

Submission date: 05 Sep 2021 Received in revised form: 23 Nov 2023 Acceptance date: 05 Jan 2023 Available online: 29 Mar 2023

COMPARATIVE ANALYSIS OF INTERNATIONAL AND MALAYSIAN LEGAL FRAMEWORKS ON THE TREATMENT ON UNCONTROLLABLE CHILDREN: IS THERE ANY INCONSISTENCY?

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DOI: <https://doi.org/10.33102/mjssl.vol11no1.346>

ABSTRACT

The issue of uncontrollable children is no longer peculiar in the present days. Although this issue is no longer novel, uncontrollable children are being defined and treated differently in different jurisdictions. On this note, numerous international legal instruments have been adopted to protect the welfare of all children which include the protection of uncontrollable children. This article aims to comparatively analyse the available provisions extracted from international legal instruments that form part of the international legal framework on uncontrollable children with the Malaysian legal framework regarding uncontrollable children. This is done to determine the consistency between the former and the latter legal frameworks. The preliminary finding from this article is that the legal framework on uncontrollable children in the Child Act 2001 has substantially incorporated proper treatment which is required by the international legal framework and is consistent with the international legal framework. This can be seen particularly in following the disintegration of the treatment on uncontrollable children and juvenile offenders as well as the prioritisation of family-based care subsequent to the 2016 amendment of the Child Act 2001. This development to carry out reform process is commendable from the aspect of children's rights and is consistent with the aspiration of the international legal framework in preserving the best interest of the child which includes uncontrollable children. To this end, content analysis was employed pertaining to the provisions of the international and Malaysian legal frameworks on the treatment of uncontrollable children which suggests that the Malaysian government has undertaken some significant efforts to incorporate the international standards within its domestic law.

Keywords: *delinquency, Child Act 2001, international legal framework, uncontrollable children*

How to cite (APA 6th Style):

Abdull Manaf, M. K. S. (2023). Comparative analysis of international and Malaysian legal frameworks on the treatment on uncontrollable children: Is there any inconsistency? *Malaysian Journal of Syariah and Law*, 11(1), 1-13.
<https://doi.org/10.33102/mjssl.vol11no1.346>

Introduction

Children who are uncontrollable have ultimately caused some issues ranging from disobedience and disrespect towards parents and teachers, absenteeism and dropouts from school to substance abuse, violence and crime (Isaksson *et al.*, 2017) At present, the national legal frameworks that govern uncontrollable children may be found in some parts of the world which include Malaysia, Singapore, the United Kingdom (UK), Scotland and several Middle East countries like Bahrain and Egypt (Child Rights International Network, 2016).

Notably, the concept of uncontrollable children is abstract in nature. It can be seen by looking at the domestic legal sphere where the uncontrollable behaviour of the children cannot be explained objectively, but rather on a case-by-case basis. Hence, uncontrollable children may be treated as status offenders in which children who commit acts that are illegal for underage persons but legal for adults. This type of treatment would allow uncontrollable children to be arrested, detained, stood before legal proceeding and sent to correctional institutions. They may also be treated as victims of abuse or neglect who need care and protection (Child Rights International Network, 2016).

A particular juxtaposition also needs to be made in differentiating between the concept of uncontrollable children and delinquency where these two concepts are in fact different in character. The concept of uncontrollable children does not necessarily involve any act which constitutes an offence under any penal law whilst delinquency is often being associated with the commission or omission of any particular act which might constitute an offence under any penal law (Bartollas, 2003). However, a dilution between these two concepts is unavoidable when the uncontrollable children who are beyond the control of parents or guardian are mistakenly treated as status offenders (Michon, n.d.).

From this understanding, it has resulted to differential treatment given by countries towards the uncontrollable children. The differential treatment raises some questions regarding the proper treatment that these children deserve. Arguably, there is no one-size-fits-all approach in dealing with children-related issues. In general, the paramount consideration would be the best interest of the child (Mohd Ali *et al.*, 2019). With that being said, some groups of children may need different treatment than the other groups (Sormunen, 2016). Realising this delicate circumstance, the international community has concluded international legal instruments that provide extensive international legal or non-legal frameworks to guide every country in addressing the issues of uncontrollable children. These legal instruments will be elaborated further in the subsequent section of this article.

