

Reforming Prisons and All Places of Detention Moving into the Endemic Phase in Malaysia

Challenges and Ways Forward



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FOREWORD

by Glorene A Das

Tenaganita, in its work with migrants, refugees, stateless persons, asylum seekers and victims of human trafficking, is faced daily with issues surrounding arrest, detention and violence in detention centres and prisons. It has been 26 years since our co-founder the late Dr Irene Fernandez submitted a memorandum to the Home Ministry in 1996 on the conditions of detention camps in Malaysia, which led to her being arrested and dragged to courts by the Malaysian Government for 18 years, supposedly for maliciously publishing false news. However, here we are once again, in 2022, addressing the same issues with no accountability and continuous denial from the Government.

The torture, punishment, inhumane conditions in these centres are well documented. It is accepted as a norm by many, and as a matter of fact, is built into and well-structured within the policies.

In the years since the pandemic began, the situation has intensified. Prisons and detention camps became hotbeds for the spread of COVID-19, despite the warnings issued by civil society organizations. The high figures of cases reported exhibit the severity of the quandary in Malaysian prisons and detention centres, with the root of the issue being that these facilities are dangerously overcrowded, with insufficient hygiene and intolerable conditions.

Since the majority of the detainees and prisoners were not citizens, the situation stoked xenophobic sentiment among Malaysians and created a more violent hatred for communities at margins such as migrants, stateless persons, asylum seekers and refugees. These communities became the "convenient whipping boy" to blame for the pandemic. In reality, they had no more responsibility for the spread COVID-19 in Malaysia than citizens, but they were unequal victims of the virus in that they were further criminalized and weaponized in political and societal rhetoric, leading to mass raids and hundreds more being put into the prison and detention systems, needless to say with questionable fairness of trial.

Many organizations, including both local citizens and communities at margin, demanded, protested, initiated dialogue, and pleaded for Malaysians and the government to come forward, to put a stop to the inhumane and cruel act of arrest and detention during the pandemic because in such difficult times we should be saving lives and prioritizing public health, not putting lives at further risk of death and trauma. It went to deaf ears, and the entire nation suffered as Malaysia faced national and global criticism.

In the current transition period of pandemic to endemic, it is crucial for us to review, evaluate and reassess the situation. After the experience from the COVID-19 crisis, it is obvious that the time is NOW to put in place clear public policies, instruments, frameworks and monitoring mechanisms for long overdue reforms in prisons and detention centres, to ensure that the right to bodily security, right to liberty, right to food and health are respected for these communities who are severely affected.

As such, we congratulate SUARAM for their continuous efforts towards these issues, and for being one of the main advocates for reforms. Through this research report, SUARAM has highlighted the root causes, current situations, and provided comparative analysis and possible solutions that are crucial to be taken into consideration by the Malaysian Government and its agencies. It is a moral imperative for the Government to change its practice with urgency, for the wellbeing of all as a nation, for it is proven that the culture and environment in the prisons and detention centres are essential factors to public health and safety.

We truly believe that all preparations towards full recovery from the pandemic must be grounded in human rights. Empathy and compassion reduce suffering, increase protection and save lives.

Glorene A Das Executive Director TENAGANITA

EXECUTIVE SUMMARY

The pandemic has significantly highlighted situations and conditions concerning prisons and all places of detention in Malaysia, leaving the issues and challenges intertwined. It first accentuated the issue of overcrowding in prisons and immigration detention centres, which has been pointed out before the pandemic¹. This then results in the concern for health and living conditions of all persons deprived of their liberty, particularly during the pandemic. This includes the practice of safety measures and hygiene to reduce the spread of the virus within the four walls of the facilities. Additional challenges identified included limited budget allocation to improve conditions in facilities, lack of available data, and stigmatisation and prejudice towards all persons deprived of their liberty.

As Malaysia transitions into the endemic phase and takes stock of some of the best practices from other countries, the Government must redress issues and challenges that have impeded reforms on prisons and all places in detention to alleviate lingering and longstanding consequences.

This report calls upon the Government to take the following actions:

- **Implement a human rights-based approach** in its practices. No one should be left behind and all persons, including individuals deprived of their liberty, should be treated equally.
- Commit to transparency and accountability. Accountability is one of the elements of the human rights-based approach. Information and data concerning prisons and immigration detention centres should be made available and accessible as it would assist relevant stakeholders and agencies to be ready to respond to any changes or situations. It is also timely to enact an RTI legislation that empowers individuals to request and receive information.
- **Implement pre-measures to incarceration and emphasise normalisation**. Malaysia needs to shift its focus to applying the restorative justice approach, similar to countries like Norway and Sweden. There is also a need to reinform, raise awareness, and educate the public and equip staff of prisons and all places of detention with adequate knowledge and skills in meeting the international standards and upholding human rights.
- Establish and increase continuity in multi-stakeholder cooperation including CSOs, researchers, independent journalists, etc.
- Commit to acceding to human rights instruments such as the ICCPR, ICESCR, and UNCAT.

¹ Lim 2019a

ABBREVIATIONS AND ACRONYMS

APPGM	All-Party Parliamentary Group Malaysia
ATD	Alternatives to Detention
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
СМСО	Conditional Movement Control Order
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	Civil Society Organisations
FOI	Freedom of Information
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
INGO	International Non-Governmental Organisation
МСО	Movement Control Order
NGO	Non-Governmental Organisation
OSA	Official Secrets Act 1972
POCA	Prevention of Crime Act 1959
RMCO	Recovery Movement Control Order
RTI	Right to Information
SOPs	Standard Operating Procedures
SDGs	Sustainable Development Goals
SUHAKAM	Suruhanjaya Hak Asasi Manusia (Human Rights Commission of Malaysia)
UDHR	Universal Declaration of Human Rights
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
	or Punishment
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review

INTRODUCTION

Background

The year 2020 became a significant year in history when the Covid-19 pandemic stifled countries globally, exhibiting their unpreparedness in crisis response to such an event. Lives were lost due to the virus, the healthcare system was in shock and went into overdrive, the economy declined, and livelihoods of the people were severely impacted. It altered the socioeconomic landscape globally and, in some instances, it paved the way for fluidity in the local political landscape. The virus knew no discrimination and Malaysia too was not left behind in this situation. It demanded civil society to explore alternatives in their way of living and compelled them to navigate themselves out of normalcy. It, however, has also brought to light a multitude of issues and challenges that were deeply entrenched and highlighted lingering consequences in the system that must be addressed.

While the pandemic caught countries off guard, changing the different facets of governance in states and compelling them to seek alternative means and measures to redress ongoing issues and challenges, it has surely also shifted the human rights discourse. It emphasised the underlying struggle to find a middle ground between the intersectionality of health and livelihood, and sometimes security, and accentuated the need to protect economic, social, and cultural rights.

The two years of pandemic showed there are some areas that still demand reforms, and this includes prisons and all places of detention.²

"Prison is society's unconscious". It abstractly connotes prisons as an invisible and forgotten ground. Some prisons are also said to be a "reflection of society and its cultural mentalities"⁴.

Areas of concern regarding prisons and immigration detention centres are multipronged. The first concerns overcrowding in these facilities. In 2020, the Malaysian Senate expressed support for reform when there were concerns of prison overcrowding as it was estimated that "25 out of 39 prisons"⁵ were overcrowded. Overcrowding has been a concern long before the pandemic happened. However, Covid-19 has extended concerns such as the spread of the virus and forming of new clusters, the ability to practice social distancing, as well as ensuring the health and living conditions of individuals in the said facilities, staff, and their families.⁶

² Prison reform is loosely defined as an "attempt to improve conditions inside prisons, improve effectiveness of a penal system, or implement alternatives to incarcer ation". Refer to Hubbs Law (2021). For clarity, 'all places of detentions' include lockups and immigration detention centres. We will also be using the term 'all persons/ individuals deprived of their liberty' interchangeably to refer to individuals arrested, detained, and accused.

³ Anthamatten, n.d.

⁴ Harris 2015

⁵ Shah 2020

⁶ Refer to MacDonald (2018), Human Rights Commission of Malaysia (2016) and Human Rights Commission of Malaysia (2017) for findings on the right to health and conditions in facilities.

Within the same year in 2020, after Malaysia was put into a national lockdown, news outlets reported on mass raids that were being carried out, leading to the arrest and detainment of approximately 2,000 undocumented migrants.⁷ This consequently caused the detention centres to be classified as "high-risk areas"⁸, raising concern for an increase in Covid-19 clusters, and separately, opened a floodgate of increasing xenophobia towards the vulnerable community. They found themselves in a constant state of fear due to the outpouring of hate, harassment, and threats.⁹

Up until 8 July 2021, the reported figure for undocumented migrants detained and deported were at a total of 9,241 and 13,127 respectively.¹⁰ As of 24 April, the Malaysian Immigration Director-General shared that the total capacity of all immigration detention centres, including its temporary centres, is 21,150 and the current number of detainees are at approximately 17,000.¹¹ Yet, UNHCR has not had access to the immigration detention centres since August 2019.¹²

The Human Rights Commission of Malaysia (SUHAKAM), in its 2018 report, also found the condition of the immigration detention centres to be extremely lacking where the centres are cramped, poorly maintained, unhygienic, and lack basic facilities such as clean water, food, and healthcare.¹³

With Malaysia transitioning into the endemic phase¹⁴, there is a need to delve further into reforming prisons and immigration detention centres by identifying the challenges and issues at hand and simultaneously ensuring the system is prepared and "equipped" for unforeseen situations whilst it continues to respect and uphold human rights. There is no one easy fix to these issues and they require a continuity in advocacy and cooperation between various stakeholders.

Part one of the report unpacks the definition of 'liberty' and 'security' through international human rights law, standards, and practices as well as the Malaysian legal framework, and highlights some human rights contestations. Part two underscores the issues and challenges concerning not only conditions in detention centres, but also what goes beyond the four walls of the facilities. The next part features practices of other countries Malaysia could learn from and potentially replicate in its own local system and the final part (Part 4) lays out some recommendations for various stakeholders, and particularly for the consideration of policymakers to carry forward in advancing reform in this area.

⁷ Chew 2020; Ding 2020

⁸ Fishbein and Hkawng 2020

⁹ Cheong 2020; Abd Jalil 2020; Ding 2020; Augustin 2020

¹⁰ Bernama 2021

¹¹ The Star 2022

¹² Malay Mail 2020; Human Rights Watch 2020; UNHCR 2022; Ganesan 2022

¹³ Human Rights Commission of Malaysia 2019, pp. 72 – 74

¹⁴ Malay Mail 2022

Scope of Study

The main research objective of this report is to supplement advocacy for reforms on prisons and all places of detention in Malaysia as the country transitions into the endemic phase and consequently prepares itself for any future unforeseen circumstances, learning from its own experiences and international practices during the pandemic.

Apart from that, the objectives of the research are to address the issues, challenges, and gaps in the governance of the system, conditions in prisons and detention centres, and subsequently the resulting consequences and impacts of the pandemic on the overall situation. Second, is to explore and learn best practices in other countries that Malaysia could learn from and replicate into its system, and third, to further address the gaps via recommendations and ways forward in advancing prison reforms, expanded from the best practices.

