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Sentencing Child Offenders in Malaysia: When Practice Meets its Purpose

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Abstract

In Malaysia, the increase in juvenile delinquency has always been a source of worry. The discussion around juvenile sentencing is always centred on the familial aspect of rehabilitating adolescents and the punitive role of criminal punishments. The proponents of restorative justice think that children in their vulnerable position should not be subjected to harsh sentences, whereas the proponents of punitive justice advocate for harsher, deterrent punishments. In light of this, this study aims to examine the practice of sentencing children in Malaysia. This essay examines the challenges judges encounter when selecting appropriate sentencing for juvenile criminals. This study applied a doctrinal methodology to discuss the legal provisions of the Child Act 2001, Criminal Procedure Code, Penal Code and reported cases. This study employed content analysis of the reported cases from online databases such as the LexisNexis and Current Law Journal. The data from primary sources of law such as legislation and reported cases were accompanied with secondary data obtained from journal articles, textbooks, conference papers, theses, published statistics, and webpages. This study found that the sentencing practice with regard to children in Malaysia differs from one case to another. Judicial discretion given to the judges are not accompanied by specific guidelines but rather general considerations such as the age of the offenders, the gravity of the offence, the probation report and previous conviction. This study concludes that juveniles' punishments must be proportional to the severity of their crimes. A sentencing guideline should be established to guarantee that sentencing practices are consistent. Besides, clear procedures in preparing a probation report must also be established. For future research, this study recommends a relook on the role of probation officers and the significance of probation report in assisting judges to impose appropriate punishment towards juvenile offenders.

Keywords: Child Offenders, Juveniles, Sentencing Practice, Punitive Justice, Rehabilitation

Introduction

S 2 of the Child Act 2001 (Act 611) defines a child as a person under eighteen. As far as criminal matters are concerned, s 83 of the Penal Code sets the minimum age of criminal responsibility at ten years old. This definition is consistent with the international standards in the Convention on the Rights of the Child (CRC) that treats offenders under eighteen as juveniles (Vincent & Newman, 2010). In Malaysia, when a child conflicts with the law, he is brought to Court for Children, and the criminal procedures shall comply with the Child Act 2001. Based on admissible evidence and oral testimonies, before the judge decides and determines the appropriate sentence to be imposed on the child, the legal provisions regarding the age of the child, probation report, previous convictions, and type of offence committed by the children are among paramount considerations.

The number of children involved in crime in 2020 has climbed by 10.5% to 5,342 cases compared to the previous year (4,833 instances). The number of first-time offenders has increased by 15.7% to 4,916 cases, while the number of repeat offenders has decreased by 27.2% to 426 cases (Department of Statistics Malaysia, 2021). Based on the rising trend in the statistics of child offenders in Malaysia, there is a need to pay greater attention to the issue, particularly to the welfare of juvenile offenders. The majority of juvenile offenders come from impoverished households, contributing to the ignorance of their legal rights.

In passing sentences against children, the Court needs to balance the aims of sentencing for deterrence and rehabilitation of child offenders (Samuri & Awal, 2009). Nonetheless, in several instances, harsh penalties were imposed for minor offences. For instance, in *Child v Public Prosecutor* [2020] MLJU 13944, the child was sentenced to the Henry Gurney School order for committing an offence of receiving stolen property under s 411 of the Penal Code. This school is known for admitting only juveniles who have committed serious crimes such as drug abuse, murder, and burglary. They are also notorious for exhibiting violent behaviours that are difficult to rehabilitate. Therefore, this study submits that sending the child offender to the Henry Gurney School would be disproportionate to the crime's gravity and seriousness. Thus, this study explores the problems concerning child sentencing practice in Malaysia and offers suggestions for ensuring a more uniform and consistent sentencing guideline to be adopted by courts when dealing with child offenders.

