

Inhuman sentencing of children in Malaysia

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Introduction

Persons convicted of an offence committed under the age of 18 may lawfully be sentenced to capital punishment, corporal punishment and life imprisonment.

Malaysia has a dual system of secular and Islamic law. The main laws governing juvenile justice are the Child Act 2001, the Penal Code, and the Criminal Procedure Code 1976. For Muslim children, Islamic laws are also applicable – the Syariah Courts (Criminal Jurisdiction) Act 1965, the Syariah Criminal Offences (Federal Territories) Act 1997 and the Syariah Criminal Procedure (Federal Territories) Act 1997.

The Penal Code sets the minimum age of criminal responsibility at 10,¹ but the Internal Security Act applies “regardless” of age,² the Syariah Criminal Offences (Federal Territories) Act 1997 refers to the attainment of puberty,³ and the Syariah Criminal Procedure (Federal Territories) Act 1997 defines a “youthful offender” as between 10 and 16.⁴

Legality of inhuman sentencing

Death penalty

The death penalty is lawful for persons under 18 at the time of the offence for certain offences.

Article 97 of the Child Act states: “(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.” Article 2(1) defines a child as under 18 years. But a child may be sentenced to capital punishment under the Essential (Security Cases) Regulations 1975, which state in article 3: “(3) Where a person is accused of or charged with a security offence, he shall, regardless of his age, be dealt with and tried in accordance with the provisions of these Regulations and the Juvenile Courts Act, 1948, shall not apply to such cases.”⁵ This applies to offences under the Internal Security Act 1960,⁶ which prescribes the death penalty for offences relating to firearms, ammunition and explosives and to the disruption of public security, public order and terrorism.⁷

Corporal punishment

Corporal punishment is lawful as a sentence. Article 91(g) of the Child Act authorises the court for children to “order the child, if a male, to be whipped with not more than ten strokes of a light cane

¹ Article 82 – see also Child Act article 2

² Essential (Security Cases) Regulations 1975, article 3

³ Articles 2 and 51

⁴ Article 2

⁵ The Juvenile Courts Act was repealed by the Child Act 2001

⁶ Essential (Security Cases) Regulations 1975, article 2

⁷ Articles 57, 58 and 59

– (i) within the Court premises; and (ii) in the presence, if he desires to be present, of the parent or guardian of the child”. Article 92 specifies how the whipping should be carried out: the child should first be certified fit for the punishment by a medical officer; the whipping should be with a light cane “with average force without lifting his hand over his head so that the child’s skin is not cut”; and it should be inflicted on any part of the child’s clothed body “except the face, head, stomach, chest or private parts”. The Criminal Procedure Code provides for whipping of a youthful offender up to 10 strokes with a light rattan, “in the way of school discipline”,⁸ and this may be ordered in cases normally punished by fine or imprisonment.⁹ No sentence of whipping shall be passed on women or on males sentenced to death.¹⁰ Many offences in the Penal Code and other laws are punishable by whipping.

Corporal punishment is also lawful as a sentence under Islamic law, and there is no exemption for females. The Syariah Courts (Criminal Jurisdiction) Act, which applies to Muslims in all the States of Peninsular Malaysia¹¹ provides for Islamic courts to order whipping up to six strokes.¹² The Syariah Criminal Offences (Federal Territories) Act applies to Muslims in the Federal Territories of Kuala Lumpur and Labuan,¹³ and provides for the punishment of whipping up to six strokes for the offences of false doctrine, incest, prostitution, homosexual acts and other sex offences.¹⁴ The Act applies to children who have attained the age of puberty according to Islamic law.¹⁵ The Syariah Criminal Procedure (Federal Territories) Act, specifies how whipping should be carried out.¹⁶

Life imprisonment

Persons convicted of crimes committed under the age of 18 may be sentenced to life imprisonment.