In brief, this report explicates the issues and challenges that lie within and outside the walls of prisons and detention centres in Malaysia during the pandemic, namely concerning the conditions inside the facilities and the overall governance; identifies practices from other countries that Malaysia could take into consideration and replicate; and, highlights ways forward to improve and strengthen relevant laws and policies for a meaningful prison reform.

Methodology

The data gathered for this report stems from both primary and secondary data. Primary data was collected from interviews with individuals who were previously detained during the pandemic between 2020 to 2021 under laws such as, among others, the Penal Code, the Sedition Act 1948, and the Prevention of Crime Act (POCA) 1959, while the secondary data was obtained from findings and cross-references from journal articles, news articles, and reports by civil society organisations (CSOs).

The overall research was carried out from December 2021 until April 2022 and interviews with 10 individuals detained, representatives from CSOs working on the ground to advance prison reform, SUHAKAM, and other researchers were held between March 2022 and April 2022. The interviews were carried out after obtaining consent and the individuals interviewed are anonymised in the case studies to respect the request for confidentiality. Among the locations of facilities where the interviewees were held and placed in includes Jinjang, Dang Wangi, Bukit Mertajam, Sungai Buloh, Kajang, and Shah Alam.

One of the limitations encountered in drafting the report was the lack of available data to expound on several of the challenges and subsequently the recommendations. Due to this, this research was carried out in an unconventional manner, diverting from the traditional academic data collection and writing. Several supporting activities were carried out simultaneously to supplement the research data. This includes interviewing researchers in two separate podcast episodes¹⁵ and an online forum on reassessing issues concerning migrants in detention centres in Malaysia¹⁶. Apart from that, a stakeholders' consultation was held in April 2022 to gather members of civil society including representatives from CSOs and Members of Parliament to share their respective experience in identifying and analysing the issues and challenges pre- and during the pandemic; stimulate thoughts and recommendations to improve and strengthen concerning laws and policies; and explore best practices and ways forward for meaningful reforms.

¹⁵ The first episode gathered Hazman Azim and Ashraf Shaharudin, co-authors of the Khazanah Research Institute (KRI) Discussion Paper on "Data Transparency for Prison Reform" to discuss on the concern of data transparency and how the right to information is imperative in advancing prison reforms (see SUARAM 2022a). The second episode had Tham Jia Vern from the Centre to unwrap issues and challenges that persisted during the pandemic and explored on post-pandemic mea sures (see SUARAM 2022b).

¹⁶ Glorene Das from Tenaganita and Abu Mufakir from Sedane Labour Research Centre were invited to share their respective experiences concerning migrant issues in detention centres.



'SECURITY', 'LIBERTY' AND HUMAN RIGHTS CONTESTATIONS

In this chapter, we attempt to briefly highlight some of the human rights contestations we have come across, loosely define 'security' and 'liberty' based on international human rights law, standards, and practices, lay out the Malaysian legal framework that encapsulates security and liberty as well some frameworks relevant to reforms on prisons and all places of detention.

We first need to acknowledge that security, as a concept, is multifaceted in nature. Security, by dictionary definition, is "protection of a person, building, organisation, or country against threats such as crime or attacks by foreign countries"¹⁷. This is widely associated as traditional security; protecting states' sovereignty¹⁸ from any external threats¹⁹. It is also one of the elements that makes up a state's national interest.²⁰ But there is also its juxtaposition: non-traditional security that entails non-military threats such as climate change, irregular migration²¹, and scarcity in resources that could result in "societal and political instability and therefore become threats to security"²². Whereas liberty is defined as "to be allowed to do something"²³, which essentially contextualises 'freedom' and encapsulates human rights as a whole.²⁴

With that being said, human rights are widely understood as "universal and inalienable; indivisible; interdependent and interrelated"²⁵. There is no running away from realising that these rights are undoubtably interrelated, inalienable, and indivisible from one another, and tied to development. For example, without the right to clean and safe drinking water and sanitation, one's right to health is impeded.²⁶ The rights are not standalone. In spite of that, human rights are contested for various reasons such as universality and cultural relativism²⁷; human rights as a normative language, metaphor and rhetoric²⁸; and the post-coloniality of states²⁹, to name a few.³⁰ Another human rights argument highlighted in a separate scholarship is that an individual must also be legally recognised by states in order to have access to, and enjoy these rights. This is a political challenge in itself and problematic in addressing the issue of statelessness and citizenship, if it ostensibly imposes that citizenship is necessary for a "full participation in society and a prerequisite for the enjoyment of the full range of human rights"³¹. In addition, human rights in recent years have also become a normative language and a rhetoric used by states and individuals.³² The language, interestingly can sometimes be used as a façade and a political endeavour, camouflaging the gap between the rhetoric expressed at the international arena and practice on their home ground. But it could also be a common language that unites individuals from "diverse backgrounds and settings"³³.

22 Banerjee and Basu 2022; see Caballero-Anthony (2016) for further explanation on the concept of non-traditional security.

25 UNFPA 2005

¹⁷ Cambridge University Press, n.d.

¹⁸ Naidu 2002

¹⁹ Fatić 2002 20 de Brouwer 2020

There is no universal definition of the term and debated. There are terms such as 'illegal migration' and 'undocumented migration' that is referred to under the ambit of 'irregular migration' (see "Irregular migration", n.d.; International Organization for Migration, n.d.).

²³ Cambridge University Press, n.d.

²⁴ The definition of the nomenclature also includes "freedom from the confinement of the body as a result of unlawful or arbitrary processes" (see Environment-rights. org, n.d.).

²⁶ Refer to Office of the United Nations High Commissioner for Human Rights, and World Health Organization (n.d.) for Fact Sheet No. 31 on the right to health.

²⁷ Donnelly 1984; Mullender 2007; Donnelly 2007; Donnelly 2008; Goodhart 2008

²⁸ Mutua 2002; Bhatia 2017

²⁹ Mutua 1995; Ishay 2004; Ghosal 2010; Sewpaul 2016; Soomro 2018; Mende 2019

³⁰ See Ishay (2004) further on the historical controversies that pose as political challenges against human rights.

³¹ UNHCR as cited in Staples 2012, pp. 3

³² Bhatia 2017; Joshi 2019; Arnauld and Theilen 2020

³³ Talbott 2017

With these contestations in place, the relationship – and so the nexus – between human rights and politics becomes more complex, apart from the sole argument that human rights mean every individual is entitled to their freedom, rights and to live and to be treated with dignity³⁴. Therefore, the justification is sufficient for it to be the centre of states' concern. The discourse also places an emphasis on common humanity and sees human rights through the veil of ignorance, where it insinuates that all 'morally irrelevant particularities'³⁵ must be ignored for the global original position to be an "imagined exercise of impartiality"³⁶. This too, however, may be seen as a double-edge sword in the context of security.

Like the rhetoric, states could limit human rights under the pretext of security and protecting the state's borders.³⁷ In reality, the presumable results of the intersectionality, however, could undermine "the very purpose of human rights"³⁸. Even more so, it could manifest a more complex reality, posing a stark contrast to the philosophical foundation of human rights. For example, states, in practice, have immigration detention centres, and laws and pieces of legislation in place to maintain national security and public order. But it also opens a can of worms: to what extent can these laws be used and who should be held accountable for the violations that occur?³⁹

Finding the middle ground between security as its whole package and human rights can be convoluted – requiring us to unpack through time particularly as the country moves into the endemic phase – but will be significant in human rights discourse. States then would need to ponder these unceasingly: what are the challenges to putting human rights in practice at the forefront, and subsequently, how to put human rights pragmatically and progressively into practice?

In International Human Rights Law, Standards and Practices

The Universal Declaration on Human Rights (UDHR) and the international human rights treaties and conventions that followed have changed the sphere of world politics. It asserts states' responsibility to protect and uphold human rights and further accentuates and acknowledges the very existence of culture, identity, and citizenship. The UDHR⁴⁰ – although it is not a legally binding instrument – essentially articulates the rights and freedoms every human being is entitled to, including economic, social and cultural rights.

³⁴ Ingram 2008

³⁵ Particularities include an individual's race, nationality, culture, history and so forth.

³⁶ Pin-Fat 2010, pp. 72

³⁷ van Kempen 2013

³⁸ Ingram 2008, pp. 401

³⁹ See Miller (2017) on justice; Walen (2014) on restorative justice; and Radzik and Murphy (2015) on retributive justice and reconciliation.

⁴⁰ Adopted by General Assembly Resolution 217 A(III) of 10 December 1948. The Universal Declaration is available in 369 language variations on the website of the Office of the United Nations High Commissioner for Human Rights.

Article 1 of the UDHR sets the foundation that "all human beings are born free and equal in dignity and rights"⁴¹. It is followed by Article 3 of the UDHR where "everyone has the right to life, liberty and security of person"⁴² and no human being should be discriminated, treated indifferently and inhumanely. Article 3 further ties itself to the following articles in the UDHR⁴³:

- i Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment";
- ii Article 6: "Every person has the right to recognition everywhere as a person before the law";
- iii Article 9: "No one shall be subjected to arbitrary arrest, detention or exile"; and,
- iv Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks".

Both 'security' and 'liberty' appear together in the UDHR. The terminologies are also found in and interrelated with a number of the articles in the two covenants that make up of the Bill of Rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In the ICCPR, Article 9⁴⁴, on the right to liberty and security, is profoundly tied to Article 10⁴⁵ of the same Covenant that is on the right to be treated with humanity and with respect for inherent dignity. Grounding on detention, General Comment No. 35⁴⁶ that interprets Article 9 of the ICCPR explicates its complementarity to other Articles including Article 7 of the ICCPR on torture. Interestingly, Article 7 of the ICCPR on torture crosscuts into the economic, cultural, and social rights, specifically the right to health in the ICESCR⁴⁷. The right to health in Article 12 entails physical, mental, and social well-being.⁴⁸ It also underlines the rights of individuals deprived of their liberty including the right to enjoy the highest attainable standard of physical and mental health.⁴⁹

On states' obligations, General Comment No. 14 of the ICESCR⁵⁰ lays out that states have the responsibility to respect, protect and fulfil the right to health of all persons⁵¹. Paragraphs 34 and 36 respectively impose that states are obliged to respect by "refraining from denying or limiting equal access"⁵² and to "ensure provision of health care, including immunization programmes against major infectious diseases"⁵³. Ultimately, states are obliged to "ensure the right of access to health facilities, goods and services on non-discriminatory basis, especially for vulnerable and marginalized groups"⁵⁴, and particularly with Malaysia moving into the endemic phase, to "provide immunization against major infectious diseases occurring in the community"⁵⁵ and "take measures to prevent, treat and control epidemic and endemic diseases"⁵⁶.

^{41 217} A (III)

⁴² Ibid.

⁴³ Ibid. 44 The

The Article specifically reads out "[E]veryone 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 procedure as are established by law".

⁴⁵ The Article explicitly reads that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The Article is to be read with Article 9. CCPR/C/GC/35

⁴⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27.

⁴⁷ Article 12 of the ICESCR.

⁴⁸ See Office of the United Nations High Commissioner for Human Rights and World Health Organization (n.d.) for fact sheet on 'the right to health'.

