

Pre-Trial Detention of Children; A comparative analysis between Malaysian Juvenile Justice System and International Standards

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Abstract: Pre-trial detention of any individual charged with crime is consistently viewed by many legal scholars as a controversial issue. This practice has been heavily criticized as it imposes legal punishment of a person not yet convicted of a crime. It deliberately amount to violation of a cardinal principle of criminal justice which maintain that a person is presumed innocent until proven guilty. In Malaysia, a growth in population of children detained at the pre-trial stage of criminal process has become a matter of great concern. This article will comparatively analyse Malaysian current law and practice on this particular area with reference to the international standards. In addition, this paper also will attempt to highlight any imprecision or shortcoming of the current Malaysian legal framework and propose possible suggestions for its improvement.

Key words: Children • Pre-trial detention • Criminal proceedings

INTRODUCTION

The issue of pre-trial detention of children in conflict with the law has remained controversial for decades. It refers to detention children awaiting trial or finalisation of their trial. Excessive use of this practice has been widely criticized as it simply violates the fundamental doctrine of criminal justice, that a person is presumed innocence until proven guilty [1]. This principle prohibits the punishment of individuals before their guilt has been authoritatively demonstrated. The record shows that one out of three, or 3.2 million people are in pre-trial detention worldwide [2]. As regard to the pre-trial detention of children, it is regarded as one of the hotly debated issues across jurisdictions. Despite effort by various legal systems to inculcate the approach restricting that pre-trial detention of children into their legislation, they have failed to prevent the unacceptable level of children languished in detention centre or prison, including at pre-trial stage [3]. Therefore, the issue on appropriateness of pre-trial detention imposed on children in conflict with the law has attracted numerous scholarly discussions. Researches disclosed that pre-trial detention have negative and harmful impacts on children. The study revealed that child

detainees at pre-trial stage suffered from deprivation of social life, traumatized experience, stigmatization as delinquent and impairment of the ability to prepare their legal defences [4]. In addition, other studies have disclosed that the treatment received by the detainee at the detention centre or prison are no better and often worse, than the treatment experienced by those who have already being convicted for criminal offence [5]. The issues of inadequate medical facilities and lack of professionally trained staffs were identified as the common reasons that hinder the effectiveness of child detention facilities [6]. Due to these reasons, the international instruments have consistently discouraged the practice of pre-trial detention.

This article hopes to add a scholarly dimension on the pre-trial detention of children under Malaysian law and its compatibility with the international standards. The first section of the article will examine the international standards on pre-trial detention of children in conflict with the law set out by the international instruments. The second section, which is the main focus of this paper, attempts to analyse current Malaysian juvenile justice on this aspect. It scrutinizes legal issues relating to pre-trial detention of children as well as factors that contribute to

this problem. The final part of this paper proposes legal amendment to current Malaysian juvenile justice as part of the solution to tackle this legal issue.

International Standards on Pre-Trial Detention of Children: International instruments have consistently viewed the issue of pre-trial detention of children as a matter of great concern. Guidelines on the pre-trial detention can be found in various international instruments and regional instruments. However, as far as detention of children is concerned, there are specific provisions provided under the United Nation Convention on Right of Children (CRC [7]) the United Nation Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) [8] and United Nation Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) [9]. Based on the provisions of these international instruments, there are at least four main principles governing the pre-trial detention of children.

Firstly, any detention of children shall not be resorted unless it fulfills specific tests on the arbitrariness and lawfulness. This requirement imposes strict condition on detention of children in the sense that it must not only be exercised in compliance the legal provisions of law but must also free from element of injustice, unpredictability, unreasonableness capriciousness and proportionality [10].

