

RESEARCH ARTICLE

Best Interests of the Child in Juvenile Justice: Analysis of Malaysia, Philippines, and Thailand

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Abstract: The “best interests of the child” (BIC) is the most referenced child rights principle in international law, whereas juvenile justice is the most mentioned topic. This paper examines how countries in Southeast Asia (SEA) interpret BIC in juvenile justice and if their understanding is consistent with the Convention on the Rights of the Child (CRC) and other international standards and why. It contends that BIC’s indeterminate use led to misinterpretation of child rights and that BIC interpretation is influenced by several factors found within the socio-cultural and political economy of SEA. Using Malaysia, the Philippines, and Thailand as case studies for their representation of legal and socio-cultural traditions in SEA, this study applies a positivist and constructivist approach to qualitative research using surveys, jurisprudence, documentary research, and interviews with children and justice actors. It finds that CRC’s ratification and laws enacted with BIC therein do not guarantee the full protection of the rights of children in conflict with the law (CICL). It highlights the importance of using BIC cautiously, the value of asking children their BIC, and the need to deconstruct adult overgeneralizations on juvenile justice. As BIC is more than a legal concept, it recommends a constructivist approach in search of common values about childhood and justice across cultures. The study seeks to clarify the academic, legal, and practical interpretation of BIC in juvenile justice and to protect the rights of CICL in SEA.

Keywords: best interests of the child, child/juvenile justice, restorative justice, ASEAN, Malaysia, Philippines, Thailand

The “best interests of the child” (BIC) is the most cited child rights principle, yet it is difficult to apply in practice, especially in juvenile justice. As one of the fundamental principles for interpreting the Convention on the Rights of the Child (CRC), clarifying its meaning and purpose has an extensive impact. Aside from the over-arching provision in Article 3(1) of the CRC, where BIC is a primary consideration in all actions concerning children, BIC references in Articles 9, 18, 20, 37, and 40 have implications for juvenile justice (Convention on the rights of the child, 1989). Although BIC preceded the CRC, it was undefined

in the CRC and its predecessor, the Declaration on the Rights of the Child. Moreover, BIC was diluted from “the paramount consideration” to “a primary consideration.” The principle is doubly subjective (Beshir, 2012), influenced by the personal biases of decision-makers and society’s conception of a child’s best interests based on its common anthropological and sociological context. As BIC is linked with the socio-cultural conception of childhood, there are as many interpretations of BIC as there are conceptions of childhood in different societies. BIC is indeterminate as it can be adapted to a child’s unique situation

and dynamic knowledge about child development (Alston, 1994).

Some scholars have defended BIC's flexibility in considering the different socio-cultural contexts in which it is to be used (Khazova, 2016; Van Bueren, 2008). However, it has become its weakness as it resulted in misuse like separating children from their families, discontinuing basic services, and inability to develop their potential as many are deprived of liberty not as a last resort. Juvenile justice was chosen as an entry point given the difficulty in determining the best interests of a child who is charged, accused of, or committed a crime. This is reflected in at least seven international standards on juvenile justice, including Beijing Rules, Riyadh Guidelines, Havana Rules, Tokyo Rules, Vienna Guidelines, CRC General Comment (GC) 24 (UN Committee on the Rights of the Child, 2019) amending CRC GC 10 (2007), which changed juvenile justice to child justice emphasizing that CICL are still children. This paper utilizes juvenile justice as previous international standards used juvenile justice, and child justice is not yet widely known. The reasons for the difficulty in considering BIC when a child offends, particularly in SEA, were explored in this research. In SEA, BIC literature is scant, and juvenile justice analysis is limited to compliance with international standards. Malaysia, the Philippines, and

Thailand were chosen to represent SEA's diversity and for their sociological, anthropological, and legal similarities with other SEA nations.

Malaysia, predominantly Islamic with British legal influence, operates under a dual secular and Syariah system. Thailand, primarily Buddhist, blends civil law with common law elements. The Philippines, mainly Christian with a Muslim minority, combines Spanish-based civil and penal laws with American-influenced common law and Shariah law for family matters in the southern region.