In prohibiting the death penalty for persons under 18, article 97(2) of the Child Act prescribes in lieu detention “in a prison during the pleasure of (a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan, or (b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State”. Paragraph 3 states that the person’s case must be reviewed annually and recommendations can be made for release or further detention, but there is no prohibition of life imprisonment. The Act states that no child under 14 shall be imprisoned.¹⁷

These restrictions do not apply in the case of security offences under the Internal Security Act. Under the Essential (Security Cases) Regulations, a person is punished according to the Act “regardless of his age”.¹⁸ Life imprisonment is the prescribed punishment for offences relating to consorting with persons possessing arms or explosives, and to the disruption of public security, public order and terrorism.¹⁹

Inhuman sentencing in practice

⁸ Articles 288

⁹ Article 293

¹⁰ Article 289

¹¹ Articles 1 and 2

¹² Article 2

¹³ Article 2

¹⁴ Articles 4, 20, 21, 22, 23, 25 and 26

¹⁵ Articles 2 and 51

¹⁶ Articles 125 and 126

¹⁷ Article 96

¹⁸ Article 3

¹⁹ Articles 58 and 59

The Government has stated that capital punishment is not imposed in practice on juvenile offenders.²⁰ Since 1990, no executions of juvenile offenders in Malaysia have been recorded by Amnesty International.²¹

We have been unable to obtain statistical information relating to sentences of life imprisonment, detention “during the pleasure”, or corporal punishment. The U.S. Bureau of Democracy, Human Rights and Labor noted that judicial caning was carried out during 2009 but gives no specific figures.²²

Progress towards prohibition and elimination

Law reform needed

The Essential (Security Cases) Regulations 1975 should be amended/repealed to ensure abolition in law of capital punishment of child offenders. All legal provisions authorising judicial corporal punishment (whipping) for such persons should be repealed, including under Islamic law, and life imprisonment should be explicitly prohibited.

Law reform under way

The Government stated its intention to amend the provisions for caning of boys in the Child Act and to amend the Essential (Security Cases) Regulations to abolish capital punishment for child offenders in 2007.²³ During examination by the Human Rights Council at the Universal Periodic Review in 2009, the Government stated that abolition of judicial caning and capital punishment for persons under 18 at the time of the offence was an “immediate concern”. It reported that the Child Act was under review, the Ministry of Women, Family and Community Development was planning to recommend the withdrawal of the sentence of caning for children, and the process of amending the Essential (Security Cases) Regulations to abolish the death penalty for children was under way.²⁴ There have been no indications of any intention to prohibit corporal punishment under Islamic law.

National campaigns

We are not aware of any national campaigns on the issue of inhuman sentencing.

The Malaysian Bar Association has called for repeal of the Essential (Security Cases) Regulations 1975.²⁵

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

²¹ Amnesty International, “Executions of Juveniles Since 1990”, <http://www.amnesty.org/en/death-penalty/executions-of-child-offenders-since-1990>, accessed 21 May 2010

²² <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135998.htm>, accessed 24 July 2010

²³ 25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report to the Committee on the Rights of the Child, para. 48

²⁴ A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, paras. 56 and 59

²⁵ <http://www.mfasia.org/mfaStatements/F95-MalaysiaBarResolution.html>, accessed 6 May 2010

National and international law conflicting with inhuman sentencing

The Constitution

There is no prohibition in the Federal Constitution (1957) of cruel, inhuman or degrading treatment or punishment.

International human rights treaties

Malaysia has ratified or acceded to the following international treaties:

- Convention on the Elimination of All Forms of Discrimination Against Women (in 1995)
- Convention on the Rights of the Child (in 1995)
Reservations: “The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, [...], 28, [paragraph 1 (a)] 37, [...] of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.”
- Convention on the Rights of Persons with Disabilities (in 2010)

Malaysia has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, the International Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Economic, Social and Cultural Rights.

Malaysia has not ratified or acceded to any complaints/communications mechanisms.

