.¹²⁸ The court rooms in Kuala Lumpur Court Complex also are well-equipped with relevant facilities, such as high tech equipment for live link and video conference and a special waiting room for children. Other states still do not have special court rooms exclusively set up for children. Instead, sittings are held in the normal court declared as Court for Children. This is done by specifically allotting certain days for the sitting of the Court for Children. On other days, the same court rooms are used as adult courts.¹²⁹ The practice of sharing court rooms is regarded as not being in line with the true spirit of the establishment of the Court for Children, which indicates that the court for children should be exclusive and separate from adult courts. A lack of complete special courts for children in all states impliedly demonstrates failure on part of the Malaysian Government to give full commitment towards implementation of the requirement of Child Act 2001 which was passed more than fifteen years ago. Therefore, it is pertinent for the Government of Malaysia to set up more special courts for children in all states. Each of them must be designed and equipped with child-friendly facilities, such as a special court setting, a waiting room for children, an exclusive entry and exit point, as well as technology to facilitate the process of giving evidence such as live link and video conferences.

In addition, the current Child Act 2001 is silent on the requirement of informality of proceeding before the Court for Children. For example, there is no provision which provides

¹²⁸Nayagam, J., n. 80 above, p 70.

¹²⁹*Ibid*, p 71.

for informality of procedure, an informal court setting, the removal of formal attire and others. As a matter of comparison, reference to the Evidence of Child Witness Act 2007 discloses various provisions which expressly provides for the informality of proceeding. The Evidence of Child Witness Act 2007, which is exclusively applicable to child witnesses, provides various provisions for informality of court setting. For example, the court is given discretion to direct the wearing of coats, jackets, gowns or other formal attire of a judge and court officers to be dispensed with during the giving of evidence of a child as witness. The court also may relax the formality of proceedings by allowing child witnesses to give evidence from a separate court, or through live link or video conferences. The absence of provisions on the informality of proceedings in Child Act 2001, which govern the trial process of child defendant or child accused, implicitly shows that they are not entitled to the same privileges enjoyed by child witnesses. Distinguishing the treatment of children as accused and as witnesses amounts to discriminatory practice. Children accused shall not be deprived of privileges as they are in fact at the most disadvantaged position to defend themselves compared to child witnesses. It is submitted that the current position of law on this matter is unfair and unsatisfactory as it provides different treatment for children in the criminal process. Children, regardless of their status as witness or accused, should be afforded with the same privileges. In line with the requirement of the CRC which emphasizes the need to create a child friendly environment and facilities to suit children's capacities and needs, it is suggested that the provisions relating to informality of proceedings should be inserted into the Child Act 2001 to make them available to the child defendant or the accused.

5.3.3 Right to Privacy of Proceedings

In line with the requirement of the CRC, the Child Act 2001 also guarantees the right of children to privacy of proceedings. Any proceeding in the Court for Children is a closed proceeding. It may only be attended by restricted persons, which include members and officer of court, the children who are parties to the case before the court, children's parents or guardians, advocate, witness and any parties who is directly concerned with the case.¹³⁰ In addition, the Child Act 2001 also stipulates that any mass media report or picture of the child or any other person, place or thing that may lead to identification of the child concerned shall not be published in any newspaper or magazine or transmitted through any electronic medium.¹³¹ Any person who contravenes this provision shall be liable to a fine not exceeding ten thousand or to imprisonment for a term not exceeding five years or to both. As far as the privacy of proceedings is concerned, the position currently in Malaysian law measures up with the requirements set by the CRC.

5.3.4 Right to Legal Representation During Trial

Under Malaysian law, the right to legal representation is regarded as a fundamental right of each citizen. It is entrenched in the Federal Constitution, which is the highest law in the country.¹³² Article 5 of the Federal Constitution contains provisions pertaining to fundamental liberties of each citizen. Among the matters regarded as essential is the right to legal representation. Article 5(3) of the Federal Constitution acknowledges the right of every person to be represented by a counsel of his own choice. This right is applicable to all citizens of Malaysia regardless of their race, gender and age. It means that any citizen, including a

¹³⁰Section 12(3) of the Child Act 2001.

¹³¹Section 15 of the Child Act 2001.

¹³²Article 4 of the Malaysian Federal Constitution.

child, is constitutionally guaranteed of this right. In addition, general provisions pertaining to the right of children to legal representation are also provided under the CPC and the Child Act 2001.

Briefly, the duty of counsel during the trial stage begins from the moment the child accused is brought before the court. It is the duty of court to read and explain the charge and the substance of the alleged offence against the child in simple language suitable to his age, maturity and understanding.¹³³ Alternatively, the duty may be undertaken by the defence counsel or other persons determined by the court.¹³⁴ At this stage, the defence counsel may explain to the child the nature of the offence framed against him. The counsel may give his personal legal advice to the child, either to plead guilty or to claim for trial. However, the decision to choose any of these two options remains in the hand of the child. If the child chooses to plead guilty, the defence counsel is responsible to duly explain the consequences and possible modes of punishment that may be imposed by the court on him. The counsel also is responsible to mitigate for leniency of sentence before the court passes the sentence.¹³⁵ In doing so, the counsel will normally highlight relevant mitigating factors for the consideration of the court. Among the relevant factors taken into account by the court in imposing the sentence are public interest, age of the child, family background of child, educational background, health, first offence, the nature and gravity of the offence and the effect of the offence on the victim.

On the other hand, if the child choose to claim for trial, the counsel is expected to prepare the defence for the child. Prior to the trial, the counsel is responsible for applying for access to relevant documents that may be used during the trial. During the trial, the main

¹³³Section 90 (1) of the Child Act 2001.

¹³⁴Section 90(2)(a) of the Child Act 2001.

¹³⁵Section 90(11) of the Child Act 2001.

duty of the counsel is to challenge the prosecution case by raising reasonable doubt to prosecution case. Therefore, in an attempt to discharge this duty, the defence counsel may challenge the prosecution's case on various grounds. The defence counsel has the right to challenge the evidence of the prosecution's witnesses by way of cross-examination.¹³⁶ The counsel also may object to the admission of evidence tendered by the prosecution by relying on the rules of evidence. During the defence stage, the counsel may advise the child on his 3 options, namely to give evidence on oath, to give unsworn evidence or to remain silent. The counsel is responsible for explaining the consequences of each option available to the child if he is called by the court to answer the case. In addition, the counsel may call relevant witnesses to support the defence case. The counsel also may produce any other relevant evidence in the form of documentary as well as circumstantial evidence to support the defence version of the case. At the close of the trial, the defence counsel is responsible for submitting before the court a summary of the case in view of the defence version.

In the event the child is not satisfied with the court decision and/or sentence, he may instruct his counsel to file and appeal for revision. It is the duty of the counsel to advise the child of the proper course of proceedings that should be taken based on the facts and circumstances of each case. In case the court has passed a custody sentence against the child, the counsel may, on instruction from the child client, file an application for stay of execution pending hearing of appeal or revision. These are basically the duties of the defence counsel for the child during the criminal trial. As illustrated above, the legal process of trial is very complex and strict. It is impossible for the child to defend himself without the assistance of a legal counsel.

¹³⁶Section 90(6) of the Child Act 2001.

5.3.4.1 No Mandatory provision on child representation

In terms of the right to representation, it should be noted that child representation is not mandatory under current Malaysian law. This is obviously in contrary to the requirement of the CRC, which dictates that representation of children shall be made mandatory. The provisions pertaining to the right to counsel under the current law is general, making no distinction between the right of an adult and the right of a child. There is no financial aid support to the child to enable him to appoint counsel. The child, like an adult, is expected to use his own money to pay the legal costs and fees. Otherwise, the child has to turn to his parent for the financial aid. It should be noted that there is no provision under the law which obliges the parent to appoint counsel for their child in criminal cases. In case the parents refuse to engage lawyer for the child, then the child would be left unrepresented. In other words, representation of children in criminal trials highly depends on the financial status and willingness of the parents or guardians. In reality, the majority of child defendants or accused are from lower income group parents and guardians.¹³⁷ As a result, some of them are unrepresented during the trial proceedings.

The alternative option for the unrepresented child to get legal aid assistance is to apply for legal aid from the relevant government or private agencies. As far as legal aid assistance is concerned, current Malaysian law does not provide special privilege to children in need of legal assistance. The child who intends to apply for legal aid has to follow similar procedure and rules that are equally applicable to an adult counterpart. Currently, there are three agencies or departments which provides for legal aid assistance. These agencies are the Legal Aid Department, the National Legal Aid Foundation (NLAF) or the Legal Aid Centre.

¹³⁷Nayagam, J., n. 80 above, p 63.

The Legal Aid Department is the governmental department under the Legal Affairs Division, Prime Minister's Department which is responsible to provide legal aid to those who are financially incapable to engage a lawyer. The department, which has twenty two branches across all states, provides legal assistance to those who are eligible to receive legal aid assistance.¹³⁸ The statute that governs the Legal Aid Department is the Legal Aid Act 1971. The Act empowers the Department to represent the deserving person who is in need of legal advice and assistance in civil and criminal and cases. However, as far as a criminal case is concerned, the jurisdiction of the legal aid department to represent an accused in criminal cases is very limited. The department may only represent the accused in criminal cases for the purpose of mitigation. In other words, it will only represent the accused who has agreed to plead guilty and is in need of the assistance of legal counsel to mitigate for leniency of a sentence. Legal assistance to the accused may only be given if there is a specific sanction from the Minister. There is however an exception to this general principle, particularly in cases involving the child accused. The Act gives authority to the Legal Aid Department to represent the child accused in a criminal trial. It means the child is entitled to get free legal assistance from the Legal Aid Department. In order to benefit from the legal service, a child needs to file an application by filling up the prescribed form. However, in practice, it is difficult to secure the service of a legal counsel from the Legal Aid Department. Firstly, it is due to the reason that the department has only limited number of legal counsels. Based on record, the department has only 171 legal and paralegal officers at twenty-two branches to handle various types of civil and criminal cases in different courts throughout the country.¹³⁹ Secondly, the requirement to qualify for legal assistance from the Legal Aid Department is very stringent. In order to be eligible for legal assistance from the department, the parents or

¹³⁸Legal Aid Department, 2015. *Organization Chart*. [online] LAD. Available from: http://www.jbg.gov.my/index.php?option=com_content&view=article&id=594&Itemid=219&lang=en [Accessed on 20/6/2015].

¹³⁹UNICEF, 2013. n. 10 above, p 58.

guardians of children must have a yearly income not exceeding RM25,000.¹⁴⁰ In addition, parents or guardians with yearly income between RM25,000 and RM30,000 may still be entitled to legal assistance on the condition that they pay a minimal fee of RM300.¹⁴¹ Any child who does not meet this condition is not eligible to request for legal assistance unless there is special authorization by the Director of the Department.

In addition, the government also has set up the NLAF. Among the main reason which led to the establishment of the NLAF was the issue of high volume of unrepresented suspects and accused in legal proceedings. In order to cater to this problem, the government, in collaboration with the Malaysian Bar Council has launched the NLAF which officially began its operation on 2nd April 2012. The main objective of the NLAF is to provide legal services and representation to eligible person at all stage of proceedings. In order to successfully implement its objective, the NLAF has conducted thirty one training sessions to a total of 1,007 lawyers since its inception until 2014.¹⁴² Undoubtedly, the establishment of the NLAF has made a great impact in terms of affording legal representation to needed persons, including children.

Apart from these government-funded legal services, there are also free legal services on a pro bono basis provided by the Malaysian Bar Council. The Malaysian Bar Council, through its legal centres, extends the services of legal representation to needed groups,

¹⁴⁰Legal Aid Department, 2015. *Legal Aid Eligibility Means Test*, [online] LAD. Available from: http://www.jbg.gov.my/index.php?option=com_wrapper&view=wrapper&Itemid=295&lang=en [Accessed 25/6/2015].

¹⁴¹*Ibid.*

¹⁴²Leong, C. (2013). *Press Release: Yayasan Bantuan Guaman Kebangsaan Concludes Ground Breaking First Year*. [online] Malaysian Bar Council. Available from: http://www.malaysianbar.org.my/press_statements/press_release_yayasan_bantuan_guaman_kebangsaan_concludes_groundbreaking_first_year.html [Accessed on 5/7/2015]

including children.¹⁴³ In order to ensure its service is reachable, the Malaysian Bar Council has set up legal aid branches in all states in Malaysia. The centre deals with every walk-in client. The centre is responsible for assessing the eligibility of a person to get free legal representation from the Bar Council. In the event a person passes the eligibility test, the centre will make an arrangement for legal representation by referring the matter to volunteer lawyers. However, the ability of the centre to offer free legal representation is limited, due to a lack of volunteering lawyers.¹⁴⁴

Based on the above discussion, it can be summarized that there is still room for improvement of the right of children to representation under Malaysian law. The fact that there is no provision that makes representation of children mandatory under the current Malaysian law indicates that it is not in compliance with international standards. This position is unsatisfactorily absurd as it irrationally imposes an unfair expectation on children to appoint counsel by themselves out of their own pocket. Due to this unsatisfactory position, representation of children during criminal trials highly depends on the financial status and willingness of their parents or guardians. In reality, the majority of accused children or child defendants in Malaysia are from the lower income group.¹⁴⁵ Though unrepresented children may alternatively seek free legal assistance from the government agencies or the Malaysian Bar Council, it is unfortunate to learn that all these bodies do not provide priority or special privilege for children. This position puts children on the same par with adults in terms of competition to get free legal assistance from these bodies. In addition, the chance to get free legal assistance from government funded bodies as well as the Malaysian Bar Council is

¹⁴³Nekoo, R. (2012). *2012/2013 National Legal Aid Committee Interim Report*, [online] Malaysian Bar Council. Available from: http://www.malaysianbar.org.my/national_legal_aid/2012/2013_national_legal_aid_committee_interim_report.html [Accessed on 20/7/2015].

¹⁴⁴Yahaya, Y. (2012). Justice Seen, Justice Done. [online] *The Malay Mail*, 3rd Feb. Available from: <http://www.themalaymailonline.com> [Accessed on 20/7/2015].

¹⁴⁵Nayagam, J., n. 80 above, p 68.

limited as these bodies also face a high volume of cases and a shortage of man power. Therefore, in the event that the parent or guardian of a child is unable or refuses to appoint counsel for them, the government should intervene and engage a lawyer for them. A special centre funded by the government should be set up to administer this matter properly and smoothly. In addition, the Malaysian Bar Council and the non-governmental organizations should also strive to increase the manpower and resources available.

5.3.4.2 Guidelines code of ethics and on qualification of counsels

Currently, there are no special guidelines relating to the representation of children under Malaysian current law. There is no specific condition or requirement imposed on legal counsels before they are regarded as being eligible to represent children. The absence of the specific requirement on this aspect may affect the quality and standard of representation offered to children. Thus, it is important for relevant government agencies or the Malaysian Bar Council to provide a specific code of ethics for legal counsels who intend to represent child clients. This is because representing children in criminal proceedings may prove very challenging to counsels, especially junior ones with less experience and expertise. Counsels who act for child clients are expected to face ethical and practical difficulties which do not usually arise when acting for adult clients. There are various issues pertaining to the representation of children that requires direction in the form of formal guidelines. For example, currently there is no clear guidelines from the Malaysian Bar Council on the capacity of children to give instructions. The question is how does one determine the child is capable of giving instructions? What is the basis for determining whether a child is capable of giving independent instruction or not? The absence of specific guidelines on this matter may cause inefficiency of representation and non-uniformity of practices from one state to another state in Malaysia. Reference to other countries such as the United States and Australia reveals

that special guideline are available on this matter. For example, the representation principles of Australia emphasize that the capacity of a child to give instruction should be based on his ability to speak and his willingness to participate rather than the child's level of maturity.¹⁴⁶

Apart from that, there is also a need to provide guidelines on the eligibility of counsels to act for children. The Malaysian Bar Council should set certain standards for its members before they are eligible to represent children. For example, any counsel should be required to attend specialized trainings courses and seminars relating to representation of children. This is to ensure that these counsels adopt a proper method and approach in liaising with children, taking into consideration their inherent differences with adults. There is an urgent need to have a special guideline on the standards and ethics of child representation. In order to formulate comprehensive guidelines on this matter, it is worth to refer to the practice of other countries. The lack of adequate guidelines and specific standards may deter lawyers from offering competent representation to children.

To sum up, there are various issues relating to the representation of children in criminal proceedings under current Malaysian laws. These issues point out that it is insufficient to merely state the right of children to be represented in the statute without providing a proper mechanism on how this right can be exercised and upheld. Therefore, it is crucial for the government re-evaluate current laws on this matter and formulate comprehensive provisions on child representation.

¹⁴⁶Walsh, T. and Douglas, H. (2011). Lawyers, Advocacy and Child Protection. *Melbourne University Law Review*, 35(2), p 30.