Methodology

This study applied a doctrinal methodology to discuss the legal provisions of the Child Act 2001, Criminal Procedure Code, Penal Code and reported cases. This study employed content analysis of the reported cases from online databases such as the LexisNexis and Current Law Journal. Cases from various jurisdictions were referred such as Malaysia, the United Kingdom, and other common law countries. The data from primary sources of law such as legislation and reported cases were accompanied with secondary data obtained from journal articles, textbooks, conference papers, theses, published statistics, and webpages.

Jurisdiction to Hear Cases Involving Children

The Child Act 2001 (Act 611) governs the protection, care, trial, and rehabilitation of children in conflict with the law. The Court for Children is established by S 11(1) of the Act, and its purpose is to hear, determine, or otherwise dispose of any charge brought against a child. S 91 of the Act enumerates the sentencing competence of the Court for Children as follows:

(a) Admonition and discharge
(b) Bond of good behaviour
(c) Order the child to be cared for by a relative or fit person
(d) Fines, compensation, or costs
(e) Probation order
(f) Approved school or Henry Gurney school order
(g) Imprisonment (for a child aged fourteen and above only)

As regards the criminal jurisdiction of the Court for Children, s 11(5) stipulates that the Court shall have jurisdiction to try all offences except offences punishable with death. In Malaysia, 33 crimes are subject to the death penalty, including murder, drug trafficking, terrorist acts, treason, discharging firearms, waging war against the *Yang diPertuan Agong,* kidnapping, rape or robbery resulting in death (Amnesty International, 2019). For those offences, the case will be tried before the High Court. However, under s 97 of the Child Act 2001, the High Court shall not pronounce a death sentence against a child convicted of the offence. In place of capital punishment, a person convicted of an offence is imprisoned in prison at the discretion of the Yang di-Pertuan Agong if the offence was committed in Kuala Lumpur or Labuan, or the Ruler or Yang di-Pertua Negeri if it was committed in the State.

In *PP v Kuan* (2007) 6 CLJ 341, the Federal Court emphasised that the death sentence shall not be pronounced or recorded against a person who was a child when the offence was committed. In this case, the accused was 12 years and nine months at the time of the alleged murder. The Federal Court observed that its judicial power is limited by Federal law by virtue of s 97 of the Child Act 2001. Similarly, in *PP Yusry* (2021) 1 LNS 2223, upon convicting the accused of 23 murder charges in the *Tahfiz* arson incident under s 302 of the Penal Code, the High Court in Kuala Lumpur ordered the accused to be detained in prison at the pleasure of the *Yang diPertuan Agong.* This is in lieu of the death penalty since the accused persons were below eighteen when the offence was committed. In *Malik Yatam lwn Pengarah Penjara Kajang* [2021] 1 LNS 1420, the High Court held that the finding of guilt of the child under s 302 of the Penal Code and the order for him to be detained in Kajang prison at the pleasure of the Sultan of Selangor complied with s 97 of the Child Act 2001.

Another instance where cases are heard in courts other than the Court for Children is provided under s 83(3) of the Child Act 2001. When a child commits an offence after turning 18, the charge is heard by a court other than a Children's Court. The Court's sentencing power in this situation includes:

(a) Detention in a Henry Gurney School up to but not after the child turns 21;
(b) Admonition and discharge, bond of good behaviour, order of care by relative or fit person, fine, compensation, costs, or community service order; or
(c) If the offence is punishable by imprisonment, the child may be imprisoned according to Sessions Court's sentencing power.

Sentencing Practice towards Children in Malaysia

According to ss 173(b), 173(j)(i), and 173(m)(ii) of the Criminal Procedure Code, when an accused pleads guilty to a charge or a court finds him guilty at the end of a trial; the Court must pass sentence according to the law. Under s 90(18) of the Child Act 2001, the Court is empowered to impose order under s 91 of the Act upon proof of offence against a child. In

sentencing, the Court exercises its discretion, but no golden rule is formulated regarding sentencing in criminal cases (Sidhu, 2011). The Court will hear the plea of mitigation by the defence counsel and the submission of aggravating factors by the prosecution before passing sentence (Sidhu, 2011). In *PP v Jessica Lim Lu Ping & Anor* [2004] MLJU 159, the High Court observed that despite decades of sentencing, no golden rule has emerged in criminal sentencing. No sentencing formula exists. All courts have a flexible discretion to choose suitable sentencing judiciously and with a conscience. As far as child offenders are concerned, there are several considerations that courts take into account in determining the proper sentence to be passed.

