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# Voice of Academia

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# Voice of Academia

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# The Position of a Child Offender under the Laws of Preventive Detention in Malaysia

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## ABSTRACT

*Preventive detention is a detention order directed by the minister with a view to prevent a person from acting in any manner prejudicial to public order or because it is necessary for the suppression of violence or the prevention of crimes involving violence. When a person is detained under the laws of preventive detention, his/her right to be heard is deprived. That is why this kind of detention is also called a detention without trial. Any person, including a child is subjected to these laws if he or she goes beyond them. Even though there is a special Act namely, the Child Act 2001, it is not applicable in cases involving a child offender who is detained under the laws of preventive detention. Therefore, this paper discusses the reasons behind the judgment of the judges as to why the Child Act 2001 is not applicable in child offender cases. At the end of the discussion, the writers provide suggestions for the need of the applicability of the Child Act 2001 in child offender case.*

**Keywords:** Child, preventive detention, public order, national security.

## 1. Introduction

Preventive detention is synonymous with ISA (Internal Security Act 1960) which empowers the authority concerned to detain any suspected person who acts in any manner prejudicial to the national security. But there are two other laws that deal with preventive detention which also empower the authority concerned to detain any suspected person who acts in any manner prejudicial to public order, for instance, snatch thieves, illegal racers, drug traffickers etc.

It can be said that children (formerly known as juvenile) are among the wrongdoers or offenders or culprits. They also involved in illegal activities together with adults. A child who commits an offence is called a child offender. There is a special law for children, namely, the Child Act 2001.

The Child Act 2001 was gazetted on March, 1 2001 and has come into force since August, 1 2002. The Child Act 2001 is a consolidation with amendments of three Acts ie. the Child Protection Act 1991, the Women and Girls Protection Act 1973 and the Juvenile Court Act 1947. These three Acts were repealed by section 130 of the Child Act 2001. In addition, the Juvenile Court was also replaced by the Court for Children which has the power to hear any cases involving a child except a case which can be sentenced to death (Sarirah and Mumtaz, 2004).

There are procedures of arrest, detention and trial in the Child Act 2001 specifically to deal with a child offender. Even in a case of child offender which is heard by the High Court judge will be decided according to the provisions of the Child Act 2001.

The issue arises when a child offender is arrested and detained without trial under the laws of preventive detention. This paper will discuss the reasons behind the judgment of the judges as to why the Child Act 2001 is not applicable in child offender cases.

## 2. Definition

Section 2 of the Child Act 2001 defines a child as a person below the age of 18. This definition corresponds to the definition under Article 1 of the Convention On The Rights Of The Child (CRC) where Malaysia is a signa-

tory. Article 1 states:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Previously, there are two categories of persons below the age of 18, namely a child (a person below the age of 14) and a young person (a person above the age of 14). Now, by virtue of section 2 of the Child Act 2001, there is no longer a young person but a child as reference to any person below the age of 18. For instance, if a child offender is 17 years old he/she will be referred to as a child and no longer a young person (Abdul Halim Sidek, 2004).

### **3. The Laws of Preventive Detention**

#### ***3.1 Historical background***

Preventive detention was inherited by Malaysia as a part of the colonial baggage that the British left behind. Malaysia is one of the few countries in the world whose constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights (Hardial Singh Khaira, 2007).

Preventive detention first became a feature of Malaya in 1948 primarily to combat the armed insurgency of the Malaysian Communist Party. The Emergency Regulations Ordinance 1948 was enacted to empower the British Commissioner and the Executive to regulate any rules pertaining to the emergency matters including arrest and detention of any person who acts in any manner prejudicial to the security of Malaya.

In 1960, the Government of Malaya announced that the communist emergency had officially come to an end although there were threats at hill areas and the Thai border. Then, ISA was enacted and came into force on 16 September 1963. The main goal of ISA is to combat subversion activities. ISA empowers the police officer to arrest and detain for a period not exceeding 60 days any person who acts in any manner prejudicial to the security of Malaysia. It also empowers the Minister of Home Affairs to detain the person concerned without trial for a period not exceeding two years.