5.3.5 Right to be Tried Promptly Before Competent Courts

The Malaysian juvenile justice system also encounters delays in disposing cases involving children in conflict with the law. Delay in disposal of cases may be detrimental to the children, especially to those detained in detention centres or prisons pending trial of cases. Statistics reveal that approximately 10% of children with cases pending for trial before the Court in 2009 were held in detention.¹⁴⁷ The figure further elaborates that 80% of children held in detention centre were on pre-trial stage.¹⁴⁸ Out of that figure, 51% were detained for less than six months, 11% for between six and twelve months and 7% for between twelve and twenty four months.¹⁴⁹ The research also revealed that three children had been detained for more than three years due to a delay in the disposal of cases.¹⁵⁰ These statistics suggest that the number of children under pre-trial detention in Malaysia is alarming. The fact that many been detained for more than six months pending disposal shows that international standards have not been met, which set a six-month time frame for disposal. In fact, the Committee on the CRC in its concluding observations has specifically expressed its concern over the issue of long pre-trial detention of children and delay in dealing with cases involving children in Malaysia.¹⁵¹

Obviously, the issue of delay in the disposal of juvenile cases in Malaysia, especially cases that involve pre-trial child detainees, requires special attention. It is crucial to stipulate specific provisions under the law which require that cases involving children under pre-trial detention should be given the highest priority and disposed of within a specific time period.

¹⁴⁷UNICEF, n. 10 above, p 44.

¹⁴⁸*Ibid*, p 44.

¹⁴⁹*Ibid*, p 46.

¹⁵⁰*Ibid*, p 46.

¹⁵¹Committee on the CRC, *Concluding Observations: Malaysia*.UN Doc. CRC/C/MYS/CO/1, 25 June 2007, para. 103.

In addition, more detailed conditions should be imposed by the law before allowing children to be detained pending trial of their cases. In line with the requirement of international standards which stress that detention of children should be a measure of last resort, the law should adopt an approach which favours the release of children pending trial of their cases.

5.4 Conclusion

This chapter examines both pre-trial and trial rights of children in criminal proceedings under current Malaysian juvenile justice system. It critically analyses the adequacy of Malaysian laws on this subject with reference to relevant provisions of statutes, decided cases, and contemporary Malaysian legal practice. The examination discloses that current Malaysian laws fail to afford comprehensive recognition and protection on rights of children in conflict with the law in criminal proceedings. The Child Act 2001, the main governing statute for juvenile justice in Malaysia, does not contain comprehensive provisions and guidelines on the rights of children at various stages of criminal process. Consequently, reference on certain aspects of criminal process need to be made to the CPC, which is the general statute on criminal procedure. The discussion in this chapter specifically points out various instances of criminal proceedings in which the provisions of the CPC, which are normally applicable to adults, are equally applicable to children. The application of provisions of the CPC in governing juvenile matters is strongly uncalled for as it is neither designed to meet the need or interests of children nor the aim of juvenile justice. Similarly, in terms of rights of children to be heard, reference to the Evidence Act 1950 and the Evidence of Child Witness Act 2007 reveals vagueness and lack of provisions on both substantive and procedural aspects of law on this aspect.

In addition, this chapter also highlights various relevant issues pertaining to rights of children in conflict with the law under current Malaysian juvenile justice. It critically examines the issues of lack of jurisdiction of the Court for Children, incompetency of judges, inadequate facilities, shortage of experts, absence of mandatory legal aid, lack of policy and guidelines and others.

To sum up, this chapter discloses that the current legal framework on rights of children in conflict with the law in criminal proceedings under Malaysian juvenile justice is far from satisfactory. This aspect requires immediate attention as it does not only fail to adequately give due recognition and protection to the rights of children in conflict with the law but also put their future at stake. It is submitted that it is high time for the Government of Malaysia to reform current Malaysian juvenile justice on this aspect by using the international standards set by the international instruments, particularly the CRC. The next chapter will comparatively analyse to what extent the current Malaysian juvenile justice system complies with the CRC's standards on the rights of children in criminal proceedings.

SIXTH CHAPTER

COMPATIBILITY OF MALAYSIAN JUVENILE JUSTICE SYSTEM WITH THE CRC'S STANDARDS ON RIGHTS OF CHILDREN IN CRIMINAL PROCEEDINGS; COMPARATIVE ANALYSIS AND CONCLUSION

6.1 Introduction

This final chapter consolidates the constituent elements from the past chapters and seeks to link it to the main purpose of this research, which is to comparatively analyse to what extent current Malaysian law on the rights of children in criminal proceedings is compatible with the CRC's standards. Using the CRC's standards as a benchmark, this chapter critically examines various aspects of Malaysian law on criminal proceedings with reference to relevant legislations, decided cases and current legal practice. The discussion also takes into consideration the provisions of the recent amendment to the Child Act 2001, which was gazetted on 25th July 2016.¹ By virtue of the amendment, the Act is now titled as the Child Act (Amendment) 2016. The bill of the Child Act (Amendment) 2016 was tabled for first reading in the Malaysian House of Representatives on 2nd December 2015.² It was debated and passed during the parliamentary session on 6th April 2016.³ The Bill was sent to

¹Attorney General Chamber's of Malaysia, 2016. Federal Gazette. [online] AGC. Available from: <http://www.federalgazette.agc.gov.my/> [Accessed on 30/7/2016].

²Malaysia, House of Representatives, *Debates*, 2015, Vol. 61, pp. 1-2.

³ Malaysia, House of Representatives, *Debates*, 2016, Vol. 19, p 81.

the Senate for debate. It was passed by the Senate on 4th May 2016.⁴ The Child Act (Amendment) 2016 was officially gazetted on 25th July 2016 after receiving royal assent. However, the Act is only expected to come into force next year.⁵ Delay in implementation of the amendment is necessary to enable relevant parties such as judges, lawyers, probation officers and relevant agencies to understand the nature and effects of the amendment. Apart from that, the delay is also necessary to give relevant parties ample time to make appropriate arrangements pertaining to establishment of adequate facilities, recruitment of staffs, management of financial resources and others. These arrangements are important to ensure that the amendment could be smoothly implemented when it comes into force soon.

In addition, this chapter also seeks to figure out the shortcomings and loopholes of the predominant existing structure of the Malaysian juvenile justice system. Accordingly, it attempts to propose several reform initiatives. The ultimate aim of these is to ensure that the rights of children enshrined by the CRC are guaranteed and safeguarded at every stage of criminal proceedings. The discussion under this chapter will be divided into the following sub- topics;

- i. Age of criminal responsibility
- ii. Court for Children
- iii. Separate procedure
- iv. Detention
- v. Representation of children
- vi. Alternative measures in dealing with children in conflict with the law

⁴ Malaysia, House of Senate, *Debates*, 2016, Vol. 11, p 41.

⁵Bernama (2016). Child Act (Amendment) 2016 Gazetted. [online] New Strait Times, 26th July. Available from: <http://www.nst.com.my> [Accessed on 29/7/2016], Bernama (2016). Implement Amendment to Children Act in Sept 2016-Ministry. [online] Malaysian Digest, 17th April. Available from: <http://www.malaysiandigest.com> [Accessed on 2/8/2016].

- vii. The establishment of a specialized body to monitor the implementation of the CRC

6.2 Age of Criminal Responsibility

Determining an appropriate age for child criminal responsibility is an essential aspect of juvenile justice. It is not merely a process of selecting, fixing and applying an age limit for criminal responsibility of children. Instead, it is an exercise in drawing the line on the competency of children to be subjected to criminal responsibility. This process is regarded as a central principle of any juvenile justice system as it represents how a society and its system view the status of childhood. It also reflects the characteristics, both progressive and repressive, of each juvenile justice system.⁶ Therefore, it is important to analyse the current framework of the Malaysian juvenile justice system on the age of criminal responsibility in light of the CRC's standards.

6.2.1 Minimum Age of Criminal Liability

The CRC has laid down a specific legal requirement on the minimum age of criminal responsibility of children. It covers the minimum age of criminal responsibility of children as well as principles that govern this matter. With regard to the minimum age of the criminal responsibility, Article 40(3) of the CRC expressly requires each state party to fix age of criminal responsibility for children. Unfortunately, the CRC does not state a minimum age of criminal responsibility and leaves it to the discretion of each state party. However, the

⁶Jaime, F. (2010). The Significance of the Age of Criminal Responsibility within the Irish Youth Justice System. *Galway Student Law Review*, 4, p 22.

Committee on the CRC has consistently reiterated that the age of criminal responsibility should not be fixed below the age of twelve.⁷

As a matter of comparison, analysis on Malaysian laws on this matter indicates that they have not measured up with the requirements of the CRC. Governing principles relating to child criminal responsibility under Malaysian laws are provided under Section 82 and 83 of the Penal Code. Briefly, it can be summarized as follows;

- a- Children below the age of ten are completely exonerated from criminal responsibility.
- b- Criminal liability of children between the age bracket of ten and twelve is governed by the principle of rebuttable presumption of *doli incapax*. Based on this presumption, children under this category can be subjected to criminal liability unless they can prove that they are not capable of understanding the nature and consequences of their action at the time of the commission of the crime. The burden of proof is on the children.
- c- Children above the age of twelve can be completely subjected to criminal responsibility.

Based on the above principles, it can be concluded that current minimum age of criminal responsibility in Malaysia is ten years old. This minimum age of criminal responsibility is apparently low and incompatible with the standard set by the CRC. In fact, the Committee of the CRC, in its concluding observation, expressed concern over the low age of criminal

⁷Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 Apr 2007, para. 32.

responsibility under the Malaysian criminal justice system.⁸ The Committee recommended Malaysia to raise the minimum age of criminal responsibility to at least twelve or higher.⁹

In view of that, it is proposed that current minimum age of criminal liability under Malaysian law be re-examined and reformed accordingly. A new threshold for the age of criminal liability must not only take into consideration international standards and practices but also other factors such as recent findings of psychologists and scientists on the physical, mental and psychological development of children. Due attention must be given to finding studies on the true nature, characteristics, personality, maturity and vulnerability of children. In addition, related factors such as socio-politics, culture, religion and history should also be taken into consideration. Appreciation of all these factors may help determine fair and appropriate laws, policies and practices on the criminal liability of children.

6.2.1.2 Possible options of reform

As far as this issue is concerned, there are five possible reform options that can be considered as follows:

- a- To determine the minimum age of criminal responsibility based on the concept of immunity from prosecution and completely abolish the doctrine of doli incapax.*

The first option available is to determine the minimum age of criminal responsibility based on the concept of immunity from prosecution. Under this option, a new specific minimum age of criminal responsibility higher than current law should be chosen as

⁸Committee on the Rights of the Child, *Concluding Observations: Malaysia*, UN Doc. CRC/C/MYS/CO/1, 25 June 2007, para. 103.

⁹*Ibid*, para. 104(a).

minimum age of criminal responsibility. Consequently, any child below the fixed age of immunity from prosecution should be automatically exonerated from criminal responsibility. The adoption of this option also abolishes the doctrine of *doli incapax*.

b- To retain the existing minimum age of criminal responsibility as well as the doctrine of doli incapax.

The second option to retain the existing law which currently set the age of ten years old as the minimum age of criminal responsibility. Adoption of this option means the continued practice of *doli incapax* in governing the law relating to the minimum age of criminal responsibility. If this option is adopted, there is a need to re-examine the doctrine of *doli incapax* so that all issues pertaining to its concept, procedure and practice can be properly addressed. However, this option is not preferable as it is contrary to the requirement of the CRC which consistently stresses that the age of criminal responsibility should be set to at least at the age of twelve or higher.

c- Raise the minimum age of criminal responsibility and abolish the rebuttable presumption of doli incapax.

The third option available is to raise the minimum age of criminal responsibility under existing Malaysian law to a higher age such as twelve or above. In the meantime, the application of the rebuttable presumption of *doli incapax* should be abolished. It means the any child above the age of minimum criminal responsibility would be automatically subjected to criminal liability and treated in accordance to specific criminal processes.

d- Raise the minimum age of criminal responsibility and create a rebuttable presumption of doli incapax for persons between the revised age and eighteen years. The burden of rebutting the presumption continues to rest with the defence.

The fourth option available is to raise the current minimum age of criminal responsibility to a higher age than ten. In the meantime, the application of rebuttable presumption of *doli incapax* would be used to determine criminal liability of children between the newly proposed minimum age of criminal responsibility and the age of eighteen years old. In addition, similar to the position of existing Malaysian law, the burden of rebutting the presumption that a child does not possess a required level of intelligence and cannot be subjected to criminal responsibility would be placed on the defence.

e- Raise the minimum age of criminal responsibility and retain the rebuttable presumption of doli incapax for persons between the newly proposed age and eighteen years. The burden of rebutting the presumption continues to rest with the prosecution.

The fifth alternative option that could be possibly chosen is to raise the minimum age of criminal responsibility from ten to a higher age and retain the rebuttable presumption of *doli incapax* for persons between the newly adopted age and eighteen years. This option is similar to the fourth option mentioned above, except the burden of proof here is shifted to the prosecution.

The above-mentioned options are among the options available in order to reform current law relating to minimum age of criminal responsibility under Malaysian laws. Each of the options has its own strengths and weaknesses. As highlighted above, the point of clash between these approaches is either to totally introduce a new approach (option (a)) or to maintain the current approach but focus on its improvement (option (b)-(e)). Out of these five options, it is submitted that the first option, namely determining a minimum age of criminal responsibility based on the concept of immunity from prosecution and completely abolishing the doctrine of *doli incapax* is the best option for Malaysian juvenile justice system. This is based on the following grounds;

a- Requirement of the CRC

The committees on the CRC have consistently asked state parties to fix the minimum age of criminal responsibility to at least twelve or an age higher than that. In view of that, it is pertinent for the Malaysian legislature to pay due attention to the remarks made by the committee of the CRC which has expressed concern over the low age of criminal responsibility under the Malaysian criminal justice system.¹⁰

b- Practice of various legal systems

The practice of various legal systems across the world also serves as a reliable ground to re-evaluate Malaysian law on the child's criminal responsibility. The record reveals that majority of legal systems adopt the age of twelve and above as the age of criminal responsibility.¹¹ The fact that the majority of legal systems choose the age of twelve and

¹⁰CRC Committee, *Concluding Observations: Malaysia* (UN Doc. CRC/C/MYS/CO/1 25 June 2007), para 103.

¹¹Parkes, A. (2013). *Children and International Human Rights Law: The Right of the Child to be Heard*. New York: Routledge, p 152.

above as the minimum age of criminal responsibility should serve as a solid ground to trigger the Malaysian legislature to re-evaluate its current minimum age of criminal responsibility of children.

c- Scientific, psychological and sociological findings on development of children

Research done by scientists, psychologists and sociologists do not support the appropriateness of the imposition of criminal responsibility on children as young as ten years old.¹² These theories and findings strongly indicate that children of a young age do not possess the experience and emotional maturity to control their impulses and to understand the nature and consequences of their actions. Therefore, it is unreasonable, inappropriate and unsafe to impose criminal responsibility to children of such a young age.

6.2.2 Applicability of MACR to All Offences

The Committee on the CRC has outlined that principles relating to the age of criminal responsibility of children should be made applicable to all types of offences without any exceptions or conditions. Comparatively, current Malaysian law on criminal responsibility of children is not in line with the CRC's standards as it is not absolute and subject to qualifications. Close reference implies that applicability of provision relating to minimum age of criminal liability of children provided under Section 82 of the Penal Code is subjected to limitation. This provision is not applicable to offences classified as security and emergency offences under specific statutes, such as the Essential (Security Cases) Regulation 1975, the

¹²Piaget, J.(1932). *The Moral Judgment of the Child*. London: The Free Press Publications, p 319, Kohlberg, L. (1976). Moral Stages and Moralisation: The Cognitive-Developmental Approach. In: Lickona, T., ed., *Moral Development and Behaviour: Theory, Research, and Social Issues*, New York: Holt, Rinehart and Winston, p 52 and Sowell, E.R. et al. (1999). Localising Age Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping. *NeuroImage*, 9, pp. 593–596.

Security Offences (Special Measures) Act 2012, the Prevention of Crime Act 2013, the Prevention of Terrorism Act 2015, and the Dangerous Drugs (Special Preventive Measures) Act 1985. The decision of the court in decided cases indicate that provisions in the statutes relating to emergency and national security offences shall override provisions of other statutes, including statutes relating to children.¹³ Consequently, even a child below the current minimum age criminal responsibility of ten years may be subjected to security and emergency offences. This position is in violation of the CRC's standards which states that the principles relating to the age of criminal responsibility of children should be applicable to all types of offences without any exceptions or conditions. In fact, the Committee on the CRC, in its concluding observation on Malaysia, has expressed concern over a law which clearly provides statutory exception to the applicability of the principles relating to the age of criminal responsibility of children.¹⁴ Therefore, in line with the requirement of the CRC, it is suggested that legal principles relating to the MACR under Malaysian law should not be subjected to any exception. Express provision should be inserted in the Child Act 2001 to specifically exclude children from being subjected to any offence under any statute, including under specific statutes relating to security and emergency offences such as the Security Offences (Special Measures) Act 2012, the Prevention of Terrorism Act 2015, and the Dangerous Drugs (Special Preventive Measures) Act 1985.

