

Legislative Action for Protection of Juvenile Offenders in Malaysia and Bangladesh: An Overview

Dr. Nahid Ferdousi*

Abstract

Delinquent children have the right to legal protection and fair treatment in a justice system that respects their human rights. Separate legislation along with child-friendly justice is very important in changing the life of offenders. The main objectives of the separate legal measures are protection, rehabilitation and reintegration to restore the delinquent children to normal living condition and to develop their personality as a law abiding and responsible citizen. But the law and policy for child protection is developed in different countries in conformity with Convention on the Rights of the Child (CRC) 1989 and other international guidelines. The many differences and complexities of juvenile justice and the variations in practice have not been always easy to capture and reflect in these guidelines. Comprehensive juvenile justice systems do not exist in every country. This article assesses the legal mechanisms for protection of juvenile delinquents in Malaysia and Bangladesh.

I. Introduction

In line with the development of human civilization, the separate legislation for child offenders has grown in different countries in this world.¹ Significant reform initiatives are underway in many countries of the Asian countries. In fact, the justice system does not only cover the treatment of the delinquent children but also address the root causes of the offences as well as implement appropriate measures to prevent unusual behaviour. It is a core dimension of the rights of the child and a vital area where a State's commitment to children's rights can be best expressed.²

In 1899, juvenile justice concept was first introduced in Chicago, United States of America. Afterwards, juvenile justice system has been introduced in almost all the countries of the civilized world.³ However, juvenile deviation from societal norms has existed throughout the world which greatly affects law and order situation of the society and the country at large.⁴ The global approach for prevention and protection of juvenile

* She is an Associate Professor of Law in the School of Social Science, Humanities and Languages (SSHL) at Bangladesh Open University. She worked as a Research Fellow at the Centre for Civilisational Dialogue, University of Malaya, Malaysia. Email: nahid329@yahoo.com.

¹ Alice Mcgrath, *A Voice for the Future of Juvenile Justice In Asia-Pacific, the Asia Pacific Council For Juvenile Justice*, Bangkok, March 2013, Published by the International Juvenile Justice Observatory (IJJO), p. 13.

² M. Imman Ali, *Towards A Justice Delivery System for Children in Bangladesh*, A guide and Case Law on Children in conflict with the Law, UNICEF Bangladesh 2010, p. 13.

offenders through administration of justice has undergone vast transformations under the auspices of the United Nations with various international rules, conventions and guidelines. But there are different views about the concept of juvenile separate treatment and their justice system also. Every country has a different approach towards the protective measures for juveniles under their own legal systems.⁵ The control of juvenile delinquency and their justice system in line with the international instruments have slight differences in the South and South-East Asia like Bangladesh and Malaysia.

Since independence of Bangladesh in 1971, the first expression of concern about the protection of children came through the Children Act 1974,⁶ the unique principle for children in relating to trial, custody, protection, punishment, treatment and reformation. But there were many loopholes in the existing laws itself regarding the definition of a child as well as the age limit and different legislations provide different age limits of juveniles. Consequently, children are not tried in separate juvenile courts; confidentiality is not maintained and the social enquiry reports of probation officers and alternative measures are seldom considered fairly.

However, there is no special juvenile justice policy with welfare, rehabilitation and reintegration yet.⁷ Even the legal measures related to the treatment of offender children were not unified and they were treated under scattered penal laws⁸ until 2013. Thereafter, the government enacted the National Children Policy 2011⁹ and the Children Act 2013¹⁰ on the basis of the CRC which is a positive step and will gradually pave the way for the protection of the rights of the child in all sphere of life. The main purpose of the Act is to protect the children through various measures for the prevention of delinquency including diversions; restorative justice; guarantees of a fair trial; support for social re-integration and to develop a child-friendly juvenile court in the country. Thus, all dealing authorities should bring about a change in the mindset to provide a child-friendly justice system.¹¹

³ McShane Marilyn D. and Williams Frank P., (eds.), *Encyclopedia of Juvenile Justice*, Sage Publication, London, 2003, pp. 119, 216.

⁴ UNICEF, *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, UNICEF, Dhaka, 2006, p. 39.

⁵ Abul Hakim Sarker, *Juvenile Delinquency: Dhaka City Experience*, Human Nursery for Development, Dhaka, 2001, p.45.

⁶ Now repealed by the Children Act 2013. The Act was made effective from 21 August 2013.

⁷ Afsan Chowdhury, et al. (eds.), *Our Daughters in Safe Custody*, A Year Book on Juvenile Justice and Violence against Children in Bangladesh, Save the Children UK and Services Plus, Bangladesh, 2002, p. 3.

⁸ The most commonly applied penal laws against children are the Special Powers Act, 1974, for gang, rape and murder etc. the Anti-Terrorist Act, 1992 for teasing girl, snatching, hijacking and the Arms Act, 1878 for illegal possession of arms. These penal laws do not lead the best interest of the juveniles in a uniform way.

⁹ The government of Bangladesh also adopted the National Children Policy 2011 which contains specific provisions, Articles 4.2, 4.3 and 6.7 concerning protection of children from all kinds of violence, abuse and discrimination.