⁴⁹ Interpretation of this right can be read further in General Comment No. 14.

⁵⁰ Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights.

⁵¹ All persons including "prisoners or detainees, minorities, asylum-seekers and illegal immigrants" (see E/C.12/2000/4, para 34).

⁵² E/C.12/2000/4, para 34.

⁵³ E/C.12/2000/4, para 36.

⁵⁴ E/C.12/2000/4, para 43 (a). 55 E/C.12/2000/4, para 44 (b).

⁵⁶ E/C.12/2000/4, para 44 (c).

Aside from the ICCPR and ICESCR, there are several other international – legally and non-legally binding – treaties and conventions that further set out the right to liberty and security of a person, and the right to be treated with humanity and respect for their inherent dignity. This includes the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Standard Minimum Rules for the Treatment of Prisoners and its expanded rules known as the "Nelson Mandela Rules", and Basic Principles for the Treatment of Prisoners. Additionally, immigration detention, under international human rights law, should only be used where "necessary, reasonable and proportionate to a legitimate government objective"⁵⁷ and as a last resort.

It should be noted that to date, Malaysia is a party to only three international conventions, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and its optional protocols, and the Convention on the Rights of Persons with Disabilities (CRPD). It has not signed, ratified or acceded to the legally binding ICCPR and ICESCR.

In the Malaysian Legal Framework

Malaysia has several laws that carry detention or imprisonment sentencing and are relevant to security.

Criminal law defines criminal and delinquent behaviour and imposes sanctions through punishment such as fines, imprisonment, whipping, police supervision, and death penalty. In Malaysia, most of the penal provisions are contained in the Penal Code⁵⁸. The Code defines the act(s) or omission(s) that constitutes an offence and provides for its punishment. Offences in the Code are separated into two categories: (i) non-serious offence⁵⁹ that constitutes as an offence punishable with imprisonment for not more than 10 years and (ii) serious offence⁶⁰ that constitutes an offence punishable with imprisonment for 10 years or more. The Criminal Procedure Code (CPC) also gives the courts discretion to impose imprisonment in default of payment of fine.⁶¹

Outside of the Code, there are other sets of law that stipulate imprisonment as punishment.

It is first encapsulated in security laws. Security laws refer to a piece of legislation enacted for the purpose of maintaining public order and national security. These laws generally transgress on fundamental rights provided by the Federal Constitution of Malaysia (FC)⁶², such as (i) the right to personal liberty⁶³; (ii) the freedom of movement⁶⁴; (iii) the freedom of speech, assembly and association⁶⁵; or (iv) the rights to property⁶⁶. Since 1957, Malaysia has introduced the following security laws:

⁵⁷ International Detention Coalition, n.d.

⁵⁸ The Penal Code will be referred to as "the Code" throughout this chapter.

⁵⁹ Section 52A of the Code.

⁶⁰ Section 52B of the Code. 61 Section 283 of the CPC

Article 149 of FC grants power to the Parliament to pass legislation to combat subversion which permits the violation of the fundamental rights contained in Article 5, Article 9, Article 10 and Article 13 of the FC.

⁶³ Article 5 of FC.

⁶⁴ Article 9 of FC.

⁶⁵ Article 10 of FC.

- Internal Security Act 1960 (since repealed in 2012); a.
- Dangerous Drugs (Special Preventive Measures) Act 1985; b.
- Dangerous Drugs (Forfeiture of Property) Act 1988; с.
- d. Security Offences (Special Measures) Act 2012;
- Prevention of Terrorism Act 2015; and e.
- f. Prevention of Crime Act 1959.

Second, the Immigration Act 1959/196367 sets out the procedure on entry into and departure from Malaysia and dictates that persons who contravene the Immigration Act shall be removed from Malaysia. Usually, persons who have no valid travel documents⁶⁸ or fall under "prohibited immigrants"⁶⁹ will be ordered for removal from Malaysia. More often than not, refugees and asylum seekers are arrested and sentenced for immigration offences as they do not possess valid travel documents. They are then detained in detention centres while waiting for deportation. However, there is no time limit stipulated for their detention in detention centres as the Immigration Act states that people may be detained for "such period as may be necessary".⁷⁰ In 2017, it was reported that the average detention period for detainees is 16 months.⁷¹

Third, the Minister of Health prescribed the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020⁷² and subsequent regulations⁷³ to regulate the measures and the conduct of the citizens during the period of Movement Control Order (MCO)⁷⁴ and the Conditional Movement Control Order (CMCO).⁷⁵ The Regulations provide certain prohibitions; for example, public members are prohibited from moving from one place to another⁷⁶ within any infected local areas.⁷⁷ Any form of gathering, except for funeral services, was also prohibited.⁷⁸ Acting otherwise would be an offence under the Regulations. Any person convicted for any offence in the Regulations would be liable to a fine not exceeding RM1,000, imprisonment not exceeding six months, or both.79

The Lockup Rules⁸⁰ and the Prisons Regulations⁸¹, on the other hand, lay down the administration of lockup and prison, and the minimum treatment that is to be given to the detainees, including standard of accommodation, medical treatment, clothing, and diet.

69 Section 8 of Immigration Act.

PU(A) 91/2020. The Regulations are prescribed under section 11(2) of the Prevention and Control of Infectious Diseases Act 1988. Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No 2) Regulations 2020 (PU(A) 109/2020); Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No 3) Regulations 2020 (PU(A) 117/2020); Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No 4) Regulations 2020 (PU(A) 133/2020); Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No 5) Regulations 2020 (PU(A) 136/2020); and Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No 6) Regulations 2020 (PU(A) 147/2020). These regulations will be referred to as "the Regulations" throughout the chapter.

74 MCO was between 18 March 2020 – 3 May 2020. MCO was then reinstated MCO between 11 January 2021 – 31 May 2021 but varies between states. Total lockdown (FMCO) was enforced between (1 June 2021 – 28 June 2021). See Sentencing in Movement Control Order Offences [2020] 4 MLJ cxxxi by Ooi Jia Liang on the princi ples and trend of sentencing on MCO-related offences.

CMCO was between 4 May 2020 – 9 June 2020 and was followed by RMCO between 10 June 2020 – 31 March 2021) 75

⁶⁷ Subsequently will be referred to as 'Immigration Act'.

⁶⁸ Section 6 of Immigration Act.

Section 34(1) of Immigration Act. 70 Barron 2017

⁷¹ 72

⁷⁶ Regulation 3(1) of the Regulations.

All 16 states and federal territories in Malaysia as defined by Regulation 2 of the Regulations and Prevention and Control of Infectious Diseases (Declaration of 77 Infected Local Areas) Order 2020 (PU(A) 87/2020).

⁷⁸ Regulation 3(2) of the first Regulation; Regulation 6(1) of the second to sixth Regulations.

⁷⁹

Regulation 7(1) of the first Regulation, Regulation, Regulation (1) of the second to sixth Regulations. L.N. 328/1953. The Lockup Rules 1953 is prescribed under section 8 of the Prisons Ordinance 1952 (repealed by Prison Act 1995). Though the Prison Ordinance 1952 80 had been repealed, the Lockup Rules 1953 is still in force. Throughout this chapter, Lockup Rules 1953 will be referred to as "Lockup Rules"

⁸¹ P.U. (A) 325/2000. The Prisons Regulation 2000 is prescribed under section 67 of the Prison Act 1995. Prisons Regulations 2000 will be referred to as "Prisons Reg ulations" throughout this chapter.



UNDERLYING ISSUES AND CHALLENGES ACCENTUATED BY THE COVID-19 PANDEMIC

The pandemic has brought to light a multitude of deeply entrenched issues and challenges that ultimately resulted in lingering consequences in the system. In this part, we attempt to highlight issues and challenges in Malaysia accentuated by the pandemic. The issues and challenges are highlighted in no chronological order as they are interlinked and not mutually exclusive.

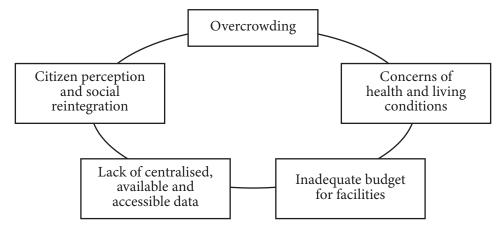


Figure 1: Interrelated issues and challenges impeding reforms during Covid-19 in Malaysia

Overcrowding in facilities could potentially put the system in overdrive in the long run.

The issue of overcrowding in prisons and all places of detention, including immigration detention centres is not new; it was already a concern before the pandemic happened.⁸²

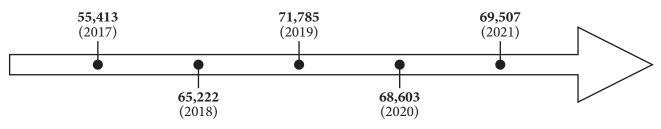


Figure 2: Prison population 2018-2021 (including pre-trial detainees and prisoners under remand)⁸³

The reported capacity of prisons and immigration detention centres were 61,242⁸⁴ and 12,530⁸⁵, respectively. Based on Figure 2, Malaysian prisons have experienced a population increase over the span of five years. The numbers show that the prisons were already overcrowded since 2018 if and when compared to the reported capacity. In 2019 alone, before the pandemic, the total number of inmates was at its peak and exceeded its usual capacity when the population was at a staggering 71,785, an increase of approximately 10 percent from 2018. Though the numbers insignificantly decreased in 2020⁸⁶ as Malaysia went into its lockdown and movement restrictions, the population slightly increased in 2021, still exceeding its capacity nationally.

⁸² Omar n.d.; The Sun Daily 2018; Raj, Khor and Suhaidak 2021

⁸³ Sources from "Malaysia - Total Prison Population 2019", n.d.; World Prison Brief n.d.; "Malaysia: Prisons In 2021" n.d.; Lim 2019b.

⁸⁴ Daim and Yunus 202185 Choong 2020a

⁸⁶ According to Choong (2020a), SUHAKAM estimated that at the end of year 2020, prisons nationwide have exceeded its capacity by at least 40 percent.

We found several factors contributing to the overcrowding in places of detention, which are incarceration for minor drug offences⁸⁷, possibly an unbalanced discretion between police and the judiciary⁸⁸ and the indefinite period of detention in immigration detention centres⁸⁹.

During a parliamentary debate in October 2018, the then Law Minister, the late Datuk Liew Vui Keong, shared that approximately 36,313 inmates (55 percent) were drug offenders.⁹⁰ Moving into 2021, Malaysian former Law Minister, Dato' Sri Azalina Othman claimed, at a regional conference on prison reforms organised by SUHAKAM, that approximately 63 percent of the inmates were made up of minor drug offenders.⁹¹ The number at that time made up more than half of the prison population. In the Malaysian legal framework, self-administration of drugs can lead up to a maximum of two years in prison and a maximum fine of RM5,000.⁹²

The second factor that leads to the issue of overcrowding, specifically in lockups, is two-fold: an imbalance of discretionary power between the police and judiciary and an excessive dependency on imprisonment. On the first, police can remand an individual for up to 14 days⁹³ but presumably sees the individual only once within the remand period. One of the plausible deductions that is contributed to this is the police are unable to carry out the investigation accordingly due to the overwhelming number of cases handled. Thus, they resort to extending the remand period.