¹³*Superintendent of Pulau Jerejak & Anor v Wong Cheng Ho* [1979], *PP v Lim Hang Sioh* [1978] 1 MLJ 68.

¹⁴Committee on the Right of Child, *Concluding observations: Malaysia*, UN Doc. CRC/C/MYS /CO/1, 2 February 2007, paras. 102–103.

6.2.3 Legal position of Child in conflict with the law younger than MACR

The CRC urges each state party to provide a special measure in dealing with a child in conflict with the law who is below the age of MACR.¹⁵ In conjunction with that, the CRC obligates state parties to ensure the establishment of laws, procedures, authorities and institutions specifically applicable to the child below the MACR who is in conflict with the law.¹⁶

There is a glaring loophole under the current Malaysian juvenile justice system in the sense that it is silent on alternative measures in dealing with children below the MACR.¹⁷ There is no authority or power of diversion given to the police, the prosecutor or the court to direct this category of children to diversion measures or programmes. Similarly, there is no any specific programme designed to deal with these children. While there is a general provision under the Child Act 2001 which allows the court to make an order for a temporary custody of children in need of care and protection, there is ambiguity on whether this provision is applicable to children below ten years old. This is because there are other provisions under the Child Act 2001 which exclude the application of its provision on children below ten years. For example, Sections 62 and 66 of the Child Act 2001 respectively prevent children below the age of ten being sent to the probation hostel or the approved school. In practice, children will be discharged unconditionally without having to face any alternative measure.¹⁸ While it is admittedly inappropriate to impose criminal liability on children below the MACR who are involved in criminal activities, releasing them unattended

¹⁵Committee on the Right of Child, *Concluding Observations: Jordan*, U.N. Doc. CRC/C/15/Add.21, 25 April 1994, para. 16, Committee on the Right of Child, *Concluding Observations: Chile*, U.N. Doc. CRC/C/CHL/CO/3, 2 February 2007.

¹⁶Article 40(3) of the CRC.

¹⁷Mustaffa, A. (2016). Diversion Under Malaysian Juvenile Justice System: A Case of Too Little Too Late?. *Asian Journal of Criminology*, 11(2), p 145.

¹⁸Abdul Rahim, A.(2012). *Jenayah Kanak-Kanak dan Undang-Undang Malaysia*. Kuala Lumpur: Dewan Bahasa dan Pustaka, p 88.

would send a wrong signal.¹⁹ Therefore, it is recommended that these children as well as their parents or guardians are assigned to undergo certain educative programmes in the form of counselling, talks and others. However, it should be stressed that assignment of these educative programmes are solely meant for the benefit of children under the age of criminal responsibility as well as their parents or guardians and should never be equated with the sanctions designed for the criminal offenders.

6.3 Court for Children

The CRC provides that any child charged for any criminal offence is entitled to have the matter determined by a competent, independent and impartial or judicial body.²⁰ This provision indicates that the CRC does not make it mandatory or essential that children must be dealt with by a judicial body. Instead, it recognizes children in conflict with the law to be dealt before a competent, impartial and independent body, which is non-judicial, as long as it complies with the procedures and safeguards enshrined in the CRC itself.²¹ Article 40 specifies that state parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.

With regard to the Malaysian juvenile justice system, the Child Act 2001 specifically provides for the establishment of a separate court known as the Court for Children to deal with children in conflict with the law. On the one hand, the establishment of the Court for Children is laudable as it shows commitment of the Malaysian Government to be in line with

¹⁹Mustaffa, A., n. 17 above, p 145.

²⁰ Art. 40 (2)(iii) of the CRC.

²¹Bueren, G.V. (1995). *The International Law on the Rights of the Child*. London: Martinus Nijhoff Publishers, pp. 180-185

international standards. However, deeper scrutiny reveals that Malaysian law merely confers the Court for Children with a limited jurisdiction. There are certain limitations and conditions imposed on the power on function and jurisdiction of the Court for Children which consequently restricts its effectiveness and efficiency. The jurisdiction of the Court for Children is provided by the Child Act 2001. Currently, the Child Act 2001 provides that the Court for Children shall have the power to try all criminal cases except those punishable with death.²² It means that the jurisdiction of the Court for Children is equal to the Session Courts. However, as highlighted in chapter five, there are several limitations and exceptions which exclude trial jurisdiction of the Court for Children. Briefly, these limitations and exceptions are as follows;

- i- Offences which are punishable with capital sentence.
- ii- Offences where children are jointly tried with adults.
- iii- Offences where formal charges are brought against children after they reach the age of eighteen years though the commission of offences occurs while they are still below the age of eighteen years.
- iv- Offences classified as security and emergency offences under special statutes, such as the Essential (Security Cases) Regulations 1975, the Security Offences (Special measures) Act 2012, the prevention of Crime Act (Amendment and Extension) 2013 and the Prevention of Terrorism Act 2015.

In all the above-mentioned cases, children shall not be heard or tried before the Court for Children. Instead, they will be transferred to adult courts. It is submitted that the current law and practice under the Malaysian juvenile justice system which restricts the jurisdiction of the

²²Section 11(5) of the Child Act 2001.

Court for Children and permits children to be transferred to adult courts is inappropriate. The basis for this argument can be briefly summarized as follows;

- a- This practice is contrary to the requirement of a separate system for children as per the CRC.²³ Allowing children to be transferred to an adult court in certain cases explicitly breaches the requirement for a separate system as it permits children to be tried and treated in the same manner with their adult counterparts.
- b- Transfer of children to adult courts implicitly amounts to discrimination and double standards as they are denied the same treatment and advantages afforded to other children who are tried before the Court for Children. For example, children who are tried in adult courts are not automatically entitled the procedural advantages applicable to proceeding before the Court for Children, such as informality of proceedings, restriction on the disclosure of identity, the benefit of closed proceedings, requirement on attendance of court advisors and parents. Adult criminal courts are not designed to address children's special need. In addition, children who are tried before adult courts are also deprived from the benefit of special modes of punishments exclusively provided for children tried in the Court for Children. These modes of punishments, which are specially designed to suit the needs, interests and welfare of child offenders, are not available to children tried who stand before adult courts.
- c- The current law which restricts the jurisdiction of the Court for Children based on the nature, type and gravity of the offences is inappropriate as it noticeably fails to give adequate consideration to the physical, mental and psychological development and maturity of children. Children are fundamentally different from adults and deserve differential treatment in the justice system. The recent development of science and technology has enabled experts to closely analyse the development of children from

²³Article 40 (3) of the CRC.

different aspects. Advancement in technology has proven that children are not merely smaller version of adults. Instead there are fundamental differences between children and adults, which therefore warrant fundamentally different systems of justice. The finding of researchers and experts clearly indicate that a child's physical, mental and psychological aspects are not fully developed to be given due consideration like those of an adult.²⁴ These findings strongly point out that even when children commit the most serious crimes, they are not capable of fully comprehending the effects and ramifications of their actions, nor are they culpable for the crime in the sense that adults would be. Due to their lack of development and maturity, children should not be legally treated in the same manner as adults. Rather, children must be governed by a different justice system with different sets of legal principles which are specifically designed for them.

In view of that, it is proposed that jurisdiction of the Court for Children under Malaysian juvenile justice system should be revised. Amendment should be made to the existing court system by setting up a completely separate system for children comprising different level of judges. The establishment of this comprehensive system of Court for Children confers exclusive jurisdiction to the Court for Children to try all cases involving children, regardless the nature, type or gravity of the offences. This amendment would ensure that all cases relating to children be tried before the Court for Children. It would also put an end to the current practice which allows children to be transferred to adult courts for certain particular offences.

²⁴ Aronson, J.D. (2009). Neuroscience and Child Justice. *Akron Law Review*, 42, p 925, Blakemore S-J and Choudhury S. (2006). Development of the Adolescent Brain: Implications for Executive Function and Social Cognition. *Journal of Child Psychology and Psychiatry*, 47(3), pp. 302-308, Delmage, E. (2013). The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective. *Youth Justice*, 13(2), p 135, Cauffman, E. and Steinberg, L. (2000). Immaturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults. *Behavioral Sciences and the Law*, 18, pp. 756-757, Elliott, C.(2011). Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice. *Journal of Criminal Law*, 75(4), p 289.

6.3.1 Lack of Experienced Judges

Lack of experience and knowledge among magistrates who preside over the Court for Children are also identified as another reason that contributes to the lack of its efficiency and effectiveness. The Child Act 2001 provides that the Court for Children shall be presided by the magistrates.²⁵ The magistrates are the lowest ranked court judicial officers. It is a common practice in the Malaysian legal service to appoint fresh graduates to serve as magistrates at various courts.²⁶ As the Child Act 2001 specifically provides that magistrates are responsible to preside over the court for children in all states, cases involving children are automatically handled by them. There is a question on competency, credibility and capability of young magistrates to handle particularly serious cases involving children due to the fact that they lack legal knowledge, experience and expertise. It needs to be highlighted that original criminal jurisdiction of magistrates is confined to cases that are punishable with imprisonment for not more than ten years and fines.²⁷ In terms of sentencing jurisdiction, the magistrates may pass the sentence of imprisonment not exceeding five years, a fine not exceeding RM10,000, whipping up to twelve strokes or any sentence combining the aforementioned. It means that the jurisdiction of magistrates is limited to less serious crimes.²⁸ Any offence punishable by more than that shall be triable before either the Session Courts or the High Courts. Currently, the Child Act 2001 provides that any magistrate who presides over the Court for Children is responsible for handling various types of cases, including serious criminal cases. The Act confers the Court for Children to try all criminal offences except offences punishable by death, which is equivalent to jurisdiction of the

²⁵Section 11(2) of the Child Act 2001.

²⁶Kamarudin, A.R. (2009). Inquiry of Deaths Under the Malaysian Criminal Procedure Code. *Malayan Law Journal*,6, p lxviii.

²⁷Section 85 of the Subordinate Court Act 1948.

²⁸Section 87 of the Subordinate Court Act 1948.

Session Courts.²⁹ Obviously, magistrates lack experience and knowledge to deal with these types of cases, which are normally handled by either the Session Court or High Court judges. For example, the case of rape,³⁰ gang robbery,³¹ and possession of firearms³² committed by adults shall be triable before the Session Courts as they are punishable by more than five years imprisonment. However, if children are charged with rape, gang robbery or possession of firearms, they will be tried in the Court for Children which are presided over by the magistrates. The issue arose as to the competency, credibility and capability of magistrates to handle these serious cases which are normally triable by the Session Courts. Obviously, they lack experience, knowledge and expertise.

Apart from that, allowing magistrates to handle serious cases committed by children further leads to the issue of differential treatment and standards applied between children and adults. While adults who commit serious offences are tried before Session Court judges, children who commit offences of the same nature and gravity are tried before magistrates who are junior, with less experience as judicial officers. This practice gives the impression that serious crime cases involving children are taken lightly and considered less important than cases involving adults. It can be implicitly regarded as double standard practice and is discriminatory in nature as the cases involving children are given less attention though their liberty, interest and future are at stake.

In view of that, it is proposed that the appointment of judges who preside over the Court for Children should be reviewed. Appointment of magistrates to preside over the Court

²⁹Section 11(5) of the Child Act 2001.

³⁰Section 376 of the Penal Code provides that whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

³¹Section 395 provides whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

³²Section 8 of the Firearms (Increased Penalties) Act 1971 provides that any person who is in unlawful possession of a firearm shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six strokes.

for Children is inappropriate as they lack the knowledge, expertise and experience needed in handling serious crimes. Therefore, specific requirements and qualifications must be expressly imposed for the appointment of the judges for the Court for Children. In line with its trial jurisdiction, it is suggested the judges for the Court for Children must be appointed among senior and experienced judges, at least with the rank of Session Court judges or legal practitioners with not less than ten years legal experience, who possess vast legal knowledge and expertise.

6.3.2 Facilities

Adequacy of facilities is another area that requires attention in order to upgrade the efficiency and effectiveness of the Court for Children. The Child Act 2001 specifically provides a provision for the introduction and the establishment of the Court for Children. The establishment of the special Court for Children aims for a separate criminal justice system for children and adults, in the sense any criminal proceedings that involves children shall exclusively be held in the Court for Children. This means that not only the application of special rules and procedures for the Court for Children but also the establishment of special court rooms equipped with relevant facilities to facilitate the criminal justice processes. Unfortunately, the record shows that only the Kuala Lumpur Court Complex in Federal Territory has set up exclusive and well equipped court rooms consigned as the Court for Children.³³ The rest still hold sitting of the Court for Children in normal court rooms. The same court rooms are used interchangeably for adults and children by holding each sitting in different sessions or days.³⁴

³³Nayagam, J. (2012). Strengths and Weaknesses of the Protection Mechanism and Support System for Reintegration of Children in Conflict with the Law. *Malaysian Journal on Human Right*, 6, p 71.

³⁴UNICEF, (2013). *The Malaysian Juvenile justice system: A Study of Mechanisms for Handling Children in Conflict with the Law*. Kuala Lumpur. p 64.

While the use of sharing court rooms does not pose any issue on legality of proceedings, it raises issues over the efficiency and smooth running of the court process. Sharing of court rooms resulted with limited time is allocated for the sitting session of the Court for Children. This in turn has affected the efficiency of the Court for Children speedily dispose of cases.³⁵ Apart from that, the sharing of court rooms is also criticized on the grounds of absence of special design and court setting for children. These shared court rooms lack the necessary equipment and child-friendly facilities, such as a special court setting, waiting rooms for children, exclusive entry and exit points, and the technology to facilitate process of giving evidence such as live link and video conference facilities. Therefore, the practice of sharing court rooms is not favourable as it is not in true spirit of establishment of the Court for Children.

The shortage in Courts for Children in all states indicates a failure on part of the Malaysian Government to give full commitment towards the implementation of the requirements of the Child Act 2001 which was passed almost sixteen years ago. It also implies that the Government of Malaysia was not prepared to implement the CRC's requirements since 1995. In view of that, more serious commitment and progressive effort are expected from the Government of Malaysia, especially towards improving and upgrading the infrastructure and facilities of the Court for Children. It is hoped that the Government of Malaysia will allocate and channel more funds to enable more courts with adequate facilities and equipment to be strategically set up in all states.

³⁵Dusuki, F.N. (2009). The UN Convention on the Rights of the Child and The Administration of Juvenile Justice: An Examination of the Legal Framework in Malaysia. *Asia Law Quarterly*, 1, p 141.

6.4 Separate Procedure

Article 40 (3) of the CRC also demands the establishment of separate laws and procedures specifically applicable to children charged with criminal cases in order to cater to their specific needs. This provision obligates state parties to formulate special rules and procedures at criminal proceedings. As far as this requirement is concerned, it is the weakest part of the Malaysian juvenile justice system. Close examination of relevant Malaysian laws, especially the Child Act 2001, reveals that they fail to provide comprehensive separate procedure governing criminal proceedings of children at the pre-trial, trial and post-trial stages. The provisions of the Child Act 2001 on procedural aspects are too general and ambiguous. As a result, reference needs to be made to the CPC, which is the general statute governing criminal procedure that is designed to be made applicable to adults. In addition, procedural law provided under the CPC is also too formal, rigid, not child-friendly and inappropriate for children. Among the aspects that need to be specifically given attention are as follows:

6.4.1 Arrest

As far as the CRC's provisions on the arrest of children is concerned, there is a lack of clarity particularly on the procedural aspect. The CRC does not specifically provide a specific guideline detailing circumstances under which children should be arrested, the method of arrest, handling of children during the period of arrest and detention, special requirements on officer responsible in conducting arrest and others. In practice, the decision to arrest or detain children under custody is not a mechanical process but involves complicated consideration. The decision is regarded primarily to be a police decision. In dealing with children suspected of committing crimes, the police have to determine the next

appropriate response by taking into consideration the nature and seriousness of the suspected criminal action, circumstances in which it is committed, and the age of the child suspect. The question is should it be solely a police decision to take into custody a child who is in danger of leading a dissolute life when broad jurisdictional power is invoked? The broad discretionary jurisdiction given to the police may open up the possibility of hazardous abuse if left unchecked. Therefore, there is a need to have exhaustive legislation particularly on the procedure to take children into custody.