Age of the Child

The age of a child offender plays an essential role in determining the sentence to be imposed because an appropriate sentence will determine the child's life (Mouseri et al., 2012). According to US Supreme Court in the case of *Roper v. Simmons [2005] 543 US 551*, juveniles are prone to negative influences and peer pressure. Therefore, in child criminal cases, the age must be highlighted prior to the sentencing. According to s 82 of the Penal Code, a child under ten has no criminal responsibility. This is because due to their infancy and immaturity, the law assumes that children under ten are incapable of committing crimes (Rahim, 2014). Meanwhile, for children aged ten to twelve, s 83 provides that a child shall be criminally liable if he has sufficient maturity and understanding of the nature and consequence of his acts. The illustrations of s 83 can be seen in several Indian cases which have similar protection under s 83 of the Indian Penal Code. In *Mahapatra v King* (1950) Cut 293, where an eleven-year-old boy was charged with murder. From the evidence, it was proven that he charged towards the victim with a knife, saying that he would cut him to bits and eventually did cut him. The Court held that his conduct led to one inference that he intended to hurt the victim, and he knew that a cut inflicted by a knife would effectuate his intention. In *Abdul Sattar v Crown 1949 50 Cri LJ 336*, several boys below twelve years old broke into several shops and committed theft. The Court held that the act of breaking the locks and taking only valuable items indicated that the accused had sufficient maturity and understanding of their conduct.

In *Re Marimuthu 9 Cr LJ 392*, a ten-year-old girl working as a servant took a silver button belonging to her master and gave it to her mother. The accused was acquitted, and the Court observed that under s 83, a child between 7 and 12 years of age could not be found guilty of an offence unless it is proven that the child had attained sufficient maturity of understanding to judge the nature and consequences of the acts done. In contrast, in *Ullah v the King AIR 950 Orissa 251*, a child who became angry with his friends whilst holding a knife advanced toward one of them, uttering threatening gestures, "I will cut you to bits", which he actually did and killed the friend. The Court concluded that his entire action could only lead to one inference, that he fully understood that his conduct would effectuate his intention to kill his friend.

With regard to children above the age of twelve, by implication of s 83 of the Penal Code, they can be found criminally responsible, although the sentence that can be passed against them shall comply with s 91 of the Child Act 2001 and differs from adult offenders. The Court will normally look into the seriousness of the offences. The importance of age involving child offenders was discussed in the case of *Muhamad Zakwan Bin Zainuddin v Public Prosecutor and another appeal [2019] MLJU 1462*, where a rape case was committed together with adult

offenders. At first, the child was sentenced to imprisonment. However, an appeal was made by the respondent's defence counsel to the High Court on the ground that the offender was a child at that time. After the High Court judge examined the evidence and testimony, the child was sent to Henry Gurney until he reached 21 years old.

Type of the Case and Gravity of the Offence

Courts often resort to distinguishing a severe offence from a minor crime in determining the appropriate order to be recorded against a child offender. According to s 2(1) of the Child Act 2001, grave crimes include:

(a) the offence of murder, culpable homicide not amounting to murder or attempted murder,
(b) all offences under the Firearms (Increased Penalties) Act 1971,
(c) all offences under the Internal Security Act 1960 punishable with imprisonment for life or with death,
(d) all offences under the Dangerous Drugs Act 1952 punishable with imprisonment for more than five years or with death, and
(e) all offences under the Kidnapping Act 1961.

