

THE RIGHT OF CHILD OFFENDERS TO FAIR TRIAL FOR OFFENCES PUNISHABLE BY DEATH PENALTY

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ABSTRACT

Section 11(5) of the Child Act 2001 (CA 2001) provides that the jurisdiction of the Court For Children (CFC) is to try all types of offenses committed by children except for offenses punishable by the death penalty. Therefore, when a child commits an offense for which the punishment is the death penalty, the child should be tried in the High Court. This research was carried out to determine the legal definitions of children, accused, and child offenders. Following that, this research examines the rights of child offenders according to international human rights law and Malaysian law. The author will also examine the pertinent cases. The author collects data using the library research approach. This research focuses on several rights of child offenders, namely the right to bail, the right to be detained separately from adults, the right to a closed trial, and the right to a fair sentence. Trial at the High Court is conducted by a judge, whereas in the CFC a judge will be aided by two advisers, one of the advisers shall be a woman. These differences may result in injustice to child offenders during trial in the High Court. Therefore, amendments to the CA 2001 should be made to preserve the rights of child offenders of offenses punishable by death.

Keywords: Criminal offenses; accused juvenile; High Court; death penalty; child justice system

INTRODUCTION

There are many incidences that involve conflicts between children and the law, and these children are claimed to be involved in criminal activities. It is a matter of whether these children will become a part of a society that loyal to the country or whether they will fall into the valley of crime (Csey et al, 2013).

According to the online Cambridge dictionary, a child is a phrase given to a person from the time he is born until he becomes an adult, or it refers to someone's son or daughter. Meanwhile, the Kamus

Dewan mentions a child as a boy or girl and the child is not yet more than 7 to 8 years old (Siti Hajar Mohd Afendi et.al, 2023).

The Malaysian Child Act 2001 (Act 611)(hereinafter referred to as CA 2001) is a specific act enacted to address protection, care and rehabilitation of children in Malaysia and came into force in August 2002. This Act is a combination of three previous legislations, namely the Juvenile Courts Act 1947, the Child Protection Act 1999 and the Women and Girls Protection Act 1973. Act 611 listed three categories of children, namely children who need care and protection; children who need protection and

rehabilitation; and children who have conflicts with the law.

Section 11(1) of the CA 2001 provides that the CFC is established to hear, decide or resolve any charge against a child as well as to exercise any other jurisdiction granted or to be granted to the child court. The CFC consists of a Magistrate and is assisted by two advisers appointed by the Minister. One of the advisers shall be a woman as provided in subsection 11(3) CA 2001. However, subsection 11(5) of the Act provides that the CFC shall only have jurisdiction to try all types of offences not including offences that can be punishable by death sentence.

In accordance with section 117 of the CA 2001, no provision in the act other than sections 96 and 97 shall affect the powers of the High Court and that any power which may be exercised by the CFC shall in the same manner be exercised by the High Court. Thus, children who commit offenses punishable by the death penalty can be tried in the High Court. If the child is tried in the High Court, what measures are taken to distinguish between the trial of an adult and a child? Does subsection 11(2) regarding the presence of two advisers appointed by the Minister applies at the High Court? According to section 18 of the Courts of Judicature Act 1964 (CoJA 1964) only one judge is required to hear and decide a trial in the High Court. Article 3, the Convention on the Rights of the Child 1989 (CRC 1989) states that the best interest of the child must be primary consideration in every action concerning children.

It can be seen that in any action involving children in Court, authorities or legislatures, the best interests of the child shall be the primary consideration. Additionally, article 37 clarifies that the torture of children is prohibited. Children should not be imprisoned for life without the possibility of freedom and should not be detained for no cause or in an unlawful manner.

In summary, children's best interest must be prioritized while taking action against the accused juvenile. Children are protected from both the death sentence and life imprisonment. Torture or cruelty to children is illegal. If a child is condemned to prison, it should be for the shortest possible term. When accused children are detained, they should be allowed to communicate with family members via visitation or postal mail. Similar to an adult, a child is entitled to legal aid or any form of assistance to represent himself in court.

To complete this study, various objectives must be met. The first objective is to define children as well as accused juveniles in accordance with the provisions of the law. The second objective is to identify the jurisdiction of the CFC and examine the rights of the accused juvenile in accordance with international human rights law as well as Malaysian laws. The third objective is to examine cases involving the accused juvenile. This is a legal research, and it is designed as a qualitative study. This study collects and analyzes data from primary sources such as legislation and reports of court cases using library research methodologies. For a more extensive study, secondary data was also collected among journal articles and reports.

