

INVESTIGATION PROCESS OF CHILDREN UNDER MALAYSIAN JUVENILE JUSTICE: TO ARREST OR NOT TO ARREST?

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ABSTRACT

An arrest is one of the most controversial issues in the juvenile justice system. In general, the law allows police officers to detain children suspected of committing crimes for the purpose of investigation. While the arrest process is unquestionably intended to ensure public order and justice, it may cause severe stigma and traumatic experiences for children known for their physical, mental, psychological, and emotional sensitivity. This article aims to analyze the existing Malaysian juvenile justice system relating to the arrest of children, with reference to international standards set by international instruments. It encompasses qualitative research of doctrinal and comparative nature. The paper attempts to highlight the inadequacies of current Malaysian laws in addressing the issues of the arrest of children. It will also highlight inconsistencies of Malaysian laws with the international standards, the paper provides recommendations for prospective legal reform on the aspect of arrest and detention of children.

Keywords: Children, Arrest, Malaysia Law, International Standards

INTRODUCTION

The majority of the population in Malaysia has always been made up of children. According to the statistic, the number of the child population in Malaysia forms 28.3% out of the total population of 32.7 million in 2020. Given that fact, it is essential for the government to design a comprehensive framework, policy, and practice on the development and protection of children. Among the key aspects that require special attention towards realizing that an important goal is to establish a comprehensive juvenile justice system. A juvenile justice system refers to legislation, norms, rules, guidelines, policies, processes, methods, bodies, and institutions that are expressly applicable to children in conflict with the law. The system is complex since it incorporates a wide range of institutions, agencies, and authorities that are primarily responsible for dealing with delinquent issues, including police, prosecutors, the judiciary, lawyers, ministries, prison facilities, non-governmental groups, and others (United Nations Children's Fund, 2011).

This paper aims to analyze Malaysian laws relating to the arrest of children in conflict with the law, with reference to international standards. Arrest refers to a process of detaining a suspect alleged of committing criminal offences by the authority. It is not a mechanical process but rather an important decision by the detaining authority after careful consideration of complicated factors, such as the nature of the offence, circumstances under which the offence is committed, the seriousness of the offence, age of the suspect, and others. As far as the juvenile justice process is concerned, it is a critical stage as the arrest marks the first step where any child will come into contact with the formal criminal process and that he will be deprived of his fundamental liberty. The first part of the paper briefly introduces the definition and the importance of the juvenile justice system. The second part of the paper highlights general principles relating to the arrest and detention of children under international standards. It examines the principles and guidelines stipulated by the international instruments on this aspect of law. The third part, which is the main focus of this paper, critically analyzes the position of Malaysian law and practice pertaining to the arrest of children under criminal process. The

fourth part proposes recommendations towards improving current Malaysian law on this specific area of criminal justice. Lastly, the fifth part concludes the discussion on this topic (Abramson, 2006).

International Standards

The issue of child arrest has consistently been regarded as a matter of great concern by international instruments. General guidelines on this matter can be found in various international and regional instruments. For example, the United Nations Convention on the Rights of the Child (CRC), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) provide specific guidelines on the arrest of children.

Reference to international standards discloses that there are at least three basic principles that regulate the pre-trial arrest and detention of children. Firstly, the international standards emphasize that children shall not be deprived of their liberty unjustly or arbitrarily. This principle recognizes and upholds children's rights to fundamental freedom and strongly opposes any violation of this right. In elaborating this principle, the CRC states that the term "arbitrariness" has a broad legal meaning that encompasses inappropriateness, injustice, lack of predictability, and absence of the due process of law. This implies that any arrest or detention of a child must be both legal and reasonable in all circumstances. It emphasizes that the arrest should be strictly carried out in compliance with procedural standards and the due process of law. A similar principle can be found in the Beijing Rules and Havana Rules (Abramson, 2006).