¹⁰ Cabinet gives final approval to Children Act, 2013⁷, Bangladesh Sangbad Sangstha, 25 February, 2013. Available at: <http://www1.bssnews.net/newsDetails.php?cat=0&id=315573&date=2012-12-13>.

¹¹ "Child-friendly Justice" refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

In Malaysia, like Bangladesh significant progress has been achieved when it ratified the CRC.¹² Significant progress has been achieved in the establishment of legal frameworks for child protection services with the introduction of the Child Act 2001¹³ and other relevant laws. This framework has further been strengthened with the introduction of the National Policy for Children and the National Child Protection Policy. This framework has further been strengthened with the National Policy on Children and the National Child Protection Policy as well as Action Plans in 2009. Supporting the implementation of these two policies is the government's initiative to propose a Social Worker Act due to be tabled in Parliament in 2011. The Act will propose to regulate the profession of social work in Malaysia and strengthen the provision of welfare services towards the care, safety and protection of all citizens in Malaysia. It brings Malaysia closer to achieving a comprehensive child protection system with a clear continuum of prevention, early and rehabilitative interventions. Thus, as a signatory country of CRC, Bangladesh and Malaysia, it is fully committed to improve the status of children of the country. In accordance with the CRC and the Constitution of this country, the government has committed itself in adopting a rights-based approach to prevent and protect from all forms of discrimination of children.¹⁴

II. State Laws and Policies in Bangladesh

A. Domestic Legislation

Bangladesh is one of the most densely populated countries in the world. Children under the age of 18 years account for 64 million in Bangladesh.¹⁵ But the protective legislations on juvenile justice are not comprehensive yet in Bangladesh. Bangladesh formally focused its attention on children protection in the Constitution of Bangladesh.¹⁶ The major legislations related to juveniles were the Probation of Offenders Ordinance,

¹² Malaysia began its creation of such an environment when it ratified the Convention on the Rights of the Child (CRC) in 1995 with an initial 12 reservations. In 1998, Malaysia withdrew 5 reservations i.e. Article 22, 28 (1) (b), (c), (d) and (e), 40(3) and (4), 44 dan 45. Subsequently, in July 2010, Malaysia withdrew 3 more reservations i.e. Article 1, 13 and 15 leaving 5 remaining reservations (articles 2, 7, 14, 28(1)(a) and 37) and it indicates the Government's commitment towards strengthening the child protection system. The first country report on the implementation of the CRC was presented to the United Nations Committee on the Rights of the Child in January 2007 and the second report is due to be submitted to the Committee in 2012. Subsequently, the country enacted various legislations contributing to the evolving child protection environment that included the Child Care Centre Act of 1984, Care Centre Act 1993 and lead to the most significant enactment of the Child Act in 2001.

¹³ The Child Act 2011(Act no. 611)

¹⁴ Child Protection and Child Welfare Services in Malaysia, Beijing High Level Meeting November 4-6, 2010, Ministry of Women, Family and Community Development, p. 3.

¹⁵ Available at: [http://www.unicef.org/bangladesh/cbg_\(18.10.08\).pdf](http://www.unicef.org/bangladesh/cbg_(18.10.08).pdf), accessed 28 March 2014.

¹⁶ The Constitution of the People's Republic of Bangladesh 1972 provides some provisions for children rights which are directive principles of state policy in Articles 15, 17, 25 (1), fundamental rights in Articles 27, 28, 31, 32, 39 and power of judicial review in article 26. In particular, Article 27, 28 and 31 of the Constitution lays down the general principle regarding the protection of children and others from all forms of discrimination. Article 31 also guarantees everyone the right to life, liberty and freedom from arbitrary detention. This provision specifically entitles a citizen to the right of protection by law and freedom from inhumane treatment.

1960 (Amended in 1964), the Children Act, 1974;¹⁷ and the Children Rules, 1976.¹⁸ The Children Act, 1974 provided a wide scope to the custody, protection and treatment of the juvenile delinquents under 16 years¹⁹ in almost all spheres of their lives. It also provided separate juvenile courts, and forbids joint trial of child offenders with adults, even where the offence has been committed jointly.²⁰ But the Act was not consistent with regard to age as identified by the CRC. According to CRC persons below 18 years of age are regarded as child but the Children Act defines a child is any person who is under the age of 16 years. The Act did not prescribe a full-proof method of age determination, i.e., who is going to ascertain/identify the age of the child.

Apart from the Act and Rules, there are some provisions of other laws²¹ dealing with juveniles in particular which is not updated and non child-friendly nature. As a result, juveniles suffered for a long period of time under criminal justice system. Most of these laws are not child-friendly and allow punishment of juvenile delinquents.²² Age of juveniles in different laws was a serious problem in Bangladesh. Different legislations provided dissimilar age limits of juveniles. The age limits of children provided under various legislations are as follows:

Table 1: Age of Children in Various Legislations in Bangladesh

Law	Section	Age Specified (in Year)
The Christian Divorce Act, 1869	Section 3 (v)	Boy: below 16; Girl: 13
The Contract Act, 1872	Section 11	Before attaining 18
The Majority Act, 1875	Section 3	Before attaining 18
The Guardian & Wards Act, 1890	Section 4 (i)	Below 18
The Railway Act, 1890	Section 130	Below 12
The Bengal Jail Code, 1894	Rule 963	Under the age of 15
The Code of Criminal Procedure, 1898	Section 497	Below 16
The Juvenile Smoking Act, 1919	Section 3(1)	Below 16
The Child Marriage Restraint Act, 1929	Section 2(a)	Male: Under 21 Female : Under 18
The Suppression of Immoral Traffic Act, 1933	Section 11, 12	Female under 18

¹⁷ The Children Act 1974 (Act No. XXXIX of 1974).