DEFINITION OF CHILDREN AND ACCUSED JUVENILE ACCORDING TO THE LAW

Article 1 of the CRC defines a child as every human being under the age of 18. In Malaysia, section 2(1) of the CA 2001 defines a person under the age of 18 years as a child. Section 2 Age of Majority Act 1971 also stipulates that a person aged 18 years and above is an adult. However, according to section 2 of Adoption Act 1952, a person who is under the age of 21 years old and unmarried including a woman under the age of 21 who has been divorced can be called as a minor. While in section 2 Law Reform (Marriage and Divorce) Act 1976 'minor'

was defined as every person who is 21 years old and below except a widow and widower.

However, some countries define children contrary to the definition of international law. Singapore in the Children and Young People Act 1993 has categorized a child as a person under the age of 14. Section 2 of the Act also defines a young person as a person between the ages of 14 and 17. Meanwhile, Brunei Darussalam through Section 2 of the Children and Young People Act (Decapitation 219) 14 Amendment 2012, defines a child as someone under the age of 14 and a young person as someone who is 14 years old and under the age of 18. The Protection of Children and Youths Welfare and Rights Act 2011 (amendment 2021) is Taiwan's national legal statute that touches on individuals who are 18 years old. The phrases used are children and adolescents. According to Article 2 of the Act, a child is a person under the age of 12. An adolescent is someone between the ages of 12 and 18.

Although section 2(1) of the CA 2001 defines a child as an individual under the age of 18, section 82 of the Penal Code states that a child under the age of ten shall not be punished if he commits an act that would be considered a crime if committed by an adult. This section provides absolute protection for children under 10 years of age as it is considered as *doli incapax* which is incapable of wrong. *Doli incapax* is a principle derived from Latin with the meaning of not being able to commit a crime. There is an assumption that children aged 10 and under are not guilty of an offense. However, through this principle, children aged 10 to 12 years old can be considered guilty of an offense if they reach maturity.

Section 83 of the Penal Code further states that a child aged 10 to 12 years old is not liable for the offense committed if the child has not attained the maturity level to understand the nature and consequences of the actions taken. As a result, the accused

juvenile may be classified as someone aged 13 to 17 years old who committed a criminal offense under the Penal Code or any other provision of the law. If proven guilty, the accused juvenile may be sentenced to a term commensurate with the offense committed.

However, the definition of accused juvenile in Malaysia is different from Brunei Darussalam. According to Section 2, Children and Young People Act (Decapitation 219), in Brunei only children aged 7 years until the age of 18 can be categorized as juveniles. The criminal liability of children aged 7 to 14 is regarded as minimal due to the fact of the child's ability to think. The 14 years old accused, on the other hand, is accountable for the crime he committed since at this age, the accused is capable of discerning between 'true' and 'wrong' actions (Haji Zuneidy, 2019).

COURT FOR CHILDREN AND ITS JURISDICTION

The Juvenile Courts Act 1947 (Act 90) (JCA 1947) provides the Juvenile Court's jurisdiction to hear matters involving juveniles. The Act went into force in Peninsular Malaysia on 1 December 1949, in Sabah on 1 October 1972, and in Sarawak on 2 February 1986. A juvenile is defined under Section 82 of the JCA 1947 as a person who has achieved the age of criminal responsibility but is under the age of 18 (Yusramizza & Anis Shuhaiza, 2007). Yet, in tandem with the drafting of the Child Act in 2001, the CFC was founded. The CA 2001 (via section 130) abolished the JCA 1947, the Women and Girls Protection Act 1973, and the Child Protection Act 1991.

The Court For Children, commonly known as the Juvenile Court, was established to offer the accused the right to be treated differently from adult offenders. This is based on the child's maturity level, which indicates that the child is not yet capable of considering the potential consequences of an act or omission (Abdullah Sohaimi, 2015).