Secondly, the international standards emphasize that arrest of children shall only be used as a measure of last resort. For example, the CRC states that the arrest of children shall only be used as a last option. The same principle is also provided under the Beijing Rules. Furthermore, the CRC expands on the obligation by underlining that any arrest of children shall be for the shortest period of time possible. Based on the provisions, it can be concluded that any arrest of children shall satisfy a particular twofold test to be legally justifiable, namely as a measure of last resort and for the least reasonable period. These standards place a responsibility on police or enforcement officers to first demonstrate that the anticipated arrest is the final resort step with no alternatives that would infringe on the child's rights. If the response is in affirmative, the next question is a suitable time frame, with the implicit obligation to evaluate the situation frequently and examine its continuous validity. To put it another way, this principle obligates the police or other enforcement officers to avoid arrest and detention of children as much as possible. If an arrest or detention is necessary, considerable caution should be exercised to ensure that it is for the least possible time. Commenting on this principle, the Committee on the rights of children states that every child arrested should be taken before a competent authority within twenty-four hours to determine its legality. If a conditional release is not possible, the children should be formally prosecuted with the alleged crime before competent authority or judicial body within thirty days of detention taking effect (Mustaffa, 2016).

Lastly, the international standards encourage involvement of parents or guardians in any criminal processes, including arrest. The CRC and the Beijing Rules both emphasize the importance of involving parents or guardians as much as possible at all stages of criminal processes involving children. The presence of parents or guardians in this situation does not imply that they should intervene in the child's defense or participate in the decision-making process. Instead, their participation should be considered as broad psychological and emotional support for children. While commenting on this matter, the Committee on the Rights of the Child recommends that children deprived of their liberty be held in a facility as close as possible to their family's residents. The primary purpose of this requirement is to allow them to communicate with their families through letters and visits. Furthermore, the Beijing Rules require police to notify the child's parents or guardians immediately after the arrest or as soon as possible after that. The police are also obligated to provide the parents or guardians with pertinent information about the arrest. The prompt notice of an arrest and disclosure of key facts

to parents or guardians is essential because it allows them to retain legal counsel to act in the best interests of the arrested children at the earliest stage of the criminal procedure (Mustaffa et al., 2020).

In short, it can be observed that international instruments have laid down international standards and guidelines pertaining to the arrest of children in criminal processes. These standards, which aim to recognize and guarantee rights and interests of children, should serve as a benchmark to all juvenile justice systems worldwide. It aims to ensure the utmost protection of children's liberty and security in all criminal processes and proceedings.

Position under Malaysian Law

Two main statutes govern the juvenile justice process in Malaysia, namely the Criminal Procedure Code (CPC) and Child Act 2001(CA). It should be noted that the Child Act 2001 has undergone significant amendment in 2016 by virtue of the Child Act (Amendment) 2016. The CPC is a general criminal statute that provides provisions pertaining to criminal procedure and processes. On another hand, the CA is a specific statute specially designed to govern matters relating to children. It contains specific provisions governing criminal procedures applicable to children. However, the Act clearly provides that in the absence of a specific provision in the CA concerning any criminal procedure, the provisions of the CPC shall be automatically applicable (Schabas et al., 2006).

Circumstances and Manner of Arrest

The CA states that any child accused of committing an offence shall not be arrested, detained, or tried except in compliance with this Act. According to the CA, any police officer who has reasonable grounds to think that a child has committed or attempted to commit, employ, or abet the commission of an offence may arrest the child. Section 83(a) further states that any arrested child shall not be handcuffed unless the offence is serious or if they attempt to use unreasonable force to resist or flee arrest. Apart from the requirement under Section 83, there are no other particular provisions relating to the principles and procedure governing circumstances and manner of arrest of children provided under the CA.

