

CHILDRENS RIGHTS IN MALAYSIA



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We are guilty of many errors and many faults,
but our worst crime is abandoning the children,
neglecting the fountain of life.

Many of the things we need can wait.
The child cannot.

Right now is the time
His bones are being formed,
His blood is being made
And his senses are being developed.

To him we cannot answer 'Tomorrow'.
His name is 'Today'.¹

-Gabriela Mistral

John Fitzgerald Kennedy once said, 'Children are the world's most valuable resource and its best hope for the future'.² Children are individuals who each have their own unique contribution to the world and it is our duty to protect and mould them into respectable individuals who they truly are. However, despite their indubitable importance, children are often victims of exploitation who often have their rights denied. Over the years, the concept of human rights has been greatly emphasized, yet, very little attention was focused on the rights of a child in

¹ Leonard Davies, *Children of the East* (Pelanduk Publication, 1995).

² Children's Rights, (2009) < <http://www.sabah.org.my/scwa/rightsofchild.htm> > accessed 23 August 2011.

particular. Hence, the distinction between the needs of a child and that of an average adult becomes pivotal because it is this very difference that distinguishes the basic human rights of an adult from the rights of a child. Thus, the question arises as to what exactly constitutes the rights of a child because it is not possible to uphold something which is as abstract as an undefined right.

In Malaysia, the journey towards the protection of the rights of a child has always been an uphill battle. The rights of children in Malaysia which were once at a point of non-existence are now greatly protected by the enactment of the *Child Act 2001* (the '2001 Act') and the ratification of the *Convention on the Rights of the Child* ('CRC'). It is worth noting that the rights of a child can be divided into four distinct categories which are survival rights, development rights, protection rights and participation rights.

Acknowledging the broadness of the subject matter, this article will only address the children's right to development and protection in detail. With respect to the child's right to development, the education system in Malaysia plays a vital part. On the other hand, the right to protection essentially focuses on the criminal offences against children which violate the very essence of the particular right. Despite its status as a developing country, Malaysia has proven to give due respect to children's rights via its various Statutes and Declarations. Nevertheless, the problems and obstacles it has faced in order to protect the rights of the children of Malaysia is, unfortunately, only the beginning of a long battle.

Human Rights

The Charter of the United Nation stands as the starting point for the acknowledgment of human rights at an international level.³ This subsequently led to

³ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 2.

the Universal Declaration of Human Rights ('UDHR').⁴ A declaration by title meant that it had no legally binding effect upon the States. However, covenants were drafted and in 1976 a legally binding treaty which bound all its members came into force.⁵ In reality, no country was truly bound to observe human rights but the UDHR created a moral obligation among countries for the observance of it and this led to the development of International Human Rights laws and 50 years later, UDHR has attained the position of a customary international law.

In Malaysia, both fundamental rights⁶ as well as human rights are provided for within the Federal Constitution ('FC') which is the supreme law of the country. Among the principal human rights listed within the FC are the rights to life and liberty,⁷ equality before the law,⁸ freedom of movement,⁹ freedom of speech, assembly and association,¹⁰ right to education¹¹ and freedom of religion.¹²

⁴ It was proclaimed by the United Nation General Assembly in Paris on 10 December 1948.

⁵ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICES) was adopted by the United Nation General Assembly in 1966 but it only came into force on 23 March 1976.

⁶ Fundamental rights are rights which belong without presumption or cost of privilege to all human beings within a particular jurisdiction. There are nine rights regarded as fundamental in the Malaysian Constitution; namely liberty of the person (Article 5); freedom from slavery and forced labour (Article 6); protection against retrospective criminal laws and repeated trials (Article 7); equality (Article 8); prohibition of banishment and freedom of movement (Article 9); freedom of speech, assembly and association (Article 10); freedom of religion (Article 11); rights in respect of education (Article 12) and rights to property (Article 13).

⁷ The Federal Constitution of Malaysia, art 5.

⁸ *ibid* art 8.

⁹ *ibid* art 9.

