

# Inculcating Sense of Responsibility through Restorative Justice for Child Offender in Malaysia

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*(Received: 30<sup>th</sup> April 2021; Accepted: 5<sup>th</sup> June 2021; Published: 5<sup>th</sup> July 2021)*

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## **Keywords:**

*Child Offender;  
Restorative Justice;  
Responsibility;  
Reconciliation;  
Malaysian Child  
Justice System;*

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## **ABSTRACT**

The concept of restorative justice is a legal measure promoted as an alternative to the child justice system. The international law instruments such as the Beijing Rule and the Convention on the Rights of Child has highlighted on the alternative of restorative justice to protect well being and development of the child. This concept is already well developed in the New Zealand, Australia and United Kingdom. Although the model can be taken from those countries, but Malaysia has yet to take a progressive step towards having a proper framework for restorative justice in child justice system. Therefore, this article aims to highlight on the advantages of the restorative justice in inculcating the sense of responsibility among the stakeholder who directly affected by the offences committed by children and to promote the restorative justice as a holistic measure to sustainably develop the child mentally and emotionally. The methodology applied for this paper is legal research methodology which focuses on the examination of the legal provisions and exploration to the legal text written by legal authors. This paper finds that the restorative justice plays a vital role in inculcating the sense of responsibility among child offender and it shall be independently practiced in Malaysian child justice system.

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## **INTRODUCTION**

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) being one of the earliest international instrument which concerns with the administration of juvenile justice or also known as child in conflict with the law. It aims that the state parties shall sufficiently to take positive measure in promoting well being of the juvenile or the child offender, with a view to reduce the need for legal intervention and to deal with them humanely. Rule 5.1 states that the child justice system shall be emphasizing on the child well-being. This rule is supported by Rule 17 which states that deprivation of liberty shall be the last resort and applied in less restrictive form. Further, the United Nations also come up with the Convention on the Rights of the Child (the CRC) which also focuses on the importance of the state parties to treat children who has infringed the penal law by respecting their dignity, human rights and fundamental liberties. This article also emphasizes on the promoting of the child's reintegration and child's assuming a constructive role in the society. This article also encourages the use of restorative justice or diversion as an alternative to the child in conflict with the law. In short based on the two international instruments mentioned above, we could infer that the international community is promoting a holistic development of the child and encouraging alternative to divert the child justice from the conventional court litigation.

## **CONCEPT OF RESTORATIVE JUSTICE**

The general idea of restorative justice as explained by Braithwhite (1998) as restoring the victim which is restoring property lost or personal injury such as repairing the broken window or the broken teeth. It is the concept of restoring sense of security and it is a system of justice focusing more on victim-oriented, restoring the offender and restoring the community. Summarizing from the above concept, restorative justice can be seen as a method of repairing the damage caused in the course of the offence and restoring the relationship between the offender, the victim and the community at large as well as repairing the damage caused by the offender. Braithwhite (1998) further explained several characteristics of restorative justice. According to him, the wrongful act is not seen as an offence against the state but against the victim. This is the most obvious characteristic that differentiate the restorative justice from the mainstream criminal justice system. Secondly, the case is resolved through remedying the damaged caused by the offence. Thirdly, the resolution of the case is concluded from participation of all stakeholders like, the offender, the family members, the victim as well as a representative from the local community. Lastly, which also an important characteristic, that the conclusion and disposal of the case is based on group discussion and

group consensus, rather than linear punishment from the professional (i.e. judges) in the conventional criminal justice system.

Another concept of restorative justice is based on explanation of Lynch (2010) which says “Restorative justice is a response to offending which focuses on repairing the harm caused by the offence and affecting reconciliation between the victim and the offender.” This concept focuses more on reconciliation between victim and the offender. I believe that the reconciliation of the victim and the offender is a healthy way to remedy the emotional damage suffered by both victim and the offender. Looking back to our concern to the child offender, the reconciliation with the victim is a way of educating them that human relationship damaged by a wrongful act can be forgiven. Furthermore according to Lynch (2010), the aim of restorative justice is to reintegrate and reconcile based on the requirement of the international standard, primarily to repair the harm caused by the offender to the victim. This view is also parallel with the opinion of Braithwhite (2007), which highlighted that justice should heal the hurt caused by the crime especially the relationship between parties. Based on the above concept, I think that the concept of restorative justice is relevant and parallel with the idea of Beijing Rule which is to promote well being of the child, that is through restoring the damage caused to the victim, consensual resolution of the case and reconciliation of all stakeholders.