Close scrutiny of the Child Act 2001 on matters relating to arrest of children discloses that it is not comprehensive. Apart from requirement under section 83, there is no other specific provision pertaining to arrest of children. Therefore, the general provisions of the CPC will be automatically applicable on this matter. According to the CPC, there are two types of arrest, namely arrest without warrant and arrest with warrant. An arrest without warrant may normally be affected if a person is suspected of committing a seizable offence. It may be affected by four categories of people, namely police officers, penghulus, private citizens and magistrates or Justices of Peace. On the other hand, arrests with warrant are applicable to non-seizable offences.

It is worth to note that as far as manner and circumstances of arrest is concerned, the current Malaysian juvenile justice makes no distinction between the arrest of adults and children. The existing laws do not provide specific rules and procedures for circumstances in which children may be arrested and detained. In other words, there are no legal requirements that arrest of children should be guided by special criteria, principles, and procedures, considering their physical, emotional, mental, and psychological deficiency. For example, the existing laws do not specify under what circumstances the arrest of a child is permissible and justified. In addition, there is no explicit provision stating that the detention of children should be limited to exceptional circumstances and used only as a last option, as suggested by international standards. Similarly, current laws do not expressly state police officers have the authority or discretion to refuse to arrest children, particularly in minor or non-violent criminal offences.

Right to be Informed Grounds of Arrest

According to section 83(a) of the Child Act (Amendment) 2016, an arrested child must be notified of the reason for their detention. However, it appears that the provision does not elaborate the detail about the technical requirements for its execution. It is insufficient for the Act to merely provides that children have the right to be informed of the grounds for their arrest in general without laying out a precise mechanism for how this requirement can be effectively accorded to them. Because of their age, most children may have difficulty comprehending the grounds of their arrest and detention. More often than not, adults may find it challenging to understand the ground for the arrest. Children may find it even more difficult, especially if the ground of arrest is explained in legal and technical words. Children cannot be expected to exercise their legal rights, such as the right to remain silent or retain legal counsel, unless they have a thorough grasp of the grounds for arrest. Therefore, it is critical that the CA provide specific principles and procedures relating to children' right to be informed about the grounds of their arrest. Any arrested child should entitle to duly understand not just all of the essential legal and factual grounds for his arrest but also the potential consequences. This requirement is crucial to protect children deprived of their liberty from being subjected to any act of prejudice, manipulation, or power abuse by the detaining authorities.

Remand Order

Under the current Malaysian juvenile justice, the police may detain a person suspected of committing a crime not more than twenty-four hours for the purpose of investigation. The CA stipulates that no child may be detained for more than twenty-four hours without judicial permission. If the investigation cannot be completed within twenty-four hours, the police must apply for the court's order to further detain the child suspect. The application for the court's order is known as "remand proceeding."

It's worth noting that the current CA has no specific provisions for the remand procedure. It also makes no mention of the length of a detention period during which children may be held in police custody for an investigation. As a result, reference to the CPC is required in this matter. Section 117 of the CPC contains provisions governing the remand procedure. It states that the police must produce an arrested child before the magistrate during the application for remand. In deciding whether to allow the application or not, the magistrate is required to determine if there are reasonable grounds to believe that the accusation or information against the arrested person is correct. As regard to the duration of remand, it is determined by referring to the maximum punishment applicable to the offences under investigation. If the investigated offence is punishable with not less than fourteen years of imprisonment, the detention period cannot exceed four days on the first application and three days on the second application. If, on the other hand, the investigated offence is punishable by death or imprisonment for a period of fourteen years or more, the detention shall not exceed seven days on the first application and seven days on the second application.

It is clear that existing Malaysian laws do not provide special principles and procedures on remand and detention of children. As a result, similar procedures for remanding both children and adults have been implemented. In the case of *PP v N (A Child)*, the question arose as to whether the remand procedure for adults set out in Section 117 of the CPC also applies to the child. Because the CA did not provide a specific remand application procedure, the Court of Appeal decided that Section 117 of the CPC applies equally to the child. As a result, when applying for remand of children, the procedure outlined in section 117 of the CPC must be followed. In addition, the current Malaysian laws make no explicit provisions relating to the duration of remand of children. The existing laws make no distinction between the remand period for children and adults. It is vital to limit the remand of children to an appropriate duration of time in accordance with international standards, which notably emphasize that the arrest or custody of children should be for the shortest period of time possible. There is also a

need to include a particular provision requiring the police to prioritize expediting the investigative process for children who have been placed on remand.