The CFC has jurisdiction over cases involving individuals under the age of 18, which are recognized as children. This conforms with the definition of children in section 2(1) of the CA 2001. Section 82 of the Penal Code, on the other hand, states that children under the age of ten are incapable of committing a crime. Furthermore, section 83 of the Penal Code specifies that a child between the ages of 10 and 12 is deemed capable of committing a crime if the child is mature and capable of understanding his nature and acts when committing the crime. However, if a child of that age is not yet able to consider the circumstances and the consequences of his actions, then the child should not be held liable for the offenses he committed. It can be concluded that this child court only deals with children aged 13 to 17 years old. Offenders who have attained the minimum age of accountability must bear responsibility for the activities that they have committed, which are suitable for their age, skills, and mistakes (Norjihan Ab Aziz & Nur Najaa Syairah, 2023).

Other than hearing and deciding on any charge against a child, the CFC also exercises any other jurisdiction, which has been granted or will be granted to the Court by the CA 2001 or other written laws. Section 11(5) of the CA 2001 states that the Court For Children has jurisdiction to try all types of offenses except offenses punishable by the death penalty. Therefore, the accused juvenile who commits an offense that can be sentenced to death cannot be tried in this Court For Children. In addition, the Court For Children also does not have jurisdiction to try children charged with offenses along with adults. According to Section 83(4) of the CA, the child shall be tried in a Court having jurisdiction to try the offenses.

Section 11(2) of the CA 2001 provides that the child court must be consists of a Magistrate and shall be assisted by two advisers except for cases under sections

39(4), 42(4), 84(3) and 86(1). Section 39(4) of the CA 2001 explains the situations under which a child may seek protection and rehabilitation. As a result, the Court may reasonably issue an order placing the child in a sanctuary until an order under Section 40 of the same act is issued. Meanwhile, section 84(3) applies to the Court For Children's power to investigate cases involving children, except when the offense is a charge related to murder or other serious crime; or the Court believes that the child should be isolated from associating with any other person; or the Court believes that releasing the child will undermine the goal of justice. As a result, the child's release shall be contingent on the execution of a bond by the child's mother, father, or guardian. As for section 86(1), it provides for the custody of children who are not released on bail after arrest, in which the child shall be held in a place of detention specified in this Act.

According to section 11(3) of the CA 2001, it is mandatory for one of those advisers to be a woman. Section 11(4) of the CA 2001 states that the job of counsel is to advise the judge of the CFC on the punishment of a child offender found guilty or to enter a guilty plea and to advise the child's parent or guardian. The judge in the case of *PP v Ayasamy [1955]* said that among the roles of the counsel is to inform and give the court an opinion on the punishment or any other form of treatment of a child brought before him.

CHILD OFFENDERS FOR OFFENSES PUNISHABLE BY DEATH PENALTY

If a 14-years-old child is found guilty of an offense that can be imprisoned, then the child cannot serve imprisonment in the same facility as an adult prisoner according to section 96(3) of the CA 2001. This is to prevent the child from being affected by negative elements, traumatized, bullied by adult inmates, or receiving treatment that is

different from what a child should receive. Further, section 97(1) of the CA 2001 specifies that the death sentence will not be carried out on child offenders who commit a capital offense. If the court finds that the child has committed an offense punishable by the death penalty, the Court will substitute the sentence to imprisonment, where the term of detention is in accordance with the approval of the Yang di-Pertuan Agong (YDPA) for offenses committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan. Whereas, for offenses committed in states without a King or Sultan, the period of detention is in accordance with the consent of the head of state, which is Yang di-Pertua Negeri.

Fortunately, section 96(1) of the CA 2001 states that if the child is 14 years old, he or she cannot be placed in jail or committed to imprisonment for failing to pay fines, damages, or costs. According to the Penal Code, there are few offenses that can be punishable with the death penalty. Among these are:

1. Section 302 of the Penal Code, which deals with the crime of murder. If convicted, the death sentence could be imposed.
2. Section 376(4) of the Penal Code: The offense of forcing a person to death while committing or attempting rape. The death sentence is the punishment for this offense.
3. Section 396 of the Penal Code: The crime of gang robbery and murder. This offense carries the death sentence, as well as thirty years in jail and flogging.

Therefore, children who commit the above offenses, shall be tried in the High Court as the child court has no jurisdiction to try the offence. In *PP v Ahmad Jasni [2001]*, the accused, who was 12 years old, was charged in the High Court with the murder of a 5-year-old girl. The issue in this case is whether a child can be sentenced to death. The Court has referred to section 16 of the JCA 1947 which provides that the death penalty cannot be imposed on children and that imprisonment will be imposed instead of the death penalty. The term of imprisonment

is based on the approval of the Sultan of Selangor.