### **PRACTICES OF RESTORATIVE JUSTICE AND ITS IMPACT TO THE STAKEHOLDERS**

For this section, I will take several examples of the restorative justice system practiced in several countries aiming to show how this method is practiced and how it affects all stakeholders. Based on Fox (2004), in New Zealand, The Children, Young Persons and Their Families Act 1989 was passed which mandated conferencing for nearly all young offenders and families with child care concerns. The court appointed youth justice coordinator who is usually trained social worker facilitates the conference. McNeal & Brown (2019) claimed that New Zealand has created the Family Group Conferencing model from the tradition of the Maori people in their youth justice system which gives chance to the people involved to have their voice. This method has expanded to the cases involving school disciplinary issues as well as the adult offenders. In short, the restorative justice model in New Zealand is a group conferencing involving parents, child offender and the victim, facilitated by a trained facilitator to reach into a resolution and to dispose the case. This conference has diverted the child offender from criminal court litigation and avoiding their contact with adult offender which seems to give negative impact to the child’s development. Kaho (2016) explains that the key mechanism of the Family Group Conferencing is that “Bringing together state representatives, the young offender, the offender’s family and the victim in a statutory decision making process”. Kaho (2016) also elaborated that the Family

Group Conferencing aims to hold the offender accountable for their behaviour and encourage reconciliation between offender and the victim.

Differently in the United Kingdom, Fox (2004) explained that the restorative justice process based on Wagga Wagga model is facilitated by police staff, social service professionals or trained volunteers from community where the crime took place. Further, Lynch (2016) specified, the restorative justice process in England and Wales is done through private institutions but there is a responsibility lies on the state to ensure the process is done according to the international standard and securing rights of the child offender. Based on the explanation by Lynch (2016), we could see, the emphasize is given on securing basic rights of the children. Those rights are as laid down in the CRC which is education, liberty as well as promoting well being and development of the child. On the other hand, Munchie (2011) describes the restorative justice process in Northern Ireland that is practice since 2003 is through Youth Conference Service, following practices in New Zealand. This method stimulates sense of responsibility among child offender towards the damage he or she has caused. This conference will be discussing on the possible measure that can be taken by the child offender to repair the harm while giving a chance for the victim to listen the explanation from the child offender for reason of commission of the offence. This contention is supported by O'Mahony (2012) which says that the children who are ordered for youth conferencing by the court have lower rate of re-offending. This positive contention made by O' Mahony shows us that there is a clear relationship between developing sense of responsibility through group discussion to the lower rate of repeating the same offence. When a child offender learns that they have to be directly responsible to the damage they have caused, they have to restore it. Besides, the offender also will learn that restoring the relationship with the victim also have the same importance as repairing the damage. This method is an indirect education to the children specifically regarding their emotional, mental and social development.

In short, based on the above discussion, the restorative justice process involving all parties affected by the offence has created a platform to resolve the case without having the child offender to go through a conventional criminal court litigation. The resolution of the case is derived from the group or the conference consensus taking into account explanations and opinion of all parties involved. In my opinion, this method secures rights of the children when their parents or guardian is also involved in decision making. In this way, they can voice out their opinion or to object any decision which may lead to deprivation of the child's right. Furthermore, the child's right is also secured when the child as the offender is given a chance to explain their position as well as the reason behind commission of the offence. As to the parents, their involvement in resolution of the case would create a sense of love and bringing back close relationship with their children. Lynch (2010), expounded that the traditional view of the restorative justice emphasizes on the promotion of responsibility and accountability as well as taking into

account the participation of the family of the victim and member of the community in the disposal of the case. It promotes family decision making within strictly controlled boundaries; as they are not allowed to decide not to take any action against the child rather their freedom of choice of restorative outcome to be taken.

Besides the abovementioned impact of restorative justice towards child offender, the society will also benefit from this kind of practice. Fox (2004) points out that restorative justice valued as a way of hearing voices of all those involved in the incident and subsequent potential to heal and restore community harmony. This is in contrast to the adversarial criminal justice system in which the victim, offender and the society is silenced by the representative of the state. In this way, voices of the community at the ground level would be heard as to what way they think appropriate to help the child to repair the harm he or she has caused. I am in the view that, if the decision is obtained from the conference backed by statement of apology or explanation from the child, it will also restore the sense of security among community members. The community would have a confidence that they are heard and their opinion is accepted if an offence is committed against them.