Then, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (hereinafter referred to as “EPOPO”) was enacted and came into force on 16 May 1969. The main goal of the EPOPO is to curb any activities which may threaten the public order. The EPOPO also empowers a police officer to arrest and detain for a period of 60 days any suspected person who is involved in any activities prejudicial to the public order. The Minister of Home Affairs is also empowered to detain the suspected person without trial for a period not exceeding two years.

Preventive detention was extended to the cases of drugs trafficking. Therefore, Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter referred to as “DDA”) was enacted. The main objective of DDA is to detain any person who is involved in drug trafficking which may threaten the public interest. The enforcement of DDA is reviewed for extension every five years. If it does not do so, therefore the detainee under DDA will be released (Mimi Kamariah Majid, 1995).

The fundamental ground for the preventive detention is when the Minister is satisfied that a person should be detained for the sake of public interest (Abdull Hamid Embong, 2002).

### ***3.2. The arrest by the Police Officer***

Section 73 of the ISA provides that any police officer may without warrant, arrest and detain pending enquiries any suspected person in respect of whom he has reason to believe :

- (a) that there are grounds which would justify his detention under section 8; and
- (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

Section 3 of the DDA also provides that any police officer may without warrant, arrest and detain any suspected person for the purpose of investigation, in respect of whom he has reason to believe there are grounds which could justify his detention under section 6(1). That suspected person may be detained in police custody for a period not exceeding sixty days

without an order of detention having been made in respect of him under section 6(1), provided that:

- (a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;
- (b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;
- (c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

Section 3 of the EPOPO also empowers any police officer to arrest and detain without warrant any suspected person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1) of the EPOPO.

Nevertheless, Article 151 of the Federal Constitution gives to any person detained without trial certain administrative rights. By the terms of Article 151 the authority, on whose order a person is detained, shall as soon as may be, inform the detainee of the grounds of detention and the allegations of fact on which the order is based.

### ***3.3. The order for a preventive detention without trial by the Minister***

Criminal proceedings and preventive detention are not parallel proceedings. The object of a criminal prosecution is to punish a person for an offence committed by him, while a preventive detention is an anticipatory measure and may not relate to an offence (Hardial Singh Khaira, 2007). In addition, there are two distinct powers under two different laws. The power to institute criminal proceedings lies with the Attorney General and is provided by Article 145(3) of the Federal Constitution. However, the power to issue an order directing a preventive detention without trial of any suspected person lies with the Minister of Home Affairs and is provided by the ISA, DDA and EPOPO.

Section 8 of the ISA provides that if the Minister is satisfied that the detention of any suspected person is necessary with a view of preventing him from acting in any manner prejudicial to the security of Malaysia, he may make a detention order directing that person to be detained for any period not exceeding two years.

Section 6 of the DDA empowers the Minister to issue an order directing such person to be detained for any period not exceeding two years whenever he is satisfied that such person has been or is associated with any activity relating to or involving trafficking of dangerous drugs and it is necessary in the interest of public order after considering the complete report of investigation and the report of the Inquiry Officer.

Section 4 of the EPOPO also empowers the Minister to issue an order directing a detention of any suspected person for any period not exceeding two years after he is satisfied that the detention is necessary with a view to prevent any person from acting in any manner prejudicial to public order and it is also necessary for the suppression of violence or the prevention of crimes involving violence.

The law does not require the Minister to refer the matter before him to the Attorney General first for his consideration whether to institute criminal proceedings before considering whether to issue a detention order. Their powers are separate and provided by different laws. Indeed, even the powers of the police to arrest a person that leads to the institution of criminal proceedings and to detain a person with a view of detention by the Minister are provided by different laws. The former mainly under the Criminal Procedure Code, the latter under the EPOPO (*Lee Kew Sang v. Timbalan Menteri Dalam Negeri* [2005] 3 CLJ 914).