Place of Detention

Aside from that, Section 85 of the Child Act of 2001 specifies the location of detention for arrested children. It states that a child who is detained at any stage of a criminal proceeding shall not be detained or permitted to associate with the adult suspect or accused. This requirement applies to both the pre-trial and trial processes, as well as the post-trial process. Its goal is to protect children from any negative consequences that may result from their association with adult arrestees. However, in practice, the issue of a lack of facilities has limited the effectiveness of this legal requirement. This is due to the fact that current police station designs do not include separate cells for children, which may prevent them from having direct or indirect contact with adult suspects. A child suspect may be detained in a separate cell, but this does not prevent him from having contact with an adult suspect, who may be detained in a cell next to or opposite to his. According to statistics, only 46% of children in the pre-trial stage are detained at specialized detention centers run by the welfare department, while the rest are detained in prisons alongside adults. Various parties have criticized this practice and expressed concern about children being detained alongside adult detainees in the same cells. Despite this criticism, this issue is still persists, implying the failure on the part of the government to adequately address this problem the issue of a lack of specialized and separate detention facilities for children.

Furthermore, Section 83 of the Child Act 2001 requires the police to notify the arrested child's parents, guardians, or relatives, as well as the probation officer, about the arrest, the reason for the arrest, and the right to legal counsel before initiating any form of interrogation or recording his or her statement. This provision's requirement is commendable because it aims to protect the interests and welfare of arrested children. However, the Act is silent on the consequences of the police failing to comply with this requirement. There is also no monitoring system in place to ensure that this legal requirement is strictly followed.

Involvement of Parents or Guardians

In addition, Section 83 of the CA requires the police to notify the arrested child's parents, guardians, or relatives, as well as the probation officer, about the arrest, the reason for the arrest, and the right to legal counsel, before engaging in any form of interrogation or recording their statement. This provision's requirement is commendable since it attempts to protect the interests and welfare of children who have been arrested. The CA, however, is silent on the consequences of the police failing to comply with this provision. There is also no monitoring system in place to guarantee that this legal requirement is duly and effectively implemented. In addition, no provision in the CPC allows parents and guardians to participate directly in the remand procedures. The current law and practice only allows the legal counsel to present for children during the remand application. Parents or guardians are not permitted to attend the remand application hearing.

RECOMMENDATIONS

Based on the discussion in the previous paragraphs, it can be concluded that the current Malaysian juvenile justice relating to the arrest of children is vague, inadequate, and lacks provisions. The absence of explicit provisions in the CA governing the principles and procedure of arresting children compels the use of the principles set forth in the CPC, the general statute governing criminal procedure. The application of CPC provisions relating to the arrest of children is not ideal and appropriate since the Code is originally intended to govern criminal processes involving adults. In addition, a close examination of the current Malaysian juvenile

justice on this aspect also indicates that current laws concerning the arrest of children do not comply with international standards because it does not provide separate principles governing arrest and detention of children. The absence of clear and specific procedure of arrest of children appears to be inconsistent with the international standards set by the international instruments which require the fulfillment of special twofold test, namely as a measure of last resort and for the least reasonable period of time, in order for an arrest to be legally justifiable.