¹⁸ The Children Rules, 1976 (Rules No. S.R.0.103-L76).

¹⁹ According to the Children Act 1974; person who is below the age of 16 years is considered as a child which was not consistency with international instruments. As per the CRC, a person who is below the age of 18 years is regarded as a child.

²⁰ The Children Act, 1974, sections 6, 8.

²¹ Other laws such as the Special Powers Act 1974, the Arms Act 1887, the Nari O Shishu Nirjaton Domon Ain, 2000 etc. were passed which empowered the police to arrest delinquent on suspicion of anti-state activities as well as take measures to stop heinous offences against women and children. These penal laws do not lead the best interest of the juveniles in a uniform way.

²² Afsan Chowdhury, *et al.*, (eds.), *Our Children in Jail*, Year Book on the State of Juvenile Justice and Violence against Children in Bangladesh, Save the Children UK and Odhikar, Dhaka, 2001, p. 6.

Law	Section	Age Specified (in Year)
The Vagrancy Act, 1943	Section 2(iii)	Under 14
The Orphanages and Widows Homes Act, 1944	Section 2(2)	Below 18
The Children Act, 1974	Section 2(f)	Below 16
The Bangladesh Shishu Academy Ordinance, 1976	Section	Below 16
National Children Policy, 1994	Chapter 2	Below 14
The Women and Children Repression Prevention Act, 2000	Section 2(xi)	A person not over 16 years
Bangladesh Labour Code, 2006	Section 2 (f)	Below 14
National Children Policy, 2011	Section 2	Below 18
The Children Act, 2013	Section 2(u)	Below 18

However, age of penal responsibility is most important factor to treat the children as a juvenile delinquent. The Penal Code states in section 82 that nothing is an offence that is done by a child below the age of 9 years. Section 83 provides that criminal responsibility between the ages of 9 and 12 is subject to judicial assessment of their capacity to understand the nature and consequences of their actions at the time of the occurrence.²³ So, children under 9 years of age, has no criminal responsibility. 9 to 12 years of age has criminal responsibility on maturity and 12 to 18 years of age has full criminal responsibility as a juvenile in Bangladesh's context.

Since there are some significant loopholes in the Children Act 1974, the government has taken initiatives to amend and make it up to date. In 2013, the new Children Act has been enacted and it is a great initiative to provide separate treatment by the special units. Due to the differences in ages of children, they were denied fair justice. This discrepancy has been addressed in the Act. The age of the child has been increased from 16 to 18 years²⁴ which a delinquent will be treated as juvenile.

The Children Act 2013 guaranteed that the dignity and privacy of the child would be respected whilst investigations, inquiries and searches are conducted. The Act specifically provides that no child below the age of 9 years may be arrested under any circumstances and also no child shall be handcuffed or tied with a rope around his waist and specifically designated juvenile officer in charge of all issues and inquiries pertaining to juveniles to create a system of child-friendly policing.²⁵ In this context, new initiative has been introduced by the Act of 2013 that mandates the Child Affairs Desk²⁶ in every police station and the main responsibilities of this desk include maintaining separate files and registers for the cases involving children. where any child is brought to the police station,

²³ The Penal Code 1860 as amended in 2004; Also see M. Imman Ali, *Towards a Justice Delivery System for Children in Bangladesh*, UNICEF, 2010.

²⁴ The Children Act 2013(Act No. 26 of 2013), section 4. As per section a child is defined by the Act and includes anyone up to the age of 18 years.

²⁵ The Children Act 2013, section 44 (1).

²⁶ *Ibid.*, section 13.

the police officer shall inform the child's parents or in their absence, foster care or legal guardian or members of his extended family and to notify them of the date for producing the child before the court along with other details of the case.²⁷

Similarly, the Act prescribed the separate charge sheet for the child offenders; even when they have committed an offence together there will be separate charge sheets- one for the adult and one for the child,²⁸ which indicates that, there will be separate trials. In addition, the most important provision of the Act is the concept of diversion and alternative care²⁹ which depends upon both the police officer and probation officer to take diversionary measures and assess the possibility of bail.