According to section 15(1) of the Courts of Judicature Act 1964 (CoJA 1964) and section 7 of the Criminal Procedure Code (CPC), the High Court convenes publicly to the public. However, the clause also allows the Court to hold a private hearing if the necessity of justice, security, or other sufficient considerations is considered (Sarirah, 2011). This is intended to safeguard the dignity of the accused juvenile as well as to prevent the accused juvenile from feeling inferior and oblique by society (Norazla, Nur Zulfah & Hammad, 2020). According to Paragraph 8.1, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted on 29 November 1985 by General Assembly, in order to avoid harm being caused to her or him by undue publicity or by the process of labeling, a private hearing is the best choice for a child offender. Additionally, the accused juvenile will be more open and comfortable answering questions from the Judge, the prosecution, and the defense counsel in a closed trial.

Section 117 of the CA 2001 stipulates that the High Court has the authority to hear criminal proceedings under the CPC and the CA 2001, as may be used by the CFC. The effect is that only section 96 and section 97 of the CA 2001 must be complied with by the High Court in hearing a criminal case against a child offender who has committed an offence punishable by the death penalty. No other provision shall affect or limit the jurisdiction of the High Court in the exercise of its jurisdiction to try trials involving children who commit offences punishable by the death penalty (Sarirah, 2011).

Ahmad Maarop J in *PP v KK [2003]* states that the method of trial of a child who commits an offense punishable by the death penalty is the same as the trial of an adult

who committed the same offense. Only the punishment that can be handed down is different, where section 97 of the CA 2001 stipulates that children cannot be sentenced to death if convicted. In this case, the procedure used is the procedure for criminal trial in the High Court as provided in Chapter XX of the Criminal Procedure Code. Judge Ahmad Maarop also made a banning order to the media from disclosing names, addresses, schools, or entering or posting any details (including photographs) that allow children and victims to be identified or lead to their identity identification. This is in accordance with section 15 of the CA 2001, which has resulted in a variety of restrictions on media coverage and publications involving accused juvenile or children who are victims in a case being tried. If any person is determined to be sharing information about child offenders or child victims, the individual has violated section 15(4) of the CA 2001. If found guilty, the defendant may face a fine of up to ten thousand Malaysian ringgit or five years imprisonment, or both.

According to section 90(9)(b) of the CA 2001, once a *prima facie* case against a child offender has been proven, the child may opt to either give evidence under sworn statement or make any statement that represents him. There is no opportunity for a declaration of silence, child offenders cannot remain silent. If the High Court rules the child offenders to defend themselves, sections 181 to 182A CPC are followed. An accused person can testify under oath. However, there is no specific clause for the right to remain silent. As a result, children who are tried in the High Court may give testimony under oath or make any statement not under oath or remain silent. This is because, while the right to silence is not expressly mentioned in section 181 through section 182A of the CPC, it is implied in those sections (Sarirah, 2011).

CHILD OFFENDER'S RIGHTS BASED ON INTERNATIONAL HUMAN

RIGHTS LAW AND MALAYSIA LEGAL FRAMEWORK

Malaysia became a State Party to the CRC on 13 February 1995 (Aminuddin & Kamaliah, 2010). Malaysia made 12 reservations when it signed the CRC, which was later reduced to 8, including articles 1, 2, 7, 13, 14, 15, 28(1)(a), and 37. Malaysia recently announced the withdrawal of the reservation on article 1 (definition), article 13 (freedom of speech), and article 15 (freedom of association and assembly). Malaysia still has reservations on article 2 (non-discrimination), article 7 (nationality), article 14 (freedom of conscience and religion), article 28(1)(a) (free and compulsory primary education), and article 37 (torture) (Noor Aziah, 2012).

In December 2006, Malaysia sent a National Report to the Committee on the Rights of the Child (CRC Committee) on developments in implementing the Convention. The CRC Committee has evaluated the 2006 National Report and has made several recommendations that can be implemented by Malaysia. According to the CRC Committee, the best interests of the child set out in article 3 of CRC is a general principle relevant to the implementation of the entire Convention. Malaysia shall ensure that the best interests of the child are the primary consideration whether in the review of laws, and judicial decisions as well as in any projects, programs, or services that will be provided to the child, as per Paragraph 37 Consideration of Reports Submitted by States Parties Under Article 44 of the Convention.