In that regard, the main analysis in this article is to examine whether the treatment for uncontrollable children that the 2016 amendment of the Child Act 2001 (“CA”) provides is harmonious with the international legal framework on uncontrollable children based on several identified themes. Towards that end, the article analyses whether Malaysia has taken all appropriate measures in terms of legal provisions to cater the issue of uncontrollable children from the rehabilitating process and other related matters. Besides, the article discusses the definition of uncontrollable children from legal and scholarly sources and the factors that lead the children to become uncontrollable in Malaysia that is necessary in setting up the context for the analysis.

Definition of Uncontrollable Children and Factors that Lead the Malaysian Children to Become Uncontrollable

It is important to emphasise that concepts such as “uncontrollable behaviour” and “uncontrollable behaviours with children” are not scientific concepts. Those are also not the keywords used when searching for scientific literature. Thereby, these concepts may have different meanings for different people and the term can be used differently depending on purpose. The concept must therefore be interpreted on the basis of its context (Isaksson *et al.*, 2017). Nevertheless, reference can be made to the previous studies as well as relevant national legislation in guiding the discussion on the legal and conceptual definition of uncontrollable children.

In sociological context, Nong and Yusoff (2019) suggested that uncontrollable children are simply those who are beyond the control of the parents or guardians. The works of other researchers have also successfully provided the breakdown of the traits that may be found in uncontrollable children which can be described as naughty, ungovernable, disobedient, delinquent, deviant or those with involvement

in social problems (Akram, 2007; Sharif & Roslan, 2011; Yahaya *et al.*, 2010). The common instances of uncontrollable behaviour of children are running away from home, loitering, vagrancy, truancy and smoking (Child Rights International Network, 2016). Theoharis (n.d.) elaborated further on three constituent criteria for the children to be considered as uncontrollable which are (i) the behaviour ought to be persistently committed; (ii) the behaviour must possess a negative element which threatens the well-being of the environment; and (iii) the instruction made by the parents must be lawful.

Meanwhile, in the legal context, there is no explicit definition for uncontrollable children or children beyond control provided in the international legal instruments on children's rights. The concept of uncontrollable children is labelled with varying labels in different jurisdictions. Some countries like Myanmar and Bangladesh adopted the word "uncontrollable" while Bahrain labels the children as "bad behaviour". In Belize, the term "out of control" is used and Egypt applied the term "bad conduct". There are also terms like 'beyond control' used in Trinidad and Tobago whilst Scotland and Singapore adopted the term of "beyond parental control" (Child Rights International Network, 2016). Although the concept is seemingly described differently in different jurisdictions, the actual meaning of those terms is arguably the same which refers to the condition of children who possess uncontrollable behaviour. This also justifies the usage of the term "uncontrollable children" throughout this article where this article argues the said term is the closest depiction to describe the overall phenomenon.

It should also be noted that the legal definition of uncontrollable children is also absent in the Malaysian legal framework on children's rights particularly the CA. The nearest reference on the concept can be made by referring to section 46 of the CA which provides the provision pertaining to the procedure in applying a Beyond Control Order ("BCO"). The BCO application can be made by the parent or guardian of a child. Based on the said provision, it can be contextually understood that the children are in fact uncontrollable under two instances. First, when the parent or guardian is unable to exercise proper control over the child and the child is falling into bad association. Second, a child who has no parent or guardian or has been abandoned by his parent or guardian and the child is falling into bad association. These instances constitute the grounds to be considered by the Court for Children in considering the application for a BCO.

In light of the scholarly and legal definitions of uncontrollable children provided by the previous scholarly discussions and relevant national legislations, it is suggested that uncontrollable children to be defined as any child or children who cannot be effectively controlled by his parent or legal guardian because he fails to adhere to lawful command of the parent or legal guardian and/or persistently behaving in negative behaviour or behaviours.

Apart from understanding on the legal and conceptual definition of uncontrollable children, the identification of the factors that lead the children to become uncontrollable is also relevant. This is to ensure that all the relevant determinants for an effective analysis on the legal frameworks on uncontrollable children pertaining to the issue of uncontrollable children are taken into account. Hence, the next section would address the factors that lead the children to become uncontrollable in Malaysian context.

Factors that Lead Malaysian Children to Become Uncontrollable

Identifying the underlying factors of behaviour and demeanour in a child or in a group is necessary to set the context in discussing the issue of uncontrollable children (Isaksson *et al.*, 2017). Thwala (2013) argued that a child's behaviour is dependent on several different factors that include culture which is as a pivotal point of enriching the child's identity. In light of this claim, it is important to set up a local context while discussing the factors for the children to become uncontrollable. This is to ensure that the local legal framework is able to address the issue in the domestic setting with a due regard on the aspiration that the international legal framework has to offer in dealing with the issue of uncontrollable children. Hence, this section will elaborate the factors that lead the children in Malaysia to become uncontrollable.