Emphasis has been given on the alternative measures for delinquent children in the new Act. It states that the police officer or juvenile court can look for alternative preventive measures during any stages of the formal judicial system. The specialized approach adopted towards delinquent children such as appointment, responsibilities and duties of probation officers³⁰ approved, to provide probation service and rehabilitation the child offenders by the prescribed authorities and to observe the conditions relating to after care service considering the child's best interest.³¹ The responsibility to monitor, coordinate, review and evaluate the activities of the Child Development Centre's (CDCs)³² has delegated on the district and sub-district Child Welfare Boards.³³

In the court proceedings order of punishment and detention is restricted by the Act and introduces the provision for settlement of dispute by probation officer where any child has committed any offence of lesser gravity. On the other hand, the concept of restorative justice has been introduced which provides for compensation to the child who is a victim of crimes. However, many aspects of separate treatment of juvenile delinquency could be covered by the Act of 2013.

The Act provides that at least one children court is to be established in every district head quarter and in every metropolitan area as the case may be.³⁴ The children's court has the powers of a court of sessions under the code of criminal procedure and powers of a civil court in respect of service of summons, summoning witness and ensuring their attendance, production of documents or materials and receiving evidence on oath.³⁵ The court has been given the responsibility for assessment and determination of age of the child³⁶ and offender children at all stages of the trial shall be considered as a right of the child.³⁷ Keeping the child in safe custody during the pendency of any trial shall be considered as a last resort and for the shortest possible period of time, and any child kept in safe custody shall be dealt with by way of diversion within the shortest possible time.³⁸

²⁷ *Ibid.*, section 45.

²⁸ *Ibid.*, section 15.

²⁹ *Ibid.*, section 48.

³⁰ *Ibid.*, section 5.

³¹ The Children Act 2013, section 84.

³² CDC as correctional institute is responsible to ensure care and development of delinquent child.

³³ The Children Act 2013, sections 7-9.

³⁴ *Ibid.*, section 16.

³⁵ *Ibid.*, section 18.

³⁶ *Ibid.*, section 21.

³⁷ *Ibid.*, section 22.

³⁸ *Ibid.*, section 26.

The court shall prefer bail practice and social enquiry report for the best interest of the offender children and complete the trial within 360 days from the day of the child's first appearance before the court.³⁹ In doing so, the Act also provides that in any case where a child in conflict with the law or a child in contact with law is involved under any law whatsoever, the children court shall have the exclusive jurisdiction to try that case.⁴⁰ As of today no children court has been set-up in district level.

The Children Act 2013 mandated to establish and maintain necessary number of CDCs based on gender disaggregation for the accommodation, reformation and development of children who are ordered to be detained and those who are undergoing trial.⁴¹ Accordingly, additional CDCs are not yet establish at district levels. The Act reiterates that no child below the age of 9 years shall be kept in a certified institute and also it provided that different aged shall not be kept in the same room and on the same floor.⁴²

But the Act is not implemented by the setting with appointment child affairs police officers, probation officers, national welfare boards, establishing sufficient numbers of CDCs and juvenile courts. The State is committed to ensuring care and protection to all children by the new Act but there is no separate policy related to children in especially difficult circumstances or to the juvenile justice. There are only three correctional institutions⁴³ in Bangladesh for rectification and rehabilitation of juveniles which were renamed as Child Development Centre (CDC) under the Department of Social Services in the Ministry of Social Welfare in 2006.⁴⁴ Until 1995, there was only one correctional institute for male children at Tongi, Gazipur which was established in 1978. In 1995, the government established another correctional institute for male children in Jessore. But, until 2002, there was no such institute for girl child in Bangladesh.⁴⁵ But the conditions in the three CDCs are far from satisfactory.

B. International Standards and Norms of Juvenile Justice

All ratified states to the CRC has the obligation to undertake all necessary steps, including legislative, administrative and other measures to implement the rights contained in this instrument.⁴⁶ Bangladesh is one of the first signatories to the CRC and is bound to take steps for implementing the provisions thereof. After signing the CRC⁴⁷ in 1990, child development issue has been focused in Bangladesh. The Committee on the Rights of the Child in its concluding observations on Bangladesh has repeatedly raised concerns about the administration of the juvenile justice system and the Committee has made specific

³⁹ *Ibid.*, sections 31, 32.

⁴⁰ *Ibid.*, section 17.

⁴¹ The Children Act, 2013, section 59(1).

⁴² *Ibid.*, sections 84, 85.

⁴³ At present, there are three correctional institutions in Tongi and Jessore (for male child) and Konabari (for girl child) in Bangladesh for rehabilitation of juveniles.

⁴⁴ Ministry of Social Welfare, Citizen Charter, Department of Social Services, Dhaka, 2012, p. 20.

⁴⁵ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, Save the Children UK, Dhaka, 2008, p. 25.

⁴⁶ The Convention on the Rights of the Child 1989, Article 4.