The CRC Committee received good information provided by Malaysia regarding Malaysia's willingness to amend the Necessary (Security Cases) Regulations 1975 to eliminate the imposition of the death penalty on children. Therefore, the CRC Committee recommended that Malaysia

hasten its measures to amend the Regulations so that the execution of the death penalty on children cannot be carried out as per Paragraph 38 Consideration of Reports Submitted by States Parties Under Article 44 of the Convention.

RIGHT TO BAIL

According to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Subsequently, article 37(b) of the CRC states that no child shall be detained unjustly or arbitrarily. Arresting, detaining, or imprisoning a child must be done in line with the law.

Section 84(1) of the CA 2001 stipulates that children arrested without or with a warrant must be brought to the Court For Children within twenty-four hours after their arrest. However, under section 84(3) of the CA 2001, the Court For Children has the authority to issue bail to the accused child who commits any type of offense, excluding murder or other major crime. The court cannot issue bail on the grounds of protecting the accused child's best interests. If the Court grants bail to the child offender, it will tarnish the aim of justice.

However, an exemption is provided under section 388(1) of the CPC, which states that the Court may give bail to any individual who commits an offense punishable by death if there is no sufficient evidence to suggest that such an individual has committed the offense. Only children under the age of 16, women, those who are sick, and the elderly are eligible for the guarantee.

RIGHT TO BE SEPARATED FROM ADULTS

According to Article 10(2)(b) International Covenant on Civil and Political Rights, an accused juvenile shall be separated from adults and brought speedily for adjudication. In addition, Article 10(3) stipulates that the place of detention of the accused juvenile should be different from the adult's facility. Section 85 of the CA 2001 addresses the separation of a child from an adult while in detention at a police station, places of detention, or in a courtroom.

This segregation is made to prevent children from associating with adult offenders and it is mandatory for a woman to accompany a girl who is detained or taken to the Police Station and Court. The purpose of this segregation is to prevent the dissemination of photos or any form of footage of children being taken to the Police Station or to the Court. Moreover, if a child aged 14 years old and above is ordered to serve a sentence of imprisonment, the child cannot associate with adult prisoners. This provision has explicitly stated that child offenders cannot be placed in the same prison as other adult inmates. Child offenders need to be placed in a special prison as per section 96(3) of the CA 2001. Children under detention pending trial must be separated from adult offenders and must be detained in separate institutions from adult offenders. Their rights to receive care, protection, educational, medical and physical had to be ensured whenever the children were placed in detention as per Paragraph 13.4 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted on 29 November 1985 by General Assembly.

There is, however, no clear guideline to obtain such separation. It is recommended that the police authorities develop a guideline or standard operating procedure while conducting arrests and isolating suspected children. This is done to protect the rights of the accused juvenile. Paragraph 15,

Guidelines for Action on Children in the Criminal Justice System states that appropriate actions should be taken to provide a wide range of alternative and educational measures accessible throughout the state in the pre-arrest, pre-trial, trial, and post-trial phases, to avoid recidivism and promote the social rehabilitation of child offenders. As mentioned in paragraph 12 of the Beijing Rules, there is a need for specialized training for all law enforcement officers who are involved in the administration of juvenile justice. Thus, through the training and guidance given to the authorities, the juvenile justice system can be improved, and the rights of the accused juvenile can be preserved.

RIGHT TO A CLOSED TRIAL

The trial of a case involving an accused juvenile should be held privately and shall not be merged with the adult trial processes. If a child is arrested, he or she must be taken before the child court for trial (Teo, 2007). Only parties involved are allowed to attend the trial involving children. Section 12 (1) of the CA 2001 stipulates that the CFC shall convene in a special room that is different from the other Court conference room. The conference should also be held on a special day to try the accused juvenile. In the meantime, entrances and exits should be separated if the CFC is in the same building as the other Courts. Section 12(2) of the CA 2001 stipulates that different entrances and exits are to ensure that the accused juvenile is carried out without any interruption. In addition, the trial of the CFC may only be attended by members and officers of the Court, parents, guardians, advocates, witnesses, and any other person as determined by the Court as provided by section 12(3) of the CA 2001.

However, when it comes to the trial of a child in the High Court, section 15(1) of the CoJA 1964 provides that the place where the Court convenes in the trial of any matter, civil or criminal shall be treated as an open

court to the public. However, the Court may hear a private hearing (in camera) if the Court is satisfied that there is an interest in justice, safety, and public safety.