Several studies which are worth mentioning have been conducted previously on the factors that lead the children in Malaysia to be involved in social problems (Bakar & Hamzah, 2019; Sharif & Roslan, 2011)

and delinquency (Akram, 2007; Yahaya *et al.*, 2010). Even if the scope of the previous studies did not explicitly refer to the concept of uncontrollable children, the data produced from those studies can be utilised in the discussion on uncontrollable children because the acts referred to in the studies also fall under the scope of uncontrollable behaviour.

Bakar & Hamzah (2019) enumerated four main factors for the involvement of the teenagers in social problems which include self-related factor, peer pressure, mass media and parental issue while Sharif & Roslan (2011) identified personal and family backgrounds as the factors of the involvement in social problems among teenagers from a correctional institution. Yahaya *et al.* (2010) stressed that family relationship, peer relationship and emotional intelligence are associated as the factors for delinquency among school students. Whilst, there are five main factors causing juvenile delinquency in Malaysia as identified by (Akram, 2007) which are family, individual, environmental, poverty and religious education.

From the thematical analysis on the factors of delinquency and involvement of teenagers in social problems which was discussed in the previous research, it was discovered that there are three prevailing factors namely:

- i. family related (Akram, 2007; Bakar & Hamzah, 2019; Sharif & Roslan, 2011; Yahaya *et al.*, 2010);
- ii. personal or individual related (Akram, 2007; Bakar & Hamzah, 2019; Sharif & Roslan, 2011);
- iii. peer related (Bakar & Hamzah, 2019; Yahaya *et al.*, 2010).

These common factors identified by the previous researchers need to be analysed intrinsically to provide an extensive appreciation on how each factor can be taken into consideration in the context of uncontrollable children's concept.

i. Family Factor

Family is an important institution that is influential in the development of character in children and teenagers' life. Failed parenting will diminish the important role of family institution that subsequently increases the tendency of the involvement of children with the social problems which will bring negative impact to the children's future (De Figueiredo *et al.*, 2012; Georgas *et al.*, 2006). Previous researches by Azizan *et al.* (2015) and Holman & Kellas (2018) found that communication breakdown between parents and their children will negatively affect the relationship between parents and children and their children would likely be involved in the social problems. Hence, it can be concluded that effective communication is very crucial in preserving the family relationship.

Besides, Akram (2007) argued that the dissolution of the family institution when the parents are divorced or experiencing marital disputes is another important factor for the increase of juvenile delinquency cases because it will often result to the neglect of the children. When the children perceive that they are neglected, they will go astray without any proper guidance which becomes one of the reasons of committing delinquent acts. In the similar vein, Abd. Rahman (2008) discovered that the behavioural and emotional problems experienced by the children may also be resulted from the lack of supervision particularly by the single parents. Single parents usually need to work extra hours in order to provide sustenance for the family. As a result, the children will be deprived of due care and attention that may lead to their uncontrollable behaviour.

ii. Self-Related Factor

Muda *et al.* (2015) found that teenagers' involvement in various social problems is originated from the internal factor within the teenagers themselves. It may be caused pursuant to an emotional stress when they have not received any proper guidance from the relevant parties. This is consistent with the research which was conducted by Sharif & Roslan (2011) that concluded the internal factor within the teenagers themselves is the prevailing factor of the involvement in social problem at a school as compared to peer pressure and other related factors. Further, many teenagers are keen to try new things that they never encountered previously. This is what was found by (Azizan *et al.*, 2015; Sharif & Roslan, 2011; Yahaya *et al.*, 2010) in their studies which explained that majority of the students who are involved in social problems is resulted from their curiosity. Essentially, this is among the dominant traits endowed by the

teenagers within themselves that drive them to fearlessly try new things as explained by Madon & Ahmad (2004). Madon and Ahmad (2004) also asserted that the teenagers with history of abuse may behave in an unacceptable way due to the abuse driving them to do so. Besides, the plummeting appreciation on moral values within the children's selves may also become one of the causes for the failure of the children to behave in an acceptable manner (Bennabi & Al-Masawī, 1998).

iii. Peer Pressure

A study carried out by Yahaya *et al.* (2010) revealed that peer pressure is among the external factors that influences the development of teenagers' upbringing. Loke and Mak (2013) found that teenagers are easily influenced by their peers because they tend to take the risk in doing anything in group rather than alone. Besides, it is found that when the teenagers are facing any issue during this age, they will share with their peers first because they want to be free from their parental influence as they begin to think for themselves (Berndt, 1979). Besides, peers are also the main option for the teenagers to share their problems with as compared to their own families because teenagers usually select their peers based on common traits that they share such as behaviours and identity (Akers *et al.*, 1998). School truancy is also a misbehaviour that is closely related to peer pressure (Mat Nor *et al.*, 2012).