¹⁰ *ibid*, art 10.

¹¹ *ibid* art 12.

¹² *ibid* art 11.

Children's Rights

There has often been a confusion in regards to the difference between human rights, children's rights and youth's rights. However, legally there is a difference in terms of the provisions of the rights, as children and youth would require additional protection and care which may not be adequately provided for by human rights. Hence, for this purpose it would be worth noting that any individual under the age of 18 is categorized, by law, as a child.¹³ The basic human rights provided for under the FC such as Article 6 which prohibits slavery and forced labour and Article 12 which provides for rights in respect of education clearly extends to children. However, these provisions do not deal sufficiently with the basic needs of children in particular or rather the basic rights a child should be entitled to. It merely touches on the basic right of an adult person rather than incorporating the special needs of a child. What was found lacking within the FC was later compensated for via Statutes and Declarations.

Appreciating the fact that people under the age of 18 years require special care and protection, the *Convention on the Rights of the Child (CRC)* was adopted by the United Nations on 20 November 1989.¹⁴ The *CRC* is generally divided into three parts containing 54 Articles with the main principle being the best interest of the child.¹⁵ In essence, it divides the rights of a child into four distinct categories which are survival rights, development rights, protection rights and participation rights.

¹³ Child Act 2001 section 2(1).

¹⁴ Luisa Blanchfield, 'The United Nations Convention on the Rights of the Child: Background and Policy Issues', Congressional Research Service Report for the Congress (2 December 2009) 2.

¹⁵ Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations* (OUP, 2010)117.

Survival rights¹⁶ refer to all measures required for an adequate standard of living and accessibility to medical services while development rights¹⁷ include the rights to education, information, leisure and freedom of thought, conscience and religion. Protection rights¹⁸ cover the right to be protected from all types of child exploitation and cruelty, parental separation and any possible abuses within the criminal justice system whereas the fourth category, participation rights,¹⁹ covers the freedom to express opinions and to have a voice in issues influencing the child's life.

Despite being open for ratification to member states in 1989, the *CRC* was only ratified by the Malaysian government six years later in 1995 where it was declared that the provisions within the Convention was applicable as far as it complied with the FC, national laws and national policies. The Malaysian government also made several expressed reservations with respect to the articles.

Development Rights: Education

Every child is entitled to the right to education. The education system in Malaysia is to a large extent satisfactory. Primary education in Malaysia is not only compulsory but it is also to a large extent free. The facilities provided for in schools are also adequate and today the opportunity to further one's education at tertiary level is almost available to anyone who seeks it. However, the education opportunities for disabled children in Malaysia are often overlooked.

¹⁶ 'Children & Youth', (Human Rights Education Associated Website) <http://www.hrea.org/index.php?doc_id=146#top> accessed 23 August 2011.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*

In the metaphorical battle to uphold children's rights, many tend to overlook the special needs of disabled children. It is important that appropriate facilities for disabled children in schools are provided for. Hence, the Malaysian government must ensure not only that all schools in Malaysia are well equipped with facilities for the disabled but also that Malaysia itself, as a developing country, should be 'disable friendly'.

Among the Articles reserved in the *CRC* is *Article 28(1)(a)* which covers the right to education.²⁰ Although the basis of this provision is embedded within the FC, the Malaysian government is still disinclined to ratify it. In this aspect the Malaysian government should do away with all the reservations especially *Article 28(1)(a)* which provides for free and compulsory primary education. Currently, primary education in Malaysia is free and compulsory.²¹

Protection Rights: Corporal Punishment

The reservation of *Article 37* of the *CRC*²² which prohibits torture or cruel, inhumane or degrading punishment contributes to the legality of corporal punishment in Malaysia. However, *Article 19* of the *CRC* provides that all necessary measures must be taken in order to protect a child from all forms of physical or mental violence while in the care of those responsible. Technically, this would mean that corporal punishment would fall under this category as it inflicts physical harm on a child. By right, a child has the right to legal protection from assault and any form of corporal punishment. However, in Malaysia, though limited

²⁰ Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/law/crc-reserve.htm>> accessed 23 August 2011.