Status of treaties

The legal system in Malaysia is based on English common law. Treaties become part of domestic law only when they have been expressly incorporated by legislation.²⁶ They typically cannot be invoked directly in the courts.

Recommendations from human rights treaty monitoring bodies

Committee on the Rights of the Child

(25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report, paras. 38, 39, 48, 49, 103 and 104)

“The Committee welcomes the information provided by the State party that it will amend the Essential (Security Cases) Regulations of 1975 to abolish the imposition of capital punishment on children. The Committee notes that capital punishment is not imposed in practice for offences committed by persons who are under 18 at the time of the offence. Nevertheless, it notes with grave concern that the State party has not yet withdrawn its reservation to article 37.

²⁶ UNICEF (2007), *Law Reform and Implementation of the Convention on the Rights of the Child*, Florence: UNICEF Innocenti Research Centre

“The Committee recommends that the State party, as a matter of priority, expedite its measures to amend the Essential (Security Cases) Regulations of 1975 to abolish the imposition of capital punishment on children. With regard to the State party’s reservation to article 37, the Committee refers to its earlier recommendation in paragraph 12 above.

“The Committee, while welcoming the State party’s statement that it will amend the provisions of the Child Act 2001 (Act 611) which provide for caning of male children, expresses its deep concern that caning is still a lawful penal sanction provided by the Child Act and that it is also used as a disciplinary measure in penal institutions.

“The Committee urges the State party to immediately abolish all forms of cruel, inhuman or degrading punishments, including caning and other forms of corporal punishment imposed on persons having committed a crime when under the age of 18 and as a disciplinary measure in penal institutions, taking into account the Committee’s General Comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (CRC/C/GC/8).

“The Committee notes with concern the low minimum age of criminal responsibility which is ten years in the Penal Code (Act 574), and the discrepancies between the minimum age standards in the Penal Code, the interpretation of the Muslim jurists in the *Syariah* Court and the *Syariah* Criminal Procedure (Federal Territories) Act 1984. The Committee expresses its concern, among other things, at long (pre-trial) detention periods, delays in dealing with cases involving children and the fact that children in conflict with the law are often subject to negative publicity in the media. Furthermore, the Committee is concerned at the deprivation of liberty at the pleasure of the Yang di-Pertuan Agong or the ruler or the Yang di-Pertua Negeri, which results in the undetermined length of deprivation, causing problems in terms of the development of the child, including her/his recovery and social reintegration.

“The Committee recommends that the State party continue and strengthen its efforts to ensure the full implementation of juvenile justice standards, in particular articles 37, 40 and 39 of the Convention and other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the “Riyadh Guidelines”) and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the “Havana Rules”), taking into account the Committee’s newly adopted General Comment No. 10 on children’s rights in juvenile justice (CRC/C/GC/10). It recommends that the State party:

- a) urgently raise the minimum age of criminal responsibility at least to the age of 12 and continue to increase it to a higher age level and carry out a study on the discrepancies between the minimum age standards in the Penal Code, the interpretation of the Muslim jurists in the *Syariah* Court and the *Syariah* Criminal Procedure (Federal Territories) Act 1984 to prevent different standards being imposed on children upon entering the criminal justice system;
- b) develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort;
- c) amend the existing laws, including the Child Act 2001 (Act 611), in order to ensure that the deprivation of liberty is in full conformity with articles 37 and 40, paragraph 1, of the Convention and take the necessary measures, for example suspended sentencing and early release, to ensure that deprivation of liberty is limited to the shortest time possible....”

Universal Periodic Review

Malaysia was examined under the Universal Periodic Review process in 2009. During the review the Government stated that abolition of judicial caning and capital punishment for persons under 18 at the time of the offence was an “immediate concern”.²⁷ The Government did not support recommendations to abolish all capital punishment.²⁸

²⁷ A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, para. 56

²⁸ A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, paras. 105, 106(10) and 106(15)