Having identified several prevalent contributing factors for the children to become uncontrollable in Malaysia, the next chapter serves to provide content analysis on the international legal framework on uncontrollable children which is important to be understood. This is done to identify the international legal standards in addressing the issue of uncontrollable children. The international and Malaysian standards as well as the contributing factors are vital to be analysed together. This will serve as a guidance to the comparative analysis on the consistency of the international and Malaysian frameworks that is going to be presented in this article. Towards this end, the comparative analysis ought to correspond with the rights of the child at the international plane (at the macro level) and more importantly, it would be ensured that these approaches would correspond with the societal structure of local societies in Malaysia (at the micro level).

International Legal Framework on Uncontrollable Children

Cases of uncontrollable children have been present for a substantial amount of time worldwide. It was reported between March–April 2003, 55% children were detained in a Boys' Remand Home in Lagos, Nigeria for 'beyond parental control' behaviour which were non-criminal cases, whilst 80% of girls were detained in the Girls' Remand Home on the same basis (Pinheiro, 2006). Meanwhile, between 1999 to 2013 there were 24,427 Anti-Social Behaviour Orders ("ASBO") issued in the United Kingdom, 36% of which were applied to people under the age of 18. The orders were issued in response to the evidence that a person has been acting in a way that causes or is likely to cause harassment, alarm or distress which is akin to uncontrollable behaviour. ASBOs are not a criminal punishment but breach of an ASBO in England and Wales can lead to a criminal conviction. In this regard, it was reported that almost 60% of ASBOs issued were breached. Among children, two thirds of the affected children had breached their order at least once where 37% of them received a custodial sentence for breaching their order (Child Rights International Network, 2016).

Owing to the fact that there are inconsistencies in addressing the issue of uncontrollable behaviour in different countries, it is of vital importance to have a standardised approach to the administration of uncontrollable children which needs to be formulated under the leadership of the United Nations. This needs to be done not only to address the issue of uncontrollable children strictly through judicial measures but also through other mechanisms which is aimed to protect the well-being and rights of such children by correcting their thoughts and behaviours rather than penalising them.

From this realisation, the United Nations member states have pledged their commitment for an international cooperation in dealing with this rampant issue. Their commitment became a breakthrough to the introduction of the international legal framework which consists of several guidelines and resolutions guided by the general principles pertaining the rights and protection of children as embodied under the CRC (Glenn Mower Jr., 1997). To provide a breakdown on this, the following specific part

will analyse several international legal instruments which have directly or indirectly become an international framework pertaining to the issue of uncontrollable children.

The international legal instruments that will be discussed are as follows:

- i. The United Nations Convention on the Rights of the Child;
- ii. The United Nations Guidelines for the Prevention of Juvenile Delinquency;
- iii. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice; and
- iv. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.

A reference to these instruments reveals that it has set out important principles that aim to protect the right and interest of the uncontrollable children. Although some of these instruments focus on the juvenile delinquency, it is still relevant to be cited in the discussion of uncontrollable children because this issue is relatively being described as status offence which warrants the applicability of the said international instruments as described by Child Rights International Network (2016).

i. The United Nations Convention on the Rights of the Child

CRC is the main international instrument which concerns the children in general. It spells out that children have different needs and protection in terms of fundamental rights, personality, and capacity from adults (Cantwell, n.d.). Glenn Mower Jr. (1997) further explained that CRC underlines the civil, economic, political, and social rights to fulfil the special needs of children. It is notable that the CRC presents a revolutionary and radical approach to empower the children which centres on the general concept of the children's best interest (Fottrell, 2001). The CRC indirectly addresses on the issue of uncontrollable children through the principles of the best interest of the child, the responsibilities of family and the government, and rehabilitation. The paramount consideration in addressing the treatment for uncontrollable children could be found in article 3 of the CRC which states that the best interests of children should be prioritised in all actions and decisions taken concerning them (UN Office of the High Commissioner for Human Rights (OHCHR), 1997). In this context, all parties including private and public social welfare institutions, local authorities, courts, and legislative bodies must consider the effects of their actions on children to protect their best interests (Pinheiro, 2006). Hence, the abolishment of status offence is needed to preserve the best interest of the children by keeping the children away from being in contact with the law (Child Rights International Network, 2016).