In addition, there is no specific provision under the CRC specifically mentioned on their right to be informed of the grounds of arrest. Instead, the CRC merely mentions about the right of children to be informed of the charge against them and is silent on the right to be informed of the grounds of arrest. Failure of the CRC to explicitly make a clear reference on the information right of children upon arrest has attracted criticism from scholars.³⁶ So the issue here is how this right can be best explained to children? In what manner should it be explained to them? Who is most qualified to explain it to children? It is insufficient for the CRC to merely guarantee the right of children to be informed of the grounds of arrest in general without providing specific procedure on how it can be effectively communicated to them. Most children, due to their immaturity, may face difficulties in understanding the ground as well as the nature and cause of their arrest. While even adults may find it difficult to understand the ground of arrest, it is more so for children, especially if the ground is explained using legal and technical terms. Without duly understanding the grounds of arrest, children cannot be expected to exercise their legal rights, such as the right to remain silent or the right to engage legal counsel. Therefore, it is important for the CRC to clearly set out specific guidelines on principles as well as procedures relating to the right of children to be

³⁶Schabas, W. and Sax, H. (2006). Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty. In: Alen, A. et al., eds., *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff Publishers, pp. 39-40.

informed on the grounds of their arrest. There is a need to provide guidelines to enable children to duly understand not only all the essential legal and factual grounds relating to their arrest but also the consequences that may follow afterwards. The guidelines should also provide a comprehensive mechanism to protect the rights of children deprived of liberty from any possibility of discrimination, manipulation or abuse of power.

Obviously, the lack of specific guidelines in the CRC on certain matters relating to the arrest of children may convey a wrong signal in the sense that they simply allow the extension of the same principles applicable on adults to children without the need of necessary modification. This apparently does not coincide with the fundamental principle of the juvenile justice system which demands special treatment of children. In fact, it does not reflect the requirement of the CRC itself, particularly Article 40 of the CRC, which acknowledges the need for special treatment of children. The lack of guidelines on this matter can be explained by referring to the existing practice of juvenile justice systems, where the same standards, rules and procedures for both adults and children have been widely adopted.

As a matter of comparison, the provision of the Child Act 2001 on arrest of children is also very general. It provides that any police officer may arrest a child who he reasonably believes has committed or attempted to commit, employ or abet the commission of an offence.³⁷ Apart from imposing the duty on the police officer to inform the parent or guardian upon detention of children,³⁸ the act does not provide a provision on the procedure relating to the arrest of children. There is no mention at all on mode of arrest, the right to be informed of ground of arrest, the use of handcuffs, the right to counsel, the requirement to inform parents, guardians and others. Instead, it merely mentions that any arrested child shall be

³⁷Section 110(1) of the Child Act 2001.

³⁸Section 87 of the Child Act 2001.

dealt with as provided by the CPC.³⁹ This indicates that a similar procedure of arrest under the CPC, that is applicable to adults, shall be equally applicable to children without any modification. The application of a similar procedure that is applicable to adults in conducting arrest of children is simply inappropriate. It amounts to a total disregard of the uniqueness and fundamental difference between adults and children.

6.4.1.1 New provision of the Child Act (Amendment) 2016

It should be noted that reference to the Child Act (Amendment) 2016 highlights new procedures on the arrest of children. Briefly, Section 83(a) of the Child Act (Amendment) 2016 provides the following:

- a- Any arrested child shall not be handcuffed except if the offence if he or she is alleged to have committed is a serious offence or attempts to use unreasonable force to refuse or evade arrest.
- b- Any arrested child shall be informed of the ground of his or her arrest.
- c- The police officer shall contact the parents, guardian or relatives of the arrested child and probation officer to inform about the arrest, ground of arrest and right to legal counsel before initiating any form of interrogation or recording his or her statement.
- d- The police officer may allow the probation officer and parent or guardian of any arrested child to meet him or her at the place of detention.

The introduction of section 83(a) of the Child Act (Amendment) 2016 is much awaited as it is expected to bring improvement to the current law by introducing new procedures relating to arrest. However, section 83(a) does not contain requirements on several other aspects of the arrest, namely the duration of arrest, the mandatory right to counsel during arrest and the

³⁹Section 110(2) of the Child Act 2001.

engagement of professional service to assist arrested children in understanding their rights during the arrest.

In recognition of the children's rights under the law, it is submitted that there is a need to design special procedures relating to the arrest of children and matters relating to such action. Therefore, it is suggested that specific requirements on the procedure of children's arrest should be inserted into current Malaysian laws. It is suggested that the following provisions are expressly included in the proposed statute:

- a- The arrest and detention of children should be done in an appropriate manner. Taking into consideration their physical, mental and psychological ability, any element of force shall be avoided as much as possible in effecting the detention of children. The use of handcuffs also should be avoided as much as possible if the child submits and gives full co-operation.
- b- Depending on the nature and circumstances of cases, the police should be required to use their discretion to first issue formal notice directing children suspected of committing non-seizable⁴⁰ or minor offences to submit themselves to the police station for the purpose of arrest within a specific period. The police should only go after children if they fail to submit themselves voluntarily at any police station within the stipulated period.
- c- Every child who is arrested or detained should be immediately informed without delay by the arresting officer of the fact that he or she is under arrest. The arresting officer also should be required to inform the effect of arrest as well as his or her rights as an arrested person, including the right to remain silent, to contact and be represented by legal counsel and others. In the event that the arresting

⁴⁰Section 2(1) of the CPC defines non-seizable offence as offence in which a police officer may not ordinarily arrest without warrant. Normally, it refers to less serious criminal offence in nature punishable with imprisonment for less than three years.

officer faces any difficulty to duly inform the arrested child, the services of a child expert or any other professional should be engaged. Observation of these procedures is important to enable arrested children to duly understand their rights and rightfully decide the necessary steps in exercising their rights.

- d- In case of non-seizable offences or minor crimes, the police officer should only be allowed to detain children for the purpose of investigation for a period of fifteen hours. In the event that the investigation cannot be completed within that period, the police should either bring the children before the magistrate for the application of remand or release them on police bond. Reducing the period of detention would indirectly force the police to speed up the investigation and give priority to cases involving children.
- e- Legal representation of children under detention should be made mandatory immediately after arrest. In order to facilitate this process, the police shall be required to duly inform the parents or guardians and legal aid centres about the detention of their children. In the event the parents or guardian fails to appoint children within reasonable stipulated period of arrest, the legal aid agencies should be required to appoint legal counsel acting for children under detention.
- f- It is important to strictly ensure that children under detention are separated from adults. Though the current Child Act 2001 has already provided explicit provision on this matter, it is not strictly followed by the police. This is mainly due to the lack of sufficient facilities in certain police stations, especially in small towns. Due to insufficient lock-up rooms, children are detained in the same cell with adults.

6.4.2 Remand

Article 37 of the CRC states that children deprived of their liberty shall have the right to challenge the legality of the deprivation before a court or other competent, independent and impartial authority and to obtain a prompt decision on any such action.⁴¹ Elaborating on this matter, the Committee on the CRC recommends that every child arrested should be brought before a competent authority within twenty-four hours to determine its legality.⁴² As a matter of comparison, Malaysian law provides that the police is entitled to detain a suspect for twenty-four hours for the purpose of investigation. In the event that the investigation cannot be completed within twenty-four hours, the police must bring the suspect before the magistrate to apply for remand order. This requirement is in line with the requirement of the CRC which demand children to be brought before the Magistrate court to decide on the legality of arrest. However, the current Child Act 2001 does not provide a special procedure for remand of child suspect. As a result, the procedure for remand under the CPC which is applicable to adults is equally applicable to children.⁴³ It is submitted that the current procedure of remand under the CPC is inappropriate for children. In terms of duration, it allows the detention of a suspect up to a maximum period of seven days if the suspect is investigated for committing offences punishable with less than fourteen years imprisonment. On the other hand, a suspect who is investigated for committing offences punishable with fourteen years imprisonment may be detained for a maximum period of fourteen days. It is submitted that a long period of remand detention for the purpose of investigation is not in line with the requirement of the CRC, which emphasizes the detention of children shall be for the shortest period.

⁴¹Article 37(d).

⁴²Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Child Justice, CRC/C/GC/10, 25 Apr 2007, para. 83.

⁴³*PP v N (A Child)* [2004] 2 MLJ 299.

Apart from that, current provisions on remand in CPC does not provide mandatory requirement for the arrested children to be represented during the remand application. Therefore, children have to rely on their parents or guardians to either engage counsel for them or turn to legal aid centres for legal assistance to represent them during the remand application. The absence of specific provision on mandatory representation simply means that the hearing of the remand application may be conducted in the absence of legal counsel on behalf of the children. This is inconsistent with the requirement of Article 37 of the CRC which states that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance.⁴⁴

Lastly, the CPC does not contain any provision which permits parents and guardians to be involved directly in the remand proceedings. Current law and practice merely allows counsel to appear for children during the remand application. Parents or guardians are not allowed to be present during the hearing of remand application.

In view of that, there is a need to introduce specific procedure governing the remand under the proposed statute governing criminal procedure of children. It is suggested that the following procedural provisions relating to the remand process should be expressly inserted into current law;

- a- Representation of children during the remand application should be made mandatory.

In the event that parents or guardians are unable or refuse to appoint legal counsel, free legal aid assistance from government or private agencies should be afforded to children.

⁴⁴Article 37(d) of the CRC.

- b- Remand of children should be avoided as much as possible and allowed only in exceptional circumstances. It should only be used as a measure of last resort, as articulated by the CRC. The court must be guided by the principle of “*exceptional circumstances*” in allowing the application. With regard to its amount, it is suggested that it refers to the existence of a peculiar fact which warrants the court to allow detention, such as seriousness of the alleged offence, the existence of a previous record of conviction, the interest of the public and others. It should be left to court’s discretion to assess the existence of exceptional circumstances that warrant detention based on facts of each case. The burden should be imposed on the police to satisfy the court of the existing of exceptional circumstances which justify the application for remand. Any remand application to detain children should not be allowed unless the police can successfully satisfy the court of the existence of exceptional circumstances.
- c- The duration of remand detention for children should be restricted. Currently, the CPC provides that the duration of remand detention depends on punishment of the offence under which the case is investigated. If the offence is punishable with fourteen years imprisonment and above, the period of detention shall be not more than seven days on the first application. If the police apply for extension, the court has discretionary power to further allow further for a maximum period of seven days. For offences punishable by jail for less than fourteen years, remand can be granted for a maximum period of four days on the first application. If there is any application for extension, the court may grant an extension not more than three days.⁴⁵ This duration of remand equally is applicable to both children and adults without any distinction. It is suggested that distinction should be made between the duration of the remand detention between adults and children, taking into consideration their level of

⁴⁵Section 117(2) of the CPC.

development and maturity. The long period of remand detention for children is unfavourable as it may cause various problems to them, such as stigmatization, labelling, traumatization, deprivation of school and social life and others. In this respect, it is suggested that the duration of remand for children should not be more than seven days for offences punishable with imprisonment fourteen years and above, and four days for offences punishable less than fourteen years.

- d- Parents or guardians must be given access to children during the remand detention. In order to avoid any interference with police investigation, the specific time and length of time may be fixed for them to have contact with children. It is suggested that parents or guardians should be allowed to meet children under remand detention at least twice a day with a period of at least 45 minutes for each session.

6.4.3 Pre-Trial Detention

Pre-trial detention of children before conviction constitutes legal punishment and thus infringes the doctrine of innocent until proven guilty. The CRC has predominantly viewed the issue of pre-trial detention of children as a matter of great concern. Accordingly, it has laid down specific principles relating to this matter, which is contained in Article 37 of the Convention.

As far as this matter is concerned, the CRC emphasizes that the detention of children shall only be used as a measure of last resort and for the shortest period of time.⁴⁶ This requirement strictly demands that any sort of detention shall only be used in exceptional

⁴⁶Article 37(b) of the CRC

circumstances after careful consideration.⁴⁷ In comparison, current Malaysian laws do not provide for a specific requirement on pre-trial detention. For example, neither the Child Act 2001 nor the CPC provides a statutory limit regarding the length of time regarding the disposal of cases for children under pre-trial detention. The absence of clear and comprehensive principles has resulted with the issue of a high number of children detained at the pre-trial stage. As highlighted in chapter five, statistics showed that 80% of children held at various detention centres and prisons in Malaysia between 2006 and 2009 were at the pre-trial stage.⁴⁸ Out of that, 51% of these children were detained for less than six months, 11% were detained for between six and twelve months and 7% for between twelve and twenty-four months.⁴⁹ The research also revealed that three children had been detained for more than three years due to delay in the disposal of cases.⁵⁰

The Committee on the CRC in its concluding observations specifically expressed its concern over the issue of long pre-trial detention for children and the delay in dealing with cases involving children in Malaysia.⁵¹ Apparently, the detention of children is a matter of great concern as it deprives them of their rights to be cared for by their parents, to have a social life, to be developed personally, to obtain educational opportunities, to access health care and others. In addition, research showed that the detention of children has far reaching effects, including deprivation of social life, trauma, stigmatization and impairment of the ability to prepare their legal defences.⁵² Studies by local researchers disclosed that children under detention in Malaysia experienced extreme trauma as well as a high level of physical

⁴⁷Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 80.

⁴⁸UNICEF, n. 34 above, p 45.

⁴⁹*Ibid*, p 46.

⁵⁰*Ibid*, p 46.

⁵¹Committee on the Right of Child, Concluding *Observations: Malaysia*, UN Doc. CRC/C/MYS/CO/1, 25 June 2007, para. 103.

⁵²Mccarthy, B.R. (1987). Preventive Detention and Pretrial in the Juvenile Court Custody. *Journal of Crime and Justice*, 15, p186.

and emotional neglect.⁵³ In addition, the report by the SUHAKAM disclosed that the conditions and facilities at detention centres and prisons in Malaysia were far from satisfactory. The visit by the SUHAKAM to these prisons revealed that there is a poor level of cleanliness and no standard policy for regular health inspections. These factors have been identified as main contributing factors to persisting health problems to the detainees.⁵⁴

Rigid and strict legal principles relating to the bail of children under current Malaysian laws contribute to the high volume of pre-trial detentions. Firstly, the Child Act 2001 strictly stipulates that the bail of children must be executed by parents or guardians. Unlike adults, the Act does not permit children to be released on their own cognisance. In the event that parents or guardians are unable or refuse to furnish bail for children, they will be placed under detention. Secondly, current law also confines the method of executing the bail to cash only. This stringent requirement may cause difficulty particular to poor families who do not have access to cash. Thirdly, the Child Act 2001 permits the court to refuse to grant bail if the child is charged with murder, a grave offence or if the release would defeat the ends of justice. In addition, there are certain offences which are classified by law as unbailable offences. Any children who commits these offences will be automatically denied bail. Among the specific statutes which provides for unbailable offences are the Essential (Security Cases) Regulations 1975,⁵⁵ Firearms (Increased Penalties) Act 1971⁵⁶ and Dangerous Drug Act 1952.⁵⁷ Since the Child Act is silent on the right of children relating to unbailable offence, it means that the children charged for this type of offences will not be entitled to bail at all. All the issues relating to the principles and procedures of bail of

⁵³Ahmad, A. and Mazlan, N.H. (2014). Substance Abuse and Childhood Trauma Experiences: Comparison between Incarcerated and Non-incarcerated Youth. *Procedia - Social and Behavioral Sciences*, 113, p 169.

⁵⁴Human Rights Commission of Malaysia(SUHAKAM), 2015. *Human Rights Commission of Malaysia Annual Report 2015*. Kuala Lumpur,p 21.

⁵⁵Regulation 9 of the Essential (Security Cases) Regulations 1975.

⁵⁶Section 12 of the Firearms (Increased Penalties) Act 1971.

⁵⁷Section 41B of the Dangerous Drug Act 1952.

children have led to the escalating number of children held under pre-trial detention. Delay in the disposal of cases involving pre-trial detention of children is clearly in contrast with the requirement of the CRC. Explaining on the requirement relating to this matter, the Committee on the CRC stresses that state parties should as much as possible ensure that a child detained at the pre-trial stage can be released, and if necessary under certain conditions.⁵⁸ Pursuant to that, the Committee urges state parties to set the timeframe for the disposal of cases involving children who are placed under pre-trial detention. It recommends states parties to ensure that cases involving children under detention before they are charged should not exceed thirty days at the latest.⁵⁹ The committee for the CRC has urged state parties to introduce legal provisions requiring the competent authority to decide and dispose the case not later than six months after they have been presented.⁶⁰

With regard to the place of detention, Article 37 of the CRC requires that arrested children be detained in a separate place from adults, unless it is considered in the child's best interest not to do so.⁶¹ The Committee on the CRC further states that it is the duty of state parties to set up separate facilities with distinct child centred staff, policies and practices to accommodate the detention of children.⁶² Comparatively, the Child Act 2001 provides that children under pre-trial detention shall be detained at detention centres gazetted by the Ministry. These places of detention shall be governed by separate regulations and inspections.⁶³ In this respect, it is clear that the requirements provided under the Child Act 2001 on separation between child and adult detainees are entirely in line with the standard of

⁵⁸Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 Apr 2007, Para. 81.

⁵⁹Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 83.

⁶⁰*Ibid.*, para 83.