⁴⁷ The Convention on the Rights of the Child (CRC) adopted by the United Nations, General Assembly, 20 November, 1989, The Convention came into force on 2 September, 1990 in Bangladesh.

recommendations aimed to bring juvenile justice in line with the Convention, including raising the minimum age of criminal responsibility to 12 years from 9 years, considering the establishment of specialised juvenile courts, setting legal limits on the length of pre-trial detention of children, continuing efforts to ensure that children are placed in detention separately from adults, adopting policies to promote alternative measures to detention, providing children with adequate legal assistance and establishing an independent body for the monitoring of detention conditions.⁴⁸

However, the Act was created prior to the coming into force of many international standards and did not reflect the principles of the CRC⁴⁹ and other international instruments.⁵⁰ Most of Bangladesh's existing legislation on juvenile justice predates current international standards on juvenile justice such as the CRC, the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules),⁵¹ the UN Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines),⁵² the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (the Havana Rules)⁵³ and thus does not reflect and comply with these principles.⁵⁴

Bangladesh has not yet incorporated all the provisions of the CRC into its domestic laws. Recently the development of the children laws, international treaties, covenants and conventions have been considered in the case of *State vs. Md Roushan Mondal* in Bangladesh.⁵⁵ In *State vs. The Metropolitan Police Commissioner, Khulna and others*, Justice M. Imman Ali issued an important Suo Moto Rule No. 04 of 2008, the applicability by courts of international instruments was also considered.⁵⁶ Thereafter the child rights based Children Act enacted in 2013.

III. Laws and Policies of Juvenile Justice in Malaysia

A. National Legislation on Juvenile Justice

In 2010, the population of Malaysia was estimated at 28.25 million, including an estimated 3 million indigenous people and 2 million non-Malaysian citizens. Meanwhile, there are

⁴⁸ Committee on the Rights of the Child, Concluding Observations: Bangladesh's Second Periodic Report and Concluding Observations, 27 October 2003.

⁴⁹ According to the Article 40 of the CRC, Children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects their rights. Governments are required to set a minimum age below which children cannot be held criminally responsible and to provide minimum guarantees for the fairness and quick resolution of judicial or alternative proceedings.

⁵⁰ K.M. Subhan, *Juvenile Justice Administration in Bangladesh: Laws and their Implementation*, Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference, Bangladesh Institute of Law and International Affairs, BILIA, Dhaka, 2005, p. 215.

⁵¹ The Beijing Rules provide guidelines on how juveniles should be treated while part of the justice system addressing issues such as privacy, special training for the police and due process guarantees. In addition, the Rules set out guidelines for the diversion of juveniles from judicial proceedings.

⁵² The Riyadh Guidelines set standards aimed at preventing juvenile delinquency.

⁵³ The Havana Rules provide detailed minimum standards for the care and treatment of juveniles deprived of their liberty.

⁵⁴ UNICEF, Bangladesh: Justice for Children Factsheet, 2010, Available at http://www.crin.org/docs/UNICEF_JusticeForChildrenBangladesh_2010_EN.pdf

⁵⁵ 59 DLR 2007 72.

⁵⁶ 60 DLR 2008 660.

an estimated 11 million children under 18 with 3.2 million under the age of five.⁵⁷ With a significant portion of almost one third of the total population is children, Malaysia recognizes the importance of investing in children and places a huge emphasis on the survival, protection, development and participation of children, as underlined in the Convention on the Rights of the Child (CRC), 1989.⁵⁸

Malaysia has a dual system of secular and Islamic law. The main laws governing juvenile justice are the Child Act 2001, the Penal Code, and the Criminal Procedure Code 1976. For Muslim children, Islamic laws are also applicable – the Syariah Courts (Criminal Jurisdiction) Act 1965, the Syariah Criminal Offences (Federal Territories) Act 1997 and the Syariah Criminal Procedure (Federal Territories) Act 1997. Malaysia started its child protection and welfare when it ratified the Convention on the Rights of the Child (CRC) in 1995. This was a major step for the country, in particular the Government's attempts to comply with the CRC especially through the enactment of the Child Act in 2001.

The principal law governing protection of children is the Child Act 2001,⁵⁹ which came into force on 1 August 2002. In the preamble, it is stated that children should be accorded special care and their welfare given paramount importance.⁶⁰ This Act consolidated three former Acts, namely, the Juvenile Courts Act 1947⁶¹, Women and Young Girls Protection Act 1973⁶² and Child Protection Act 1991⁶³. The Child Act 2001 affords protection for children and tackles the problems of juvenile delinquency, child prostitutions and children out of control. It imposes severe punishments for child trafficking, abuse, molestation, neglect, and abandonment. It also mandates the formation of children's courts. In the Child Act 2001 there is a protective feature concerning assistance by probation officer in the event of arrest. It provides that upon arrest, a copy of the charge and related documents are to be transmitted to the probation officer so to assist him in preparing an informative probation report.⁶⁴ The Act provides comprehensive trial procedure in respect to children. It is submitted that by conforming to both the letter and spirit of these provisions would be adequate in safeguarding the interests of children in court.⁶⁵

Malaysia, in following the CRC defines a child to be any person below 18 and by the time the Child Act 2001 was passed, there should no longer be any reference to the word 'juvenile' or 'young offender', both implying negative connotations. Nonetheless, such terminologies still exist in corresponding statute, namely the Criminal Procedure Code, which is applicable to children in the event of any lacuna in the Child Act 2001. From the legal point of view there are various definitions of juveniles depending on their group and age in Malaysia which are as follows:

⁵⁷ Social Statistics Bulletin Malaysia 2010 (Government of Malaysia, Department of Statistics).

⁵⁸ Child Protection and Child Welfare Services in Malaysia, Beijing High Level Meeting, Ministry of Women, Family and Community Development, November 4-6, 2010, P. 2.