Furthermore, section 7 of the CPC also provides that a Criminal Court that tries any criminal offense shall be treated as an open court to the public. The public can present in any hearing held in the Federal Court, Court of Appeal, and High Court. The exemption in section 15(1) of the CoJA 1964 has allowed the Court to hear cases in private where it is necessary to safeguard the interests of justice, safety, and public safety or other factors. In this regard, only certain parties are allowed to hear proceedings conducted such as court staff including lawyers, family members of the accused and victims, witnesses, bona fide representatives of the press as well as moral officers or officers from the welfare home (Sarirah, 2011). Section 12(3) of the CA 2001 provides that only members and officers of the Court, child offenders, parents or guardians, advocates, witnesses, and any person connected to the case are allowed to enter the court to hear the trial proceedings of the child. In the trial of a child, section 117 of CA 2001 grants the High Court the same powers as the child court. As a result, as allowed in section 12(3) of the CA 2001, the parties' attendance before the High Court may be limited. It also fits with the provisions of section 15(1) of the CoJA 1964, which permits for private hearings.

RIGHT TO A FAIR SENTENCE

The execution of the death penalty on children is prohibited. In accordance with article 37 of the CRC, no death penalty or life imprisonment can be carried out on children under the age of 18. Section 97(1) of the CA 2001 also provides that the death penalty cannot be made against a child who has been found guilty of an offence punishable by the death penalty. The death penalty will be replaced with imprisonment. The length of imprisonment is subject to the consent of the

Yang di-Pertuan Agong, the King of state or Yang di-Pertua Negeri.

When a child is charged with murder, he is prosecuted in the High Court, and if the prosecution proves the prima facie case, the Court will sentence him with imprisonment for as long as the YDPA consents to in place of the death penalty (Noor Hasliza & Zuhair, 2021). Section 293(1) of CPC states, “*when any youthful offender is convicted before any Criminal Court of any offence punishable by fine or imprisonment, the Court may, instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment.*” Therefore, court may order child offender to perform community service not exceeding 240 hours, where it only applied to young offenders aged between 18 to 21 years old. Community service is defined by section 293(1)(e)(ii) of the CPC as any job, service, or course of instruction undertaken for the benefit of the general public, including work performed in exchange for payment to a jail or local authority and be overseen by the Minister in charge of women, families, and communities. Section 97A CA 2001 states that the CFC has the authority to order a child offender to conduct community service for a term of no more than 120 hours over a period of no more than six months.

A Community Service Order (CSO) is a non-incarceration alternative to imprisonment. The goal was to provide rehabilitation, prevent offenders from repeating crimes, and integrate them back into society in general, through the following core elements, punishment, rehabilitation and reparation. Punishment is by taking away an offender's spare time by assigning them tasks. Rehabilitation by imposing a social responsibility mentality and making community service a rewarding experience for the offender. According to the Department of Social Welfare, Ministry of Women, Family and Community Development, reparation is to create moral virtue in the offender while providing tangible advantages to society.

MNZMN v PP & Other Appeals [2023] the appellant, who was 15 at the time, had been charged at the Children's Courts in Sepang and Petaling Jaya. The three charges brought against the appellant were heard concurrently, where it is an offense under section 14(a) Sexual Offences Against Children Act 2017 and section 377C Penal Code. The appellant pled guilty to all of them. The Magistrates ordered the appellant to be placed in the Henry Gurney School for three years after reading the probation report produced by the welfare officer and hearing the recommendations of the two advisors appointed pursuant to the CA 2001 and the submission of the appellant's counsel and Deputy Public Prosecutor. After reviewing the appeal, the Court of Appeal judges considered that the appropriate punishment is to invoke section 91(1)(da) of the CA 2001 and order the appellant to perform community service of a total of 100 hours as prescribed and supervised by the Social Welfare Department, Ministry of Women, Family and Community which may include undergoing counseling, religious and moral education thereat.

The concept of family-based preservation, also known as Deinstitutionalisation (DI) on an international level, is an attempt to provide all children with the opportunity to grow up in a family context. In Malaysia, this concept assures children who require protection and care. The first alternative is to live with family members, and the ultimate option is to be placed in an institution under the Department of Social Welfare. The focus of the DI concept's implementation is on childcare provided by parents, family members, or others who are qualified and acceptable in a family setting, rather than on the ultimate closure of custodial facilities (Ministry of Women, Family and Community Development, 2016).