Meanwhile, articles 5 and 18 of the CRC confer upon the parents, with the support of the government, on the responsibilities of parents in raising and educating children. In this regard, the government should respect such responsibility by providing suitable assistance and support to the parents in raising their children to give their best to the children. On this note, CRC does not tamper with the responsibility of the parents or confer extra authority to the government. In essence, it entrusts the government with the responsibility to protect and support families in performing their duties as the caregivers of children (UN Office of the High Commissioner for Human Rights (OHCHR), 1997). Besides, article 9 of the CRC guarantees that the children's right is to not be separated from their parents unless it is done for their best interests. Due to this guarantee, uncontrollable children must be under the custody of their parents and should not be sent to welfare institutions except when the measure is found to be the best resolution for them and it is the last resort (Child Rights International Network, 2016).

The provisions that are discussed in the above paragraph require the parents and the government to work together in addressing the uncontrollable behaviour. The parents should not let go of their responsibilities just to be taken by the government bodies. At the same time, the government should include parents in the correctional process of uncontrollable children. In addition, detention in correctional institutions should be used only as the last resort since children are entitled to be rehabilitated within their family environment as the primary rehabilitation measure.

Government intervention is permitted when the family-environment intervention fails to provide intended result on the rehabilitation of the uncontrollable children. This intervening action is promoted by article 20 of the CRC where it provides that the government must carry out intervention if the family environment of the child is not satisfactory (Seymour, 1992). Government intervention might consist offering various alternative correctional mechanisms from foster placement or suitable institutional

placement if necessary (Champion, 2001). As far as the cases of uncontrollable children are concerned, the government possesses a duty to be involved in family matters for the purpose of correcting and rehabilitating the children in the event of the failure of parents to fulfil their original responsibility (Champion, 2001).

The CRC also underscores the principles in relation to the placement of children in correctional institutions. The principles contained in articles 37 and 40 of the CRC provide the children with a right to rehabilitation that respects them, suitable for their age and preparing them for their reintegration into society. The second limb of article 37, in particular, provides on the call for preserving the liberty of the children in the event that they are in conflict with the law. Hence, any form of deprivation of liberty upon children should be considered as a rare and exceptional measure only. In the event that deprivation of liberty is considered as necessary, the children shall be treated with full dignity and guaranteed the appropriate legal rights as a detainee (Schabas & Sax, 2006). Meanwhile, article 40 concerns on the basic principles of the child criminal justice system. It encourages the guarantee of children's well-being throughout the criminal justice process. In the event of the children being in conflict with the law and need to undergo criminal justice process, the process should be aligned to the family court principles that concern mainly on the best interest of the child rather than applying a punitive approach (Van Bueren, 2006).

Besides, children also need to be protected from any violence as guaranteed under article 19 of the CRC. In fulfilling this obligation, the government should give assurance that children are not abused or being subjected to an ill treatment by government workers at every procedural stage of the administration of justice. This is especially in the rehabilitation process and punishment (Pinheiro, 2006). Be that as it may, penal measure should be the final option or not becoming an option at all. Non-penal measure that catalyses the children's development and allows them to remain at their residence is preferable compared to other penal measures. If the circumstance of the case permits, leaving correctional institutions should be enforced especially through care and supervision order, probation order, foster care order and educational and vocational programmes (UNICEF, 2017). The realisation of these CRC principles to the uncontrollable children simply means that they may be subjected to the placement in correctional institutions only in these irregular circumstances: which are correctional institutions are allowed only as a last resort in rehabilitation, diversion from correctional institutions is encouraged and the children who are sent to correctional institutions should be treated with respect and not maltreated, and effectively reintegrated into society.

ii. The United Nations Guidelines for The Prevention of Juvenile Delinquency

The United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") provide important principles on the prevention of children delinquency. The guidelines were finalised and adopted by the United Nations General Assembly on 14th of December 1990 to provide a supplemental document to the CRC (Carroll *et al.*, 2009). It contains the provision on the call for an action to legislate a safeguarding policy in assisting the realisation of socialisation and integration of children through family, society, peers, school, and media as stipulated under article 10 of the Riyadh Guidelines (Child Rights International Network, 2009). Meanwhile, article 5 of the Riyadh Guidelines provides, *inter alia*, that putting label on children as deviant or delinquent should be refrained because it has the tendency to cause negative behaviour and that community-based services should be introduced as an alternative for the children from being involved in court proceedings. This is important to prevent children from being involved in delinquency. Besides that, article 5 also highlights the crucial role of society in preventing children from crossing the law by giving assistance to the families in preparation for the care and nurture of children (UNICEF, 2017).