⁶¹Similar requirement is provided in article 10(2) of the ICCPR, Rule 85 of the Standard Minimum Rules for the Treatment of Prisoners, rule 13.4 of the Beijing Rules and rule 17 of the Havana Rules.

⁶²Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 Apr 2007, para. 85.

⁶³Section 58 and 86 of the Child Act 2001.

the CRC. However, the issue arose as to the implementation of this requirement. In practice, there are insufficient specialized places of detention to accommodate children detained at the pre-trial stage. Only 46% of children at pre-trial stage are detained at the specialized detention centres operated by the Welfare Department while the rest are detained at prisons together with adults. Though, the prisons have kept the children and adults at separate sections, they do not have qualified child-centred staff as well as policies and practices specially designed for children. The issue of lack of separate child detention centres has also been criticized by the SUHAKAM. According to the report released by this Human Right Commission, there were 1196 children that have been detained at the immigration centres as at 26th September 2014.⁶⁴ 516 out of that total number were children below the age of twelve and the rest are children aged between thirteen to eighteen years old. The report further disclosed that children have been detained together with adult detainees in the same cells at these detention centres.

Lastly, the CRC expressly emphasizes that that no child shall be deprived of his or her liberty unlawfully or arbitrarily.⁶⁵ It imposes strict conditions on deprivation of liberty in the sense that any detention of children shall not be resorted to unless it fulfils specific tests on arbitrariness and lawfulness. This requirement implies that any detention must not only be exercised in compliance with the legal provisions of law but must also be free from elements of injustice, unpredictability, unreasonableness, capriciousness and proportionality.⁶⁶ In violation of this requirement of the CRC, current Malaysian law allows any person regardless of his or her age, to be detained without trial for a specific period of time. There are a number

⁶⁴Human Rights Commission of Malaysia (SUHAKAM), (2014). *Human Rights Commission of Malaysia Annual Report 2014*, Kuala Lumpur, p 50.

⁶⁵Article 37(b) of the CRC.

⁶⁶Schabas, W. and Sax, H. (2006). Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty. In Alen, A. et al., eds., *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff Publishers, p 76.

of statutes that confer prerogative power to the relevant minister to detain any person without trial.⁶⁷ Among these statutes are the Security Offences (Special Measures) Act 2012 and the Dangerous Drug Act (Special Preventive Measures) 1985⁶⁸ and the Prevention of Crime Act 2013 (Amendment and Extension). In the case of *Chong Boon Pau v the Minister of Home Affairs & 3 Ors*,⁶⁹ the Minister of Home Affairs had made an order under Section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, ordering the respondent, who was a child, to be detained for two years. The respondent challenged the validity of the preventive detention order. The High Court held that the preventive detention order could not be issued against the respondent as he was a child. The court ruled that a child could only be detained without trial in accordance with the Child Courts Act, 1947. In reversing the decision of the High Court, the Federal Court held that the High Court judge was wrong in holding that a child can be detained without trial only under the Child Courts Act and not under the Emergency (Public Order and Prevention of Crime) Ordinance. The court further ruled that a child may be detained without trial under Section 36 of the Child Courts Act or under the Emergency (Public Order and Prevention of Crime) Ordinance according to the circumstances, and in the circumstances of this case, the respondent's detention under the Ordinance was lawful. It is submitted that the detention of children without trial violates the requirement of due process of law in criminal process relating to children as stipulated in Article 37 and 40 of the CRC. The detention without trial is

⁶⁷Article 18 of the JDL, Rule 19.1 of the Beijing Rules.

⁶⁸The tabling of this Bill has been heavily criticized by quarters of public on the ground it imitates the provisions of the abolished draconian laws of Internal Security Act (ISA). Refer to Leong, C. (2013). *Press Release: Amendments to the Prevention of Crime Act 1959 are Regressive and a Blow to the Rule of Law in Malaysia*. [online] Malaysian Bar Council. Available from: http://www.malaysianbar.org.my/press_statements/press_release_amendments_to_the_prevention_of_crime_act_1959_are_regressive_and_a_blow_to_the_rule_of_law_in_malaysia.html [Accessed on 23/6/2015], Johan, J. (2013). Welcome Back, Draconian Laws. [online] *The Star*, 7th Oct. Available from: <http://www.thestar.com.my> [Accessed on 23/6/2015] and Shakar, L.K. (2013). Proposed PCA Amendments Allow Two-Year Detention Without Trial. [online] *The Star*, 26th Sept. Available from: <http://www.thestar.com.my/> [Accessed on 27/6/2015].

⁶⁹[1980] 1 MLJ 154.

obviously inappropriate to be imposed on children as there are many other ways that can be suitably resorted to deal with them. Instead of sending a child for a long period of detention, a variety of dispositions which promote rehabilitation of child offenders such as supervision orders, probation, counselling, community services, vocational training programmes and other alternatives should be resorted to for the benefit and welfare of the child.

Based on the above discussion, there is a need to re-evaluate Malaysian law relating to pre-trial detention as it is evidently inconsistent with the requirements of the CRC. In view of that, it is suggested that the following measures are implemented to tackle this issue;

a- Special rules and procedure

There should be special rules and procedures that govern the detention of children. In terms of rules and principles, it is proposed that a special provision which provides restrictions on the detention of children must be inserted into the current law. The proposed provision should expressly stipulate that any detention of children at any stage shall be governed by the tests of arbitrariness and lawfulness. The burden is on the prosecution to convince the court on the arbitrariness and legality of the pre-trial as well as detention pending trial. In addition, it is also pertinent to provide clear principles and guidelines on relevant factors that shall be taken into consideration by the court in determining this matter. In this respect, it is proposed that any decision to detain the child must be guided by the three following factors, namely, the best interests of children, the presumption of innocence, and the gravity of the offence.

In terms of procedure, it is suggested that special hearings should be conducted by the court in determining the decision to detain any child at both the pre-trial as well as trial

stages. The purpose of the hearing is to enable the court to determine the appropriateness of the detention of children. Both the prosecution as well as the counsel for the children must be given the opportunity to produce evidence in the form of witness testimony, documents and others to enable the court to determine this matter.

b- Timeframe for disposal of cases

Currently, there is no provision under Malaysian law which provides a timeframe for the disposal of cases involving children under detention at all stages. The absence of a specific provision on the timeframe for cases involving children under detention has deprived these cases from being given priority. It is suggested that the special provision of law should be introduced to require the court to finally adjudicate the cases involving children within six months after its registration. Imposing a specific and compulsory timeframe on the disposal of child cases will force the court to expedite the criminal adjudication process, or at least put them on priority lists.

c- Abolishment of preventive detention

It is suggested that specific statutes which provide for preventive detention should be amended, if not abolished. The provision of these statutes which allow preventive detention of children without trial based on the potential of future crime is considered to be barbaric. The use of prevention detention to deter future crime is not only inimical to the interest of children but also seriously perverts the goal of institutional justice. Therefore, it is proposed that specific provisions that prevent the use of preventive detention on children should be expressly inserted to the relevant statutes.

d- Bail

It is suggested that legal principles and procedure for bail of children under current Malaysian law be re-examined. It is recommended that the following modifications be made to the current law;

i- Mechanism of execution of bail for children is modified by allowing parents or guardians who are unable to furnish bail by cash to use other options such as payment by instalment, mortgage and others.

ii- Current law which confines the right to bail children to parents and guardian should be amended by extending the same right to other people who wish to stand as bailor to them.

Discretionary power should be given to the court to allow children who commit non-serious and minor criminal offences to be released on their own cognizance pending trial.

iii- All legislations which provide for unbailable offences should be amended by inserting exceptional provisions that allow children to be released on bail pending trial.

e- Alternative measures

Current Malaysian law exclusively focuses on the formal method of adjudication in dealing with children in conflict with the law. Reference to other juvenile justice systems discloses that various informal methods have been developed in handling child delinquency. It is the effectiveness of alternative measures in reducing child crimes that has triggered many legal systems to integrate them as part of their juvenile justice systems.⁷⁰ Therefore, it is high time to reform the current Malaysian juvenile justice system by introducing informal

⁷⁰Dunkel, F. (2009). Diversion: A Meaningful and Successful Alternative to Punishment in European Juvenile Justice Systems. In: Junger-Tas, J. and Dunkel, F., eds., *Reforming Child Justice*, London, New York: Springer, p 154.

alternative measures such as diversion, alternate dispute resolution, family conference, counselling, vocational training and others in handling children in conflict with the law.

Undoubtedly, the detention of children at the pre-trial as well as trial stages can systematically cause physical, emotional and psychological harm. It is important for the Malaysian legislature to seriously initiate a review on its current legal framework on the pre-trial detention of children. A holistic legal approach, strategy and policy to keep children as much as possible away from pre-trial detention should be given priority and due consideration.

6.4.4 Interrogation

Investigation is considered to be one of the crucial stages of the criminal process. Children under detention may be subjected to interrogation in the form of questioning, recording of statement, interview and examination for the purpose of obtaining evidence or confession during the investigation process. The CRC specifically emphasizes that children shall not be compelled to testify against themselves or to confess to a crime.⁷¹ This requirement strictly prohibits any use of violence, oppression, torture, cruel, or inhuman or degrading treatment against children for the purpose of obtaining evidence or confession. The Committee on the CRC further elaborated that the term “*compel*” under Section 40(2) should not be confined to a violent mode of obtaining confession, admission or self-incriminatory evidence such as the use of physical force and threat.⁷² Instead, the term should be interpreted broadly to cover non-violence modes such as false promise, misrepresentation and undue influence.

⁷¹Article 40(2)(iv) of CRC.

⁷²Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 Apr 2007, para. 57.

The current Child Act 2001 does not provide any special procedure for the interrogation of children. In the absence of specific provisions on this matter, the general provision provided under the CPC shall be applicable to children. Close examination of the procedure for investigation and the interrogation process provided under the CPC reveals that it fails to adequately provide safeguards on the rights of children. As discussed in chapter five, the procedure of recording statements and examination provided under the CPC is inappropriate to be applied on children based on several grounds. The amendment to Sections 112 and 113 of the CPC in 2006, which abolished the requirement of administration of legal caution on the accused, has serious repercussions on children. Firstly, Sections 112 and 113 of the CPC do not touch on the fundamental right of children to remain silent during the interrogation. The section provides that any person acquainted with the facts and circumstances of the case is bound to answer all questions put to him truthfully, except any question which would have a tendency to expose him to a criminal charge or penalty or forfeiture.⁷³ It is argued that the provision has diminished the right of children to remain silent.⁷⁴ Secondly, Section 113 of the CPC permits the statements of children to be recorded without the need to caution them on their right not to give any self-incriminatory statement during investigation. The absence of this requirement to caution children on their right not to give any self-incriminatory statement has far reaching repercussions. Children may not be able to understand their right if no caution is sufficiently administered and explained to them prior to the recording of statement or examination. Allowing the police to record their statement during interrogation without the necessity to administer caution may also open the opportunity for abuse of power by the interrogators. Interrogators may take advantage on the naivety of children by applying

⁷³Section 112(2) and (3) of the CPC.

⁷⁴Farrar, S.A. (2009). The "New" Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 2006. *Asian Journal of Criminology*, 4(2), p 129, Rafique, S.T.D. (2009). Arrest & Investigation of Offences and Amendments of the Criminal Procedure Code. *Current Law Journal*, 1, p i.

rigorous techniques such as oppression, torture, or threats. In addition, though the CPC specifically prohibits any statement recorded during investigation to be tendered as the prosecution's evidence, but this statement is still considered to be an essential piece of evidence. This is because an exception to Section 113 of the CPC allows the statement during course of investigation to be tendered in court by the accused to support his or her defence.⁷⁵ Lastly, the CPC is silent on the rights of children to be accompanied by parents, guardians, probation officers or other support persons during the interrogation. Consequently, no parents, guardians, probation officers or other support persons are allowed to accompany children while they are questioned by the police.

It is clear that there is no specific procedure on interrogation process for children provided under current Malaysian laws. The absence of specific procedures for children in this aspect is detrimental to the child's rights and interests. The application of general procedure under the CPC means that a similar procedure is applicable to both children and adults. This position is unsatisfactory as the CPC's provisions on these aspects are too general and not specifically designed to cater to the needs and interests of children. These provisions are inadequate and incomprehensive to protect the rights of children. As such, it is recommended that the proposed act should provide specific provisions on the procedure for interrogating children. It is recommended that the following procedural aspects should be included in the proposed statute;

- a- Express provision should be inserted to guarantee the right of children to remain silent during the interrogation and examination.
- b- Caution must be made compulsory before any evidence or statement of children is recorded. Procedures and principles regarding the administration of caution to

⁷⁵Section 113(2) of the CPC.

children must be clearly elaborated. For example, simple words and language understandable to children should be used, and an interpreter should be engaged whenever necessary.

- c- Children should be allowed to consult legal counsel before the process of interrogation is initiated.
- d- Children should be allowed to be accompanied by parents, guardians, probation officers or other support persons during interrogation.

6.4.5 Trial

Article 40 (3) of the CRC also demands for the establishment of separate laws and procedures specifically applicable to children charged with criminal cases in order to cater their specific needs. As far as the trial proceedings of children under the Malaysian juvenile justice system is concerned, the processes are similar to the ones that are applicable to adults. The Child Act 2001 does not provide comprehensive provisions on special procedure relating to the trial of children in the Court for Children. It is proposed that the following aspects are given due consideration;

a- Adversarial vs inquisitorial

Currently, trial proceedings in Malaysia are based on the adversarial system. Under this system, the prosecutor and the counsel play a crucial role in handling the trial process. The judge merely plays a passive role and acts as a referee. The application of this adversarial system in child criminal proceedings is rigid and not child-friendly, particularly in cases where children are unrepresented. It is suggested that a specific procedure for child criminal

proceedings which is more child friendly be formulated. Special provisions should be introduced to expand and increase the power and role of the court in handling child criminal trials. Contrary to the current system which limits the power of the court to interfere in the criminal trial process, new provisions need to be introduced to empower the court to play a more active role in a criminal trial. This is to ensure that criminal processes involving children can be handled fairly and efficiently. In cases where children are unrepresented, the court should be given broader jurisdiction to interfere with the trial. The judge should be given discretionary power to pose question to the witness, summon the attendance of relevant witness before the court, and order for the production of documents. The purpose of these extended roles and discretionary power is not meant to give an unfair advantage to the children but more towards ensuring that trial proceedings run smoothly, fairly and justly.

Alternatively, it is suggested that an inquisitorial system is adopted by the court in handling child criminal trials. The inquisitorial system is more appropriate and practical in governing trial processes for children. This system gives wide powers to the court play an active role in handling the trial process. However, it is difficult to introduce the inquisitorial system into the current juvenile justice system which is traditionally based on the adversarial system. An attempt to introduce an inquisitorial system to the court for children requires not only a major amendment of law but also other related aspects such as the training of judges, lawyers as well as staff.

b- Informality of proceedings

There is no express provision on the informality of proceedings in the Child Act 2001. On the one hand, this implicitly gives magistrates the discretion to conduct the trial in an

informal way. On the other hand, the absence of express provision is negative in the sense that it fails to encourage the magistrates or the judges who handle child cases to give due consideration on the importance of the informality of proceedings. In terms of court setting, the use of the court rooms interchangeably for the sitting of adult courts and Court for Children has further caused difficulty in arranging an informal court setting. It is suggested that a clear provision on the informality of proceedings should be expressly included in the proposed statute so that its implementation will not be taken for granted by the court. The provisions must clearly elaborate various aspects of informality, covering courtroom setting, language, dress code, counsels and others.

In short, it is submitted that there is a need to have a special criminal procedure specifically designed for children in line with the establishment of the Court for Children. The purpose of establishing the special Court for Children should not be confined to the separation of a different place for trial. Instead, the setting up of the Court for Children should be combined with the formulation of a comprehensive separate procedure that is specifically designed to facilitate children participation in criminal proceedings. As highlighted above, there are various aspects of the current Malaysian juvenile justice system which merely adopts similar procedures which are applicable to adults. In view of that, it is pertinent to ensure that special criminal procedures should be specifically designed for children containing comprehensive provisions on the procedural aspect of criminal proceedings involving children at the pre-trial, trial and post-trial stages. Alternatively, the current Child Act 2001 should be significantly revised to include relevant provisions on a separate criminal procedure for children.