For instance, in *PP v Turmizzy (2007) 6 MLJ 642*, Ipoh High Court held that since drug trafficking is a grave crime that affects public health and safety, it does not warrant the Court's mercy. The Court cited the Lordship KN Segara J's observation in *PP v Boon (2006) 6 MLJ 254,* where it was held that since serious crimes among youths seem to be on the rise, it would send a wrong signal to children and the public at large if the Court were to treat them with "kid gloves." Similarly, in, the High Court of Taiping observed that most crimes committed by juvenile offenders in the 1950s to 1970s were most crimes committed by juvenile offenders were petty offences out of mischief or poverty. However, juvenile crimes have worsened, and some young persons are involved in drug trafficking and crimes of violence. The Court observed that the "authorities should not fall into this trap or hoodwinked. The Court must show its abhorrence, and this could only be shown by reflecting on the sentence imposed by the Court." The Court affirmed the custodial sentence against the accused, who was found guilty of robbery and causing hurt.

In *Yg (A Child) [2020] MLJU 1705*, the prosecutor made an appeal to the High Court. The child involved in a crime under section 326 of the Penal Code, which is an offence regarding inflicting grievous bodily harm by using a sharp weapon or any other dangerous weapon and being convicted, shall be imprisoned for up to 20 years. The prosecutor found the sentence unfitting because the judge failed to consider the seriousness of the injuries suffered by the victim. The Sessions Court sentenced the child offender to go through community service for 120-hour for a total of six times. Unsatisfied with the sentence, the prosecution showed a doctor's report, which explained the victim's severe injuries resulting from the respondent's violent act. It was not appropriate for the court to sentence child offenders with a lenient sentence simply because they are child offenders who are protected under the Child Act 2001. If the punishment is too lenient, it will lead to an increase in crime among children. Suppose an appropriate punishment is not handed down to child offenders. In that case, it will send the wrong signal to other 'children' and the general public that the court will show compassion and gentleness if they commit the offence. The sentences handed down by the courts should

reflect the social changes in society." As a result of the appeal, the High Court sentenced the child offender to Henry Gurney School.

In contrast, in less severe crimes, courts are more likely to pass lenient sentences to child offenders. For example, in *Pendakwaraya Rosman (2012) 5 LNS 21,* an eleven-year-old child pleaded guilty to stealing jewellery with an adult co-accused. The Court held that although the offence provided an imprisonment sentence, the evidence showed that his uncle urged him to commit the offence. The Court considered that it is common for children to be induced by negative influences. Hence admonition and discharge is a proper sentence to change for the better in the future. Similarly, in *A Child v Public Prosecutor (2020) MLJU 1394*, the Court held that sending the child to Henry Gurney School was a "little harsh", considering that the offence of receipt of stolen property did not involve violence. The Court ordered him to be sent to *Sekolah Tunas Bakti* as the public interest can still be served when the child repents and decides to start afresh and returns to society as a good person.

The guiding principle by the Court of Appeal in *Azizan v. PP [2012] 6 CLJ 370* provides that in cases of youthful offenders, wherever possible, they should be kept out of prison. In *PP v Malek [2020] 1 LNS 436,* the child pleaded guilty to self-administration of drugs and was sentenced to RM1000 fines in default, three months imprisonment and a supervisory order of the National Drugs Agency and the police every month for two years. The prosecution appealed against the adequacy of the sentence. The High Court of Johor Bahru held that in balancing the public interest and child offenders' interest, the Court needs to consider the public interest for incarceration and become a good citizen. The courts generally are of the view that when an offence involves a child or young offender, the public interest is best served if the child or young offender is allowed to rehabilitate himself and become a good citizen. In the public interest, children or young offenders should be permitted to enter into society and make a better future for themselves. In that way, both the individual and society will benefit.

Clean Record vs Previous Conviction

A clean record often works as a mitigating factor that warrants a lenient sentence (Sidhu, 2011). In *Pendakwa Raya lwn LKL [2018] MLJU 2140,* the accused was 15 years and two months when the rape occurred. The Magistrate's Court considered that the accused was a first-time offender, pleaded guilty to the charge, showed the absence of violence in committing the offence, and the evidence of remorse after the rape incident. The court ordered him to pay RM5,000 fines, to be paid by his father, and a two-year good behaviour bond. On the issue of clean records, the Magistrate applied the principle in *PP v Daud (1981)1 MLJ 315*, where the Court concluded that a "sentence according to law" must be within the penal section and assessed and passed pursuant to recognised judicial norms. First-time offenders are a major influence in sentencing. Before passing sentence, a Magistrate must call for evidence about the accused's background, antecedent, and character.