This comparative study argues that the application of BIC in juvenile justice is more than a legal concept as it is influenced by several factors found in the socio-cultural and political economy of the region. It first discusses how international standards on juvenile justice define BIC and the theory behind them. The second part is a comparative analysis of laws in the three countries, how they are interpreted by courts as final arbiters of how these laws are applied, and how they align with international standards. The third part examines the reasons behind the interpretation of BIC in juvenile justice and the theories of childhood and justice in these countries. The last part presents the study's conclusions and implications for further research and policy reform.

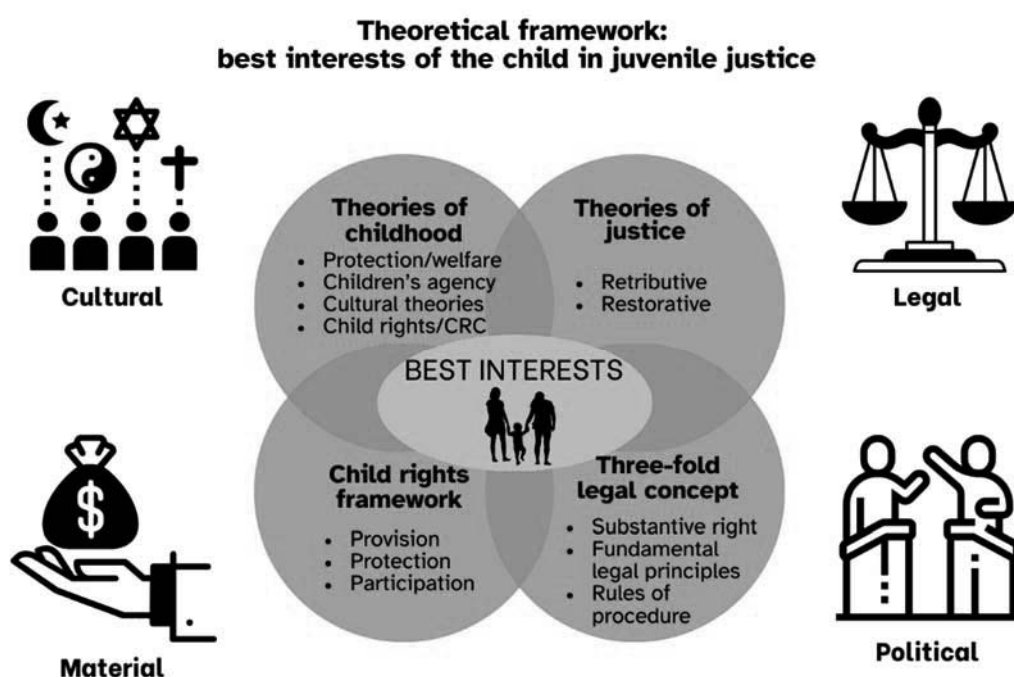


Figure 1. Theoretical Framework: Best Interests of the Child in Juvenile Justice

Research Methods and Framework

Using the theoretical framework shown in Figure 1, this paper analyzed how the three countries understand and apply BIC in juvenile justice by approaching the research question in three unique ways. First, it went beyond an analysis of compliance of national laws and jurisprudence with international standards by analyzing the theories and evidence behind the international standards and comparing them with the theories prevalent in the three countries. Secondly, it analyzed the legal, political, material, and socio-cultural factors affecting the interpretation of BIC in juvenile justice in these three countries and their interconnectedness. Finally, this study examined the justice actors' perspectives and included children's voices on BIC and their experiences with the juvenile justice system. While limited to three countries, they represent the cultural and legal diversity of SEA, a region known for invoking regional and national values in international and regional human rights instruments and dialogues.

Given the research questions, types of knowledge sought, researcher's role, and implications of research findings, this study uses qualitative research. As interpretative research, it delves into the specific meanings and behaviors experienced in a certain social phenomenon through the participant's subjective experiences (Palmer & Bolderston, 2006), such as the interpretation of BIC by justice actors and the experiences of children in the three countries. The validity of qualitative methods is improved by using various data collection methods, including semi-structured interviews, focus group discussions, life maps, questionnaires, observation studies, and chart reviews to explore multi-faceted concepts like BIC in juvenile justice. Thematic analysis was done to identify common issues across all primary and secondary data sources.