On this note, the Chief Justice of Malaysia, The Right Honourable Tun Tengku Maimun binti Tuan Mat had, in 2021, issued a practice direction to tighten the issuance of remand orders, ensuring persons under investigation have legal representation.⁹⁴ When the police apply for a remand order from the Magistrate, the Magistrate has to consider whether the statutory requirements and legal elements⁹⁵ have been fulfilled. All the necessary legal requirements must be satisfied, and the Magistrate should also satisfy himself whether there is "reasonable suspicion"⁹⁶ that justified the arrest and detention before granting the remand order. Magistrate should not be acting as mere rubber stamp.⁹⁷

The second fold is represented by the current courts in Malaysia where they tend to skew towards retribution rather than rehabilitation. This is relevant in cases where minor drug offenders are imprisoned than being given a pre-measure of rehabilitating the offenders. The criminal justice system imposes a great deal of importance to imprisonment as a major means of deterring crime and protecting society in the name of security. It is also seen as a primary method of punishment. Therefore, more offenders are imprisoned than it is necessary due to the lack of alternatives.⁹⁸

McIntyre 2022; Ganesan 2022; Malaysian Advisory Group on Myanmar 2022
Lim 2019b

92 Section 15 of the Dangerous Drugs Act 1952.

⁸⁷ Omar, n.d., pp. 339; Azim and Shaharudin 2021, p. 10; Tham and Omar 2021

⁸⁸ Police Powers and Remand Proceedings [2003] 2 MLJ cxxix by Jerald Gomez.

⁹⁰ LIM 2019b 91 FMT 2021

⁹³ Section 117 of the Criminal Procedure Code provides that if the investigation cannot be completed within 24 hours, the police can apply to extend the detention period twice. If the offence is punishable with less than 14 years imprisonment, the remand period can be extended up to 7 days. The first remand application is made to further detain an individual for a maximum of 4 days, and if they wish to investigate further at the end of the 4-day period, he can apply to extend the remand for another 3 days. For offence punishable with more than 14 years imprisonment, the remand period can be extended up to 14 days, with the court allowing up to 7 days of extension for the first remand application, and another 7 days for the second remand application. Note that this only applies to criminal offences in gener al under the Penal Code and Dangerous Drugs Act 1952.

⁹⁴ See Karim (2021). Refer further to the Chief Justice of Malaysia Practice Direction No 11 of 2021.

⁹⁵ Section 117 of CPC.

⁹⁶ In Re The Detention of R. Sivarasa & Ors [1997] 1 CLJ 471.

⁹⁷ Anbalagan 2021

⁹⁸ See Short-Term Imprisonment in Malaysia: An Overview [2001] 4 MLJ Ixiii by Dr Mohammad Akram for an overview on short-term imprisonment and how it leads to overcrowding in prisons.

The third factor focuses on overcrowding in the immigration detention centres. We found reports and news articles highlighting overcrowding in these centres⁹⁹ but to date, the official data or record from the Government is not available. Therefore, the challenge to expound on this issue in the context of immigration detention centres due to the lack of official data is immeasurable.

In spite of this, (potential) overcrowding in the immigration detention centres is contributed to by the indefinite period of detention combined with an unclear administrative procedure.¹⁰⁰ The law concerning immigration in Malaysia only stops at punishing persons who commit an immigration offence but does not lay down a clear procedure after the sentencing has been completed. In fact, migrants are deprived of their right to fair trial as they get arbitrarily arrested without being informed of the reasons for arrest and simultaneously in the language they understand.¹⁰¹ Further, as explained above, the law does not provide any time limit when detaining migrants - who have finished serving their imprisonment – other than "such period as may be necessary"¹⁰².

In 2020, when Malaysia was struggling to cope with the pandemic and went into lockdowns, movement restrictions and mass raids were carried out. It had only worsened the situation as migrants, refugees and asylum seekers were arrested and detained. It is particularly more concerning that it is uncertain if those who were arrested and detained in 2020 during the pandemic, when the raids were carried out, are still detained in the centres today.

Nevertheless, on 20 April 2022, news outlets had reported about 500 Rohingya migrants escaping immigration detention centre where six died while making the escape.¹⁰³ The police said that the escape was presumably due to the issue of overcrowding that led to a riot at the facility.¹⁰⁴ This claim is inconsistent to the Immigration Department's denial of overcrowding in these facilities.¹⁰⁵ The Malaysian Immigration Director-General said that as of 24 April 2022, the total capacity of all immigration detention centres, including its temporary centres, was 21,150.106 They have also refuted SUHAKAM's alleged claims that the immigration detention centres are overcrowded.¹⁰⁷ It was also reported that, to date, UNHCR has not been given access to the detention centres since August 2019.108 This impedes the overall process as UNHCR is unable to identify individuals and families who are registered and hold a UNHCR card or are pending registration. This too eventually slows down the process for repatriation.

⁹⁹ Fishbein and Hkawng 2020; Chew 2020; The Straits Times 2022

¹⁰⁰ Malaysian Bar 2022

¹⁰¹ See report by Koalisi Buruh Migran Berdaulat (2020) on their fact-finding report on the condition of deported Indonesian migrants during the pandemic and the UPR submission by Global Detention Project (2018). 102 Section 34(1) of Immigration Act.

¹⁰³ The Straits Times 2022; Hisamudin 2022

¹⁰⁴ Ibid.

According to Choong (2020b), SUHAKAM, through its findings, said that the total capacity in the immigration detention centres was 12,530. In addition to this, New 105 Straits Times published a news report with the headline "Overcrowded Immigration depot due to countries refusing to accept their people" on 14 March 2022 (see Riduan 2022)

¹⁰⁶ The Star 2022 107 FMT 2022

¹⁰⁸ UNCHR 2022; Ganesan 2022; Malay Mail 2020

Ultimately, an overcrowded facility – be it prisons or immigration detention centres – impedes one from being able to live adequately. As highlighted earlier, overcrowding has already been a prepandemic concern. In his parliamentary reply in 2018, former law minister, the late Datuk Liew Vui Keong shared that beds were lacking in a 10-person cell that was housing 20 inmates, and it was to the point that inmates took turns to sleep.¹⁰⁹ It was also in the same year that he shared that the government is committed to lowering the numbers of convicts and "implement[ing] effective measures to reduce the number of prisoners"¹¹⁰.

... and heighten concerns on health, living conditions and being treated with dignity.

This is unequivocally a concern when advancing reform on prisons and all places of detention. It is also tied to the issue of overcrowding particularly during the pandemic. It continues to raise concerns on the health and living conditions of those deprived of their liberty as well as the increase in clusters. Likewise, this is not a new concern for stakeholders to look into and take action upon.

In 2021, a total of 51,123 individuals¹¹¹ had contracted Covid-19.¹¹² Separately, there were reports of Covid-19 clusters that rose from the immigration detention centres after the raids and arrests of migrants were carried out in 2020.¹¹³ This is just the tip of the iceberg.

Concerning the implementation of preventative measures to first reduce the spread of the Covid-19 virus in the facilities, interviewees who were detained in lockups shared that it appeared there was no concern for the virus spreading in the facility.¹¹⁴ They observed that social distancing was not practised, and neither were they instructed to perform a Covid-19 test at the facilities they were detained in.¹¹⁵ They shared that they were also not allowed to wear a mask although there were people around them.¹¹⁶

In prisons, the Malaysian Prison Department had implemented several "instructions" (perintah) and a plan to contain the spread of the Covid-19 virus. This includes the screening of inmates for Covid-19 before they were admitted into the facility and creating transit centres in prisons for newly admitted inmates.¹¹⁷

On their living conditions, interviewees shared that their cells had no windows and no clock that would enable them to tell day and night. They were neither provided with pillows nor bed sheets in the cells and slept on the floor.¹¹⁸ On the contrary, Section 13 of the Lockup Rules 1953 reads that "every prisoner shall be supplied with bedding¹¹⁹ which shall be changed and washed as often as may be necessary but never less than once a month"¹²⁰. This creates a gap for interpretation on the type of bedding the inmate should be provided with.

¹⁰⁹ See Lim (2019b). Also see a special report by Low (2021) where ex-inmates shared their experiences in an overcrowded facility.

¹¹⁰ It should also be noted that in his parliamentary response, Datuk Liew shared that Malaysian prisons, at that time, could only accommodate a maximum of 45,000 inmates and was already experiencing overcrowding (see Lim 2019b).

¹¹¹ The figure consists of inmates, prison staffs and their family members.

¹¹² Daim and Yunus 2021; Alhadjri 2021

¹¹³ Kanyakumari 2020; Fishbein and Hkawng 2020; Wahab 2020; Reuters 2020; Ling 2021

¹¹⁴ Refer to Appendix for summary of the interviews.

¹¹⁵ Refer to Appendix for summary of the interviews.

¹¹⁶ Refer to Appendix for summary of the interviews.

¹¹⁷ Malaysia, Parliamentary Hansard, House of Representatives, 14 December 2021, Question 28.

¹¹⁸ Refer to Appendix for summary of the interviews.

¹¹⁹ The regulation however does not include what is connoted as 'bedding'.

Individuals deprived of their liberty were also deprived of their right to privacy. Interviewees shared that they did not have privacy in lockups when using the toilet as there were CCTVs placed above the toilets and there were cells located in front of the open bathroom.¹²¹ Both the toilet and bathroom were said to be situated in the same, small area. One of the interviewees shared that detainees were not provided with basic daily essentials such as towels, sanitiser, soap and toothbrushes. This was particularly concerning as they were unable to take care of their hygiene and this could potentially lead to health concerns. There are also no provisions in law that stipulate on individuals being provided with such necessities and being treated with humanity and equal dignity.

The gamut of right to health and to be treated with dignity also covers their liberty from being tortured, right to safe drinking water and sanitation and adequate food.¹²²

Based on the interviews and news reports, there were also concerns of torture, ill-treatment, and deaths in custody. A former prison staff admitted that he and his colleagues were beating inmates as a means to relieve work stress caused by the issue of overcrowding.¹²³ Again, this reflects that the issues and challenges are interrelated; overcrowding becomes one of the few reasons prison officers resort to abusing inmates to "relieve work stress" and consequently neglecting human rights.

Interviewees who were in prison, separately, shared that the prison they were in uses the "bucket system" where their urine is collected in a bucket and then disposed. Due to this, their living conditions are unsanitary, and they do not have the choice but to live in a cell that is foul-smelling. Again, this is not a new practice; SUHAKAM highlighted that some of the prisons still practice this system.¹²⁴

Unlike the existence of Lockup Rules and the Prisons Regulation that set out the basic treatment to be given to detainees in lockups and prisons respectively, there is no equivalent set of rules for immigration detention centres. SUHAKAM in 2018 found the condition of the immigration detention centres to be extremely lacking whereby the detention centres were cramped, poorly maintained, unhygienic, and lacked basic facilities such as clean water, food, and healthcare.¹²⁵

The situation and treatment of migrants in the immigration detention centres during Covid-19 pandemic differ from those in prisons. SUHAKAM reported that the detainees at one of the immigration detention centres are being held in "unacceptable conditions, with poor sanitation and inadequate medical care"¹²⁶. Reports of inhumane treatment of migrants during the pandemic included¹²⁷:

123 Ragu 2021

125 Human R 126 FMT, n.d.

¹²¹ Refer to Appendix for summary of the interviews.

