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Children facing Criminal Charges and the Right to Challenge the Lawfulness of Detention Before Court: Key Considerations and Directions

The interface between children and the criminal justice system gives rise to a number of issues, particularly in regard to detention . If child has (allegedly) committed a crime, such as theft or assault, what should be the age of responsibility (when and where the child should be dealt with by the criminal justice system) ? Is there to a be difference between pre-trial and post-trial considerations ? Should the child fall under the general criminal justice system (catering to adult offenders) or should there be some other system , diverting to other alternatives - to deal with the child in that predicament ? How to balance the interests of the child, the interests of the victim and the rest of society ?

In recent decades, the impact of human rights, and more specifically child rights, on the criminal law and justice system has led to a quantum shift from retribution to rehabilitation, and from viewing the child as an object of duties to a subject with rights. In concrete terms, it is now globally recognized that due to their evolving physical and psychological development, children should be treated differently from adults; they deserve to be given a second chance if they have done something wrong.

Among an array of human rights treaties and standards, it is the 1989 Convention on the Rights of the Child (CRC) and the work of the Child Rights Committee (established to monitor its implementation) which help to guide the global community on the current state of affairs and the good practices needed on this matter. The Convention defines a child as a person under 18 years of age, linked with the principles of non-discrimination , best interests of the child, the right to life, survival and development, and respect for the child's views. There are many provisions concerning the relationship between the child and the justice system, **alias** juvenile justice. The two most pertinent are Articles 37 and 40 which provide as follows:

" Article 37
States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." and

" Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of

dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
(i) To be presumed innocent until proven guilty according to law;
(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

The Convention has evolved with various General Comments from the Committee, particularly General Comment No. 10 on the issue of juvenile justice, which provides specifics to attenuate the use of detention. The Convention is complemented by a series of international guidelines on the matter including : the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules); and the (Vienna) Guidelines for Action on Children in the Criminal Justice System. The work of the United Nations Working Group on Arbitrary Detention is also essential and its initiative to strengthen the rules on this front are much welcome.

A range of regional treaties and instruments, from Europe to the Americas, Africa, the Arab region and the Southeast Asian region reinforce the global concern for children. Two of the most recent regional instruments are

the European Rules for juvenile offenders subject to sanctions or measures (2008) and the Resolution 2010 of the (Parliamentary Assembly of) Council of Europe (2014) on Child-friendly juvenile justice: from rhetoric to reality.

The developments and preferred directions interfacing with the right to challenge the detention before court are shaped by the following considerations:

1. The need for a juvenile justice system , especially the presence of legislation on juvenile justice and establishment of juvenile courts

Given the special needs of children and their vulnerability, every child who is charged with a criminal offence deserves to be dealt with under a specific law setting up a juvenile justice system, with juvenile courts and related procedures , specially trained judges and personnel. Many countries now have this system, together with procedures responsive to children, and the professionally trained judges can be assisted on the bench by lay magistrates, with due regard to gender balance . However, some countries still rely on the ordinary system which caters to adults, thus leading to the situation where the best interests of the child are not responded to. The anomaly is aggravated by the presence of administrative detention which gives non-judicial entities the discretion to detain children suspected of crimes or breaches of various laws, at times arbitrarily. This is particularly evident where the authorities invoke various security laws, such as the Martial law and emergency laws present in various countries, to deprive children of their liberty , with conditions attached which make it difficult for children to access courts to challenge the detention. It is further hampered by armed conflict situations where restrictive measures are applied against children, such as detention without access to court or equivalent The application of so-called religious law by illiberal or extremist elements may also lead to the incarceration of children in breach of international standards.

On the more salutary side, a number of countries have now moved towards establishing specific systems to deal with children in conflict with the law. The United Nations has, for instance, helped Angola and Mozambique to establish juvenile courts and juvenile justice departments. There is also a youth forum in Mozambique together with a data base on children in these situations. In 2006, the Philippines also introduced a law on juvenile justice, with a system of juvenile welfare councils at the national and regional levels to oversee the implementation of the new law.