The researcher used the two main traditions of qualitative research—positivist and constructivist. The positivist approach analyzed international standards, national laws, and jurisprudence. The constructivist approach examined the factors influencing their interpretation of BIC in juvenile justice and gave voices to justice actors and children. Questionnaires were sent to government agencies overseeing judges, law enforcement, prosecutors, defense lawyers, probation officers, and social workers from the three

countries, with a total of 102 respondents (45 males, 47 females), followed by semi-structured interviews including 26 international and regional experts. Sixty-five children (39 boys, 26 girls) engaged in guided individual reflections with open and closed questions, life mapping, semi-structured interviews, and focus group discussions. Ethical clearance was obtained, and strict protocol was followed to ensure informed consent from respondents, especially the children. Consultations were conducted in a safe environment, respecting their privacy and dignity, and their names were not disclosed.

International Standards

Although the CRC's almost universal ratification suggests that a global consensus on child rights is possible despite economic, political, social, cultural, and religious differences among nations, this research unearths the reasons behind SEA countries' difficulties in complying with international standards on juvenile justice. It sheds light on the disparities between prevailing theories in SEA and the liberal theory of childhood underpinning global norms. It dissects international standards surrounding BIC and juvenile justice, scrutinizing the evidence behind them and their capacity to provide objective parameters. It underscores the imperative of integrating international standards into national laws, as ratification alone does not guarantee enforceability in dualist legal systems.

Aside from being undefined and diluted to "a primary consideration" in the CRC, BIC is often phrased negatively (e.g., unless or except in the BIC). Articles 9, 18, 20, 37, and 40 of the CRC used BIC to justify separating the child from their family or non-participation of parents in court proceedings (Convention on the rights of the child, 1989). Removing the child from the family often results in institutionalization, which has detrimental effects on the child (United Nations, 2019). Using BIC as an exception to the general rule on rights dilutes the CRC message that all children, including CICL, have rights because they are entitled to them and not only because it is in their best interests. BIC had its role before the CRC when there was no consolidated set of legally binding rights, but it should not be used to replace child rights if there are specific applicable provisions in international law. The purpose of BIC now is to fill

the gap(s) of international standards or to determine if there are conflicting viable solutions that are all in line with child rights (Cantwell, 2016).

General Comment 14 did not define BIC but emphasized its complexity and individualized interpretation (UN Committee on the Rights of the Child, 2013). By introducing BIC as a three-fold legal concept, the GC gave legal professionals distinct authority to assess and determine BIC with a suggested formula for best interests assessment and determination and a list of universal parameters that pose challenges for SEA, as shown in this paper. The GC clarified that “a primary consideration” means that BIC may not hold equal weight with other considerations, echoing the reasoning during the drafting of the CRC when “paramount consideration” was watered down (Office of the High Commissioner on Human Rights, 2007).

Although all member states of the Association of Southeast Asian Nations (ASEAN) ratified the CRC, Brunei, Malaysia, Singapore, and Thailand registered reservations. Malaysia’s reservations include Article 37, which explains why corporal punishment and status offenses exist in their justice system. Thailand’s reservation to Article 22 explains why there were children in immigration detention before they implemented a new policy. These reservations and repeated Concluding Observations on juvenile justice could be attributed to these countries not sharing the theory of childhood behind international standards. Conversely, it could be due to the drafters of the CRC not considering SEA’s legal, material, political, and cultural contexts.

Aspects of the model of childhood behind international standards that conflict with SEA’s local contexts relate to age markers (age of majority, minimum age of criminal responsibility [MACR], treatment of children below MACR, status offenses), punishment (degrading forms of punishment, deprivation of liberty), and procedural guarantees, especially on child participation in the justice system.