¹²² Office of the United Nations High Commissioner for Human Rights and World Health Organization, n.d.

See Human Rights Commission of Malaysia (2019), Human Rights Commission of Malaysia (2020) and Bedi (2019) highlighting the 'bucket-system' in prisons.
Human Rights Commission of Malaysia 2019, pp. 72 – 74

¹²⁷ See Quah (2020) and Koalisi Buruh Migran Berdaulat (2020).

- a. Cramped cells with insufficient place to sleep;
- b. Lack of food and clean water;
- c. No access to basic sanitary items such as sanitary pads and diapers for women and children;
- d. Confiscation of personal properties;
- e. Extortion;
- f. Excessive item prices in immigration detention centre;
- g. Physical abuse;
- h. Sprayed with high-pressured spray with disinfectant; and
- i. No adequate medical treatment.

It was also reported that some of the recently escaped Rohingya migrants asked for water from the villagers nearby because they were thirsty.¹²⁸ This reflects the lack of clean water in detention centres and heightens concern on the treatment received by the migrants in the immigration detention centres.

Additionally, in a Parliamentary Written Reply dated 3 November 2020, it was revealed that 756 children were being held at immigration detention centres nationwide as of 26 October 2020 with 405 children being detained without their respective guardians.¹²⁹ The figure increased in 2021 whereby as of 11 October 2021, 1,475 children were being detained in immigration centres.¹³⁰

Malaysia, although not a party to the 1951 Refugee Convention, is a party to the CRC.¹³¹ Following Malaysia's obligation as a state party to the CRC, the Child Act 2001¹³² was enacted. The Child Act is "[a]n Act to consolidate and amend the laws relating to the care, protection and rehabilitation of children and to provide for matters connected therewith and incidental thereto."¹³³ A child is defined under the Child Act as a person under the age of eighteen years; and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in section 82 of the Penal Code.¹³⁴ The Child Act's Preamble further provides that every child is entitled to protection and assistance in all circumstances without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental, or emotional disabilities or any other status. It should be noted that refugee children, asylum-seeking children and undocumented children are not expressly mentioned or covered in the Child Act. However, from the Preamble itself, it can be deduced that they can fall within the scope and protection of the Child Act.

132 The Act will subsequently be referred to as 'Child Act' throughout the report.

¹²⁸ Sherman and David 2022

¹²⁹ Tan, Sivanandam and Rahim 2020

¹³⁰ Malaysia, Parliamentary Hansard, House of Representatives, 11 November 2021, Question 5; Malaysia, Parliamentary Hansard, House of Representatives, 23 Novem ber 2021, Question 29

¹³¹ Malaysia, however, has made reservations on several of the core articles under the Convention.

¹³³ Preamble of the Child Act.

¹³⁴ Section 2 of the Child Act. Section 82 of the Penal Code provides that nothing is an offence which is done by a child under ten years of age.

Section 17 of the Child Act lists situations of children in need of care and protection, which are, among others:

- a. a child who has been or is at substantial risk of being physically, emotionally or sexually abused;
- b. a child who has been neglected or abandoned by his guardians or parents;
- c. a child who has no adequate care, food, clothing and shelter provided to him by his guardians or parents; and
- d. a child who has no parents or guardian, who needs to be examined, investigated or treated for the purpose of restoring or preserving his health and his parents or guardian neglects or refuses to have him examined, investigated or treated.

There may be views that doubt that undocumented children would fall under the description of section 17¹³⁵ and noted that the Child Act is intended to protect children from highly abusive situations.¹³⁶ It was not designed to cater for children who lack legal status or whose fundamental rights as children are being violated such as children denied primary education or healthcare.¹³⁷ Given that Malaysia is a signatory of the CRC, Malaysia ought to provide protection and humanitarian assistance under Article 22 to refugee children, asylum-seeking children, and undocumented children.

CSOs¹³⁸ and SUHAKAM¹³⁹ have also taken the stance that children should not be detained in detention centres, depriving them the access to liberty, healthcare, and education especially during Covid-19 pandemic, which heightens their risk of contracting the virus.¹⁴⁰ SUHAKAM in their 2019 Annual Report remarked that according to the Immigration Department, children were not arrested for violating immigration law but were taken along with the adults for their safety.¹⁴¹ SUHAKAM also observed that there are no facilities for children in almost all of the immigration detention centres causing children to suffer in the unconducive environment.¹⁴² It was also documented that in Sabah, children were employed as garbage collectors and detention centre block cleaners.¹⁴³

¹³⁵ Supaat 2014, pp. 15

¹³⁶ Supaat 2014, pp. 16 137 Ibid.

Refer to "Malaysia must pursue alternatives to immigration detention for children immediately" (2020), "Malaysia: End Abusive Immigration Detention" (2020) and Fore "Children in detention are at heightened risk of contracting COVID-19 and should be released" (2020).

¹³⁹ FMT Reporters 2022

¹⁴⁰ Refer to "Malaysia must pursue alternatives to immigration detention for children immediately" (2020), "Malaysia: End Abusive Immigration Detention" (2020) and Fore (2020).

¹⁴¹ Human Rights Commission of Malaysia 2020, pp. 152

¹⁴² Human Rights Commission of Malaysia 2020, pp. 153

¹⁴³ Koalisi Buruh Migran Berdaulat 2020

Constrained budget allocation to improve situations.

First and foremost, while the budget covers most of the sectors in Malaysia, there is a lack of allocation, at least based on the presentation of the budget by the finance minister, to improve the overall system. This includes improving prisons and all places of detention, and capacity building training for officers and staffs in the respective facility to ensure its handlings are aligned to international standards and practices. Essentially, prisons and all places of detention should also be treated as the sectors in the frontline as they encapsulate the concern for security.

It is commendable that in recent years, the Malaysian Government has allocated a budget for the Prisons Department. In its Budget 2021, the Government had allocated RM20 million to the Prisons Department to build a weaving complex, among others, which contributes to improving the skills of the prison inmates and ultimately prepares them for their reintegration into the community.¹⁴⁴ In 2022, Finance Minister Tengku Datuk Seri Zafrul – at the tabling of Budget 2022 in Parliament – said that incentives for prison officers to monitor inmates would also increase.¹⁴⁵

While these are undoubtedly essential, there is still a lack of incentives to improve the living conditions of individuals deprived of their liberty and infrastructure within the four walls of the facilities.¹⁴⁶

On the cost to maintain an inmate, the then-Law Minister, the late Datuk Liew Vui Keong cited in 2018 that the daily cost for a prisoner ranged between RM38 to RM41 and included in this cost are prison staff wages and the cost for amenities.¹⁴⁷ *Berita Harian*, however, in its report claimed that the sole cost of feeding an inmate in Marang Prison was RM41 a day.¹⁴⁸ Regardless, the cost per prisoner did not increase drastically. In his parliamentary response in 2021 , the Home Minister responded that the "total cost for the purpose of maintaining a prisoner in the jail (a day) is RM50"¹⁴⁹. In Sabah, the state Prison Department reportedly spends an estimate of RM114 million yearly and the daily expenditure to feed the inmates ranges between RM35 and RM41 per person.¹⁵⁰ It is uncertain what and how the deductions are made on the cost, and the amount left allocated to feed an inmate as well as if these costs differ from one prison to another.

Budget needs to be redressed, re-evaluated and allocated for prisons and all places of detention to ensure the conditions are improved and that it should be made available for the public's knowledge.

¹⁴⁴ Refer to "Full Budget 2021 Speech" (2020), "Prisons DG: Some of Rm20mil Allocated to be Used for Royal Pahang Weaving Complex" (2020) and Ministry of Finance Malaysia (2020).

¹⁴⁵ See Ministry of Finance Malaysia (2021) and "Budget 2022: Prison Wardens to Get More Allowance For Monitoring Inmates" (2021).

¹⁴⁶ At the Regional Conference on Prison Reform in 2021, SUHAKAM Commissioner shared that the issue of overcrowding had caused a shortage of water supply in the facilities (see Ragu 2021).

¹⁴⁷ Lim 2019b

¹⁴⁸ Shamsuddin 2019

^{149 &}quot;Hamzah: Home Ministry Seeks to Lower Costs of Detaining Prisoners" 2021

¹⁵⁰ Miwil 2018

Lack of data and statistics delays advocacy on the ground, transparency and accountability.

The lack of data and statistics imposes an immutable challenge towards both on-the-ground advocacy, such as the drafting of this report, and consequently in advancing prison reforms.

There is a lack of centralised data to attain the breakdown of inmates in prisons and detainees in the immigration detention centres, and subsequently other particularities such as genders and age groups of those detained.¹⁵¹ Data in this report is supplemented and collated from different sources of news outlets and in fact, the numbers vary between these reports. The Malaysian Public Sector Open Data Portal has insofar collated the number of inmates in prisons between 2016 and 2019¹⁵² and has categorised the number of inmates by state, prison centre, and gender (men and women).

Year	Breakdown	Total	
	Men	Women	
2016	107,758	13,039	120,797
2017	106,872	14,399	121,271
2018	103,186	13,904	117,090
2019	123,596	14,448	138,044

Table 1: Breakdown on number of prisoners in Malaysia (based on released dataset) 153

In 2019, the reported number of inmates in prisons was at a staggering 71,785. Whereas the dataset recorded a total of 138,044 inmates, although it may not have taken into account the inmates that were released within the same year. Therefore, there could be a discrepancy in identifying the true figure or range as to the number of inmates entering and leaving prisons.

This is a challenge where the role of the key actors is intertwined.

The UNHCR, being the key international organisation in providing assistance to, among others, refugees and asylum-seekers, has not had the access to the detainees in these immigration detention centres since August 2019.¹⁵⁴ This undeniably disables them from being able to identify refugees and asylum seekers, and consequently have updated data and statistics. Data related to migrants in detention centres are not publicly accessible and the only way of knowing the said figures is through parliamentary responses and through self-documentation via news reports.

Although there are ways to ensure data is supplemented, this challenge should also be taken with a grain of salt, presumably due to the overwhelming number of in-and-outs of inmates as exhibited previously in Figure 2 causing the difficulty to keep track of the numbers and categorisation. The other presumption includes the strain experienced by staff at the facilities to keep up with the numbers, particularly in prisons and during the pandemic lockdown phase as there could be a large disparity between the ratio of prison staff and inmates.

¹⁵¹ The official number of detainees in the immigration detention centres provided by the Government is only obtainable through parliamentary responses.

¹⁵² See Zabir (2021) for the dataset.

¹⁵³ Source from Zabir, Nur Atikah binti. 2021. "Number of Prisoners by State, Prison Center and Gender - Dataset". Data.gov.my. https://www.data.gov.my/data/en_US/ dataset/number-of-prisoners-by-state-prison-center-and-gender/resource/5ddae5ea-8372-42a5-966f-6b8b522009f1.