Section 293(1)(b) states that Court may order the offender to be delivered to his

parent or to his guardian or nearest adult relative or to such other person as the Court shall designate on such parent, guardian, relative or other person executing a bond with or without surety or sureties, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond make an order in respect of the offender ordering him to be of good behaviour for any period not exceeding two years and containing any directions to that offender in the nature of the conditions referred to in paragraphs 294a (a), (b) and (c) which the Court shall think fit to give.

Judges may consider sentences in the form of community service orders and family-based preservation orders when sentencing the accused child. In *Tukiran bin Taib v. Public Prosecutor [1955]*, the offender was 17 years old when he was charged in the Magistrate's court at Tanjong Karang with the theft of 167 coconuts under section 379 of the Penal Code. He pleaded guilty and was sentenced to 4 months imprisonment. Bellamy J says, 'It has been stressed by this Court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out of prison, if possible.' Therefore, imprisonment should be the last resort of punishment.

CASE ANALYSIS

In *PP v Low Hai Voon [2010]*, a child offender aged 14 years and 9 months has been charged with murder under section 302 of the Penal Code. However, the charge has been changed to the offense of manslaughter without intent under section 304(a) of the Penal Code. The guilty plea of the child offender was recorded and accepted by the Court. The High Court judge has referred to section 91(f) of the CA 2001 and ordered that the child offender be sent to a school that has

been approved by the Act until the offender reaches the age of 21.

In the case of *PP v Buri Hemna [1998]*, the accused juvenile committed an offense under section 39B (1) of the Dangerous Drugs Act 1952 when he was 17 years old. The issue in this case is whether the accused should be tried by a High Court judge assisted by two advisers or without being assisted by two advisers. The Honourable Judge ruled that the High Court could try a child without being assisted by two advisers. According to him, there is no written law which says that a trial by the High Court does not need to be heard and settled by a judge only as provided by section 18 of the CoJA 1964. In addition, the judge in this case also explained that there is no legal provision that says that the trial of a child offender by the High Court should be handled as per the circumstances of the CFC.

Augustine Paul J in the case of *PP v Mohd Redzuan bin Saibom [2002]*, used section 16 of the Juvenile Courts Act 1957 to sentence a child convicted of violating section 39(1) of the Dangerous Drugs Act 1952. Section 16 of the Juvenile Courts Act states that the death sentence does not apply to child offenders. As a result, the Judge has substituted a jail sentence for the term allowed by the Yang di-Pertuan Agong or Tuan Yang di-Pertua Negeri. In *PP V Khairul Al Sidek bin Lurin & Anor [2010]*, the child offender was charged under section 302 of the Penal Code for the murder of the deceased, Mohd Azlie Hanif bin Gazali using a stick and a belt. The prosecution managed to prove the case beyond a reasonable doubt. Therefore, the child offender is ordered to be held in prison for the term approved by the Yang Di-Pertua Negeri Sabah in lieu of the death penalty convicted thereof pursuant to section 97(2)(b) of the Child Act 2001.

In another case, *PP v Muhammad Adli Shah bin Mohd Yusry [2021]*, the accused was convicted for murder charge under section 302 of the Penal Code. On September 14, 2017, between 4.15 and 6.45

a.m., a fire broke out at the Tahfiz Darul Quran Ittifaqiyah Centre, Jalan Keramat Akhir, killing 23 people, including 22 students and a warden. The High Court Judge ordered the accused to serve the sentence for the duration permitted by the Yang di-Pertuan Agong (YDPA) under section 97(2)(a) of the CA 2001, which allows the death penalty to be substituted for imprisonment. This is due to the accused's age at the time of the offense is 16 years. The death sentence cannot be inflicted on criminals under the age of 18 at the time of committing the offence.

Section 97 of the CA of 2001 eliminates the death penalty for child offenders and replaces it with imprisonment. The length of imprisonment is determined by the YDPA or the state TYT. In the matter of *Kok Wah Kuan v. Director of Kajang Prison, Selangor Darul Ehsan [2004]*, the issue in this case is the YDPA's authority to imprison child offenders who commit crimes punishable by death. The death penalty will be replaced with a jail sentences, the length of imprisonment will be determined by the YDPA. The Court of Appeal concluded that section 97(2) of the CA 2001 violates the notion of separation of powers, which is crucial under Malaysia's Federal Constitution. As a result, it is concluded that the section's provisions are unlawful and unconstitutional. Therefore, there is no mechanism for punishing child offender who commit murder offenses.