²¹ Education Act 1996 section 29.

²² Convention on the Rights of a Child, (United Nations Treaty Collection Website) <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en> accessed 23 August 2011. The reservation of the Articles took place on 19 July 2010.

by the 2001 Act²³ and the Domestic Violence Act 1994²⁴, corporal punishment at home is lawful. Further, the *Education Regulations (Student Discipline) 2006* regulates corporal punishment of boys in schools.

Hence, in Malaysia, corporal punishment is a common form of disciplinary action. Though some may argue that when raising a child, corporal punishment is indeed a necessity, does that mean that the rights of a child should be tampered with? Besides that, there are many other, non-physical ways, of 'getting through' to a child. Assuming that corporal punishment is necessary in raising a child, then where exactly does one draw the line as to the amount of physical contact which is acceptable as different children have different levels of tolerance. The Malaysian government is currently pressured by the Committee on the Rights of the Child²⁵ as well as the local Bar Council to end all corporal punishment of children within the nation.

The Malaysian government is perhaps hesitant to prohibit corporal punishment due to religious and cultural considerations which sometimes tend to see mild physical punishment as an effective way to raise children.²⁶ More often than not religion tends to play a crucial role in legal development. For example, Christianity tends to encourage the use of physically abusive techniques in raising a child and this could be traced back to biblical passages which actually condone corporal punishment.²⁷ Malaysia, being a country which was once under the

²³ Child Act 2001 section 17(2)(a).

²⁴ Section 2 provides a wide definition of the term 'domestic violence' which tends to govern any excessive form of corporal punishment.

²⁵ UNCHR 'Committee on the Rights of a Child: Consideration of Reports Submitted by State Parties under Article 44 of the Convention: Malaysia' (2 February 2007) UN DOC CRC/C/MYS/CO/1.

²⁶ Narasappa Kumaraswamy and Azizah Othman, 'Corporal Punishment Study: A Case in Malaysia' (2011) Psychology Scientific Research Paper No. 10.4236/psych.2011.21004, 24.

²⁷ Janet L. Mullings, James Walter Marquart and Deborah J Hartley, *The Victimization of Children: Emerging Issues*, (The Haworth Maltreatment and Trauma Press, 2004) 88.

colonisation of the British has inherited the English legal system and to a significant extent the Malaysian legal system is somewhat similar to that of the English legal system.

In the United Kingdom, the defence of reasonable chastisement²⁸ is applicable for the common law crime of assault which means that provided that the chastisement was reasonable, corporal punishment in the UK is legal.²⁹ However, the defence is only applicable for cases of minor assaults and not those that cause actual bodily harm.³⁰ Hence, the similarity between the laws with regards to Malaysia and the UK is similar when corporal punishment is concerned. Thus corporal punishment is not only legalised in Malaysia but it has also become a norm within the society.

However, does this mean that the rights of children should vary according to their culture because what may seem a violation of rights in one country may be a norm in another? In reality, the rights of a child remain the same regardless of the child's culture but culture does in fact play a pivotal role in determining the different types of rights that the authority in a particular country is willing to allow the child to exercise and this is the exact scenario in Malaysia with regards to corporal punishment. The culture and tradition of a country should always be preserved so long as it does not run contrary to the rights of the children.

Hence, this calls for an answer to the question as to whether or not corporal punishment is still relevant in today's modern society. Corporal punishment is indubitably relevant in disciplining a child. Sometimes mere warnings may be insufficient to make a child understand and reasonable chastisement usually does

²⁸ Chastisement is the infliction of corporal punishment. The defence of reasonable chastisement allows parents to inflict physical harm upon their children with the intention of correcting them provided that it does not cause actual bodily harm and remains within the realms of reasonableness.

²⁹ *A v United Kingdom* [1998] 2 FLR 959.