6.5 Right to be Heard

Article 12 of the CRC unequivocally requires state parties to provide children with the opportunity to be heard in any judicial proceedings and their views to be given due weight in accordance with the age and maturity of the child. According to the committee on the CRC, the requirement of this provision obligates state parties to unconditionally guarantee the right of children to be heard.⁷⁶ With respect to penal judicial proceedings, the Committee emphasizes that Article 12 requires the right of children alleged to have, accused of, or recognized as having, infringed the penal law to be fully observed during all stages of the judicial process, from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge.⁷⁷ Based on that, there should be no room for any form of curtailment of this right.⁷⁸

Comparatively, principles and procedures relating to the right of children to participate in trial proceedings is another area of juvenile justice which require due attention. As highlighted in chapter five, there are several issues relating to the right of children to be heard under the current Malaysian child justice system. These issues are;

a- Entitlement to procedural privileges

The Committee on the CRC demanded state parties to create the appropriate condition for supporting and encouraging children to express their views.⁷⁹ This requirement aims to

⁷⁶Committee on the CRC, General Comment No. 12, The Right of the Child to Be Heard, CRC/C/GC/12 20 July 2009, para. 19.

⁷⁷*Ibid*, para. 58.

⁷⁸Bueren, G.V. (1998). *The International Law on the Rights of the Child*, London: Martinus Nijhoff Publishers, p 137-145

⁷⁹Committee on the CRC, General Comment No. 12, The right of the child to be heard, CRC/C/GC/12 20 July 2009, para 49.

enable children to effectively participate in judicial proceedings. However, examination of current Malaysian laws on child evidence discloses that it only focuses on the position of children's evidence as a prosecution witness. There is ambiguity on the position of children as accused persons as the current law is silent on this aspect. As a result, accused children are excluded from receiving similar protection and privileges from special measures as those accorded to child witnesses for the prosecution. For example, the Evidence of Child Witness Act 2007 governs all procedural laws pertaining to the evidence given by a child in a criminal trial. The objective of the Act is mainly to provide a special procedure of giving evidence in order to ensure the child witness is able to testify comfortably without being traumatized by the complex technicalities of settings in a normal court room. In conjunction with that, the Act requires various privileges to be afforded to child witnesses to facilitate the process of giving evidence, such as a special court setting, the use of screen, the use of high tech equipment such as video recording and live-link, the examination of child witnesses through intermediary, the removal of publicity, and the removal of formal attire. Unfortunately, it is absurd to note that the Evidence of Child Witness Act 2007 is only applicable to child witnesses only. Section 2 of the Evidence of Child Witness Act 2007 defines the term "*child witness*" as any witness under sixteen who is called to give evidence but does not include the accused. This provision explicitly excludes children accused of crimes from receiving the same privileges afforded to child witnesses.⁸⁰ It is difficult to grasp the rationale behind this exclusion as it has deliberately, unreasonably and unfairly discriminated the child accused. This position is much regretted as the child accused that appears before both the Court for Children as well as adult courts are often in the most disadvantaged position and in dire need of special measures to enable them to defend themselves.

⁸⁰Mohd Alias, N.(2015). Justice for All: The Need for Proper Interpretation of Vulnerable Accused in Malaysian Criminal Trials-A Proposal for Reform. *Current Law Journal*,1, p xxv.

It is submitted that that the current law should be amended by providing specific provisions which guarantee procedural rights of child accused. The definition of the child witness in the Evidence of Child Witness Act 2007 should be amended to include all children both as witnesses and accused. This amendment is necessary in order to extend the applicability of the Evidence of Child Witness Act 2007, which provides various privileges for the child witnesses, to cover all accused child. This proposed amendment will ensure that accused child equally enjoy procedural privileges and protection which are currently afforded to child witness for prosecution.

b- Rule of competency

Section 133A of the current Evidence Act 1950 has clearly subjected child evidence to the rule of competency.⁸¹ Under the rules of competency, the court is required to hold preliminary inquiry to determine the competency of children to give evidence.⁸² Based on the inquiry, the court will decide whether the child is entitling to give sworn evidence, unsworn evidence or incompetent to give evidence at all. While it is unanimously agreed that the inquiry is mandatory⁸³, there is no provision or clear guideline on how the inquiry should be conducted.⁸⁴ Reference to decided cases indicate that trial within trial must be held to determine the competency whereas some other cases held that it was not mandatory.⁸⁵

It is proposed that Section 133A of the Evidence Act 1950 which lays down the rule of competency in determining the eligibility of children to give evidence should be amended.

⁸¹*Tajudin bin Salleh v Public Prosecutor* [2008] 1 MLJ 397, at p 412., Mustaffa, A. and Moharani, S.N.A. (2012). Isu-Isu dan Permasalahan Keterangan Kanak-Kanak di Bawah Undang-Undang di Malaysia; Satu Penilaian. *Kanun Jurnal Undang-Undang Malaysia*, 24(1), p 60.

⁸²*Sidek Bin Ludan v Public Prosecutor* [1995] 3 MLJ 178.

⁸³*Yusaini Bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582.

⁸⁴*Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798.

⁸⁵*Ibid*, 723.

This is in line with the requirement of Article 12 of the CRC which unconditionally guarantees the right of children to be heard and prohibits any curtailment of this right. The law should guarantee and recognize the right of children who are capable of giving evidence to testify before the court, regardless of their age or level of maturity. It is the duty of courts to assess on the quality, trustworthiness, weight and values of their evidence. In other words, the issue of lack of maturity or intellect capacity should not automatically deprive children from giving evidence. Instead, it should only affect the weight or quality of the evidence.

c- Requirement of corroboration

The Evidence Act 1950 stipulates a requirement of corroboration for the admissibility of evidence of the child. In case of sworn evidence of the child, corroboration is required as a rule of prudence.⁸⁶ It means that the sworn evidence can stand on its own and admissible in law. Corroboration is not mandatory but judges are encouraged to be extra cautious in admitting sworn evidence of children by reminding themselves on the danger of acting based on the uncorroborated sworn evidence. This requirement implies that though sworn evidence of children is admissible in law, its weight is not as strong as adult evidence.

In the case of unsworn evidence of children, the Evidence Act 1950 provides that corroborative evidence is mandatory. It means that the court cannot act on the unsworn evidence of the child alone unless it is corroborated by other evidence.⁸⁷ The main reason cited by the court in justifying the need for corroboration is to mitigate the possibility of concoction of stories by the child, as a child may sometimes have difficulty differentiating between fantasy and reality.⁸⁸ Though this principle is always discussed with respect to child witnesses, it is presumed that it is equally applicable to accused child since the Evidence Act

⁸⁶*Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174.

⁸⁷*Public Prosecutor v Mohd Noor Abdullah* [1992] 1 CLJ 702.

⁸⁸*Din v Public Prosecutor* [1964] MLJ 300 FC.

1950 has not drawn any distinction between child evidence both as a witness or as an accused.

It is submitted that subjecting unsworn evidence of children to the rule of corroboration is not only discriminatory in nature but may also affect the course of justice.⁸⁹ It is discriminatory in the sense that it renders the testimony of children to be unequal to the testimony of adults, as if they are simply second class human beings. More importantly, rules of corroboration may affect the course of justice as it technically prevents judges from acting on the uncorroborated evidence of children though they believe the evidence given by them. Therefore, it is suggested the requirement of mandatory corroboration on unsworn evidence of children is abolished.

d- Cross-examination

Currently, there is no provision under Malaysian law which allows cross-examination of the child accused to be recorded in advance of trial. As discussed in chapter five, the application of pre-recorded cross-examination, which has been successfully implemented in several states in Australia, is evidently effective in enhancing the quality of evidence as well as reducing the trauma on children. Therefore, it is recommended that specific provision which gives discretion to the court to allow pre-recorded cross-examination of children to be introduced into Malaysian law as it may offer a more effective way to overcome difficulties faced by them while giving evidence during the trial.

⁸⁹Mustaffa, A., Moharani, S.N.A., n. 81 above, p 62, Shair Mohamed, M.A. (2013). The Corroboration Controversy Created by Section 157 of the Evidence Act 1950. *Malayan Law Journal*, 6, p cxx.

Based on the above discussion, it can be concluded that rights of children to be heard in criminal proceedings under Malaysian law is subjected to various limitations and restrictions. Imposition of these rigid restrictions and limitations on rights of children to be heard in criminal proceedings amounts to a violation of article 12 of the CRC which guarantees the unconditional right of children to be heard in judicial proceedings. In view of that, it is timely to re-evaluate current Malaysian law on the right of children to be heard.

6.6 Representation of Children

The issue of legal representation is an important aspect juvenile justice system. As far as criminal proceedings is concerned, Article 37 of the CRC stresses that this right must be afforded to children at the earliest stage of the criminal process, that is immediately upon arrest. This is to guarantee that criminal processes against children are conducted in a just, fair and transparent manner. Article 12 of the CRC recognizes the right of children to be heard in any proceedings which affects their interest, either directly or through a representative. The term “representative” refers to the parent, lawyer, or other support person such as social worker and others.⁹⁰ There are certain aspects of current Malaysian law on the right of children to representation that do not measure up with the requirements of the CRC. These aspects are as follows;

6.6.1 Mandatory Legal Representation

Article 40(2) (b) (ii) of the CRC provides children with the right to have legal or other appropriate assistance in the preparation of their defence. It requires children to get access to

⁹⁰Committee on the CRC, General Comment No. 12, The Right of the Child to Be Heard, CRC/C/GC/12 20 July 2009, para 36.

legal representation at all stages of criminal proceedings and it should be free of charge.⁹¹ It is unfortunate to learn that current Malaysian law does not make it mandatory. The absence of provision on mandatory legal representation of children has put children charged with criminal offences in a disadvantaged position. It puts unnecessary burden on children to independently appoint the lawyer to represent them in criminal process. This is unfair as children do not have an independent source of income and fully rely on their parents or guardians. In the event that parents or guardians refuse or unable to appoint counsel for them, children might be left in a state of helplessness. Though there is an alternative option for children to apply legal assistance from the government as well as the Malaysian Bar Council's legal aid centres, there is no guarantee that their application would be granted. This is because legal aid centres conducted by both government and Bar Council are not as efficient as expected. As discussed in chapter five, the centres have been struggling to counter the problem of lack of manpower as well as resources. Bureaucratic and rigid procedures in processing and determining the eligibility of a person applying for legal aid is another main hurdle that has to be encountered by any child who intends to seek assistance from legal aid centres.

6.6.1.1 New provision of the Child Act (Amendment) 2016

Reference to the Child Act (Amendment) 2016 reveals that it proposes the introduction of a new provision relating to the right of children to representation. Section 89(a) of the Act provides that if children charged with any criminal offence are unable to appoint legal counsel to represent them, they may file an application for legal assistance. The court, upon receiving the application, shall appoint a legal counsel to represent the children. The

⁹¹Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Child Justice, CRC/C/GC/10, 25 April 2007, para. 49.

inclusion of this new provision into the Child Act (Amendment) 2016 will guarantee the right of children to get legal representation. However, there are still several issues that may arise relating to this problem. Firstly, the appointment of counsel by the court shall only be made upon request and through the filing of formal application by children. This provision implies that the appointment of counsel by court is not automatic and depends on the decision of children. Children are given the option of whether to appoint counsel or not. In other words, the court shall not appoint the counsel if the children fail or refuse to file an application for legal assistance. The question is whether it is appropriate to allow children to independently decide whether they should appoint counsel or not? Who would assist and advise children to decide whether to file an application for legal assistance or not? It is submitted that the appointment of counsel for unrepresented children should be made mandatory. The court should be given the power to automatically appoint counsel for children who are unrepresented, without the need to wait for them to file a formal application. This will avoid any unnecessary delay which may arise due to the filing and processing of a formal application. Automatic appointment of counsel by the court is not a new practice. The current CPC confers power to the court to automatically appoint counsel for unrepresented accused children charged with an offence punishable by death.

In addition, section 89(a) of the Child Act (Amendment) 2016 specifically provides power of court to order the appointment of legal representation merely exercisable after children are formally charged in court. Consequently, children at the pre-trial stage are not entitled to file an application to court for the appointment of legal counsel. In other words, they are denied the privilege which is afforded to children who have already been formally charged in court.

To tackle this problem, it is suggested that legal representation of children should be made mandatory in any criminal proceedings. The inclusion of clear and specific provisions on the mandatory representation of children will guarantee that this right is afforded to them without a room for excuses by any party.

6.6.2 Access to Legal Counsel at the Earliest Possible Moment in the Criminal Process

Article 37 of the CRC provides that any child shall have prompt access to legal assistance immediately upon arrest. In addition, the CRC also imposes a duty on state parties to provide every child with legal assistance in preparing and presenting his or her case.⁹² With regard to Malaysian law, the issue remains controversial. As discussed in chapter five, with reference to decided cases, there are divergent views on the earliest moment the right to counsel can be exercised. While some cases hold that the right of an arrested person to consult a legal practitioner of his own choice commences immediately after arrest, others viewed that it is not automatic as balance has to be struck between the right of an arrested person to consult his counsel and the right of the police to investigate the case.⁹³

In 2006, an amendment was made to the CPC which aims to improve the law on right of arrested person to legal counsel upon arrest. The newly introduced section 28(A) of the CPC explicitly articulates that an arrested person is entitled to communicate and consult the lawyer of his own choice before the questioning or recording is commenced. Unfortunately, the provision of section 28(A) of the CPC is not comprehensive to guarantee the right of children to representation. Firstly, section 28(A) merely imposes an obligation on the police to allow

⁹²Article 40(2)(b)(ii) of the CRC.

⁹³*Ramli Bin Salleh v Inspector Yahya bin Hassim* [1973] 1 MLJ 54, *Ooi Ah Phua v Officer in Charge, Criminal Investigation Kedah/Perlis* [1975]2 MLJ 198 and *Saul Hamid v PP* [1987]2 MLJ 736.

the arrested person to make an attempt to contact legal counsel. This obligation is discharged by allowing the arrested person to make an attempt to call the counsel.⁹⁴ It does not concern whether the attempt to contact the counsel is successful or not. Nor does the provision state how many attempts should be given to the arrested person to contact the counsel.

Secondly, section 28(A) merely guarantees the right of children to counsel before the questioning or recording is commenced, not immediately after the arrest. Consequently, there is a possibility that arrested children may be placed under detention for a long period before they can get access to legal counsel. This is because the process of questioning and recording of statement is not necessarily commenced immediately after the arrest. There is no provision, practice direction or guidelines which mention that the police need to immediately initiate the questioning after the arrest. Section 28 merely states that the police is entitled to detain a person for twenty hours for the purpose of investigation and is silent on when the questioning should be initiated. It is solely the discretionary power of the police.

Thirdly, the application of section 28(A) is not absolute as it is subject to exceptions. Para (8) of Section 28 provides certain exceptional circumstances in which the police may deny the right of the arrested person to legal counsel. It states that police officers do not have to comply with the requirements relating to the right to counsel if they reasonably believe that it will result in an accomplice absconding or the concealment, fabrication or destruction of evidence or intimidating witness. The scope of this exception is not further explained in detail in the provision. Due to its vagueness, it may open the room for abuse of power by the police officer. Further, the provision is also silent on the consequences that may follow in the event

⁹⁴Sidhu, B.S. (2007). Amendments to The Criminal Procedure Code: Radical or Piecemeal Legislation?. *Malayan Law Journal*, 7, p liii.

the police officer fails to exercise the discretion provided under para (8) judiciously.⁹⁵ There is also nowhere mentioned in this provision on the mechanism to monitor or evaluate whether the discretionary power vested to the Deputy Superintendent under para (8) is legally and rightfully exercised. It is regrettable that a clear provision on sanctions against violation of the requirement of this provision is not included in the CPC.

Fourthly, Section 28(A) provides for the right to get access to legal counsel before the questioning and recording is initiated. It does not provide a requirement or permission on the presence of counsel during the interrogation. In other words, there is no mandatory requirement on the presence of legal counsel during the interrogation.

In short, it can be concluded that the position of law relating to the right of children to legal counsel immediately upon arrest under current Malaysian law lacks clarity. Obviously, this is not in line with the requirement of Article 37 of the CRC which provides that any child shall have prompt access to legal assistance immediately upon arrest. The presence of counsel may make a difference in the sense that he may advise the child on his right to remain silence, the right not to give incriminatory evidence and the right to give evidence voluntarily and free from any threat, oppression and coercion. The child, due to lack of knowledge and understanding should not be left alone to find out their right and entitlement under the criminal justice system. The naivety of children may leave the child wholly in the dark of the criminal proceeding initiated against them. Without the assistance from the appropriate person, arrested children may feel physically and emotionally defenseless to face the allegation made against them. It may also open the possibility of abuse of power on part of

⁹⁵Rafique, S.T.D. n.74 above, p i.

the police during the criminal investigation process. As a result, it may eventually end up with arrested children giving up any hope to defend themselves and choose to plead guilty.