International standards on juvenile justice stem from a liberal theory of childhood, viewing offense as part of adolescent risk-taking behavior. They emphasize restorative justice and the need to treat CICL as children are still entitled to all rights under the CRC. Although they consider offending children as vulnerable and needing protection, the three countries consider treating CICL as innocent as naïveté. Another CRC innovation is child participation, with GC 14

stating that children should be asked about their best interests as part of the BIC assessment. If children have the maturity to determine their best interests, then many of the interviewed adults in SEA opine that they also have the maturity to understand right from wrong.

Reconciling the tension between protection and participation is critical for the sake of BIC (Lansdown, 2005). Although there are scholars who argue that the CRC’s conception of childhood emphasizing dependence and vulnerability is a “Western” construct that depoliticizes children who have the capacity to participate in various settings (Knutsson, 1997; Johnny, 2006), other scholars see no contradiction in children exercising agency while depending on adults for protection against abuse to exercise their rights completely (Alderson, 2008; Neale, 2008; Lister, 2007). Listening to interviewed children showed that the tension between participation and protection rights can be reconciled. The children interviewed showed better appreciation than adults of the risks they encountered, violence they faced, drivers of juvenile offence, and the necessary approaches to prevent and address juvenile offence. On the other hand, children can exercise their agency and share their views freely when protected from backlash and other child rights violations, informed about their rights and provided confidential and safe mechanisms to share their views.

The concept of child’s evolving capacity seeks to balance participation and protection rights through provisions like MACR, discernment, and presumption of minority. Although the CRC provided a universal definition of a child to define the scope of applicability of the CRC and neuroscience supported a high MACR, setting biological age markers is challenging given cultural differences. Psychosocial maturity happens in a continuum depending on several factors including the child’s environment and that of their caregivers.

Another difference between international standards and SEA is the notion of punishment. Backed by scientific studies on the negative effects of status offenses (Moore et al., 2017), corporal punishment (Smith, 2006), and institutionalization (Underwood & Washington, 2016), which are common in SEA even for children below MACR, international standards encourage diversion, and alternatives to formal trial and detention. International standards state that deprivation of liberty should be a measure of last resort, for the shortest possible period of time, limited to exceptional cases, and subject to review. These

requirements do not exist in other international human rights instruments and are additional safeguards for children (Liefwaard, 2008). They are hardly followed in SEA as deprivation of liberty is often the first response and is even legislated in the three countries for serious crimes or for repeat offenses, regardless of the nature of the crime. Automatically exempting serious and repeat offenses contradicts the requirement to undertake an individualized BIC assessment. Given the experience during COVID-19, where countries like Indonesia and Cambodia (UNICEF, 2020) managed the pandemic using non-custodial measures and releasing children from detention, it is time to revisit the public health and safety exceptions in GC 24.

The CRC's almost universal ratification is not a panacea and does not automatically guarantee collective understanding. Although international standards offer objective benchmarks in defining BIC in juvenile justice, there must be an analysis of the legislative intent and history, how these standards protect BIC or not, the theory behind them, and how they are similar or different from local theories to better comprehend the reasons for the different application. International standards must be integrated into national laws to be enforceable domestically, as ratification alone does not automatically incorporate them into local laws in dualist countries like the three covered by the study.

National Laws and Jurisprudence

Malaysia, the Philippines, and Thailand have juvenile justice laws, with BIC cited either as the primary or paramount consideration. Using the three-fold legal concept in GC 14, the Philippine law is ahead of the two countries in its substantive provisions as it defined BIC and restorative justice and referred to the CRC. Additionally, proceedings shall be conducted in the BIC, and children can participate and express themselves freely. The Philippines' MACR is a year beyond the minimum prescribed in GC 24. Instead of juvenile, Republic Act (R.A.) 9344 uses child in conflict with the law (Juvenile Justice and Welfare Act, 2006), which emphasizes that the offender is a child, consistent with GC 24. It provides for a presumption of minority and diversion for crimes with penalties of less than six years. However, the Philippines retrogressed when it amended R.A. 9344, allowing

the institutionalization of children below MACR. The constant and continuing threat to lower the MACR, institutionalization of children below MACR, and several cases brought to the Supreme Court clarifying the retroactive applicability and rationale of R.A. 9344 show that despite a progressive law, BIC is not fully imbibed in Philippine society.