The specific guidelines on status offence are also included in the Riyadh Guidelines. In this regard, the prevention on the children from being stigmatised, victimised or criminalised should be carried out through creation of laws to ensure that a status offence is not treated as an offence as well, bearing the meaning that no children should be punished for committing it as underlined under article 56 of the Riyadh Guidelines. For this reason, prevention is the main solution in dealing with the status offence. The Riyadh Guidelines promote that the children shall be free from any negative labelling when they do not behave like how they should reasonably behave. Negative labelling would only contribute to further undesirable behaviour by children. Further, they should not be subjected to any court

proceedings and community-based rehabilitation is the utmost preference when they are in conflict with the law. Thus, the Riyadh Guidelines recommend the community with diversionary measures as have been underlined in the guidelines and should be carried out through legislation. The legislation therefore will abolish the provision on penal measure on status offence (which may include uncontrollable behaviour) to protect the welfare of these children. This is because it underlines an important consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear naturally from most individuals with the transition to adulthood. The holistic approach of which the Riyadh Guidelines promote is therefore laudable in dealing with the issues of uncontrollable children and other status offence as it explicitly sets child-oriented methods to preserve the best interest of the child.

iii. United Nations Standard Minimum Rules for the Administration of Juvenile Justice

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) were approved and adopted by the United Nations General Assembly on 29th of November 1985 in Beijing, China. It underlines the international standards on the administration of justice for children. The rules introduce the minimum standards in handling a child who is in conflict with law. It is notable that many principles of the Beijing Rules are embodied in the CRC and applied according to the condition in terms of economy, society, and culture of the state party. In response, articles 2 and 3 of the Beijing Rules state that the principles are applicable to all children who are involved in court proceedings including criminal offenders, status offenders, and children administered under welfare and care proceedings. Even if the rules use the term juvenile justice, all perceived status offence which include uncontrollable children also fall within the scope of applicability of the rules because its scope may be extended to be applied not only to juvenile offenders but also to children who may portray any specific behaviour that would not be punishable if committed by an adult.

Generally, the Beijing Rules call for each state to set up a dedicated and separate justice system for children’s needs. This is important to emphasise preventive measures, encourage diversionary programmes, and support child-friendly procedures. Moreover, the rules promote the protection of children’s welfare, minimum intervention by the children’s justice system, and reduction of harm caused by such intervention (UNICEF, 2017). However, a particular focus must be given to article 11 of the Beijing Rules which provides that children should be averted from being involved in court proceedings since the courts are only the final option. Alternatively, articles 18 and 19 of the Beijing Rules put on recommendations that misbehaving children should be treated through community-based programmes, supervision, counselling, adoptive care, and other out-of-court measures whereas their placement in institutions should be considered as the last resort or an extraordinary measure and ordered for the shortest period possible (Cantwell, n.d.).

Since uncontrollable children have the tendency to be involved in court proceedings as they may in fact conduct some acts which are against the law, the Beijing Rules may come in handy to function as a guide. Therefore, non-penal measure should be encouraged to decrease the possibility of intervention by the courts and institutional placement should only serve as the last resort by making family- or community-based rehabilitation as the foremost option. It is important because the involvement of children in court proceedings and their placement in institutions may subject them to stigmatisation and will bring them a negative influence. The effects on the children could be worst due to the already poor parent-child relationship. Therefore, alternative care programmes must be practised and also supported by the CRC and the Riyadh Guidelines.

iv. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (“The Havana Rules”) were elaborated by the Committee on Crime Prevention and Control in close cooperation with several intergovernmental and non-governmental organisations, such as Defence for Children International. It was adopted by the United Nations General Assembly on 14th of December 1990. They promote the least possible use of deprivation of liberty, especially in prison and other closed institutions. The Havana Rules underline principally on the separation of juveniles who are subjected to institutionalisation that should be carried out based on the provision of the type of care most suitable for their needs and the protection of their physical, mental, and moral integrity and well-being as

provided in Rule 28. Besides, Rule 29 of the Havana Rules calls for the end of the practice of mixing the juveniles with adults in detention and the classification of juveniles according to their sex, age, personality, and offence type in ensuring their protection from undue influences. Other than that, the Havana Rules elaborate special provisions covering various aspects of institutional life. The aspects elaborated are, *inter alia*, physical environment and accommodation (Rules 31-37), education (Rules 38-46), recreation (Rule 47), religion (Rule 48), medical care (Rules 49-55), contact with the outside world (Rules 59-62), inspection and complaints (Rule 72-78) as well as return to the community (Rules 79-80).