⁵⁹ The Child Act 2001 (Act 611). Children accordingly, regardless whether they are victims or offenders are all governed by a single Act.

⁶⁰ Preamble of the Child Act, 2001.

⁶¹ The Act to establish the Juvenile Court and deal with child offenders.

⁶² Act to provide care and protection to children.

⁶³ Act to protect women and children exposed and involved in immoral vices.

⁶⁴ The Child Act, 2001, section 87.

⁶⁵ *Ibid*, section 90 (1-18).

Table 2: Age of Children in Various Legislations in Malaysia

Law	Age Specified (in Year)
The Child Protection Act 1991	A person under the age of 18 years and below
The Prison Act 1995	A prisoner who is under the age of 21 years and detains juveniles aged between 14 and 21 years in prison
The Children and Young Persons Employment Act 1996	Child as a person aged between 10 and 14 years, and a young person as one aged between 14 and 16 years
The Child Act 2001	A person under the age of 18 years and below

In case of age of criminal responsibility in Malaysia, the Penal Code stipulates 10 to be the age of attainment of criminal responsibility⁶⁶ but children between 10 and below 12 who have not shown sufficient maturity may be absolved from criminality as well.⁶⁷ So the Penal Code and the Child Act sets the minimum age of criminal responsibility at 10,⁶⁸ but the Syariah Criminal Offences (Federal Territories) Act 1997 refers to the attainment of puberty,⁶⁹ and the Syariah Criminal Procedure (Federal Territories) Act 1997 defines a “youthful offender” as between 10 and 16.⁷⁰ Apart from this, the Evidence Act 1950 provides an additional protection for boys below 13 where they are presumed to be incapable of committing the offence of rape.⁷¹ In conclusion, children from 10 to 18 may be liable for any criminal charges in the court for children unless the offence is punishable with death⁷² whereupon the trial will then be conducted in the High Court.⁷³

In case of sentence of children, the death penalty is lawful for persons under 18 at the time of the offence for certain offences.⁷⁴ Section 2(1) of the Child Act 2001 defines a child as under 18 years.⁷⁵ But a child may be sentenced to capital punishment under the Essential (Security Cases) Regulations 1975 though it has been repealed.⁷⁶ The Child Act states: “A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.”⁷⁷

In case of corporal punishment, the Child Act and the other laws allow the whipping which is contradicted with internal conventions. Section 91(g) of the Child Act authorises the court for children to “order the child, if a male, to be whipped with not more than ten strokes of a light cane- (i) within the Court premises; and (ii) in the presence, if he desires to be present, of the parent or guardian of the child”.⁷⁸ Section 92 specifies how the

⁶⁶ The Penal Code (Act 574), section 82.

⁶⁷ *Ibid*, section 83.

⁶⁸ *Ibid*, section 82 and also the Child Act, section 2.

⁶⁹ Syariah Criminal Offences (Federal Territories) Act 1997, Articles 2 and 51

⁷⁰ The Syariah Criminal Procedure (Federal Territories) Act 1997, Article 2

⁷¹ The Evidence Act 1950, section 113.

⁷² Offences such as murder, drug trafficking and possession of firearms.

⁷³ The Evidence Act 1950, section 11(5).

⁷⁴ Report prepared for the Child Rights Information Network (www.crin.org), July 2010.

⁷⁵ The Child Act 2001, section 2(1)

⁷⁶ Essential (Security Cases) Regulations 1975 has been repealed in 2012.

⁷⁷ The Child Act 2001, section 97.

⁷⁸ *Ibid*, sections 91(g), 92.

whipping should be carried out: the child should first be certified fit for the punishment by a medical officer; the whipping should be with a light cane “with average force without lifting his hand over his head so that the child’s skin is not cut”; and it should be inflicted on any part of the child’s clothed body “except the face, head, stomach, chest or private parts”.⁷⁹ The Criminal Procedure Code provides for whipping of a youthful offender up to 10 strokes with a light rattan, “in the way of school discipline”,⁸⁰ and this may be ordered in cases normally punished by fine or imprisonment.⁸¹ No sentence of whipping shall be passed on women or on males sentenced to death.⁸² Many offences in the Penal Code and other laws are punishable by whipping. Corporal punishment is also lawful as a sentence under Islamic law, and there is no exemption for females.⁸³

In Malaysia, the National Policy on Children⁸⁴ and the National Child Protection Policy as well as Action Plans⁸⁵ 2009 formulated by the Ministry of Women Family and Community Development (MWFCD). Objectives of the policies highlight the rights of children to survival, protection, development and participation, all of which are in-line with the CRC. The two Policies intend to mobilize intra and inter ministerial involvement to address the needs of children and community. They also intend to maximize the efforts and leverage the roles of the private sector, media, civil society and the community. The policies additionally encourage a systematic approach to advocacy and building evidence to help make in-depth analysis related to children and propose interventions that would promote child well-being. In fact, these two policies were based on the 1991-2000 National Plan of Action for Children that were linked to objectives and strategic visions of the National Mission of Wawasan 2020 (Vision 2020).