Malaysian law surpassed the CRC by asking Courts to consider BIC for paramount consideration (Child Act, 2001). However, most of the reviewed Malaysian jurisprudence was tilted towards retributive justice. In several cases, the Court reasoned that the penalty must "adequately reflect the revulsion of the citizens for the particular crime committed. The purpose of sentencing is seen not as a punishment to the accused person, it is also seen as a public denunciation of the criminal act" (M.I.B.A. et al. v. Public Prosecutor, 2011, para. 18). Public interest becomes the overriding consideration in sentencing irrespective of the offender's age as "sympathy towards a child accused is balanced against the harm that a lenient punishment may cause to the public" (Public Prosecutor v. A.A.B.D., 2012, para. 30). Even disruption in the child's normal life, including their education, cannot prevail over public interest (Public Prosecutor v. A.A.B.D., 2012). The High Court often declared the child's confinement at Henry Gurney Schools, which are closed centers for serious offenders, to be in their best interests (Public Prosecutor v. S.A.B.M.F., 1996). In rare cases of a favorable ruling for the child, the Court cited public interest instead of BIC (H.B.M. et al. v. Public Prosecutor, 2010).

The Malaysian Child Act excludes from the jurisdiction of the Children's Court those accused of crimes that are punishable by death, co-accused with an adult, or who turned 18 before being formally charged (Child Act, 2001, s. 11), which contradicts international standards as the reckoning point should be the time when the offense was committed. Malaysia has no law on diversion, and children beyond control remain in Malaysian statute despite calls to abolish this status offense in Concluding Observations to Malaysia (UN Committee on the Rights of the Child, 2007). Its MACR is at 10 years, although those under 12 are not criminally liable if they have insufficient maturity to understand the consequences of their conduct (Penal Code, 1997, art. 82). This system of two minimum ages goes against international standards as it grants courts significant discretion on a matter that is beyond legal.

Children below 14 years old do not go to Henry Gurney Schools but to other approved schools that practice deprivation of liberty (Child Act, 2001).

Thailand provides that the treatment of the child in any case shall give primary importance (Child Protection Act, 2003, art. 22) to BIC, but the Juvenile and Family Court and Procedure Act distinguishes between a child and a juvenile, implying a juvenile is no longer a child who needs special protection. The BIC elements in Thai law as a substantive principle are diversion for crimes with penalties under five years and rehabilitation plans for those with penalties of up to 20 years. Although MACR was recently raised to 12 years, it remains below the CRC Committee's prescribed minimum. Children under 15 will not be imprisoned but may go to closed institutions.

In terms of BIC as a procedural rule, the protection offered by the three countries is somewhat similar, although Malaysia lags behind Thailand and the

Philippines in procedural safeguards. Warrantless arrests by the police are common in Malaysia (Raoul Wallenberg Institute, 2015). Although no physical restraints may be used on a child unless necessary in Thailand and the Philippines, a CICL can be handcuffed if the offense is serious in Malaysia. A CICL must undergo immediate physical and mental examination and receive necessary medical treatment upon arrest in the Philippines, but in Malaysia and Thailand, it depends on the court's opinion or request. Juvenile Justice and Welfare Act (2006) assures CICL the right to testify for themselves, which they can waive. Under the Child Act of Malaysia, the child will be asked to speak if not legally represented; however, under Thailand's Act B.E. 2553, the child must be able to express their feelings and opinions during the criminal proceeding, while also giving this option to adults (Juvenile and Family Court and Procedure Act, 2010).