Secondly, the detention of children shall only be used as a measure of last resort and for the shortest period of time. The requirement is expressly provided under the CRC, the Beijing Rules [11] and the Havana Rules [12]. It strictly demands that any sort of detention must pass specific double- tests, namely as a measure of last resort and for the shortest appropriate period of time, in order to be legally justified. Commenting on this this requirement, Committee on the CRC recommends that the state parties should as much as possible ensure that the child detained at pre-trial stage can be released and if necessary under certain conditions [13]. In this respect, the Committee on the Rights of the Child has recommended the state parties to ensure that cases involving children under detention before they are charged should not exceed thirty days at the latest [14]. It also urges the state parties to ensure that the judicial body of competent authority to make a final decision on the charges against children within six months after the case is formally presented [15]. In the same vein, the Havana Rules provides that all relevant bodies, particularly the courts, the prosecutors and the

investigators are required to give the highest priority to expediting the process to ensure the shortest possible period of detention [16].

Thirdly, in the circumstances where detention of children is justifiable and necessary, the international standards requires that rules and procedures during the detention to be strictly adhered. The CRC dictates that detained children also must be detained in a separate place from adults [17]. Similar requirement is also stipulated in the Beijing rules [18] and the Havana Rules [19]. In addition, the Havana Rules and the Beijing Rules also stipulate that children detained at the pre-trial stage must be given opportunities to continue their education or training. The children must be afforded with care, protection and all necessary assistance such social, educational, vocational, psychological and medical that they may need in view of their age, sex and personality [20]. The detained children must also be given right to maintain contact with their family as well as right to legal assistance.

Finally, the international standards specifically provides that any child detained shall be brought before promptly before a judge or before a court or other competent, independent and impartial authority authorised by law to exercise judicial power [21]. This right is automatic and does not depend neither upon request of the detainee or discretion of the detaining authority [22]. The main reason for this requirement is to provide the child with an opportunity to challenge the validity of the detention.

Despite the guidelines provided by the international instruments on the detention of children, its compliance still meets persistent defiant by many legal systems. There are various proofs that certain legal systems still permit children under detention to associate with adults at the detention centres. For example, the United Nation Committee on the Rights of the Child [23], the Council of Europe Commissioner for Human Rights [24], the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment [25] and the European Committee of Social Rights [26] have issued vehement criticism over the practice under Ireland legal system which permits children to mix adults in the same place of detention [27]. Similarly, there are various other legal systems, such as Austria, Finland, Ireland, Germany, Portugal, Switzerland and United Kingdom which continue to detain children with adults despite an explicit prohibition by the international instruments [28]. Apart

from that, disclosure of various reports on improper treatment of children at the detention centres [29], lack of professionally trained staffs at the detention centres [30] and denial of family access to child detainees [31] clearly indicate the failure of various legal systems to measure up with the requirements of international standards on pre-trial detention.

In short, the international instruments have set out specific standards on the pre-trial detention of children. These standards serve as a benchmark on this matter for each juvenile justice system across the world. Unfortunately, failure on the part of certain countries to comply and implement the requirements of the international standards has resulted with thousands of juveniles languishing in detention centres awaiting completion of trial. This matter need to be addressed as a matter of urgency. Obviously, it is pertinent for each country to streamline its legal framework in accordance to the requirements of the international standards.

Pre-Trial Detention under Malaysian Law: The Malaysian modern juvenile justice system is based on the English Common law [32]. Historically, the British occupation in Malaysia from the eighteenth century until the country gained independence in 1957 has led to the introduction and the reception of the English law in various legal aspects, including juvenile justice [33]. The enactment of the Juvenile Court Act 1947, which was drafted based on the English legislation, marked the beginning of the modern legal framework of juvenile justice in Malaysia. This Act was enacted based on the recommendation of the Juvenile Delinquency and Juvenile Welfare Committee [34]. The Act governed all criminal matters which involve juveniles. The ratification of the CRC by Malaysian government in 1995 triggered a new phase of progressive development of the Malaysian law and policy pertaining to children [35]. Among a remarkable development in the Malaysian juvenile justice system after the ratification of the CRC was the introduction of the Child Act 2001. The Act, which repealed 3 previous Acts, namely the Juvenile Courts Act 1947, the Women and Young Girls Protection Act 1973 and the Child Protection Act 1991, was enacted by the Malaysian legislative with the aim to align its juvenile justice system with the requirements of the CRC and international standards and practice. The Child Act 2001 has undergone through a major amendment in 2016 [36].