6.6.2.1 New provision of the Child Act (Amendment) 2016

The Child Act (Amendment) 2016 contains a new provision on right to representation. Section 83(A) of the the Child Act (Amendment) 2016 requires the police officer to inform the parents, guardians or relatives of the arrested children about the arrest and right of children to consult legal counsel of their own choice before any form of interrogation or statement is recorded. However, para (4) of the same section provides the proviso to the effect that nothing in the section shall be affect the power of the police officer to treat children in the manner provided by the CPC. While the introduction of this provision is a positive attempt to safeguard right of children to representation, it is vague and lacks clarity. As far as the right to legal representation is concern, the proposed section merely imposes a duty on the police officer to inform parents, guardians or relatives of the children about the arrest, place of detention and the right to appoint legal counsel before the investigation or recording of statement is initiated. It does not require interrogation or recording of statement to be postponed or delayed for a specific period until the counsel is appointed to represent the arrested child. In addition, the section contains a proviso which allows the application of provisions of the CPC in dealing with children. The inclusion of this proviso to the section 83(A) may allow the police to invoke exceptions under Section 28(A) of the CPC to deny children from the right to representation. It should be noted that para 8 of section 28(A) permits the police to proceed with the interrogation and recording of statement if the police officer reasonably believes that it will result in an accomplice absconding or concealing, fabricating or destroying evidence or intimidating witness.

Based on the above discussion, it is suggested that following amendments are made to the Child Act 2001;

- a- To include a specific provision in the Child Act (Amendment) 2016 which expressly provides that children are entitled to legal counsel immediately after arrest, not merely before questioning and recording commence.
- b- To include a specific provision in the Child Act (Amendment) 2016 that requires an arresting police officer to inform an arrested child of the right to retain counsel and be given the opportunity to contact and meet the counsel immediately upon the arrest.
- c- To include a specific provision in the Child Act (Amendment) 2016 which specifically obliges the police to inform the parents or guardians of children immediately after the arrest. This is to enable them to make necessary arrangements for the engagement of legal counsel. In the event that parents or guardians are unable to engage legal counsel within the stipulated period, for example five hours after the arrest, the police should notify the Legal Aid Department, the Legal Aid Centre or the National Legal Aid Foundation (“NLAF”) about the arrest of children. These agencies should be responsible for collaborating and deciding on the immediate appointment or assignment of counsel for children.
- d- To include specific provision in the Child Act (Amendment) 2016 which imposes a duty on the court to order a counsel to be appointed for unrepresented children. The order must be directed to the Attorney General Office, the Bar Council of Malaysia or the NLAF to immediately assign counsel. It is also proposed that amendment to be made to the Legal Profession Act 1976 to make it mandatory for newly qualified

lawyers to serve at the Legal Aid Department for certain period of time.⁹⁶ Newly qualified lawyers attached to the legal Aid Department may be asked to represent children in pre-trial criminal process such as remand application, interrogation and others. Special course training on child representation should be provided by the Bar Council to equip them with relevant skills and knowledge. This measure will enable the Legal Aid Department to overcome the problem of shortage of legal counsel that prevents it from effectively offering legal assistance to children.

- e- An amendment should also be made to specifically exclude the application of section 28(A), which allows the police to invoke their discretionary power to deny an arrested person from counsel on arrested children. It is pertinent to have a provision to this effect as the access to counsel at the earliest possible moment of criminal process is critical, especially for children. Alternatively, exceptions provided under section 28(5) may be sustained but the discretionary power of police to exercise should be subjected to scrutiny. It is submitted that the police should obtain an order from the court in order to invoke the exceptions provided under section 28A (5). The police need to satisfy the court that there is a reasonable ground to deny arrested children from counsel in order to prevent an accomplice from absconding concealing, fabricating or destroying evidence or intimidating witnesses.

6.6.3 Qualification of Counsel for Children

The Committee on the CRC urges state parties to provide adequate legal assistance for children in conflict with the law.⁹⁷ The counsels who represent children must have proper

⁹⁶Srimurugan. (2006). Right of Accused Person to Consult and to be Defended by a Legal Practitioner; Revisited. *Current Law Journal*, 3, p xlv.

⁹⁷Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, para. 49.

legal training to handle and work with children in conflict with the law. With regard to Malaysian law, currently there is no condition imposed on counsels who represent children in any criminal proceedings. It is submitted that there is a need to provide a standardized guideline on the eligibility and qualification of counsel to act for children. This is because representing children in criminal proceedings is challenging in the sense that it requires counsels to adopt special approaches, methods and strategies which are different from what are normally applicable when dealing with adult clients. The Malaysian Bar Council, as a governing body for legal practitioners, should play a pivotal role by setting certain required standards for its members before they are eligible to represent children. It is suggested that the Malaysian Bar Council should impose requirement that any counsels who are interested to represent children need to attend specialized courses and trainings. The courses and trainings should furnish counsels with a background in relevant social sciences, such as the psychological and sociological aspects of child development as well as the art of communication with children which are necessary to enhance their special skills in dealing and handling child cases. In addition, it is also important to ensure that these trainings and courses will enable counsels to master international standards on the rights of children provided under various international instruments such as the CRC, the Beijing Rules and others.

6.6.4 Code of Ethics

As discussed in chapter four, currently there is no provision or guideline provided under the CRC on ethical requirement for the counsels who intend to represents children. Similarly, reference to current Malaysian juvenile justice system discloses the absence of provisions or guidelines on this aspect. The nature of the relationship between counsels and children is

definitely different from the relationship between counsels and adults. This professional relationship must be specially modified to suit the needs, interests and level of development of children. Therefore, there is a need to regulate a special code of ethics for child representation. It is recommended that the Malaysian Bar Council to lay down specific guideline on code of ethics of child representation. The guideline code of ethics must specifically elaborate the general obligations and duties of counsels towards children, the duty to act professionally to child clients, the duty to possess a specially required level of knowledge and skills, the duty of trust, confidentiality, celerity and others.

6.6.5 Supervisory Committee

Representation of children is challenging as it may pose certain practical and ethical problems. Unlike adults, it is inappropriate to expect children to independently arrange, assess and monitor the service, role and quality of their counsels. Currently, there is no specific body or committee, either from government or private agencies, which is formally set up to specifically co-ordinate and supervise matters relating to the representation of children. Since the issue of representation of children is regarded as one of the utmost aspects of the juvenile justice system, it is desirable to set up a special committee to closely supervise this matter. The proposed committee should be given wide powers and mandates to perform various functions relating to representation of children. Among these functions are;

- a- To advise children on their right to be represented at various stages of criminal proceedings.
- b- To identify unrepresented children at any stage of the criminal process by working closely with relevant bodies such as parents, guardians, the police, courts and the Attorney General's Office.

- c- To facilitate the appointment of counsels at any stage of the criminal proceedings by co-ordinating effective communication and arrangement between various relevant bodies such as court, police, Malaysian Bar Council, NLAf and others.
- d- To act as an ombudsman for child representation. As an ombudsman, the committee may assume various roles such as providing advice for both children and counsels on representation matters, receiving, investigating and resolving any complaint or breach of professional conduct by counsels, identifying systematic issues leading to poor service or breach of rights and others.
- e- To maintain a list of accredited counsels for children who have successfully undergone relevant specialized trainings and courses.

It is proposed that the proposed committee is set up under the NLAf. As discussed in chapter five, NLAf is a body set up by the government in collaboration with the Malaysian Bar Council in 2012 with the aim to provide legal services and representation to eligible persons at all stage of proceedings. Counsels who provide legal service through the NLAf will receive only nominal payments since their service is regarded as part of their responsibility. In order to improve the quality of representation, the NLAf has conducted various training sessions for lawyers since its inception until 2014. Due to its promising achievement in upgrading the right to legal representation, there is a possibility to fully utilize the huge potential of the NLAf towards improving the right of children to counsel. Therefore, it is suggested that the role of the NLAf is expanded by setting up a special supervisory committee to specifically supervise matters relating to child representation.

To sum up, this examination of the current Malaysian juvenile justice system on the representation of children in criminal proceedings discloses that it is not comprehensive and

not compatible with the requirements of the CRC. There are various aspects of children's rights which require adjustment and improvement. Accordingly, reform in this area is urgently needed as representation of children is one of the key areas of the juvenile justice system.

6.7 Alternative Measures for Dealing With Children in Conflict With the Law

The CRC has encouraged each juvenile justice system to develop alternative measures to deal with the children in conflict with the law, without the need to resort to the formal judicial proceedings. Article 40 of the CRC states that state parties shall, wherever appropriate and desirable, deal with children without resorting to judicial proceedings. Elaborating on this requirement, the Committee on the CRC has pointed out that diversion from the criminal justice system should be a core objective of every youth justice system and this should be explicitly stated in legislation. There is a variety of dispositions recommended by the CRC as alternative measures to the formal judicial proceedings. Among these dispositions are reprimands, discharges, bind overs, community service, compensation, restitution, fines, care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care.⁹⁸

Close examination of Malaysian juvenile justice on this aspect discloses that it does not correspond with the requirement of the CRC. Malaysian juvenile justice system is still largely based on traditional criminal justice, which puts too much emphasis on the use of formal adjudication methods. The current law does not provide specific provisions on the use

⁹⁸Article 40(4) of the CRC.

of informal or alternative measures in dealing with children in conflict with the law, even on minor or petty criminal offences. As a result, any child suspected or accused of committing criminal offence is subjected to strict, rigid and complicated criminal processes, regardless of the nature and gravity of the offence. The strict application and adherence to the formal adjudication process in dealing with children is inappropriate, improper and too harsh as it deliberately fails to appreciate the fact children lack physical, mental and psychological maturity and ability. The application of formal adjudication methods in dealing with children has been long criticized for its failure and ineffectiveness to deliver on its own aim of offender reform, rehabilitation and crime prevention. As highlighted in chapter five, there are various issues clouding the formal adjudication process of children under Malaysian law. Among the main issues are the escalating number of juvenile cases, high volume of child incarceration and unreasonable delay in disposal of cases.

Obviously, current Malaysian Juvenile justice lags far behind other legal systems in terms of approach and practice in handling children in conflict with the law as it does not provide any special provision on informal and alternative measure to deal with children in conflict with the law. The use of non-adjudication measures in dealing with children still remains a strange approach under the current Malaysian child justice.

6.7.1 New Provision of the Child Act (Amendment) 2016

It is interesting to note that the Child Act (Amendment) 2016 provides for an alternative measure in dealing with children. The Act provides the court with the power to order any child offender to community service.⁹⁹ The Court for Children may, if it thinks fit and appropriate, order child offenders to undergo community service for a period not

⁹⁹Section 91(da) of the draft bill of the Child Act 2015.

exceeding 120 hours within six months.¹⁰⁰ This provision empowers the Court for Children to invoke its discretionary power to order children to undergo community service, instead of sentencing them to existing modes of sentencing provided under the Child Act 2001. The introduction of community service will mark a new development and approach of Malaysian juvenile justice in dealing with children in conflict with the law. Nevertheless, it appears that the Child Act (Amendment) 2016 merely focuses on community service as the sole alternative measure. This alternative measure can only be invoked by the court after the child accused is found guilty. The act does not provide further provision for the application of other modes of alternative measures at the pre-trial and trial stages, such as discharge by warning, caution, mediation, family group conferences and others. Nor does it confer any discretionary power to the prosecutor or the police to resort to alternative measures in dealing with children in conflict with the law.

6.7.2 Advantages of Diversion

There are various advantages of diversion which have made it popular and widely practiced in various legal systems. Firstly, diversion may prevent children from direct consequences of formal court adjudication such as unwarranted labelling¹⁰¹ and stigmatization.¹⁰² The formal sanctions of the court may expose children to the possible negative effects of labelling and stigmatization rather than encouraging social integration. In fact, labelling theory has been cited as the basis that paves way for diversion. Based on the labelling theory, a person who is perceived to be an offender under the justice system has a

¹⁰⁰Section 97A of the draft bill of the Child Act 2015.

¹⁰¹McAra, L. and McVie, S. (2007). Youth Justice: The Impact of System Contact on Patterns of Desistance from Offending. *European Journal of Criminology*, 4(3), p 340.

¹⁰²Dunkel, F., n. 70 above, p 149.

tendency to begin to behave in ways in line with that label.¹⁰³ Secondly, diversion is effective in reducing recidivism among children. There are various studies which positively demonstrate the level of its effectiveness, particularly in reducing the recidivism among the children in conflict with the law.¹⁰⁴ The research revealed that diverting children to various diversionary programs was significantly more effective in reducing recidivism than traditional justice system processing.¹⁰⁵ The findings also showed that exposing children to a direct contact with the formal judicial system can increase the likelihood of reoffending.¹⁰⁶ Thirdly, diversion also offers a speedier way of case disposal.¹⁰⁷ A formal adjudication process is time consuming. It normally involves complex legal issues, rigid procedures, complicated legal technicalities and tedious processes. A delay in the disposal of cases may cause harmful effects on children. Lastly, diversion is more cost effective than formal child court processes.¹⁰⁸ The adjudication process incurs a lot of cost on various parties. The parties have to bear the cost of counsels' fee, preparation of documents, transportation, expert witnesses, facilities and others. The utilization of diversion may enable parties to save on the cost of the adjudication process.

Based on the above discussion, it is proposed that the Malaysian Government initiate a comprehensive design of its own legal framework on informal and alternative measures to deal with children in conflict with the law. This proposal is challenging as it requires

¹⁰³Wilson, H. A. and Hoge, R. D. (2013). Diverting Our Attention to What Works: Evaluating the Effectiveness of a Youth Diversion Program. *Youth Violence & juvenile Justice*, 11(4), p 314.

¹⁰⁴Lipsey, M. W. (2009). The Primary Factors that Characterize Effective Interventions with Child Offenders: A Meta-Analytic Overview. *Victims & Offenders*, 4(2), p 126.

¹⁰⁵Wilson, H. A. and Hoge, R. D. (2013). The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review. *Criminal Justice And Behavior*, 40(5), p 510.

¹⁰⁶Hayes, H. and Daly, K. (2004). Conferencing and re-offending in Queensland. *Australian and New Zealand Journal of Criminology*, 7(2), p 191.

¹⁰⁷Feld, B.C. (1999). The transformation of the child court – part II: Race and the “Crack Down” on Youth Crime. *Minnesota Law Review*, 84, pp. 350-354, Polk, K. (1989). Child Diversion: A Look at the Record. *Crime & Delinquency*, 30(4), p 648.

¹⁰⁸Bala, N. (2003). Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders. *Alberta Law Review*, 40(4), p 991.

extensive legal reforms to current laws and policies. Below are some of the recommendations on the important aspects of the proposed legal framework on alternative measure:

a- Introduction of statutory provision on alternative measures

It is timely to revise the current Malaysian juvenile justice system by statutorily introducing diversion and restoration as alternative measures in dealing with children in conflict with the law. This specific chapter should sufficiently provide comprehensive provisions on the important aspects of diversion and restorative programmes such as definition, concept, applicability, procedure aspects and others.

i- Diversion

It is suggested that diversion should be made applicable to petty and minor offences, which do not require penal law intervention. Though there is evidence that a crime has been committed by children, diversion may be resorted if the facts and circumstances of case suggest that a diversion measure is more appropriate and sufficient to deal with the matter. It is suggested that diversion measure to be introduced into current Malaysian juvenile justice system. It is proposed that this type of diversion with non-intervention should be made applicable to children who have committed non-seizable offences, which are considered as minor or less serious crimes.¹⁰⁹ Discretionary power should be granted to the police to informally deal with children apprehended or caught for committing non-seizable offences by way of advice, caution or warning. Such advice, caution or warning should be given in the

¹⁰⁹Section 2(1) of the CPC defines it as an offence in which a police officer may arrest without warrant. Generally, it refers to offence which is punishable with 3 years imprisonment and above. However, an offence is regarded as seizable offence if the statute specifically provides that it is a seizable offence, though the punishment is less than 3 years.

presence of parents and do not result in any formal criminal record for the children. This type of diversionary measure is widely practiced in various legal systems. For example, Austria's legal system provides that non-intervention diversion is applicable to petty offences and offences whose maximum penalty is a fine and imprisonment of up to five years.¹¹⁰ Similarly, German law permits the discharge of children who commit the petty nature of the crime.¹¹¹ In Canada, a police officer is given discretionary power to merely warn, administer caution or take no further action against any young person alleged to have committed an offence if it is considered sufficient to do so.¹¹² Belgium legal system maintains that children under the age of eighteen years old are not criminally responsible, subject to a few exceptions.¹¹³ Instead, Belgium's law provides a wide range of diversion tactics in the form of rehabilitative and restorative measures that can be imposed on children to divert them away from formal court proceedings.¹¹⁴

ii- Restorative programmes

Restorative justice refers to a process where the parties with a stake in a particular offence meet up and sit together to collectively resolve how to deal with the aftermath of the offence and its implications for the future.¹¹⁵ It is founded on a concept which gives opportunity to offenders to repair the harm caused by the crime through balancing the interests of the offenders and the interest of victims and communities. It is suggested that restorative programmes should be made applicable to children who commit low level serious offences,

¹¹⁰§ 6 of Austria Child Court Act.

¹¹¹§ 45 (1) of the Germany Juvenile Justice Act.

¹¹²Section 6(1) of the Canadian Youth Criminal Justice Act.

¹¹³Article 36 and 37 the Belgian Youth Justice Act 2006.