In view of that, it is recommended that the criminal process of the arrest of children under Malaysian juvenile justice be reviewed and reformed, in acknowledgment of their legal rights and interests. More importantly, the formulation of new and specific processes and procedures for the arrest of children and matters pertaining to such action should consider the facts of their physical, mental, emotional, and psychological deficiencies compared to adults. There is extensive literature on findings of the scientists and psychologists which conclusively and evidently demonstrate that children's brain development, capacity, and maturity are less developed than adults. As such, it is proposed that the following principles and procedures of the arrest of children be incorporated into the present Malaysian laws;

- a) Arrest of children should be permitted only as a last option. Thus, depending on the nature and circumstances of each case, the police should be required to use their discretion in the first instance to issue a formal notice directing children suspected of non-seizable or minor offences to present themselves to the police station for the purpose of arrest within a specified period. Police should pursue children only if they fail to surrender willingly at any police station within the specified time frame.
- b) Any child arrested or detained shall be told immediately and without delay of their arrest by the arresting officer. Additionally, the arresting officer should inform the person arrested of the arrest's effect and their rights as an arrested person, which include the right to remain silent, to contact and be represented by legal counsel, and others. If the arresting officers face problems informing and explaining their rights to the apprehended children, the assistance of a child specialist or other professional should be recruited. Compliance with these processes is critical to ensure that arrested children understand their rights thoroughly and can make informed decisions about how to exercise those rights.
- c) For non-seizable offences or minor and non-violent crimes, the police officers should be permitted to arrest and detain children for an investigation period of not more than fifteen hours. If the investigation cannot be completed within that time frame, the police should either apply for a remand order before the magistrates or release them on police bond.
- d) Arrest and detention of children should be avoided whenever possible and used only in exceptional circumstances. It should be used only as a measure of last resort, as outlined by the international standards. In determining whether to allow remand or detention of children, the court should be guided by the strict principle of "exceptional circumstances," which, among other things, take into consideration relevant factors such as the gravity of the alleged offence, the existence of a prior conviction record, the public interest, and others. The burden should be on the police officers to demonstrate to the court the existence of exceptional circumstances justifying the application for remand and detention.
- e) The duration of remand and detention of children should be specifically limited. Currently, the CPC specifies that the period of remand detention is determined by the gravity of the offence for which the case is being investigated. If the offence carries a maximum sentence of fourteen years imprisonment or more, the term of detention on the initial application shall not exceed seven days. If the police seek an extension, the court can grant it for an additional seven days. Regarding the duration of remand for the cases that carry punishment less than fourteen years, the remand order may be granted for a maximum of four days on the first application. If an application for extension is made, the court may grant a maximum of another three days of detention. This period of remand is applicable equally to children and adults. It is proposed that a distinction be made between the term of remand custody for adults and children, taking their degree of development and maturity into account. The prolonged term of remand custody for children is unfavorable since it may result in a variety of problems for them, including stigma, labeling, trauma, and deprivation of school and social life. In this regard, it is proposed that remand for children should not exceed seven days for offences punishable by imprisonment for fourteen years or more and four days for offences punished by imprisonment for less than fourteen years.
- f) During remand imprisonment, parents or guardians must have access to their children. To avoid interfering with police investigations, the particular time and duration of their interaction with children may be

specified. For example, parents or guardians should be permitted to meet with children held in remand detention at least twice daily for a length of at least 45 minutes every session.

- g) Children under detention should be separated from adults. Though the current Child Act 2001 has already provided explicit provision on this matter, it is not strictly followed by the police. This is mainly due to the lack of sufficient facilities in certain police stations, especially in small towns.

It is hoped the above-mentioned recommendation will be taken into consideration in reforming the process and procedure of arrest of children under Malaysian juvenile justice.

CONCLUSION

In conclusion, the current Malaysian juvenile justice does not provide separate procedures and principles for the arrest of children. The principles and procedures on this matter are mainly governed by the provisions of the CPC, which do not differentiate between the arrest of children and adults. Therefore, it is high time to review the existing laws in view of the international standards' requirement. Though legal reform is not an easy process, it is critical for the Malaysian government to prioritize this aspect, as treating children at any level of criminal proceedings serves as a fundamental indicator of a society's attitude toward children. It will reflect the government's commitment to fulfilling international obligation to comply with international standards while also enhancing the status of children in our society.

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