However, there are other views regarding the decision of the Court of Appeal which considers that there is no issue regarding the conflict of separation of powers in section 97(2) of the CA 2001 as the Yang di-Pertuan Agong only decides the period of imprisonment which is appropriate to the offence. The power to sentence or find guilty of a child who commits an offense punishable by the death penalty still rests with the Court (Anita & Tengku Noor Azira, 2014). In the meantime, the Board of Visiting Judges also plays a role in determining the

length of imprisonment of the accused child. This is because the Board of Visiting Judges will assess the accused child at least once a year and the Board will submit the results of the report to the Yang di-Pertuan Agong. The outcome of the report will affect whether the child offender will be released early or the detention period will be extended as provided in Section 97(4) of the CA 2001. Therefore, the issue of conflict of power segregation should not be a major debate as the decision made by the Yang di-Pertuan Agong is on the advice of the Board of Visiting Judges and not the decision of the Yang di-Pertuan Agong alone. The Board of Visiting Judges is responsible for assessing the development of the accused's behavior throughout his stay in custody.

CONCLUSION AND RECOMMENDATION

According to local newspaper reports as well as a list of cases registered in the courts, the number of child offenders committing serious offenses is increasing day by day. Children are seen getting bolder to commit armed robbery, rape and murder.

Through the above discussion, section 97 of the CA 2001 has expressly stipulated that the death penalty should not be handed down or recorded against child offenders. It coincides with article 37 of the CRC, where no death penalty or life imprisonment can be carried out on children under the age of 18. Prison is a substitute for the death penalty and is in line with the provisions of section 97 of the CA 2001. The authors suggest that the Court be given the power to grant punishments other than prison sentences such as sending offenders to schools approved by the Act or to Henry Gurney School and so on.

In India, youthful offenders are sometimes detained because they require protection. Certified schools for the destitute and delinquents operate under the supervision of the government. In these

schools, children are provided proper instruction in a disciplined manner so that when they are

The authors additionally proposed to revise the CA of 2001 to expand the Court For Children's jurisdiction to hear cases involving offenses punishable by the death sentence. If the CFC is given the authority to try the offense, it is assumed that the child's rights, such as the right to be separated from the adult and the right to a closed trial, will be protected.

The death penalty in Canada was abolished on 10 December 1998, therefore murder offences in Canada do not impose a death sentence but imprisonment. Section 14(1) Youth Criminal Justice Act 2002 states Youth Justice Court has jurisdiction to try any offence committed by young person. This section provides executive jurisdiction youth justice court, where the court may hear the trial in relation to all types of offenses except as specified by the provisions. Sections 42(2) Youth Criminal Justice Act 2002 enacted a specific provision on sentencing a youth. The section establishes forms of punishment such as reprimand, directing the young person to be discharged, imposing a fine, paying other people compensation, probation, custody supervision, rehabilitative custody, or any other conditions that the court considers appropriate.

Malaysia can adopt the provisions of the law and the juvenile justice system of Canada as a measure to strengthen the juvenile system in Malaysia. The abolition of the death penalty in Canada should be a guide to Malaysia in the trial of accused children. This is in line with the provisions of international law that ban the death penalty on children. Therefore, the Court For Children should be given the power to hear and decide the trial for children who commit offenses punishable by death.

Finally, the individuals involved in the juvenile justice legal system should get training or education. The training session will include the accused juvenile's rights as well as the principles and provisions of international legal instruments. According to paragraph 21 Guidelines for Action on Children in the Criminal Justice System, law enforcement officials should get education and training in human rights and juvenile justice system as a part of their trainings.

ACKNOWLEDGEMENT

This research was not funded by any grant.

CONFLICT OF INTEREST

The authors declare no conflict of interest among parties who have been involved in writing this article.

AUTHORS' CONTRIBUTION

The first author takes full responsibility for several key aspects of the study: conceiving and designing the research, collecting and analysing the data, and preparing the manuscript. The second and third authors provided valuable feedback on the manuscript and revised it for intellectual content. All authors reviewed the final manuscript.

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