Table 1

Legal Framework for CICL

	Malaysia	Philippines	Thailand
Primary legislation	– Child Act, 2001 (as amended)	– Juvenile Justice and Welfare Act of 2006 (R.A. 9344 as amended)	– Child Protection Act – Juvenile and Family Court Procedure Act, B.E. 2553, as amended.
MACR	10 years	15 years	12 years
Presumption of minority	No	Yes	No
Treatment of children below the MACR	Children below 10 years who commit acts that are criminal in nature may receive child protection interventions by the social welfare agency, if necessary, in their best interests, but not subject to arrest, investigation, detention, trial, or liability under the justice system.	CICL below 15 years, not a recidivist, and not a serious offender will be released to parent/guardian; and participate in a community-based intervention program. CICL between 12 and 15 committing a serious crime will go to a youth care facility. CICL between 12 and 15 committing not serious crime, but a recidivist will go to an intense intervention program unless BIC requires referral to a youth care facility.	Children below 12 years shall not receive penalties for committing actions that are deemed to violate the law. Children aged 12 to 15 will enjoy the same, but courts can impose measures that may include placing children in custody, rehabilitation, or foster homes. Courts can require children below 18 to get training, attend school, or undergo psychiatric treatment.
Diversion	There is no pre-trial diversion.	Available if the imposable penalty is less than 6 years imprisonment. If it exceeds 6 years, diversion may be resorted to only by the court.	Available for offenses punishable by a maximum of 5 years imprisonment provided never been sentenced to imprisonment.

Regarding BIC as an interpretative principle of law, the decisions of the Thai courts analyzed for this study are most aligned with BIC as children were released to their parents, especially if they were first-time offenders. This is confirmed by 55% of Thai children interviewed saying their sentence was in accordance with BIC compared to 40% in the Philippines and 35% in Malaysia. Upon a finding of guilt, the Philippines and Thailand provide automatic suspension of sentences. Malaysia has these provisions to a certain extent, but Malaysian law allows courts to order imprisonment at the pleasure of local leaders like *Yang di-Pertuan Agong* or *Yang di-Pertua Negeri* for an indeterminate period, which was criticized by the CRC Committee in their Concluding Observations (UN Committee on the Rights of the Child, 2007). Regarding the confidentiality of the proceedings and the child's right to privacy, all three countries legally restrict publishing any information that would divulge the child's identity. This international standard is strictly adhered to in Thailand, as evidenced by the researcher's difficulty in accessing the cases without court approval. This rule was not strictly followed by courts in the Philippines and Malaysia, as the names of the children involved were sometimes published.

This research examined factors shaping national laws, court decisions, and justice actors' biases toward CICL.

Analysis and Discussion

The interpretation of BIC is influenced by the political, socio-cultural, material, and legal contexts of a given country and society (Armstrong, 1995). What serves the child's best interests in juvenile justice is linked to society's conception of childhood and justice. The child rights theory behind the CRC codified children's rights to provision, protection, and participation, which all children, including CICL, are entitled to but is considered Western conception in SEA.

Factors Affecting Interpretation

Economic factors are usually cited for non-compliance with international standards of juvenile justice (Zvobgo et al., 2020). As middle-income countries, the three countries have limitations on the availability and quality of social service workforce,

legal aid, diversion, and alternative measures (UNICEF East Asia and the Pacific Regional Office, 2018). However, the higher-income ASEAN countries fare worse in juvenile justice, as evidenced by their lower MACR and the practice of corporal punishment, among others. Material resources have a limited impact on the application of BIC in juvenile justice in the region as their GDP growth has not translated to better protection for CICL (Estorninos, 2017).

The way in which treaties like the CRC are incorporated into national laws influences the application of BIC in juvenile justice. As dualist countries, the three states need to enable national laws to incorporate the CRC in their legal and judicial systems. Given Malaysia's reservations on several CRC articles relevant to juvenile justice, these provisions will be applicable only if they are in conformity with the Constitution, national laws, and national policies of the Government (Malaysia, 2010). Although the CRC is not incorporated directly into Philippine national law, it can be an instructive authority in national case law because its Constitution adopts the generally accepted principles of international law as part of the law of the land (Republic of the Philippines, 1987, art. II). The 2017 Thai Constitution recognizes the King's power to conclude treaties except those with wide-scale effects on the security of economy, society, trade, or investment, which require National Assembly approval (Constitution of the Kingdom of Thailand, 2014, s. 23). Aside from legal traditions and legal systems, the political context affects their application of BIC in juvenile justice.