Issues on Pre-Trial Detention: In Malaysia, pre-trial detention of children still remains as a controversial issue. There are various issues surrounding the pre-trial detention of children. Among these issues are;

High Number of Children Detained at Pre-trial Stages: Current Malaysian laws do not provide specific requirement on cases involving pre-trial detention of children. Neither the Child Act 2001 nor the Criminal Procedure Code (CPC) provides statutory limit regarding the length of time regarding the disposal of cases for children under pre-trial detention. The absence of clear and comprehensive principles has resulted with the issue of high number of detention of children at pre-trial stage. The report by the UNICEF revealed that the volume of cases involving pre-trial detention of children in Malaysian is quite alarming. According to the report, 80% out of total number of children held at the detention centres in 2009 were on pre-trial detention [37]. The statistic further disclosed that there has been unreasonable delay in disposal of cases involving children. The record disclosed that 11% of children detained pending trial at the time of the study had been there for between 6 and 12 months [38]. In addition, 7% of children had been detained for between 12 and 24 months pending trial of their cases [39]. Apart from that, studies conducted by local researchers disclosed various negative and far reaching impact of pre-trial detention on children. The researches revealed that children under detention in Malaysian had experienced extreme traumatic experiences as well as high level of physical and emotional neglect [40].

Due to this unsatisfactory position, the Committee on the CRC has specifically expressed its concerned over the issue of long pre-trial detention children and delay in dealing with the case involving children in Malaysia [41]. The committee has demanded the government of Malaysia to seriously consider this problem and take necessary prompt action to tackle it. These facts clearly indicate that the practice under Malaysian juvenile justice is still below the standard set by the international standards, which emphasize that the detention of children should not only be the measure of last resort but also for the shortest period of time.

Lack of Specialized Detention Centres, Facilities and Trained Staffs: The Child Act 2001 specifically provides that children under pre-trial detention shall be detained at the detention centres gazetted by the Ministry. These

places of detention shall be governed by separate regulations and inspections [42]. In this respect, it is clear that the requirement provided under the Child Act 2001 on separation between child and adult detainees is entirely in line with the standard of the CRC. However, the issue arose as to the implementation of this requirement. In practice, there is insufficient specialized place of detention to accommodate children detained at the pre-trial stage. The statistic reveals that only 46% of children at pre-trial stage are detained at the specialized detention centres operated by welfare department while the rest were detained at prisons together with the adults [43]. Though, the prisons have kept the children and adults at separate sections, they do not have qualified child centred staffs as well as policies and practices specially designed for children. The issue of lack of separate child detention centres has also been criticized by the Malaysian Human Right Commission (SUHAKAM). According to the report released by the SUHAKAM, there were 1196 children that have been detained at the immigration centres as at 26th September 2014 [44]. 516 out of that total number were children below the age of twelve and the rest are children aged between thirteen to eighteen years old. The report further disclosed that children have been detained together with adult detainees in the same cells at these detention centres.

In addition, the report by the SUHAKAM disclosed that the conditions and facilities at detention centres and prisons in Malaysia were far from satisfactory. The visit by the SUHAKAM to these prisons revealed that there is a poor level of cleanliness and no standard policy for regular health inspections. These factors have been identified as main contributing factors to persisting health problems to the detainees [45].

The issue of lack of specialized detention centres, facilities and trained staffs for children under detention deliberately indicates that Malaysian juvenile justice does not measure up with the requirement of the international standards.

Bail: A rigid and strict legal principles relating to bail of children under current Malaysian laws have been identified as the main ground that contributed to the high volume of pre-trial detention. Section 84 of the Child Act 2001 provides that if a child is arrested with or without a warrant, the child shall be brought before a Court for Children within twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Court for Children. If it is not possible to bring a child

before a Court for Children within the time specified mentioned above, the child shall be brought before a Magistrate who may direct that the child be remanded in a place of detention until such time as the child can be brought before the Court for Children [46]. The Court for Children before whom a child is brought shall inquire into the case brought before it. As a general principle, the court shall allow the child to be released on bail, unless the case involved is of murder or other grave crime, it is necessary in the best interests of the child arrested to remove him from association with any undesirable or the Court For Children has reason to believe that the release of the child would defeat the ends of justice. If the court decides to release the child on bail bond, the court may determine the reasonable amount of bail which shall be executed by the parents, guardian or other responsible person [47].