2. The need for a (minimum) age of criminal responsibility which is not too low

In many countries the age of criminal responsibility is too low, thus resulting in children being charged with a criminal offence and taken to a criminal court at too young an age. This results in stigmatization of the child, particularly with an indelible criminal record from a young age, looming over the child for the rest of his or her life. In some developing countries, the age of criminal responsibility starts at seven years of age, and even in several developed countries, the age of ten has been the norm. General Comment No.10 of the Child Rights Committee advocates that that age should not be lower than twelve, and where states have a higher age, this should not be lowered. There have thus been some positive developments on this front. For instance, Brazil, Columbia, Peru and Nigeria now use 18 as the minimum age of criminal responsibility. Many South Asian countries are now trying to raise the age to at least 12. Many developed countries use 14 or 15 as the starting age, and the Child Rights Committee also advised the Czech Republic not to lower the 15 year threshold to 14. It is intriguing that in countries where there are a secular legal system and religious law system working side by side, there is the challenge of how to ensure that the latter is congruent with the former, especially if in the latter has not stipulated the minimum age.

3. The need for diversion of cases from the criminal justice system

A key direction internationally is to divert children from the criminal justice system. This means looking for solutions without having to charge the child in court. The restorative justice approach which embodies this trend explores a mediation and reconciliation process, such as through family conferences to enable the child to be accountable for his/her actions – and at the same time to have the opportunity to heal . This approach has spread from New Zealand and Australia to countries such as Thailand , the Philippines, and Ireland. Various European countries, particularly the Nordic countries, have for a long time used processes and facilities beyond the courts to deal with children, thus leaving only a small number of difficult situations to be dealt with by the courts.

The many channels of diversion are adverted to in the Child Rights Convention, which open the door to both community and family participation in the process, and General Comment No.10 adds:
"…..it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:
- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as "criminal records" and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law."

4. The need for detention as a last resort and for the shortest possible time, and alternatives to detention

This goes hand in hand with the diversion noted above. Yet, the rhetoric is at times inconsistent with the reality. Several states still resort to various security-oriented laws which veer towards detention, at times without a time limit, rather than to use that sanction as a last resort. There are also ambiguities as to what constitutes the shortest possible time.

The situation should be assessed from the angle of pre-trial detention and post-trial detention. Preferably detention in the pre-trial period should be avoided, especially as the presumption of innocence applies and there is usually a variety of possibilities to oversee the child pending the court process and judgement, particularly non-custodial measures. Bail should be readily available, but it is a fact that the poor have less access than those who are well-to-do. In the case of a court judgement against the child leading to the post- trial detention, the recent

Council of Europe resolution on the subject advocates that detention or imprisonment for life should be abolished in the case of child offenders.

5. The need for expeditious access to families, legal assistance, and courts

The need for quick access to families, legal assistance and courts when a child is arrested is essential. Various terms have been used to indicate this , including "prompt" access and access "without delay". Of note is that General Comment No. 10 stipulates that a child deprived of liberty should be brought to a court (or equivalent) within 24 hours to test the lawfulness of the detention and that the child should be brought to court to be formally charged within 30 days. It adds:

"84. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority). The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made."

Interestingly, that the European Committee for the Prevention of Torture has cited as a good practice the responsibility of the police to inform the appropriate adult about the fact that the child is being detained and that police are not permitted to interview a child unless a lawyer is also present.

6. The need for fair and humane treatment, without discrimination, at all stages

This calls into play a whole range of rights both substantive and procedural, ranging from fair trial to non-retroactive law, the right to be heard, the right against self-incrimination, access to information and interpretation, the right to privacy, separation from adults in detention, humane conditions during the detention (e.g. no solitary confinement), no corporal or capital punishment. Most countries have these guarantees in their laws but there are lapses in implementation. Of note is that some countries still use corporal punishment and capital punishment against children, at times claiming a cultural or religious basis.