¹⁵⁴ Asia Pacific Refugee Rights Network 2020

On another note, although Malaysia has yet to come up with a Freedom of Information Act, the Open Data portal explicitly sets out that:

"[A]lthough Freedom of Information (FOI) Act is not established yet at the federal level in the country, freedom of information has been practiced throughout government open data platform (data.gov.my)"¹⁵⁵

This includes individuals' freedom to request new datasets.¹⁵⁶ However, it does not oblige or commit the government to publish information and data that would concern public interest. With the absence of a legal document that empowers individuals and the public to obtain information from the government, civil society's ability on the ground to advance reforms that could, in the long run, assist the government in improving situations is impeded. Human rights activists in Malaysia underscore that the stumbling block to having an RTI legislation is the existence of the Official Secrets Act (OSA), a federal law that "supersedes other forms of legislation"¹⁵⁷.

Stigmatisation and prejudice towards persons deprived of their liberty.

Citizen perception is potentially the most challenging to address. It poses both a challenge and an issue as it ties to the openness of citizens towards individuals formerly deprived of their liberty attempting to reintegrate back into society.¹⁵⁸ Both emotions and the psychological aspect are involved to tackle the stigmatisation. It is also partly contributed to by the media's use of language and its covert portrayal of individuals deprived of their liberty.

Usage of certain words or language impedes these individuals from seeking help or reintegrating into society to start anew. Some of these connotations are implicitly associated with negative and stigmatised meanings. Due to repeated use and a preconceived image created at the back of one's mind, society might be less open and receptive to accepting these individuals.¹⁵⁹ Thus, this segregates them from the existing societal bubble they were once in, leading them to continue to experience socio-economic problems and be thrown into the same cycle.¹⁶⁰

Malaysian think tank *The Centre* recently conducted research on the public's perception, particularly towards drug users.¹⁶¹ Some of its preliminary findings include that a majority of their respondents agree to non-custodial sentences;¹⁶² and although there is sympathy, support decreased when respondents were asked if they would accept offenders as family members or neighbours.¹⁶³ The same was found in a separate study by Penal Reform International.¹⁶⁴ In Belarus, more than half of the respondents responded that they were not ready to live next to an ex-offender.¹⁶⁵

- 160 See Li (2018) and Petersilia (2000).161 Goh and Tham 2022
- 161 Gon and Tham 2022 162 Non-custodial sentence

^{155 &}quot;Freedom of Information Practice", n.d.

¹⁵⁶ The public could make a request on the portal of the dataset they require, include a description of the dataset, purpose of requesting the dataset and are able to choose from a list of dataset publishers they wish to obtain the dataset from. However, it is required for the "requester" to provide their name, telephone number and email.

¹⁵⁷ Tee 2020

¹⁵⁸ Jasni et al., 2021, pp. 3

¹⁵⁹ In a finding cited in Jasni et al. (2021), former prisoners were imprisoned more than once, and some were rejected by their family members, homeless, discriminated and are still dependent on drugs.

¹⁶² Non-custodial sentences include fines and rehabilitation for users of drugs such as cannabis

¹⁶³ SUARAM 2022b

Penal Reform International and SATIO Group of Companies 2013
Penal Reform International and SATIO Group of Companies 2013, pp. 81-106

Citizens' negative perception did not stop at ex-offenders. Migrants, refugees, and asylum seekers, especially the Rohingyas, too are perceived in a negative light. A global poll in 2020 showed that Malaysian respondents were among those most in favour of closing their countries off to refugees during the Covid-19 pandemic.¹⁶⁶ A local survey revealed, among others, the following¹⁶⁷:

a. 70% of respondents felt that it was "right" to deport refugees though this sentiment is largely shared by those aged 30 and above;

- b. 85% of respondents felt that Putrajaya should place the interest of Malaysians before migrants; and,
- c. Only 29% of respondents believed that undocumented migrants deserve equal protection.

The then Senior Minister and now Malaysian Prime Minister, Dato' Sri Ismail Sabri bin Yaakob, in 2020 stated that the surge in hate speech against Rohingyas was due to reports and videos on social media that provoked public anger towards them.¹⁶⁸ It was believed to have stemmed from a statement by Zafar Ahmad Abdul Ghani, the head of the Myanmar Ethnic Rohingya Human Rights Organisation Malaysia demanding citizenship for Rohingyas. This had triggered death threats and hate speech against the Rohingya community.¹⁶⁹ Zafar denied that he had made such a demand.¹⁷⁰ Xenophobia against the Rohingya community was further aggravated when the Royal Malaysian Air Force (RMAF) prevented 200 Rohingya in a boat from entering Malaysia with the fear of them bringing Covid-19 into Malaysia.¹⁷¹ Reports painting the Rohingya refugees living in Malaysia as uncivilised and violent¹⁷² deepened the discrimination against them.

168 Zainudin 2020 169 FMT 2020

- 171 "Royal Malaysian Air Force Foils Bid By 200 Rohingya in Boat to Enter Malaysia" 2020
- 172 Nik Anis and Lo 2021

¹⁶⁶ Soo 2020

¹⁶⁷ Jayamanogaran 2020

¹⁷⁰ See Hakim (2020) for a breakdown on the list of demands and other claims made.



PRACTICES AND LESSONS TO LEARN FROM AROUND THE GLOBE

Norway

Norway is said to have been ranked number one in terms of the most comfortable prisons with one of its prisons in Halden described as "the most humane prison"¹⁷³. Norway's prison system is one of the most suggested systems highlighted in articles and reports for countries to learn from.¹⁷⁴ It has the lowest recidivism rate and has banned life sentences. Norway, with a population rate of approximately 5.379 million¹⁷⁵, has a prison population of 2,932¹⁷⁶ that makes up 0.05 percent of the total population. However, a majority of Scandinavian countries also have a small gap between the rich and the poor as wealth is distributed more evenly. Inequality and poverty are often associated to criminality, and with a strong welfare system in a country, poverty and inequality can be reduced.¹⁷⁷

It also uses restorative justice as its approach and has a policy of providing access to services and assisting ex-inmates with housing, employment, and healthcare.¹⁷⁸ This is one of the best practices Malaysia could consider in reintegrating inmates into society. The underpinning principle of their prison system in essence is the respect for human rights.

"Because inmates are human beings. They have done wrong they must be punished, but they are still human beings."¹⁷⁹

Centring on rehabilitation, normalisation¹⁸⁰ and skill-enhancement, this contributes part and parcel to a reduction in the rate of recidivism.¹⁸¹ The system enables its former prisoners to be equipped with the necessary skills that would enable them to contribute to the country's economy.

Norwegian prison guards will also need to complete a two-year course underscoring on the law, ethics, criminology, social work and human rights at a university, and undergo a rigorous selection process.¹⁸² The prison governor shared, quoted from an article on the Guardian in 2012¹⁸³:

"We have many more prison officers than prisoners. They are talking about why they are here, what problems got them into this criminality. Our role is to help them and to guard them. The prison governor role in Norway is unique. They are meant to be coach, motivator, a role model for the inmates."

¹⁷³ See Gentleman (2012), BBC (2018) and Dorjsuren (2020).

¹⁷⁴ James 2013; Sterbenz 2014; Benko 2015; BBC 2019; Dorjsuren 2020

¹⁷⁵ See data by The World Bank (n.d.).

¹⁷⁶ World Prison Brief n.d.

¹⁷⁷ Deady 2014, pp. 4; Fajnzylber, Lederman and Loayza 2001178 Gray 2017; Ploeg 2012

¹⁷⁸ Gray 2017; 179 BBC 2019

¹⁷⁹ BBC 2019 180 Denny 2016, pp. 27

¹⁸¹ Harris 2015

¹⁸² See Gentleman (2012) and BBC (2019).

¹⁸³ Gentleman 2012

Sweden

Similar to Norway, Sweden places emphasis on rehabilitation.¹⁸⁴ The country too records a low recidivism rate. The contributing factor to this is that the system accounts for the mental health of inmates and the prison staff play an integral role, as both "enforcers and social workers"¹⁸⁵ in preparing inmates for reintegration into society.

Germany

Similarly, the German prison system is organised around the "central tenets of resocialization and rehabilitation"¹⁸⁶. According to Germany's Prison Act, the aim of imprisonment is¹⁸⁷:

"[T]o enable prisoners to lead a life of social responsibility free of crime upon release, requiring that prison life be as similar as possible to life in the community (sometimes referred to as 'the principle of normalization') and organized in such a way as to facilitate reintegration into society."

Germany's justice system slants towards fines or community-based sentences instead of custodial sentencing. Even in cases of custodial sentences, Germany tends to have shorter prison sentences.¹⁸⁸

Because Germany's custodial sentence is not meant to be punitive but to ensure the detainees lead more productive lives, the detainee is allowed "individual expression"¹⁸⁹ and control over their daily life. The cells have private bathrooms and bedding provided, and inmates are allowed to wear civilian clothing.¹⁹⁰ The prison officers undergo two years of training that is more akin to that of social workers and behaviour specialists.¹⁹¹

In relation to immigration detention centres, Germany's deportation detention has a time limit, which is up to six months or with certain conditions, it can be extended by another 12 months.¹⁹²

¹⁸⁴ Aleem 2015 185 Ibid.

¹⁸⁶ Subramanian and Shames 2013, pp. 7 187 Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Subramanian and Shames 2013, pp. 11

¹⁹⁰ York 2019

¹⁹¹ Subramanian and Shames 2013

¹⁹² Bathke 2019



MOVING FORWARD

The recommendations necessary for prison reforms – upon the reflection of the issues and challenges highlighted in this report – are numerous¹⁹³ and the essence of advancing reform on prisons and immigration detention centres boils down to the principle of *human dignity*¹⁹⁴. While there are admittedly issues and challenges that impede reforms on prisons and immigration detention centres, this report will highlight some recommendations for policymakers and civil society moving forward.

I. Implementing human rights-based approach in practices

First and foremost, Malaysia should implement a human rights-based approach in all its practices concerning human beings and in prisons no less. A human rights-based approach is fundamental as it covers principles such as equality and non-discrimination, accountability, participation, empowerment, and legality.¹⁹⁵ Non-discrimination entails that all human beings should be given equal protection of the law and are entitled to all rights and freedoms "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"¹⁹⁶. We need to recognise persons deprived of their liberty as human beings and no less than that, to be treated equally.

All in all, no one should be left behind and priority *must* be given to those who face hurdles in realising their human rights. This includes eliminating discrimination including gender discrimination and reducing poverty and inequality – that are often intersecting – in the country.

II. Committing to transparency and accountability

Increasing the availability and accessibility of data

Data and information such as budget allocation should be made transparent as to the allocation for prisons to improve the conditions and overall systems. Government or relevant agencies should proactively provide information and data concerning prisons and immigration detentions as this would assist relevant stakeholders and agencies to be ready-to-respond to any changes or situations. This also includes streamlining and centralising data from different government agencies.¹⁹⁷

The prison population should subsequently be broken down into different categorisations such as, among others, women, children, elderly, migrants and refugees, and ethnic minorities and indigenous peoples. Gender diversity and LGBTIQ people should also be considered in data collection. The challenge to have a more comprehensive, gender inclusive dataset persists due to the invisibility of this community not only outside the settings but also within the four walls of the setting.¹⁹⁸

196 Article 2 of the UDHR

¹⁹³ Azhari 2019

¹⁹⁴ Delaney et al., 2018

¹⁹⁵ Refer to Australian Human Rights Commission (n.d.), Kindornay, Ron and Carpenter (2012) and World Health Organization (2017)

¹⁹⁷ See Shaharudin (2021) on the landscape and challenges of having open government data and ways forward.