On the other hand, a previous conviction record acts as an aggravating factor that may result in harsher penalties. Normally, before the trial commences, the prosecutor will ask the investigation officer to obtain the certificate of a criminal record to be tendered in court. In the case of *Child v Public Prosecutor (2020)MLJU 1394*, an appeal was made because the Magistrate did not ask for the certificate to be tendered. In *Soosainathan v PP (2001) 2 MLJ 377*, the High Court emphasised that prior convictions are significant in two ways. First, they

negate any claim or inference that the defendant is a first-time offender or has a history of good behaviour for the purposes of any general mitigating plea. Second, they may meet the statutory requirement of a relevant prior conviction for the purpose of subjecting the defendant to harsher punishments for second or subsequent offences. In the lack of explicit directives to the contrary, there is no sentencing concept that requires increasingly harsher penalties to be applied to repeat offenders.

In the case of young offenders, previous convictions may operate as a deterrent factor. In *Re Ramli (1956) MLJ 56*, the accused was convicted on a charge of possession of housebreaking under section 28(1) (ii) of the Minor Offences Ordinance 1955. The accused admitted to six previous convictions for theft, housebreaking, and possession of the stolen property. He was sentenced to 10 days imprisonment, but after revising the probation report, the court substituted the sentence of imprisonment with an order binding over the accused. The court noted that brief prison terms are sometimes necessary, but a series of short imprisonments has little effect on reforming wrongdoers and often turns them into habitual criminals. In the case of *Yg (A Child) [2020] MLJU 1705*, the respondent was sentenced to do community service for 120 hours, six months from the date of order. The prosecution appealed since the offence committed under s 326 of the Penal Code carries imprisonment up to twenty years. After the court referred to his previous record and other factors, the respondent was sent to the Henry Gurney School until age 21.

Probation Report

Before choosing how to handle a child, the Court for Children must review a probation report, under section 90(12) of the Child Act 2001. The role of a probation officer in dealing with children who are accused of a crime is vital as they help authorities make informed decisions that are favourable to a child (Dlamalala, 2018). Probation officers interview the children in conflict with the law, write a probation report and make recommendations in assisting the court in determining the appropriate order to impose against the child offenders (Muhammad & Azman, 2018). Apart from the child, probation officers also interview the parents, guardians, and community (through school or community leader) to seek information and opinion from them (Rosli, 2021). The probation report must contain information about the kid's general conduct, family circumstances, school record, and medical history so the Court for Children can act in the child's best interests (Sidhu, 2003). The court may ask the child questions arising from the report. It may also include a Social Welfare Officer's, doctor's, or other person's written report on the child. In Malaysia, the probation report only includes the respondent's history, family, and behaviour. The tasks of probation officers are essential as it gives accurate information about the child offenders and thus assists in preparing the probation report since the probation officers see their relationship with offenders as a key to providing rehabilitative services (Burnett & McNeill, 2005).

In the case of *Public Prosecutor v Azman [2020] 1 CLJ 562*, the appellant pleaded guilty to a rape charge that was punishable under section 376(1) of the Penal Code, and if found guilty, the offender could be sentenced to not less than to 15 years and not more than 20 years of imprisonment and also whipping. The prosecutor appealed in this case because the court sentenced the child offender to 3-months of imprisonment and a fine amounting to RM1000. The prosecution reckoned that the punishments were too lenient, and that the Magistrate used her discretion without considering the element of public interest when imposing the

sentence on the respondent. The prosecution claimed that the court should consider the public interest by referring to the case of *Loo Chon Fatt [1976) 2 MLJ 256*. The High Court judge rejected the appeal as the judge was of the opined that the Magistrate had rightly adhered to the Child Act 2001. In addition, the probation officer's recommendations for the punishments were in accordance with s 91(1)(d) of the Child Act 2001. The High Court believed that child offender should be given a second chance. The Magistrate imposed a light punishment based on the respondent's guilty plea, the victim's consent, and the probation officer's suggestion.