Apart from these, the government approved Social Work Competency Standards in April 2010 for the child protection though the Act 2010 is still in bill form but the competency standards is used as a key tool for the government and the Malaysian Association of Social Workers (MASW) to set up systems to generate professional, competent and accountable social workers and deliver quality timely welfare services. This includes building capacity to efficiently prevent, intervene and respond to incidences of abuse, neglect and violence among women, children and other vulnerable groups. This will include building capacity to efficiently prevent, intervene and respond to incidences of abuse, neglect and violence among women, children and other vulnerable groups.⁸⁶

B. International Instruments on Juvenile Justice

Malaysia ratified the Convention on the Rights of the Child (CRC) in 1995 with an initial 12 reservations. In 1998, Malaysia withdrew 5 reservations i.e. Article 22, 28 (1) (b), (c),

⁷⁹ The Child Act 2001, section 92.

⁸⁰ The Criminal Procedure Code. section 288.

⁸¹ *Ibid.*, section 293.

⁸² The Criminal Procedure Code. section 289.

⁸³ 25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report to the Committee on the Rights of the Child, Para. 38.

⁸⁴ The National Policy on Children and Action Plan 2009.

⁸⁵ The National Policy on Child Protection and Action Plan 2009.

⁸⁶ Child Protection and Child Welfare Services In Malaysia, Beijing High Level Meeting November 4-6, 2010, Ministry Of Women, Family And Community Development, pp. 7-8.

(d) and (e), 40(3) and (4), 44 and 45. Subsequently, in July 2010, Malaysia withdrew 3 more reservations i.e. Article 1, 13 and 15 leaving 5 remaining reservations (articles 2, 7, 14, 28(1) (a) and 37) and it indicates the Government's commitment towards strengthening the child protection system. The first country report on the implementation of the CRC was presented to the United Nations Committee on the Rights of the Child in January 2007 and the second report is due to be submitted to the Committee in 2012.

As per the Committee on the CRC, General Comment 10, 2007 Malaysia is under an obligation to implement the provisions in the CRC in order to protect the legal rights of the children.⁸⁷ In particular, with regards to the children in conflict with the law, CRC obliges State Parties to undertake in giving protection to offender children at every stage of the juvenile justice system, in line with the requirements of Articles 37 and 40 of the CRC in order to uphold the principle of the best interest of the child.⁸⁸ While the former obligates States Parties to uphold the leading principles for the use of deprivation of liberty, the procedural rights, treatment and conditions afforded to delinquent children when deprived of liberty, the latter safeguards the legal rights of the children in conflict with the law by ensuring that they receive treatment and guarantees of fair trial which could afford protection on them.⁸⁹

As part of its commitment to the protection and well-being of its children, the Malaysian Government has ratified and signed the following Conventions.⁹⁰

Table 3: Signed and Ratified International Instruments in Malaysia

International Instruments	Date of Signature/ Ratification
Convention on the Rights of the Child, 1989	1995
Convention on the Elimination of All Forms of Discrimination against Women, 1979	1995
International Labour Organisation Convention 138 (minimum age for admission to employment) 1997	2000
International Labour Organisation Convention 182 (worst form of child labour)	2000
Convention against Transnational Organised Crime	2002
Convention on the Rights of Persons with Disabilities	2010

After adopting the CRC, major improvement was made for child protection in Malaysia. The formation of the Ministry of Women Family and Community Development (MWFCD) in 2004 laid the foundation for an effective and operational child protection

⁸⁷ General Comment No. 10 (2007): Children's Rights in Juvenile Justice, CRC/C/GC/10 available at <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ UNICEF, Malaysia, 2010.

system in the country. With the ever increasing necessity to address issues and challenges of children, a special Child Division was created in 2005 at the Department of Social Welfare, an agency under the Ministry. This move allowed the Government to handle and administer matters pertaining to children more effectively. Part of this process included the creation and deployment of child protectors who are gazetted under the Child Act 2001 and are placed at the community grass-root level.

IV. Major Findings

From the study in both countries, it is highly important to recognize the new approach in relation with CRC for child-friendly justice system. The weakness of the present system may be summarized as follows:

A. In Bangladesh

Due to delay in appointing sufficient number probation officers, establishment of child help desk in police station, adequate juvenile courts and child correctional institutions, separate treatment of juvenile offenders has a long way to go before it attains the desired goal. Since there are only three juvenile courts in the three correctional institutes, juveniles are tried in ordinary courts along with adult criminals due to lack of capacity of the correctional centres. Child-friendly specialized justice policy has not been achieved properly yet. For example, there is no special juvenile justice policy nor any mechanism in the legal system of Bangladesh to incorporate directly the principles of international conventions and rules at national levels. Furthermore, there are no time limits as to the period during which children may be kept in pre-trial detention in Bangladesh. The probation service is not yet the part of the court structure and neglected.