General Comment No.10 raises these concerns:

" 89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

− Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;

− Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;

− Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;

− The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;

− Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;

− Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned."

7. The need for a review process/mechanism concerning the detention

As part of the preferred juvenile justice system , in addition to the presence of courts, there is a need for mechanisms to visit prisons and detention centres to provide periodic monitoring of the conditions faced by detainees, including children. In Asia , for example, there is the spread of National Human Rights Commissions which have the power to carry out prison visits and receive complaints from the public at large, including detainees. In European, many countries have Ombudspersons, including Children's Ombudpersons, to provide such monitoring and oversight. General Comment No.10 provides further that :
" − Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
− Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting."

8. The need for family/community based options and child participation in the totality of the process: rehabilitation, recovery and reintegration

The involvement of families, communities, civil society and the children themselves is an important element to help question the lawfulness of the detention as well as to provide the modalities for rehabilitating the child if he/she is found to have committed a crime. The process of recovery and reintegration invites a broad range of actors to help the child. Importantly, the participation of the child in choosing the most appropriate options is essential and is both a substantive and procedural component under the rubric of child rights.
General Comment No.10 notes:
" **The Right to Be Heard (art. 12)**
43. Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.
44. It is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. This right must be fully observed at all stages of the process, starting with pretrial stage when the child has the right to remain silent, as well as the right to be heard by the police, the prosecutor and the investigating judge. But it also applies to the stages of adjudication and of implementation of the imposed measures. In other words, the child must be given the opportunity to express his/her views freely, and those views should be given due weight in accordance with the age and maturity of the child (art. 12 (1)), throughout the juvenile justice process. This means that the child, in order to effectively participate in the proceedings, must be informed not only of the charges (see paragraphs 47-48 below), but also of the juvenile justice process as such and of the possible measures.
45. The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law (see paragraph 46 below). It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the

measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.

The right to effective participation in the proceedings (art 40 (2) (b) (iv))

46. A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices."

9. The need for multi-agency cooperation, integrated services and resourcing

The building of an effective juvenile justice system invites inter-agency links and integrated services backed by adequate resources. This is all the more essential if alternatives to detention are to be promoted as part of the process of diversion. In practical terms, it implies that for cases that are settled without resort to the courts, it is the social welfare services which have a key role in supporting the reconciliation between the child and the other parties. This is reflected particularly in the practices of Nordic countries, such as the fact that in Sweden, those below 15 are cared for by the social services, while those between 15 and 17 are under the supervision of the courts with the support from the social services. Given that the background of the child will also need to be dealt with, outreach by these services to families and the surrounding communities will also be important. The services need to be both child sensitive and gender responsive. Adequate resources will need to be committed, especially from the national/local budget. This poses a key challenge to developing countries. Yet, the resources issue is not only a material affair. Pro bono work, community supports and volunteers also count as resources which emerge organically from society and which provide the social capital , not necessarily to be measured by money alone. This area welcomes good cooperation between State authorities and community actors, including child and youth networks. Assistance among peers and peer-to-peer mentoring, including by former child detainees, can be catalytic in helping children rehabilitate and return to the community.

10. The need for prevention, protection, and remediation as an integrated approach: Law, Policies, Practices and More

The call to build a system above requires proactive measures to prevent situations which may lead to the detention, to protect children in such predicament, and to provide remedies in the case of violations. This requires a range of child friendly laws, policies, practices, mechanisms, personnel and other elements to build the environment where children can challenge the lawfulness of detention. In essence, this is anchored on the international Rule of Law embodied in the various instruments pertaining to juvenile justice. Yet, ultimately, it is not merely a structural or normative issue, but also a psychological challenge and a test of wills. Is there genuinely that sense of empathy , both personal and universal : " to delve into the needs of the child, rather than dwell on the deeds of the child" ?

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