Therefore, it is crystal clear that the Minister has no such power and indeed it will be ultra vires his jurisdiction to institute proceedings under the laws of preventive detention. Again, his power is mainly to issue an order for preventive detention without trial for any period not exceeding two years.

### ***3.4. No Judicial Review***

Habeas corpus is a way out for a person whose detention is unlawful.

Indeed, habeas corpus is a process of judicial review against the decision made by the authority under his supervisory jurisdiction. Judicial review is not an appeal but it is in regard to the process to make such decision, not the decision itself (Abdull Hamid Embong, 2002).

The cases appear to show that there were various grounds on which the detention orders were challenged of which mala fide appears to be the most important ground. Nevertheless, by virtue of the amended provisions in the laws of preventive detention, the main ground for an application of habeas corpus is solely on non-compliance of procedural requirement by the Minister.

Section 11C of the DDA which is similar to section 7C of the EPOPO and section 8C of the ISA, provides that there shall be no judicial review in any court pertaining to the detention order made by the Minister in compliance with any procedural requirement. In other words, the preventive detention order made by the Minister under these laws may only be challenged on the ground of non-compliance with any procedural requirement, and nothing else (*Lee Kew Sang v Timbalan Menteri Dalam Negeri* [2005] 3 CLJ 914).

Therefore, any detention order issued by the Minister which does not comply with the procedure which is mandatory not directory, the court has the power to declare such detention to be ultra vires and invalid. For instance, in the case of *Puvaneswaran v. Minister of Home Affairs* [1991] 2 CLJ 1199, the failure of providing the detainee two copies of Form 1 which enables him to make a representation to the Advisory Board, was held as being disregarding a detainee's right and therefore the detention was invalid.

#### **4. The Position of a Child Offender Under the Laws of Preventive Detention**

In the case of the *Superintendent of Pulau Jerejak & Anor v. Wong Cheng Ho* [1979] 1 LNS 104, Wong (a child offender) filed an application of habeas corpus against the Superintendent of Pulau Jerejak to show cause why Wong should not be released from detention. Wong was detained under section 4(1) of EPOPO because he was an active member of a secret society namely, Siew Wah Kee Secret Society which operated in the area of Kam-

pong Chamang, Bentong, Pahang. The activities of the said Secret Society had threatened public order and peace in the said area. Wong was also involved in several assaults, criminal intimidation and gang clashes, one of which resulted in a murder of a 14-year old boy, and several thefts.

In the initial proceeding at the High Court, it was held that the EPOPO did not apply to a child offender and consequently the detention order under the EPOPO was improper. The court took into account the best interest of a child by referring to the provisions in the Juvenile Courts Act 1949 (now replaced by the Child Act 2001).

However, the Superintendent of Pulau Jerejak appealed to the Federal Court where the issue to be determined before the court was whether a child may be detained without trial in accordance with the EPOPO or the Child Act 2001. The Federal Court judges, consisting of Suffian LP, Chang Min Tat and Ibrahim Manan had overruled the decision of the High Court by saying that the learned Judge was erroneous in holding that a child can only be detained without trial under the Child Act 2001 and not under the EPOPO.

The decision of the Federal Court empowers the Minister with a discretionary power to detain without trial a child offender either under the Child Act 2001, or the EPOPO. If the Minister chooses to detain a child offender under the Child Act 2001 he has to satisfy the Court for Children that the child is in need of care and protection, i.e. he has no parent or guardian or his parent is unfit to exercise care and guardianship or has not been exercising proper care and guardianship and that accordingly the child has either fallen into bad company or is exposed to moral danger or is beyond control (Sarirah, 2006).

On the other hand, to proceed under the EPOPO the Minister does not have to satisfy any Court the interest of the child. All he needs to do is satisfy himself bona fide that it is necessary to detain the child offender with a view to preventing him from acting in any manner prejudicial to public order or because it is necessary for the suppression of violence or the prevention of crimes involving violence. Indeed, it is the public that requires protection (Sarirah, 2006).