As the discussion on uncontrollable children might also cover the possibility of the risk of such children to be deprived of their liberty particularly when the domestic law criminalises certain uncontrollable behaviours such as beyond parental control (Pinheiro, 2006), it should become evident why the Havana Rules are particularly relevant in addressing the issue of uncontrollable children.

Indeed, there is no international legal instrument which deals specifically on uncontrollable children (since it is commonly discussed together with delinquency and juvenile offender topics). However, the previously elaborated documents laid down useful guidance which may be referred by the domestic law makers in addressing the issue of uncontrollable children in the local context. The principles of best interest of the children, decriminalisation of status offence and diversionary programmes are core takeaways from the analysis made on the provisions of the aforementioned international legal instruments. Hence, the analysis on the Malaysian legal framework on uncontrollable children in the next section will be made thematically based on the question on whether the Malaysian legal framework does include previously described principles or otherwise.

Malaysian Legal Framework on Uncontrollable Children

The issue of uncontrollable children is not foreign in Malaysia. This can be proved by looking at the statistics from Department of Social Welfare which show that the number of uncontrollable children's cases was substantial each year with 456 cases in 2016, 258 cases in 2017 and 277 cases in 2018 (Department of Social Welfare Malaysia, 2018). Moreover, it was reported that there were 1087 complaints involving children's behavioural issues received by the Department of Social Welfare through the Talian Kasih since the beginning of the COVID-19 Movement Control Order in Malaysia on 18th of March until 13th of August 2020 (Department of Social Welfare Malaysia, 2020). There is no specific breakdown on types of cases involving children made by Department of Social Welfare. Nevertheless, the statistics does note that one of the types of complaint is pertaining to the case of uncontrollable children.

CA which came into force on 1st of August 2002 is the main legislation governing children in Malaysia. For context, a child in Malaysia is defined as any person under 18 years old. The CA protects five categories of children which are those in need of care and protection, those in need of protection and rehabilitation, those being trafficked or abducted, those beyond parental control and those who commit crimes (Dusuki, 2006). The CA therefore has indeed provided coverage for uncontrollable children.

Further, the CA uses the term 'children beyond control' and not 'uncontrollable children'. Both terms however connote the same meaning and context. Nonetheless, the definition of children beyond control is not provided clearly in the CA which is quite unusual because other categories of children are defined clearly in the CA as explained by (Dusuki, 2006). Section 46 (1) of the CA is the main provision in providing guidance on the issue of uncontrollable children. The provision which was amended in the 2016 amendment simply states the instances that permit the application of BCO from the Court for Children. The first instance is when the parent or guardian is unable to exercise proper control over the child and the child is falling into bad association while the second instance is when the child has no parent or guardian or has been abandoned by his parent or guardian and the child is falling into bad association.

Upon the approval of BCO application, the CA provides that the Court for Children may order for placement either with fit and proper person or in a centre. The Court for Children also may order for detention of child in a probation hostel. Besides, the court may also order for the children to be put under the supervision of a probation officer or any other person appointed by the Court.

Before the 2016 amendment, the CA provided the rehabilitation methods on uncontrollable children through placement in institutions and supervision. These methods were not unprecedented because both methods were utilised by the predecessor of CA which was the Juvenile Courts Act 1947. The institutionalisation method, however, differs from the repealed legislation as section 46 of CA amends the types of institutions which may accommodate children beyond control. Following the recommendation by the Committee on the Rights of the Child (2007) in its Concluding Observations on the initial report on the implementation of the CRC submitted by Malaysia, the current CA removes Henry Gurney School from the list of institutions that children beyond control may be placed to avoid placing the beyond control together with children in conflict with the law. Instead, it includes other institutions such as probation hostel and private homes referred to as “centre” as the available options. The same provision allows the Court to determine the appropriate period for the placement of the beyond control children in any provided institution.