To sum up, the benefit of restorative justice as practice in New Zealand and United Kingdom are enormous, ranging from educating the child a sense of responsibility and accountability, involvement of parents to secure rights of their child, addressing loss or damage suffered by the victim and to restore sense of security among the community members. All of this impacts of restorative justice can only be enjoyed when the child is held responsible and accountable to restore the injury.

### **THE MALAYSIAN PERSPECTIVE ON CHILD OFFENDER**

The most relevant law that protect the rights of children in Malaysia is the Child Act 2001. This Act is enacted to ensure the rights of child in Malaysia is protected in accordance with the international standard. This Act is applicable to persons categorized as 'child' that is a person below the age of eighteen years. As for the criminal liability, Mousavi and Nordin (2012) contended that Malaysia has three categories of criminal immunity that is full immunity for child below the age of ten, partial immunity for child between the age of ten to twelve years and full criminal responsibility for child between twelve to eighteen years of age. Although, the child below the age of criminal liability can be held liable for any criminal offence, but the child will be tried in a special court known as Court for Children established based on section 11 of the Child Act. This court is limited to dispose the case based on the orders enumerated in section 90 of the same Act. Among the orders that can be made at the disposal of the case involving child are, bond of good behavior, to order the child to be put in proper custody with the parents or guardian, to order the child to be sent to specific schools, payment of compensation and imprisonment as the last resort. Based on the listed orders, we could

observe that there is element of restorative justice through the order for payment of compensation, but this order is only given depending on court's decision. As for the element of education, if the court finds that the child to be sent to the approved schools, they are only to be sent to either Henry Gurney School or Sekolah Tunas Bakti. So, they are not given much freedom to choose which school they think best for their education. Besides the order for payment of compensation and sending the child to the approved schools, the finding of the court may vary and the court may have other options to dispose the case.

Observing the options available to conclude a case involving child offender, the element of restorative justice in Malaysian Child Act 2001 is still limited to the order from the court. The Status Report On The Children's Right On Malaysia (2012) criticized the Malaysian practice as to be focusing to the formal police investigation and litigation process as well as institutional rehabilitation instead of opting for restorative justice process. This statement is supported by Mustaffa (2016) which also highlighted that Malaysia still practicing the formal adjudication against the child offender in the Court for Children. The conventional court litigation process is criticized as there are increasing number of child committing criminal offences. Mustafa (2016) suggests that the restorative justice to be introduced into Malaysian Child Justice System as an alternative to reduce direct contact of the child with the formal court adjudication, and stigmatization, reducing reoffending and shorter process of disposal of the case.

Agree to the suggestion from Mustaffa (2016), I believe that the Child Act 2001 should give a space for restorative justice to work independently and free from court intervention. It is to allow all parties affected by the offence to participate in a proper discussion, to be heard and to agree to a proper resolution of the case, addressing the voice of the victim and right of the child offender. Furthermore, Malaysia should take a progressive step to follow the requirement of the Beijing Rules and the Convention on the Rights of Child as to promote the child's well being and their constructive role in the society. The parents and the community in Malaysia, as adult should also be given a chance to participate in the decision making for best interest of the child and they should play their role to educate the child.

### **CONCLUSION**

Restorative justice is not a new idea. Braithwhite has been promoting and introducing this idea since 1998. Besides, this practice has been widely accepted in New Zealand, United Kingdom and Australia. Having only small element of restorative justice in section 90 of the Malaysian Child Act is not sufficient. Malaysia shall take initiative to make restorative justice as an independent method of disposing a case involving child offender, following examples from New Zealand, United Kingdom and Australia. By introducing this method, all parties will be secured their right to be heard and most importantly, decision is made for the best

interest of the child. Lastly, the restorative justice process and outcome is a sustainable way to educate and to held the child offender accountable for their wrongful act. It is also a sustainable way to avoid reoffending.

## **ACKNOWLEDGEMENT**

This article is sponsored by the Fundamental Research Grant Scheme For Research Aculturation of Early Career Researcher (RACER) Research Project RACER19-038-0038 Entitled “Formulation of a Legal Framework for Restorative Justice in the Malaysian Child Justice Syatem”.

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- Vol 12 (127-136)