³⁰ Children Act 2004 (UK) section 58.

the trick. Corporal punishment may cause adverse psychological effects³¹ on the child and might lead to the rise of abuse cases.³² However, an analysis conducted by Jason M. Fuller of the University of Akron Law School revealed that despite the ban on corporal punishment in Sweden, the number of child abuse cases reported since its banning increased by 500%.³³

Corporal punishment may appear to violate the rights of a child but is it not true that the whole idea of giving children their rights is for their own betterment? If so, then reasonable chastisement with the view of correcting a child for his or her own development should not be prohibited provided that it remains within the realm of reasonableness. Hence, in this sense, the Malaysian government in allowing corporal punishment does not violate the rights of a child as long as the laws governing it are effectively implemented.

Protection Rights: Child Trafficking

Child trafficking³⁴ violates every possible right a child is entitled to. Most Malaysians are aware of its existence but it is highly doubtful whether they are also aware that Malaysia has become one of the major transit point for child

³¹ Christopher Harding and Richard W. Ireland, *Punishment: Rhetoric, Rule and Practice* (Routledge, 1989) 190.

³² Elizabeth Gershoff and Robert Larzelere, 'Is Corporal Punishment an Effective Means for Discipline?' (2002) APA <<http://www.apa.org/news/press/releases/2002/06/spanking.aspx>> accessed 23 August 2011.

³³ Theodore Kettle, 'Pro-Spanking Studies May Have Global Effect', *newsmax.com* (United States, 7 January 2010) <<http://www.newsmax.com/US/spanking-studies-children-spock/2010/01/07/id/345669>> accessed 28 June 2011.

³⁴ Child trafficking refers to the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

trafficking.³⁵ The *Anti-Trafficking in Persons Act 2007*³⁶ and the *2001 Act*³⁷ are evidence of the Malaysian government's effort in preventing child trafficking which has been on the rise. The laws we have today in relation to child trafficking are rather adequate³⁸ and so we should start looking for the root cause of the increase in child trafficking because it is clear now that it has nothing to do with inadequate laws. Thus, the question arises as to the effectiveness of the enforcement of these Acts and policies in the country?

Law enforcers must understand that it is their duty to ensure public safety especially with regards to children and having a complete and codified law which may seem good to the eye is certainly not the same as its actual implementation.

Protection Rights: Child Abuse

Everyone is aware of the existence of child abuse. Child abuse ranges from the usual child neglect where a child is deprived of his or her basic needs, to physical and sexual abuse and it also covers abandoned babies.³⁹ Depending on the type of offence committed, an offender may be liable to a fine of a maximum of RM 50,000, a maximum jail term of 10 years⁴⁰ and under certain specified circumstances, caning.⁴¹ However, despite these seemingly adequate laws, in 2008, the Department of Social Welfare revealed that an average of seven children were

³⁵ 'Malaysia: UNICEF Report Calls for Urgent Action on Child Trafficking' <<http://www.siiainline.org/?q=programmes/insights/malaysia-unicef-report-calls-urgent-action-child-trafficking>> accessed 28 June 2011.

³⁶ *Anti-Trafficking in Persons Act 2007* section 14.

³⁷ *Child Act 2001* part VII.

³⁸ 'Children's Rights References in the Universal Periodic Review' <<http://www.crin.org/resources/infodetail.asp?ID=22167>> accessed 28 June 2011.

³⁹ 'Get on Board Malaysians: Stop Child Abuse Now!' <http://www.unicef.org/malaysia/media_news10-unicef-urges-malaysians-to-get-on-board-to-stop-child-abuse.html> accessed 28 June 2011.

⁴⁰ *Child Act 2001* section 31.

⁴¹ *Penal Code* section 375(2).

abused daily and this figure continues to rise and what is feared is that this number does not include cases which go unreported. Most abused children suffer not only from the immediate visible effects of abuse but they also suffer from long term psychological disorders such as aggressive behaviour and depression.