While the child is placed in any provided institution, the Court may require for the parent or guardian either to (i) visit the child at a regular basis as determined by the Court; (ii) attend organised workshop for such purpose accompanied by the child; (iii) attend counselling session accompanied by the child; or (iv) consult with head teacher or principal once a month if the child is in an educational institution. Should the parent or guardian fail this order, a penalty up to RM5000 may be sentenced upon such parent or guardian. It is apparent that this provision opts to ensure that the institutionalisation will not affect any family relationship which is required to protect the best interest of the child. It also may be perceived as a step to promote the diversionary approaches in rehabilitating the beyond control children through counselling and workshop even if the provision is only applicable when the said children are placed in any institution.

Meanwhile, section 47 is the provision relating to the order of supervision by the probation officer. Under this provision, the probation officer will visit to offer advice and befriend the child pursuant probation order. The probation officer may also bring the child to the Supervising Court to amend the original order provided that the Supervising Court is satisfied that it is the best interest of the child to do so and shall supply such amended order to the Court for Children.

In addition, the 2016 amendment added the option to place the beyond control children in the care of fit and proper person who is normally among the relatives of the children which is in fact the first option in the sequence of rehabilitation methods. Not only that, but the amendment also requires the Court for Children to consider the family-based care as the desirable place for the placement of the beyond control children. The members of the family are required to involve in the rehabilitation process of the children to support its success. According to the respondents, the amendment also reorganises the placement of the children in the Department of Social Welfare’s institutions. Each of the institutions has its own specialisation and only accommodate specific category of children without mixing them with other category of children, for example, the children beyond control would not be placed in the same institution as children who commit crimes. As a result, children beyond control may only be placed in the probation hostels to provide a more effective rehabilitation process (Nong & Yusoff, 2019). This comes in place despite the same studies revealing that there were also respondents who think that correctional institutions play an important role in rehabilitating children beyond control because they think that institutional placement may be able to put a halt on the children’s misbehaviour because institutionalisation has the disciplinary and spiritual elements

Therefore, it can be summarised that the amendment is a positive development towards the full realisation of international standards pertaining to the treatment of uncontrollable children. As a result, it is also not too much to consider that the Malaysian legal framework on uncontrollable children is in conformity with the international legal framework which is relatively far from constituting a discrepancy.

Conclusion

Uncontrollable children across the world are treated in different patterns worldwide due to various terms used and understanding on the concept be it status offence, a misdemeanour or family issue. Regarding this matter, there should be an internationally recognised definition on this concept which should be provided in the international legal instruments on children's rights. In general, the issue of uncontrollable children has emerged as a result of influence by surrounding factors including the children themselves, family, peer influence and society. Therefore, the children must be protected from its negative effects. In this context, the international conventions on children's rights offer notable guidelines on the protection of children's best interests including uncontrollable children who are treated with similar importance as other children who need care and protection. The Riyadh Guidelines for instance, urge that a legislation should be enacted to prevent stigmatisation, victimisation and criminalisation of status offenders. Together with the CRC, the Beijing Rules and Havana Rules in which the United Nations calls for the abolition of status offences including uncontrollable behaviour in order to establish treatment that suits the best interest of the child.

By looking at the latest legal outset in the Malaysian setting, the 2016 amendment of the CA was a stepping stone toward the realisation of the fulfilment of the international standards in addressing the issue of uncontrollable children. The prioritisation of family-based care is in line with the aspiration of international legal framework in responding to the issue of uncontrollable children. Should the institutionalisation be inevitable in a particular case, the separation of institution between uncontrollable children from children in conflict with the law is laudable in avoiding the presumption of any wrongdoing committed by the uncontrollable children. In essence, these rehabilitation methods are able to preserve the best interest of the child which is the paramount consideration embodied in the international legal instruments in addressing the issue of uncontrollable children.

In short, uncontrollable children should be kept away from being involved in court proceedings, and institutional placement should be the last resort in the rehabilitation process. Alternatively, family or community-based rehabilitation which is also encapsulated in the CA might be the best solution for these children since they have the potential to undergo behavioural change in the future. This method is suitable to treat their misbehaviour, solve their family problems, and prepare them to face the numerous challenges in life. The legal reform ventured by the Malaysian government as the duty bearer through the amendment on the provisions pertaining to children beyond control in the CA does offer some workable solutions on the issue of uncontrollable children in Malaysia while making the best interest of the child as its paramount consideration. In furtherance of this, further research is recommended to provide empirical evidence on the effectiveness of the family or community-based rehabilitation for the uncontrollable children as compared to institutionalisation particularly in Malaysian context.

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