¹⁹⁸ Penal Reform International and Thailand Institute of Justice 2021

Enacting a 'Right to Information (RTI)' legislation

An RTI or FOI legislation would enable the public to obtain information on how the government is running its state of affairs. It is a tool where every individual can "request and receive information and thereby find out about abuses of power in a wide range of areas"¹⁹⁹. It also significantly commits the government to work in transparency and be ready to be accounted for their actions.

In 2013, the Freedom of Information Advocates Network published an analysis on RTI by region and shared that 95 countries have recognised the right to information.²⁰⁰ Separately, Transparency International published a report on eleven countries and how they respectively performed on the Sustainable Development Goal (SDG) 16.10²⁰¹. It recorded, amongst all eleven countries²⁰² Maldives and Sri Lanka have an RTI law that is the best in the region and in the top tier worldwide.²⁰³ India is also said to have one of the strongest RTI laws globally.²⁰⁴ Malaysia could learn from its Asian counterparts in coming up with a federal RTI or FOI legislation that is implementable in the country.

The legislation may exempt information that is sensitive and cannot be disclosed to protect national security, public order, and data privacy. The legislation, however, should instil that the right to information is absolute and any reasons for withholding certain information should be disclosed and on justifiable grounds, i.e., that it puts national security and public order at risk.

III. Implementing pre-measures to incarceration, alternatives to detention and emphasising on normalisation

Social reintegration and rehabilitation

Malaysia needs to shift its focus to applying the restorative justice²⁰⁵ approach similar to countries like Norway and Sweden and also placing more emphasis on normalisation and reintegration of all persons deprived of their liberty into society. This could be an approach many would have disagreements and objections towards. The underpinning argument to this is, however, to reduce the rate of recidivism and the overall rate of offenses committed through strategic measures. On the flip side, maintaining a large number of detainees and inmates is equally as costly, if not more. The system should aspire to progressively re-build its overall system including by having humane facilities and re-educating not only the public but also officers in the facilities; a synthesis to prison reforms.

¹⁹⁹ Transparency International 2018

²⁰⁰ Freedom of Information Advocates Network 2013

²⁰¹ SDG 16 aims to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels" whereas 16.10 specifically targets to "ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements" (see Sustainable Development Solutions Network, n.d.).

²⁰² Countries in the report include Bangladesh, Cambodia, Maldives, Mongolia, Nepal, Pakistan, Papua New Guinea, Solomon Islands, Sri Lanka, Vanuatu, and Vietnam. Eight countries have RTI laws in force.

²⁰³ Transparency International 2018

²⁰⁴ See Kemp (2016) and "RTI Rating by Country" (n.d.).

^{205 &}quot;The Role of Restorative Justice In A Criminal Justice System", n.d.

This is a two-fold way forward. One is to commit to advance planning on ways to reintegrate all persons deprived of their liberty into society; and reinform, raise awareness, and educate not only them but also the public. This is to reduce the rate of recidivism or individuals re-committing the same offence and educate them to make informed decisions while also understanding that their socioeconomic background could be the reason the offence was committed in the first place. In the context of drugs offences, offenders should be given apt alternatives to incarceration such as non-custodial measures. This includes being given the choice to enrol in a rehabilitation programme, which would presumably reduce the number of individuals being placed into prisons. Separately, this is to reduce stigmatisation amongst the public, increase knowledge to empower the public in making informed decisions and therefore, instil a human rights-based approach in practices. Such awareness could reduce or eliminate prejudicial thoughts that inhibit the mindset from treating them equally as human beings.

The second fold is to take stock from countries such as Norway in equipping staff of prisons and all places of detention with adequate knowledge and skills in meeting international standards and upholding human rights. Malaysia could enhance the role and responsibility of staff by providing capacity building training that encapsulates modules such as possibly, social work, international human rights standards, and guidelines. This includes the prohibition of torture towards all persons deprived of their liberty.

Pursuing Alternatives to Detention (ATD) especially for undocumented children

ATD is a practice that "allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country"²⁰⁶. This is one of the solutions that will help with resolving issues of undocumented children in detention centres. Since 2014, SUHAKAM and CSOs have been advocating for ATD for children held in immigration detention centres.²⁰⁷

In November 2021, the Home Ministry stated in a parliamentary written reply that the government is developing a pilot ATD programme to address detention of children in immigration detention centres.²⁰⁸ The pilot programme will provide temporary shelter for unaccompanied and separated children under detention with the focus given toward child mental health support.²⁰⁹ Subsequently, it was reported that a pre-council meeting between the Home Ministry and the Ministry of Women, Family and Community Development would be held on 23 December 2021 to finalise the SOP framework for the ATD pilot programme.²¹⁰ However, as of April 2022 there is no further update on the said pilot ATD programme.

The SOP framework for the ATD pilot project needs to be developed immediately to ensure the wellbeing of children in immigration detention centres as Malaysia has been lagging behind other ASEAN countries, specifically Thailand and Indonesia, who have released hundreds of children from immigration detention into community-based care since 2019.²¹¹

²⁰⁶ Office of the United Nations High Commissioner for Human Rights 2011, pp. 2

²⁰⁷ Human Rights Commission of Malaysia 2020, pp. 152

²⁰⁸ Malaysia, Parliamentary Hansard, House of Representatives, 11 November 2021, Question 5; Malaysia, Parliamentary Hansard, House of Representatives, 23 November 2021, Question 29

²⁰⁹ Ibid.

²¹⁰ Refer to "Pilot project SOP for children in detention centres to be finalised soon, says deputy home minister" (2021).

²¹¹ Refer to "IDC & ECDN Welcomes Launch of ATD Pilot in Malaysia" (2022).

IV. Increasing continuity in multi-stakeholder cooperation

Tied to the previous ways forward, the Government, who holds the duty to protect and uphold human rights, should continue to build working relationships with CSOs, NGOs, INGOs, human rights defenders, the media, independent journalists, and researchers. It could be to further study, strategise and implement areas to improve in prisons and all places of detention including tackling the concern of overcrowding. Government should leverage on the experiences and pool of resources on the ground that would enable them to deal with issues and challenges with ease and support, instead of working in silo. Civil society could, on the other hand, further push for advocacy, through education and awareness raising amongst the public.

Along with this, the Government could establish an independent, multi-stakeholder steering committee to monitor and oversee the situations and conditions concerning prisons and all places of detention, and subsequently draft and implement an action plan to address the issues identified over a period of time. This is especially important in ensuring transparency and accountability in its monitoring and evaluations. The Government should also increase collaboration with businesses to encourage and provide training and equip these individuals deprived of their liberty with skills that would help prepare them for the work they intend to go into.

V. Acceding to key human rights instruments as commitment

Insofar, Malaysia has ratified three international conventions²¹². With Malaysia being elected to the UN Human Rights Council (HRC) for the term 2022 to 2024²¹³, its role in respecting and upholding its human rights commitments is ever so vital and timely.²¹⁴ Relevant Government agencies such as the Ministry of Foreign Affairs, Legal Affairs Department of the Prime Minister's Department, and Ministry of Home Affairs should begin studying into ratifying more treaties and conventions particularly on the ICCPR, ICESCR, the 1951 Refugee Convention and the UNCAT. These should be viewed as commitments for states to ensure that human rights are protected and upheld in their jurisdiction.

The first overarching human rights instrument Malaysia should commit to is the ICCPR as it encapsulates the basics of human rights such as the right to life and human dignity, the freedom from torture, ill-treatment and arbitrary detention, and the right to fair trial. Second, as these rights are indivisible to the economic, social and cultural rights, Malaysia should study on acceding to the ICESCR. The rights enshrined in the ICESCR includes the right to health, right to an adequate standard of living and the right to education.²¹⁵ It is equally timely for Malaysia to be a party to the UNCAT as the prohibition of torture and other ill-treatment is absolute and integral in customary international law²¹⁶.

²¹² Malaysia is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and its optional protocols, and Convention on the Rights of Persons with Disabilities (CRPD).

²¹³ Ministry of Foreign Affairs Malaysia 2021

²¹⁴ Malaysia has only accepted in partial or in principle of several UPR recommendations concerning consideration to ratify or accede to international treaties and conventions at its 2nd cycle of UPR review (see COMANGO, n.d.).

²¹⁵ Office of the United Nations High Commissioner for Human Rights, n.d.

²¹⁶ Association for the Prevention of Torture and Center for Justice and International Law 2008

CONCLUSION

Reforms concerning prisons and all places of detention are essential as Malaysia moves into the endemic phase. The pandemic has taught the country lessons it should not dismiss and has highlighted concerns and consequences that are long-standing. The issues and challenges Malaysia faces concerning prisons and all places of detention, immigration included, are not new and are not standalone. Overcrowding, if not addressed and mitigated, will put the whole system in overdrive. It will strain not only inmates physically and mentally, but it will also strain the prison staff as frontliners. It will further lead to poor living and health conditions as the system and facilities will have inadequate capacity and struggle to hold and support the inmates. The overall cost will exponentially increase if these issues are not adequately addressed. On top of that, the lack of available and accessible data will impede advocacy on the ground that could significantly assist the Government in addressing the issues and challenges it faces. And finally, stigmatisation and weak implementation of social reintegration will contribute to the repeat of the whole cycle as inmates will have difficulty to support themselves financially. With practices it could learn from other countries, Malaysia could improve its system and ensure no one is left behind.

Human rights are for all. We have the duty to protect each other's rights and dignity. We need to recognise that individuals deprived of their liberty including migrants, refugees, and asylum seekers are at the end of the day human beings.

APPENDIX

Sharing of Experiences: Environment and procedures at different facilities

Below is a series of experiences shared by individuals detained under different Malaysian laws including Sedition Act 1948, Communications and Multimedia Act 1998, Dangerous Drugs Act 1952. Each individual has consented to be interviewed and to respect the request for anonymity, information of individuals will not be disclosed, including location of detainment and type of offences. Individuals will instead be identified as alphabets (A, B, C, etc.).

Malaysians in Lockups

The age of the interviewees ranged between 17 – at the time of detainment – and 40 years old. No special needs or illnesses were recorded and brought to the attention of the interviewers for A, B, C, and D. E, however, recorded of having a heart problem.

A, female with no need of medical support, was arrested in 2021 under Section 4(1) of the Sedition Act 1948. At the time of arrest, the police repeatedly mentioned that A was not being cooperative enough, although A claimed to have only been exercising her rights under the law during questioning. A has also claimed that the police were intimidating her and her family.

B was arrested in 2020 under the Penal Code for approximately less than 24 hours. He was pushed to the ground and put in handcuffs at the time of his arrest. He claimed that his handcuffs were tight and had left marks on his wrists. **C**, on the other hand, was arrested and investigated in 2021 under Section 4(1) of the Sedition Act 1948 and Section 233 of the Communications and Multimedia Act 1998.