The political climate in the three countries recently saw a surge in authoritarianism with a focus on "drug wars," which resulted in deprivation of liberty, particularly among the youth. Rodrigo Duterte's election in 2016 drastically affected juvenile justice in the Philippines. Congress tried to lower the MACR, which was widely condemned by children's rights organizations and the international community. Duterte's anti-drug campaign, estimated by human rights groups to have resulted in between 27,000 and 30,000 deaths (Gavilan, 2022), is presently under investigation by the International Criminal Court.

The Thai government waged a "drug war" for over 30 years. It has an over-incarceration rate in prisons and detention centers in the guise of drug rehabilitation centers. Thailand has extremely high percentages of drug-related crimes (45.51%) involving children

Table 2*Legal System and Tradition*

Aspect	Malaysia	Philippines	Thailand
Legal tradition	Dual legal system of English common law and Syariah law with customary law elements	Combination of civil and common law; Shariah law practiced by Moslems in the South for family matters	Primarily based on civil law with common law influences
Recognition of CRC	Requires enabling national laws to incorporate CRC in legal and judicial systems	Not directly incorporated into national law, but can be cited in case law based on the adoption of international law principles	Recognizes treaties through the King's power, with exceptions for those with significant impact, requiring National Assembly approval
Influence of BIC in Juvenile Justice	Paramount consideration in law but provisions applicable only if in conformity with the Constitution, national laws, and policies	BIC is defined in R.A. 9344. Proceedings shall be conducted in the BIC and allow the child to participate and express themselves freely	BIC cited in law and by courts as the primary consideration
Reservations to CRC	Articles 2, 7, 14, 28 paragraph 1(a) and 37	None	Article 22

(Raoul Wallenberg Institute, 2015). Thailand also faced a serious human rights crisis in 2020, with police entering schools to intimidate students involved in democracy protests, some of whom were imprisoned (Human Rights Watch, 2021).

Malaysia declared the drug problem as the nation's number one enemy since 1983 and considers it not only a social problem but also a national security threat. Malaysia's drug policies historically employed severe punitive measures like extensive arrest and detention of users and the death penalty for traffickers (Tanguay, 2011). Although Prime Minister Anwar Ibrahim is expected to reverse these practices, Malaysia has always had many political parties, none holding more than 20% of parliamentary seats, with race and religion mainly driving politics (Lee, 2021).

Even though BIC application in juvenile justice is influenced by legal and political contexts and, to a limited extent, by material resources, it is largely affected by the socio-cultural context of the three countries. The region considers the theory of childhood and justice surrounding the CRC as Western and individualistic, which is evident in the declarations of ASEAN leaders, such as the Human Rights

Declaration (2012) and Bangkok Declaration (1993). Generally, SEA values loyalty and duty to family and community, tolerance for authoritarianism, education (Samuels, 1999), relativist perspective on human rights citing economic, social, and cultural contexts, national sovereignty in human rights discussions, and emphasis on duties alongside rights (Hoang, 2009). The traditional Asian concept sees children as belonging to their parents, but the CRC is viewed as separating parents from their children (S. Chutikul, personal communication, March 3, 2019).

Thailand is a hierarchical society where children occupy the lowest position. The Thai word for child, "*dek*," signifies a hierarchical state rather than a developmental stage. In Thai culture, the parent-child relationship emphasizes reciprocity, with children in poor households striving to support and repay their families (Dixon, 2013). Filipino culture stresses parental authority and the child's obligation to obey and conform, reinforced by the Filipino virtue of "*utang na loob*" (debt of gratitude; Alampay & Jocson, 2011). Malaysian parents can legally place children who go against social norms in institutions for being "beyond control."