B. In Malaysia

In Malaysia, the legal system is based on English common law. Treaties become part of domestic law only when they have been expressly incorporated by legislation.⁹¹ They typically cannot be invoked directly in the courts. Some features are that there is no prohibition in the Federal Constitution (1957) of cruel, inhuman or degrading treatment or punishment. The existing legal provisions allowed punishment for the child offenders which is fully prohibits by the international conventions. On a further note, Malaysia has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, the International Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Economic, Social and Cultural Rights. In 2009, Malaysia was examined under the Universal Periodic Review process. During the review the government stated that abolition of judicial caning and capital punishment for persons

⁹¹ UNICEF (2007), *Law Reform and Implementation of the Convention on the Rights of the Child*, Florence: UNICEF Innocent Research Centre.

under 18 at the time of the offence was an “immediate concern”.⁹² The government did not support recommendations to abolish all capital punishment.⁹³

V. New Directions

A. *Bangladesh*

The following suggestions are made to improve the child-friendly justice system in Bangladesh:

1. As the supplementary of the Children Act 2013, a comprehensive juvenile welfare Rules with special protection, rehabilitation and reintegration planning and independent mechanisms to monitor authorities should be enacted.
2. Child certified institutes in every district should be established.
3. Separate children court should be established in different building away from criminal courts in each divisional city. The jurisdiction of the children courts should be widened to handle all types of cases similar to session courts.
4. For fair treatment of delinquency, there should be established child help desk affairs and national welfare boards that maintain special provision of arrest, prosecution, trial procedure and alternative measures.
5. Permanent probation officers should be appointed in local level for speeding up of the probation system. The responsibility of the probation officers and social case workers as a counselor must be ensured.
6. For competent monitoring system, a special cell should be created in the Department of Social Service (DSS) under the Ministry of Social Welfare to ensure after care services. Branch offices may be opened at least in the Divisional Headquarters.
7. By virtue of the Children Act 2013 the government should improved child care and protection within the field of development planning that child will be ensured developmental opportunities without alienating them from society.
8. The government should be allocated the necessary financial resources to fulfil its obligation under the new Act.
9. Orientation training and in-service refresher courses must be arranged for the various categories of personnel (police personnel, prosecution staffs, lawyers, judicial officers, probation officers, social caseworkers, personnel involved in the administration of CDCs and DSS) functioning under juvenile justice system for implementing the spirit behind the various services and programme under the system.
10. Birth registration practice must be ensured. It is most effective mechanism for age verification of a child.

B. *Malaysia*

In Malaysia, it may be that the following suggestions be made to improve the child-friendly justice system in Malaysia:

⁹² A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, para. 56.

⁹³ A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, paras. 105, 106(10) and 106(15).

1. State and local governments should review their legislation, policies and practices to ensure that children who are accused or convicted of violating the law are not deprived of their liberty except as a last resort.
2. Amend the Child Act to include detailed provisions to protect the rights of the child during arrest, investigation and police custody.
3. All legal provisions authorising judicial corporal punishment (whipping) for such persons should be repealed, including under Islamic law, and life imprisonment should be explicitly prohibited.
4. There should be amend the minimum age of criminal responsibility which at least to the age of 12 and continue to increase it to a higher age level and carry out a study on the discrepancies between the minimum age standards in the Penal Code, the interpretation of the Muslim jurists in the Syariah Court and the Syariah Criminal Procedure (Federal Territories) Act 1984 to prevent different standards being imposed on children upon entering the criminal justice system.
5. Prohibit by law the detention of children for immigration purposes and legislate and develop policies and practices designed to avoid the detention of children. While such legislation and polices are being developed, conditions in immigration detention should be improved to meet, at least, the minimum standards of detention as set out in human rights law.
6. Develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort.
7. Detention should only be used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing.
8. Children should be treated with compassion and respect for their dignity. They should not also be subjected to extended or drawn out cross-examination or other legal process. If it is in their best interests, children should be accompanied by a trusted adult throughout their involvement in the justice process.
9. Create an independent body to carry out periodic monitoring and evaluation of private and state- run alternative care institutions to ensure institutions meet minimum standards of care.
10. Implement a free-at-all-stages birth registration system that covers all territories in Malaysia, including through the use of mobile birth registration centres. All children, regardless of legal status must be able to access birth registration.

VI. Conclusion

Juvenile delinquency and the victimisation of children are issues that have a direct impact on the wellbeing of society and the nation. In this perspective, both countries should establish a child-oriented justice system which recognises the child's access to fundamental rights and freedoms and ensures that all actions concerning the child are undertaken for her/his best interest. It intends to cover an environment in the judicial system where a child offender would be treated as a child and his or her offence would be

justified in light of her/his age and level of maturity. In addition, trial of offenders would be in separate court and rehabilitation of these offenders would be in the society instead of being punished. States should enact juvenile justice laws and policies implementing the provisions of the CRC. This should cover treatment of the child from the moment the child is apprehended or detained by the police right through to post-sentencing after-care. The law should state clearly that all children over the age of criminal responsibility but under the age of 18 should fall within the juvenile justice system regardless of the nature of the offence. Everybody should treat the children as children and make the world a place where every child grows up as competent and responsible human beings and not be involved in any kind of delinquent acts and every parents, community, states will ensure their rights. By motivating the community and with the help of the government in setting up the necessary infrastructure for the community-based alternatives and the informal methods of disposition should be commenced for the offender children where they can build a safe and secure society.