In B's experience, he was given a form to sign to acknowledge that he had the right to counsel and the right to contact his family. However, he claimed that the police verbally threatened to physically abuse B during questioning. From the moment of his arrest until he was put in lockup, he was in handcuffs. The police had refused to loosen his handcuffs to ease the discomfort, despite being requested by B and his lawyer. He was neither allowed to have his handcuffs removed even when using the toilet.

Prior to entering the lockup, A was not instructed to perform a Covid-19 test and was not allowed to wear a mask despite the fact that there were other people around her. The police did inquire A regarding her vaccination status but did not check her certificate for Covid-19 vaccination through the MySejahtera application for confirmation. The police too did not wear their masks when speaking and questioning A but had worn their masks at other times.

Like **A**, **B** was not instructed to perform a Covid-19 swab test before entering lockup due to his release the following day. From his conversations with other detainees, he found out that the other detainees had performed swab tests before they were put in the holding cell. Each had only performed one swab test. This undeniably puts the other detainees at risk.

C too did not have to undergo a Covid-19 swab test and was not inquired regarding his vaccination status before entering lockup. He was, however, only called out of his cell to undergo the test the following day. The police gathered approximately 50-60 people in a room to perform swab tests and officers from the Ministry of Health were present. It appears that the detainees were not tested upon arrival but were tested in batches potentially every 2-3 days.

When placed in the holding cell, A and C observed that their cells only had a grille and no windows for proper ventilation and that they were each the only person in their cells. The bed in the cell was made of bricks, with a wooden plank laid above it, and the cell did not have a clock so A had no concept of time. B too shared that was no beddings such as pillows and bed sheets in the cell and detainees slept on the floor. The lights in the cell were also always switched on, resulting in the detainees not knowing whether it was day or night.

A further observed that other detainees wore clothes of a different colour as compared to the attire given to A. Even in the holding cell, A was not allowed to wear a mask while other people were passing by.

Before entering the holding cell, A was forced to strip down to her underwear and change into the attire given to detainees. A and B shared they did not have privacy when using the toilet. Both shower and toilet were in the same small area. A shared there was a CCTV above the toilet and the grille of her cell was right in front of the open bathroom so anyone walking past could watch A use the bathroom.

According to **B**, three meals (breakfast, lunch and dinner) were served each day. The food given, however, was inadequate and detainees were only given a small plastic bag of water (approximately less than 300ml) in the morning. Due to this, detainees would drink water from the tap when they were thirsty.

B shared that there were no health professionals in the police station. If detainees experienced certain health conditions and needed medical attention, they would be brought elsewhere. He observed that there was a group of people who were detained and handcuffed with a chain that connected at least three people and afforded about a 0.5m distance between them. A, B and C all shared that social distancing was not practised. Some of the detainees did not wear face masks, and the police did not provide them with face masks. Some of the detainees wore 3-ply surgical face masks which appeared old and worn with stains on them. Detainees' clothes also seemed old and showed signs of wear and tear.

On average, there were four to five people in a cell. Many detainees did not wear their masks properly, whereas the police did not remind them to wear their masks properly. The police also did not supply the detainees with masks, and so they could not replace their masks every day. **B** shared that the holding cell did not have hand sanitiser or soap.

C observed that there were many elderly people in lockup; approximately one third were made up of the elderly. He too shared that an elderly man in the facility was mistreated by the police and was in view that the man didn't seem fit to stay in the cell. According to C, the elderly man had told the police that he had medications he needed to take, but the police ignored his request and refused to give him his medication and called him crazy. In regard to torture, C shared that he was not tortured but had heard sounds of detainees being caned.

In a separate case, **D** was in police custody for 77 days and a victim of chain remand. He would be brought to a police station to give his statement, beaten and told to confess, and then placed in the lockup. Out of the 77 days he was detained, he shared that he was abused and tortured for 15 days.

D shared that when he was first arrested and having his statement recorded in the police station, his family member was not allowed to visit him and police did not notify his family whenever he was being transferred from one station to another, including when he was brought to court.

It should be highlighted in this case that the detainee's family struggled financially and did not receive financial support when **D** was in police custody. **D**'s family lives from day to day, surviving off **D**'s grandmother's pension. His mother was forced to sell her car to defray the cost of receiving phone calls from the police stations.

When he was arrested, the police officers did not explain that he was being arrested, nor did they notify him of his right to legal counsel and his right to contact his family. The same was experienced by E when the police did not inform her the reason she was detained for. At the site of his arrest, he shared that he was kicked and beaten by the police. Even when he told the police that he did not commit the crime he was accused of, the police continuously hit him all over his body, mainly his arms, using a pipe wrapped with plastic tape as they were trying to force a confession out of him. Gruesomely, he shared that the police had also given him electric shocks. This matter was confirmed by a family member of the detainee upon inquiry.

Even during statement taking, the detainee, along with the other individuals involved, were not informed of their right to legal counsel. It was only later on that they were told that they could be represented by lawyers.

D was not allowed to read any documents, including the statement he had given and was asked to sign approximately 30 letters/documents related to Prevention of Crime Act (POCA) 1959 without being given the opportunity to read them.

In regard to the practising of SOPs, D described the holding cell as "horrible and dirty". Like the rest, he shared that social distancing was not practised and Covid-19 swab tests were not performed. Throughout the whole event, D had thoughts of ending his life. After being detained for about a month, he had given up hope and told his mother that it would be better for him to just enter prison so that his mother would not have to worry about him and go through so much trouble for him anymore.

During the time of the interview, **D** was out on bail and case was still ongoing.

Malaysians in Prisons

The interviewees (F, G, and H) are ex-detainees and are currently under the "Pelepasan Banduan Secara Berlesen (PBSL)" (Prisoner Release on License) programme. They are aged between 50-65 years old and were in prison for various offence. One of the interviewees recorded having the illness of high blood pressure. I, a young offender, is currently detained in a correctional centre after being remanded in a prison last year.

Interviewees shared that the authorities were rude and harsh towards the inmates and instead of being called by names, they were identified and called by their "nombor badan". The level of humanity the officers had towards the inmates was so low; they were harsh, used harsh words such as "bodoh (stupid)", "bangang", "pesalah jahat", etc. The interviewees were abused through beatings by wardens and shared that ragging was prominent in the facility. One of the interviewees further shared that they would get beaten if their nails were long and that the ratio of nail cutters available for inmates was only approximately 2:600.

I, on the other hand, suffered from being treated harshly in one of the prisons. He shared that he, along with other detainees, was beaten by prison wardens. He has also suffered from beatings when asking for water as water provided is inadequate.

In relation to their living conditions, sanitation, and hygiene, interviewees shared that there were rooms shared by approximately seven persons and some by four persons depending on the location of the prison. Inmates were unable to practise social distancing as the prisons they were in were congested. They were also cooped up in the room 24 hours straight and would have to eat in the room, causing the inmates to fight. Food and water were also inadequate. They could only take shower every few days and were given a bar of soap every three months. In a separate location, the prison uses a "bucket system" where the urine is collected in a bucket, which is unsanitary and could get very smelly sometimes.

They were given masks to be worn for a few months but also depending on the location of the prisons. In Taiping, one of the interviewees shared that they were given two cloth masks to wash and reuse.

G, who has high blood pressure and a heart problem, shared that he was not given medication when he requested for it for approximately three weeks. After the said period, only then was he given medications. He did not get the opportunity to meet a doctor and further shared that the medical officer he encountered was not friendly. There were instances when inmates made requests to be provided medications, but the result was dependent on if the wardens were willing to provide the medications. Interviewees also shared their observation that there were inmates showing suicidal tendencies and requiring mental help, but claimed that presumably, there was not enough professional help that could be provided for these detainees.

G and I received both doses of the Covid-19 vaccine in September and October 2021, respectively. Interviewees shared that detainees could get vaccinated in prison. However, the caveat was that if the first dose was obtained outside of prison, they would then be unable to obtain the second dose in prison and would have to wait until they were released from prison. H also observed that a bigger prison population would be difficult to manage as compared to a smaller population.

On areas for improvement, interviewees shared there are a number of areas to improve within and outside the four walls of the facilities especially concerning the issue of overcrowding. They also highlighted that the management of the prison system is quite poor compared to other facilities and the attitudes and behaviours of officers should change, although they did not explain further on this. Separately, I, at the time of the interview, appeared more motivated and confident as compared to when he was in prison as he had learnt a lot from the wardens and seniors. He further suggested that vocational trainings should be made available as an option especially for those with low literacy skills.

Migrants in Lockups

J, K and L are migrants who were detained all around the same time.

They shared that food was inadequate and that they had to drink water from the tap when thirsty. Officers would check if detainees had Covid-19 at the time of detainment.

However, they shared that SOPs were not practised and adhered to; no masks, or sanitisers were given, and no social distancing was observed. One of the interviewees further shared that approximately nine to 11 people were placed in one small room and some of those detained were as young as 15 years old, while some were old. Some of the detainees were coughing and it was difficult to obtain medical support. Female detainees who requested for sanitary pads would be checked for confirmation before being given one. There was no privacy in the bathroom and basic daily essentials such as towels, sanitiser, soap, and toothbrushes were not provided. The space also has no windows or clocks and this ultimately left detainees to experience mental frustration.

Detainees were able to get vaccinated with the assistance of an NGO but did not receive any support or visitation from NGOs during the lockdown. They too were allowed to make calls but only local calls once a week.

L felt that he was treated well. He was allowed to communicate with his employer but did not communicate with his family. He shared that everything was fine except for communication. He found that communicating was difficult due to the language barrier. He was juggling between English and Malay with the officers, sometimes the officers among themselves would try to send someone who could understand him.

A Lawyer's Experience

M, a lawyer, briefly shares her experience on meeting her clients during the pandemic.

At the early stage of MCO, lawyers were only permitted to meet their clients virtually and request should be made in writing to the prison authorities. No physical meetings were allowed at that time. When Malaysia moved into the RMCO phase, meetings could be carried out in person but only through the intercom at the prison meeting area as physical contact was still not allowed in adherence to the SOPs. Some prisons – that allow physical meetings to take place – require lawyers to be tested for Covid-19 and produce a negative result three days prior to the meeting date.

In regard to the adherence of SOPs in the detention centres and prisons included, she observed that there was a lack of adherence to the SOPs due to overcrowding and lack of medical facilities and assistance. There was also a lack of SOP adherence in handling detainees in lockups as they were handcuffed in chain and no social distancing was observed when detainees were transported from their cell to the court and vice versa.

Lawyers were allowed access in court before their client's remand hearing. However, according to M, it was not safe for lawyers to be in the same area as some of the detainees were not wearing mask. Physical distancing was also not possible due to the insufficient space available for lawyers to meet and talk to the detainees. This consequently poses as a health risk for not only detainees but also the public when SOPs are not adhered to.

As ways forward, M suggested that firstly, prisons should provide adequate facilities and means to carry out online meetings as this would be useful as Malaysia transitions out of the pandemic phase and also for detainees to have better access to their lawyers. Second, she suggests that medical assistance as well as sanitation and hygiene be given the utmost consideration for improvement.

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