The existence of Statutes which cover offences of child abuse is evidence that Malaysia is concerned about child abuse and is taking all preliminary steps towards its elimination. Why then does child abuse continue to escalate? Is it once again a problem of implementation? Or is it people are unaware of their civic duty to protect children? Or is it the effort to protect children from child abuse is a hopeless cause because in a way it requires a great deal of intrusion into the privacy of families? Families are mostly ashamed or fearful of reporting child abuse for reasons such as the perpetrators are usually family members or relatives.

In a way the current justice system is rather unsatisfactory. For instance, the *Criminal Procedure Code (Amendment) Act 2010*, which allows plea bargaining in criminal cases,⁴² should not be extended to child abuse cases. The whole idea of plea bargaining is to save courts time and to speed up trials⁴³ but at the same time it also goes against the principle of punishment⁴⁴ and besides that, what certainty is there that the offender truly regrets what he has done and will never do the same again? This is not to say that a plea bargain denies justice but we must acknowledge that it should not be provided under certain circumstances, especially when it involves child abuse.

⁴² Penal Code section 172C.

⁴³ Shahrin Tamrin, 'Courts to Implement Plea Bargaining, Pre-Trial Conferences Soon', *The Malay Mail* (Kuala Lumpur 13 December 2010) <<http://www.mmail.com.my/content/57615-courts-implement-plea-bargaining-pretrial-conferences-soon>> accessed 23 August 2011.

⁴⁴ Mark Tunick, *Punishment: Theory and Practice* (University of California Press, 1992) 117.

There was a case which involved a seven-year-old girl whose step-father was charged with attempted rape in Perak.⁴⁵ The offender pleaded guilty and was given a lighter sentence. There is no doubt that this has saved the court's time and cost, however, the effects of the sexual abuse which the victim endured will remain a permanent scar for the rest of her life while the offender walks away after paying a small sum of money and serving 10 months of jail time.⁴⁶ Now we should ask ourselves, has justice really been served? The courts have denied justice to a child. This delivers the idea that a charged child abuser with a weak case could easily plead guilty and hope for a reduced charge. Subsequently, families are now opting not to report such cases because at the end of the day, after immense emotional turmoil, justice is rarely served. In this circumstance, it is suggested that the Malaysian justice system should adopt the system followed in India where plea bargaining is clearly not applicable to offences against women and children under the age of 14.⁴⁷

It is clear that apart from plea bargaining which plays a minor role against the elimination of child abuse, the laws in Malaysia are adequate. Hence, now it is up to us to help curb child abuse cases either by reporting it or even seeking help if one has the tendency to harm a child. Whatever be the necessary steps, child abuse must cease because it is a clear violation of the rights of the children.

Conclusion

The protection of children's rights in Malaysia has indeed improved over the years. The enactment of various Statutes and the implementation of policies that revolve around the protection of the rights of a child is clear evidence that the Malaysian

⁴⁵ Mariam Mokhtar, 'Malaysian Children and Child Abuse', *Asia Sentinel* (Kuala Lumpur, 25 January 2011) <http://www.asiasentinel.com/index.php?option=com_content&task=view&id=2941&Itemid=199> accessed 23 August 2011.

⁴⁶ *ibid.*

⁴⁷ Criminal Law (Amendment) Act 2005 s 265A(b) (India).

government is serious about it. Apart from a few exceptions it can be said that the rights of the children in Malaysia are protected. However, there will be no denying that in terms of creating awareness among the general public, Malaysia still has a long way to go. Children's rights should be made part of the curriculum and it must be taught in schools.

The responsibility of protecting children's rights lies not only on the shoulders of the governing body but also on the people who are meant to care and protect children. The Malaysian government needs to effectively enforce the legislation. Also, the fact that finance plays a pivotal role in ensuring that the rights of children are protected must be taken into account and dealt with. The rights of children must be protected and it is our duty to ensure it because as Robert Myers once concluded, '...the rhetoric of human rights needs to be translated into action. Children are not able to make that translation for themselves. They are dependant on the action of others for their rights'.⁴⁹

⁴⁹ Leonard Davies, *Children of the East*, (Pelanduk Publication, 1995) 54.