Based on above observation, it can be concluded that the provision on bail provided by the Child Act (Amendment) 2016 is too general, vague and inadequate. While it allows the court to grant bail, the Act specifically permit the court to refuse bail under certain circumstances. Unlike adults who may be released on their own recognisance, the Act strictly requires the bail of children to be executed by parents or guardians. In the event parents or guardian is unable or refuse to furnish the bail for children, they will be placed under detention. For example, there is an instance where a child had being detained for over nine months pending trial of a charge of stealing RM20 because his mother was unwilling to pay for bail [48]. In addition, the absence of alternative mode of execution of bail other than cash money under the current law also limits the opportunity of children, especially from poor families, from being released on bail. This stringent requirement may cause difficulty particular poor families who cannot afford cash money.

In addition, the current laws also permit certain circumstances in which children may be refused bail pending disposal of cases. Firstly, the Child Act 2001 permits the court may to refuse the bail if the child is charged with murder, grave offence or if the release would defeat the ends of justice. Secondly, there are several statutes under Malaysian law which provides for unailable offences, where bail cannot granted at all in any circumstances. It means if any person is charged for committing unailable offence, he will be automatically detained under detention until the case is over. Among the specific statutes which provides for unailable offences are Essential (Security Cases) Regulations

1975(ESCAR) [49], Firearms (Increased Penalties) Act 1971(FIPA) [50] and Dangerous Drug Act 1952(DDA) [51]. Since the Child Act 2001 is silent on the right of children relating to unailable offence, it means that the children charged for this type of offences will not entitle to the bail at all.

Preventive Detention: Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is proved to have committed an offence punishable under certain provisions of the penal law [52]. There are several statutes which exclusively confer discretionary powers to the minister to issue preventive order for detention without trial on the ground of prevention of crime. Among these statutes are the Security Offences (Special Measures) Act 2012 and the Dangerous Drug Act (Special Preventive Measures) 1985 and the Prevention of Crime Act 2013 (Amendment and Extension) [53]. It should be noted that the provisions of these specific statutes override the other statutes, including the Child Act 2001 [54]. It means that these statutes are applicable to all persons, including children. Obviously, provisions of these statutes which allow preventive detention of children are inconsistent with the requirement of international standards set by the international instruments. The CRC, for example, clearly mentions that no child shall be deprived of his or her liberty unlawfully or arbitrarily [55]. Any detention of children on the ground of preventive detention is unjust as the detainee has not only been denied effective legal recourse for personal protection but also opportunity to prove his or her innocence. In addition, the preventive detention of children without trial also violates the requirement of due process of law in criminal process relating to children as stipulated in article 37 and 40 of the CRC.

Legal Reform: As discussed above, there are various circumstances under which pre-trial detention of children are permitted under current Malaysian law. Obviously, the current Malaysian law on this aspect is not compatible with threshold of international standards set by the international instruments which uncompromisingly emphasize that pre-trial detention of children shall be the measure of last resort and for the shortest period of time. Close scrutiny of the relevant provisions of current law reveals that it neither provides restriction nor special procedure on the pre-trial detention of children. There is

no provision in the Child Act 2001 or Criminal Procedure Code which stipulates special condition to be fulfilled before the detention can be ordered or period of detention. This implies that the determination of the child's pre-trial detention is based on the equal principles and procedure that are applicable to adults. This position, which is evidently inconsistent with the requirement of the international standards, requires an urgent attention. It is suggested that the current Malaysian law on this matter should be re-evaluated to align them with threshold of the international standards. Among the aspects that need to be focused in pursuing this reform call are:

Special Rules and Procedure: Current Malaysian law provides no distinction on the rules and principles that govern detention of children and adults. The same principles of law that are applicable to adults equally impose on children. This position is inappropriate as it fails to adequately take into account physical, mental and psychological capability of children. It is suggested that there should be different set of rules and procedures that govern detention of children and adults. In term of procedure, it is suggested that special hearing should be conducted by the court in determining decision to detain any child at the pre-trial stage. Both prosecution as well as counsel for children must be given opportunity to produce evidence in form witness testimony, documents and others to enable the court to determine this matter. In term of rules and principles, it is proposed that special provision which provide restrictions on the pre-trial detention of children must be inserted to the current law. The proposed provision should expressly stipulate that any detention of children at this stage shall be governed by the tests of arbitrariness and lawfulness. The burden is on the prosecution to convince the court on the arbitrariness and legality of the pre-trial detention. In addition, it is also pertinent to expressly insert provision of law on the relevant factors that shall be considered by the court in determining this matter. It is proposed that any decision to detain the child must be guided by at least three of the following factors, namely, best interest of children, presumption of innocence and gravity of the offence.

Alternative Measures: Current Malaysian law exclusively focuses on the formal method of adjudication in dealing with children in conflict with the law [56]. Reference to other juvenile justice systems discloses that various informal methods have been developed and preferred in

handling juvenile delinquency. In fact, there are many researches which indicate the use of informal alternative measures in dealing with children in conflict with the law is more efficient and appropriate compare to formal method of adjudication. For example, the study shows that the use of diversion measure has significantly more effective in reducing recidivism than traditional justice system processing [57]. It also offers a speedier disposal of cases [58] and prevents children from direct consequences of formal court adjudication such as unwarranted labelling [59] and stigmatization [60]. Therefore, it is high time to reform current Malaysian juvenile justice system by introducing informal alternative measures such as diversion, alternate dispute resolution, family conference, counselling, vocational training and others in handling children in conflict with the law.

Timeframe for Disposal of Cases: Currently, there is no provision under Malaysian law which provides timeframe for the disposal of cases involving children under pre-trial detention. No priority is given to this particular type cases and this has resulted with unnecessary delay in its disposal. It is suggested that special provision of law should be introduced to require the court to finally adjudicate the cases involving children within six months after its registration. Imposing compulsory specific timeframe on the disposal of child cases will force the court to expedite the criminal adjudication process, or at least put them on priority lists.

Bail: It is suggested that legal principles and procedure for bail of children under current Malaysian law be re-examined. It is recommended that the following modifications be made to the current law;

- Mechanism of execution of bail for children is modified by allowing parents or guardians who are unable to furnish bail by cash to use other options such as payment by instalment, mortgage and others.
- Current law which confines the right to bail children to parents and guardian should be amended by extending the same right to other people who wish to stand as bailor to them. Discretionary power should be given to the court to allow children who commit non-serious and minor criminal offences to be released on their own cognizance pending trial.
- All legislations which provide for unbailable offences should be amended by inserting exceptional provisions that allow children to be released on bail pending trial.

Abolishment of Preventive Detention: It is suggested that specific statutes which provides for preventive detention should be amended if not abolished at all. The provision of these statutes which allow preventive detention of children without trial based on potential of future crime is considered as barbaric law. The use of prevention detention to deter future crime is not only inimical to the interest of children but also seriously perverts the goal of institution justice. Therefore, it is proposed that specific provision that prevent the use of preventive detention on children should be expressly inserted to the relevant statutes.

CONCLUSION

It is incomprehensible to detain any child who has not yet been found guilty in the same manner with one who has been found guilty. Undoubtedly, pre-trial detention of children systematically causes physical, emotional and psychological harm to them. Therefore, reform in the realm of pre-trial detention of children is urgently needed as legal analysis discloses that Malaysian current law, practice and policy on this matter evidently fail to measure up with the international standards outlined by the international instruments. It is timely for Malaysian government to seriously initiate review on its current legal framework on pre-trial detention of children. In line with the requirements of the international standards, holistic legal approach, strategy and policy to keep children as much as possible away from pre-trial detention should be given priority and due consideration. Though the process of legal reform is not a straightforward exercise, it is vital for the Malaysian government to regard this issue as a matter of high urgency as treatment of children at pre-trial stage is the key parameter of a society's notion on fundamental liberty of its citizen.

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