Courts often put significant weight on the findings in the probation report. For example, in *Public Prosecutor v SAK (the child) [2021] MLJU 1707*, the probation report revealed that the child stopped schooling in Form Two and supported himself by working as a security guard and collecting metal scraps. He was treated like an adult at a young age. After considering the probation report, the advice from both Advisers, submission by the learned Deputy and mitigation put forward by the child and his parents, the Court ordered the child to be sent to Henry Gurney School. In *Pendakwa Raya lwn Ahmad Izzat Izzuddin bin Ahmad Esmator [2022] MLJU 877,* the child was found guilty of sexual assault against another child. The Magistrate considered the probation report that the child was at the time pursuing his studies at a vocational college and would graduate in two years. Although he was smoking, he never caused other problems for his parents. The probation report recommended a good behaviour bond. After considering the probation report, the Magistrate observed that the child was a first offender, and the offence was committed due to the child's attitude and behaviour. The Magistrate agreed with the recommendation of the probation officer to give the child a second chance for rehabilitation by imposing a good behaviour bond and an order to attend compulsory training at the Social Welfare Department's workshop.

In cases involving child offenders, according to the Chief Justice's Practice Direction No. 2/2004, for proceedings in courts, priority should be given to remand cases, cases involving civil servants, including statutory bodies, cases involving children, and such other cases as directed by the Chief Judge of Malaya or Sabah and Sarawak. The trial for those cases must be conducted within two months after the accused was charged for the first time. Should unavoidable circumstances require the trial to be postponed, the new date must not exceed one month from the date of the postponement. Nevertheless, this Practice Direction does not address any matter regarding the probation report. Another snag faced by probation officers is the limited time given to them to conduct the interview and prepare the report (Mohammad & Azman, 2018). According to the Client's Charter of the Social Welfare Department, a probation report should be prepared not more than seven days before the date of the sentence (Social Welfare Department, 2016). Therefore, in some cases, they were only able to complete the interview once, and there are cases in which they received short notice to prepare the report. Regarding the format of the report, it is considered too simple and lacks details (Mohammad & Azman, 2018).

Conclusion

In Malaysia, s 91 of the Child Act 2001 enumerates many options available to the courts in passing sentences for child offenders. Nonetheless, there is no formal guideline in determining the sentences since courts are given vast and flexible discretion in sentencing so long the sentences passed are in accordance with the law and do not exceed the court's

sentencing jurisdiction. Due to the absence of a formulated guidance in sentencing, courts often refer to previous cases to see the sentencing trends and policy. The factors that courts consider before passing sentences to child offenders are age, the nature and types of the offence, clean record, previous conviction, and the contents of the probation report. Courts are more willing to impose rehabilitative and non-custodial sentences for minor offences. In contrast, courts demonstrate their preference to impose harsher penalties against children when the case involves a serious crime and violence. It is observed that the Child Act 2001 does not provide clear guidelines in sentencing choices given to the courts. This study submits that there should be a formal guideline to assist the courts in deciding the appropriate sentences against children. It is important to highlight those cases in subordinate courts (Court for Children, Magistrate's Courts, and Sessions Courts) do not establish precedent; hence the decision of a Court for Children does not bind other courts. Besides, due to the importance of the probation report in dealing with cases involving child offenders, it is also suggested that clear procedures and format in preparing a probation report should also be established. This ensures that the sentencing practice meets its purpose of rehabilitating and deterring children from committing crimes. For future research, it is recommended that a comprehensive study to be conducted on the role of probation officers in the juvenile justice system and the significance of probation reports in assisting judges to impose appropriate sentences towards child offenders.

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