Another ground of judgement of the Federal Court to justify the detention of a child offender under the EPOPO is the words “any person” under section 4(1) of the EPOPO which is meant to include anybody without any qualification as to age. This interpretation definitely includes a child.

Apart from that, a detention of any suspected person under the laws of preventive detention does not involve any prosecution in court to determine his offence. In fact, the procedure of arrest, detention and trial under the Child Act 2001 is only for cases to be tried in court and cannot be prolonged to a preventive detention without trial. That is why a child offender is arrested and detained under the laws of preventive detention and not under the Child Act 2001 (Sarirah, 2006).

## 5. Conclusion and Suggestion

In conclusion, it is an apparent scenario that the position of a child offender under the laws of preventive detention is similar to an adult detainee particularly in terms of arrest and detention. It is well understood that the main objective of the laws of preventive detention is to prevent a person from acting in any manner prejudicial to public order or it is necessary for the suppression of violence or the prevention of crimes involving violence.

The writer’s point of view is based on the dissenting judgment in the case of Superintendent of Pulau Jerejak & Anor v. Wong Cheng Ho [1979] 1 LNS 104. In whatever cases, the best interest of the child must be highlighted. A child should not come within the meaning of the words “any person” because there is a special law to deal with him. It must be noted that the Child Act 2001 is said to be a charter to a child which gives protection to any child in need, including a child offender. Even though a child offender is guilty of committing an offence, he/she still needs protection. The intention of Parliament is clear to treat a child differently from an adult by establishing the Court for Children and providing special procedures in dealing with a child ie. section 83 of the Child Act 2001.

There is no such protection for a child offender under the laws of preventive detention. A detention order under the laws of preventive detention is normally on the basis of certain grave allegations for preventing acts “prejudicial to the public” or “necessary for suppression of violence” or

“necessary for the prevention of crimes involving violence” which is not sufficient to secure a conviction in court but suffice to detain by the order of the Minister. Therefore, a child may also be detained without trial under the Child Act 2001 particularly for the purpose of protection and rehabilitation. It must be noted that a child offender has no previous record of conviction when he/she is an adult. In other words, the offence committed during childhood cannot be taken into account as a previous record of conviction when he/she is an adult. So, again the main objective of punishment and detention under the Child Act 2001 is not to punish in the real sense but more on rehabilitation and guidance in helping him to become a respectable and useful citizen (Sarirah, 2006).

Apart from that, it is clear in the decision of the abovementioned case that the Minister may choose either to detain a child offender under the EPOPO or the Child Act 2001. The only difference is the reason that he has to satisfy the court. The former mainly on the basis of national security and public order, the latter is care and protection of a child. Therefore, it is still lawful to detain a child offender under the Child Act 2001 which definitely does not defeat the purpose of preventive detention. There are places of detention provided by the Child Act 2001. So, it is still preventive detention no matter where he/she is being detained. The issue is that a detention of a child offender should be separated from an adult detainee. The writers’ point of view is that the detention at Kamunting, Perak may invite negative perception among the society towards the child offender.

It is also to be noted that the former Act (the Juvenile Court Act 1947) came into force a year before the enactment of the EPOPO. There is no such provision in the EPOPO which specifies the power of the Minister in dealing with a child offender for the purpose of detention without trial by the exclusion of the Juvenile Court Act 1947. Unlike the EPOPO, ESCAR (Essential [Security Cases] Regulations, 1975) clearly provides in Rule 3(3) that the Juvenile Court Act 1947 shall not apply to a child offender who is accused or charged under ESCAR. The EPOPO must make clear its intention to remove the right of a child offender.

Therefore, the writers suggest that the Child Act 2001 should be applied in whatever cases because the Parliament has acknowledged that it is a charter to any child in need of care and protection etc. Amendment should also be made to insert the right of a child offender to be detained at

the places provided for under the Child Act 2001 specifically for cases involving preventive detention.

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