¹¹⁴Put, J., Vanfraechem, I. and Walgrave, L. (2012). Restorative Dimensions in Belgian Youth Justice. *Youth Justice*, 12(2), p 84.

¹¹⁵Marshall, T.F. (1996). 'The Evolution of Restorative Justice in Britain', *European Journal on Criminal Policy and Research*, 4(4), p 21.

namely criminal offences punishable with five years imprisonment and below. In terms of procedure, it is suggested that restorative programmes should take place after the case is formally filed at the Court. If the child claims for trial, the prosecutor must proceed with the trial to prove the charge. On the other hand, if the child pleads guilty, both the prosecutor and the court should be given discretionary power to refer the case to the authoritative board that is specifically set up to deal with children. The proposed board must consist of members that are professionally trained and possess expertise to deal with children. The board should be tasked with responsibility to determine possibility of imposing any appropriate educational or rehabilitative measures instead of proceeding with the formal process of criminal justice. The board will then recommend to the court on the appropriate programmes for children. The court may, acting on the advice of the proposed board, order any child offender to undergo restorative programmes such as mediation, victim-offender reconciliation, community service, training course, recreational programs, warning, fine and others. Any child offender who has satisfactorily undergone this type of diversion may be ordered to be discharged with or without conditions and/or sanction.

b- Establishment of special board

It is important to have a special board that is specifically responsible deal with children referred to alternative measure by way of diversion as well as restorative programmes. It is proposed that a special board for diversion and restorative programmes diversion be set up to facilitate the implementation of alternative measures. The proposed board should have a systematic administrative and organizational structure and be fully funded by the government. The proposed board should be given a crucial role in determining, designing and implementing appropriate diversionary programmes as well as restorative

programmes in the form of training, counselling, victim-offender reconciliation, mediation, restitution, compensation and others.

It is suggested that the proposed board is set up and placed under the Child Division of Department of Social Welfare, Ministry of Women, Family and Community Development. A special Child Division was created under the Department of Social Welfare of the Ministry in 2005 due to increasing necessity to address issues pertaining to children. As far as administration of juvenile justice is concerned, the role of the division is vital. Probation officers, who are attached as staff of this division, are directly involved in assisting the Court for Children. Apart from preparing probation reports, probation officers also are tasked with the responsibility to implement the court's order against children. They are responsible for supervising child offenders sentenced to community service, released on bond of good behaviour and discharged from institutional care. In addition, setting up the proposed board under the Children's Division of Department of Social Welfare, which is a government body, will enable the board to secure sufficient funds and resources.

c- Facilities and professionally trained staff

Children diverted from the formal criminal process may be assigned to undergo various types of the alternative programmes. The effectiveness of alternative programmes in educating, rehabilitating or restoring children largely depend on the efficiency of staff. It is extremely essential to ensure appointment of members of proposed board as well as its staff comply with the appropriate standard and quality. They must comprise qualified persons who are professionally trained to run diversionary as well as restorative programmes. Apart from professional qualification and skill, it is also pertinent to ensure that the proposed board and staff are given adequate facilities and resources to run the alternative programmes. A

sufficient number of special centres for diversion programmes should be set up in each state to enable programmes such as training, counselling, family conference and others can be conveniently and successfully implemented. In addition, it is also essential to ensure diversionary programmes run by the proposed board of diversion are handled by the experts. To achieve this aim, the proposed board must be able to employ a sufficient number of qualified and professionally trained staffs to conduct its diversionary programmes.

The above-mentioned aspects are among the important matters that may be taken into consideration in designing legal framework of diversion as well as restorative programmes into the Malaysian juvenile justice system. The introduction of a legal framework on diversion is a crucial step as it would pave the way towards its integration as part of Malaysian juvenile justice system.

6.8 Establishment of Specialized Body to Monitor Implementation of the CRC

While the Committee on the CRC is responsible for monitoring the implementation of the CRC at the international level, there is no specific provision in the CRC which requires the establishment of the same committee, body or institution with the similar role at the national level. However, this requirement can be implicitly assumed to fall under Article 4 of the CRC, which demand state parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights under the CRC. This provision can be relied as promoting the establishment of an independent institution ombudsman office to monitor and evaluate progress in the implementation of the CRC. In addition, the Committee on the CRC has consistently encouraged state parties to establish a monitoring body, either

within the Ombudsman Office or as a separate institution, as an independent mechanism to monitor implementation of the Convention.¹¹⁶ In practice, the establishment of a children's right body or institution in the form of children's ombudsman, children's commissioners and others is not a new trend. In fact, it has been established in Sweden and Norway back in 1970 and 1981 respectively.¹¹⁷ Some countries, such as England, Scotland, Ireland and others have even enacted specific statutes that formally provide for the establishment of a children's commissioner.¹¹⁸

In Malaysia, currently there is no institution or body assigned to specifically monitor the implementation of the CRC. The fact that the Malaysian Government still maintains five reservations of CRC articles after more than twenty-one years of ratification alone implies that there is a need to set up a specialized body that evaluates this issue. Though the CRC has assigned the Committee on the CRC to monitor the implementation of the Convention, it is far from adequate to dictate the full implementation of the CRC by state parties. The existing mechanism employed by the Committee could only manage to put minimal pressure on state parties due to lack of force and legal sanction.¹¹⁹ Rather, the role of the committee is more towards advising state parties in promoting compliance with the requirement of the CRC. Therefore, there is a need to establish a monitoring body at a national level to reinforce the role of the Committee on the CRC. In view of that, it is suggested that a specialised body is set up to monitor that requirement of the CRC is fully and effectively implemented in practice. The proposed body should play a meaningful role by closely engaging in an

¹¹⁶Committee on the Rights of the Child, *Concluding Observations: Antigua and Barbuda*, UN Doc. CRC/C/15/Add.247, 1 October 2004, para 5.

¹¹⁷Parkes, A. (2013). *Children and International Human Rights Law: The Right of the Child to be Heard*. London: Routledge, p 213.

¹¹⁸*Ibid*, p 226.

¹¹⁹Kilkelly, U. (2001). The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child. *Human Rights Quarterly*, p 309, Balton D. A. (1990). The Convention on the Rights of the Child: Prospects for International Enforcement. *Human Rights Quarterly*, 12(1), p 125.

organized monitoring process that involves the collection, assessment and preparation of reports on the progress of implementation of the CRC. In addition, it is also suggested that the proposed body is given a role of ombudsman and empowered to receive and address complaints on violations of rights of children. The establishment of a specialized body for children at the national level may not only push toward optimal implementation of the CRC but also optimizes the protection of children's rights from violation.

6.9 Conclusion

This chapter combines the constituent elements from the past chapters and seeks to link it to the main objectives of this research. It comparatively analyses the compatibility of the Malaysian juvenile justice system with the CRC's standards on rights of children in conflict with the law in criminal proceedings. There is no doubt that the ratification of the CRC in 1995 by the Government of Malaysia has activated a new phase of progressive development of the Malaysian juvenile justice system. Many efforts and plans have been taken by the Government of Malaysia to address the issues of protection and welfare of children. Nevertheless, as far as the issue of rights of children under Malaysian juvenile justice is concerned, there are still many rooms for improvement. The examination in this chapter specifically discloses that there are various aspects of the Malaysian juvenile justice system which do not measure up with the standards set by the CRC.

In terms of adequacy of the provision of law, the discussion in this chapter reveals that current Malaysian laws relating to rights of children in criminal proceedings are evidently incomprehensive, vague and lacks many provisions. The Child Act 2001, which is the main statute that governs criminal proceedings against children, fails to specifically provide adequate and comprehensive provisions and guidelines on both substantive as well as

procedural aspects of criminal process. As a result, reference on these matters needs to be made to the general statute on criminal procedure, namely the CPC, which is normally applicable to adults. Similarly, other relevant main statutes, such as the Evidence Act 1950 and the Evidence of Child Witness Act 2007, do not provide adequate and specific provisions on matters relating to rights of children to give evidence in criminal proceedings. The absence of specific provisions and guidelines on certain rights of children at different stages of criminal proceedings has deliberately resulted in the application of similar legal principles and procedures for both adults and children in various aspects of juvenile justice processes. The extension of application of the rules and principles, which are originally designed for adults, to children is improper as it does not only fails to adequately take into consideration children's needs and interests but also contrary to the philosophy and aim of juvenile justice. More importantly, it should be borne in mind that this unsatisfactory legal position demands serious attention as it does not comply with the standards set by the CRC.

Apart from the issue of incomprehensiveness of the provisions of law, the analysis also reveals other related aspects of current Malaysian juvenile justice which are not corresponded to the CRC's standards. It points out other shortcomings under the Malaysian juvenile justice, particularly in terms of limited jurisdiction of the Court for Children, lack of facilities, shortage of child experts, limited access to legal aid service, incomprehensive guideline and policy and others.

Using the CRC's standards on juvenile justice as a benchmark, this chapter also presents a proposal for a legal reform of rights of children under Malaysian juvenile justice system. It proposes that the current Malaysian juvenile justice system be drastically revised and reformed, particularly on the aspects that are not measure up with the requirements of the

CRC. Though the process of legal reform is not a straight forward exercise, it is vital for the Malaysian Government to regard this issue as a matter of high urgency as treatment of children at any stage of criminal proceedings serves as a key parameter of a society's notion on children. As a signatory to the CRC which has been ratified on 17th February 1995, it is pertinent for Government of Malaysia to strive towards full implementation of the CRC. In fact, it should also be noted that the Government of Malaysia is under obligations to comply with the requirements of the CRC as the principle of international law expressly provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹²⁰ Failure to correspond with the standards of the CRC also would reflect lack of commitment and consistency on the part of Government of Malaysia to uphold her full pledge commitment towards implementing the requirements of the CRC which has been ratified almost twenty-one years ago. The challenge is now left in the hand of the Government of Malaysia to earnestly respond to the call for reform of the Malaysian juvenile justice system, which demands serious effort, a comprehensive action plan, continuous commitment and full cooperation from various relevant government and non-governmental bodies.

¹²⁰Article 26 of the Vienna Convention on the Law of Treaties (1969), UN Doc. A/CONF. 39/26, adopted on 23 May 1969.

APPENDIX

A PROPOSAL OF REFORM

In light of the discussion throughout the thesis, it is recommended that amendment to be made to current legal framework of Malaysian juvenile justice system, particularly on rights of children in criminal proceedings. Below are the key aspects of the proposed amendments;

1- Age of Criminal Responsibility

- i- To amend Section 80 of the Penal Code by raising the minimum age of criminal responsibility from ten to at least twelve years old.
- ii- To abolish Section 82 of the Penal Code that provides for the application of doctrine of *doli incapax*.
- iii- To amend Section 80 by expressly providing that legal principles relating to the MACR under Malaysian law applicable to all offences under any statute.
- iv- To formulate a special set of rules, procedures, programmes, authorities and institutions specifically designed to handle children below the MACR who are in conflict with the law.

2- Arrest

- a- Amendment to be made to the Child Act (Amendment) 2016 by introducing specific provisions on the pre-trial criminal process under Chapter X. The provisions on arrest should contain the following matters;

- i- To state that the arrest of children shall only be allowed as a measure of last resort. Any arrest shall only be permitted in exceptional circumstances.
 - ii- To explain the mode of effecting arrest on children.
 - iii- To impose restrictions on the use of handcuffs while effecting the arrest of children.
 - iv- To provide alternative methods of arrest for children, such as issuance of written notice requiring them to present or surrender themselves to police stations.
 - v- To confer discretionary powers to the police to resort to alternative measures in dealing with arrested children.
 - vi- To specifically state the right of children to be informed of the grounds of arrest by duly qualified persons immediately after arrest.
- b- Improvement of standardized practice and facilities as follows;
- i- To design standard operation procedures and guidelines for police in handling children in conflict with the law.
 - ii- To set up specialized police units in at least all major cities to handle children in conflict with the law.
 - iii- To state minimum conditions for police lock-ups in which children under arrest are detained.
 - iv- To provide trainings for police in an effective manner to deal with children in conflict with the law.

3- Remand Pending Investigation

Amendment to be made to the Child Act (Amendment) 2016 by introducing specific provisions on the following matters;

- i- To reduce the maximum period of remand of children from fourteen days to seven days.
- ii- To specifically stipulate that remand of children should be avoided as much as possible except in exceptional circumstances. The burden is on the police to show the existence of what amount to exceptional circumstances.
- iii- To confer the police with discretionary powers to resort to alternative diversionary measures in dealing with children rather than to apply for remand detention.

4- Interrogation

Amendment to be made to the Child Act (Amendment) 2016 by introducing specific provisions on the following matters;

- i- To state right of children to remain silence during interrogation.
- ii- To state right of children to be duly cautioned by qualified persons before the statement is recorded.
- iii- To state right of children to consult legal counsels before the interrogation process is initiated.
- iv- To state the right of parents, guardians and legal counsels to be present during interrogation.
- v- To require the service of child specialists to assist the police as well as children during the investigation process.

5- Bail

Amendment to section 84 of the Child Act (Amendment) 2016 on the following matters:

- i- To insert provision that allows any person other than parents or guardian to furnish bail for children. Restriction imposed under current Section 3 of the Child Act 2001 which permits only parents or guardians to bail children should be lifted up.
- ii- To insert a provision that allows for a flexible mode of executing bail that is currently confined to cash only.
- iii- To specifically state that children are entitled to apply for bail in all cases. Currently, children who are charged for committing cases classified as unbailable offences are automatically denied bail.

6- Right to Counsel

- a- Amendment of the Child Act (Amendment) 2016 on the following provisions;
 - i- To provide for mandatory requirement on representation for children at any stage of the criminal process. Any unrepresented children should be automatically entitled to get legal assistance either from the government's Legal Aid Department or private legal aid centres.
 - ii- To provide for the right of children to consult counsel immediately after arrest. The term "immediately" should be expressly defined to mean "as soon as reasonably possible" after the arrest.
 - iii- To provide for right of counsels to present during the interrogation.

- b- Specific requirement and guideline on representation of children.
 - i- To set specific requirement on eligibility of counsel who intend to represent children.
 - ii- To issue guideline on code of ethics on child representation.
 - iii- To provide courses and trainings on dealing with child clients.

7- Pre-Trial Detention

- a- Amendment to the Child Act (Amendment) 2016 by inserting provisions on special rules and procedures relating to pre-trial detention of children. These special rules and procedure should stipulate:
 - i- Any detention of children at any stage shall be governed by the tests of arbitrariness and lawfulness.
 - ii- A special hearing should be conducted by the court in determining appropriateness of the detention of children pre-trial stage.
 - iii- A specific timeframe on the disposal of child cases detained at the pre-trial stage.

It is suggested that the law should impose requirements in any case involving children under pre-trial detention shall be disposed within six months after its registration.
- b- To set up sufficient number of specialized detention centres to accommodate children at the pre-trial stage.
- c- To design special programmes aiming at rehabilitating children detained at the detention centres. The programmes should be conducted by professionally trained staffs.

8- Preventive Detention

Amendment of relevant statutes that authorize for preventive detention by inserting provisions which exclude its application on children. Among these statutes are the Security Offences (Special Measures) Act 2012 and the Dangerous Drug Act (Special Preventive Measures) 1985 and the Prevention of Crime Act 2013 (Amendment and Extension).

9- Evidence of Children

Amendment to Section 133(A) of the Evidence Act 1950 on following matters;

- i- To abolish the requirement of subjecting children to competency test before they are entitled to give evidence.
- ii- To abolish the requirement of corroboration on unsworn evidence of children.
- iii- To provide adequate facilities and professionally trained staffs to facilitate children in the process of giving evidence.

10- Separate System of Court for Children

- i- To establish an entirely separate system of Court for Children. The Court for Children should be accorded with full jurisdiction to try all cases involving children and comprise all level of judges.
- ii- To stipulate specific qualification of judges who may preside over the Court for Children. It is proposed that judges for the Court for Children must be appointed among senior and experienced judges, at least with the rank of Session Court

judges or legal practitioners with not less than ten years legal experience and possess vast legal knowledge and expertise.

iii- To design special rules and procedures for the Court for Children such as informality of proceedings, informal setting, power of court to interfere and others.

iv- To set up an adequate number of Courts for Children in all states.

v- To ensure all Court for Children are fully equipped with child-friendly facilities.

11- Diversion

Amendment to the Child Act (Amendment) 2016 on the following matters;

i- To introduce comprehensive provisions on diversion that includes definition, concept, applicability, procedure, diversionary programme and others.

ii- To confer discretionary power of diversion to the police, prosecutor and court

iii- To set up special board with the responsibility to determine, design and implement appropriate diversionary and restorative programmes for children in the form of training, counselling, victim-offender reconciliation, mediation, restitution, compensation and others.

iv- To establish adequate of facilities, institutions, staffs, trainings and others.

12- Monitoring Body

To set up a specialized body for the purpose of monitoring implementation of the CRC.

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