With this orientation, punishments imposed by elders become acceptable. Thirty-seven percent of adults interviewed in Thailand, 54% in the Philippines, and 67% in Malaysia said that to be punished is in the BIC as it teaches the child a lesson, and this often means institutionalization. Diversion, alternative measures, and open centers are inconceivable in these countries as they are seen as inadequate measures to discipline a child. Although BIC is inextricably linked to child participation, childhood is seen in this region as a never-ending relation to one's parents. Among the children interviewed, 58% percent of the Thai children said they were allowed to speak during the trial, compared to 27% in Malaysia and 35% in the Philippines. Even though the adults who answered the questionnaire scored high on knowledge of international standards, including the right to child participation, many said that children need not be consulted as they are incapable of determining their best interests.

I am guilty of not asking the child, but I determine what is the BIC, regardless if such decision runs counter to the desire and pleasure of said child (Judge X, Philippines, personal communication, December 15, 2019).

Seldom a child will be asked his or her best interests. We assume that our choice will be in the child's best interests and in most cases I deal with, the children are unable to express what is in their best interests (Defense Counsel Y, Thailand, personal communication, January 5, 2020).

We should not ask the children because they themselves do not know and do not understand what BIC is (Prosecutor Z, Malaysia, personal communication, September 20, 2019).

Link Between Culture and Religion

In SEA, the mutual interaction between culture and religion is strong. The prevalent religions in the three countries (namely Islam, Buddhism, and Christianity) strongly influence their conception of childhood and justice. In Islam, parents and guardians (*wali*) must ensure that children are given their rights and education to deter sinful deeds. A good son/daughter brings reward from God to the parents, and the children's

deeds and conduct have implications for the parents in this world and in the Hereafter (Mustafa, 2015). The concept of *bunghun*, or the repayment of moral debt and gratitude of children to their parents, is critical in understanding BIC among Thais (Baker, 2007). The Christian Bible in Psalm 127:3, which states that "children are gifts from the Lord," is very much ingrained in the Filipino psyche.

However, the Bible also says in Proverbs 13:24: "Whoever spares the rod, spoils the child, but whoever loves will apply discipline." The Bible contains verses that portray God as vindictive and retributive in both Old and New Testaments. This supports the common belief among Filipino adults that punitive measures are justified for children's infractions (Sanapo, 2012). Islam is usually associated with "an eye for an eye" kind of retributive justice because of the provision for death penalties for *hudūd* crimes like fornication and adultery; and *qisās* calls for a punishment mirroring the offense committed against the victim (Muhammad & Salam, 2018). These are heinous crimes for which the full protection of the Child Act of Malaysia is not applicable even for children (Madkoar, n.d.).

Islam and Christianity incorporate concepts of healing, restoration, and reconciliation. Although the penalty for *qisās* is the equivalent to bodily harm, the payment of blood money (*diyāh*) may recompense the victim. Additional options for victims are compensation, conciliation, or pardon. Aside from the victim's recourse, the offender's path is fundamentally established in the Islamic justice system. These are self-curing, agreement among the parties, and third-party intervention or mediation, judgment, and community actions (Qafisheh, 2012), which are examples of restorative justice.

Christianity emphasizes restorative justice through teachings on forgiveness and mercy, and rituals are recognized in both (Sarre & Young, 2011). Although Buddhism has some retributive character as it sees punishment as a consequence of karma, overall, it aligns more towards restorative justice. Buddhists believe that both offenders and victims have the "same Buddha-nature, which is not to be confused with the usual sense of self, an ever-changing collection of wholesome and unwholesome mental tendencies" (Loy, 2000, p. 149). Humans are influenced by greed or malice, but everyone may conquer them. The only suitable goal of punishment is to educate and reform (Loy, 2000). The Buddhist emphasis on education,

reformation, and addressing the social and economic causes of crime is evident in the Thai courts' decisions.

Examining childhood through a religious lens identifies common threads. Although they all value children, some religious precepts have different views on childhood, corporal punishment, and parental rights. However, they are also replete with restorative justice principles. The Southeast Asian value of prioritizing family and community over individual could play a significant role in community-based diversion, prevention of juvenile delinquency, and restorative justice.

Children's Views on BIC

Children must be asked their BIC not only because international standards say so but also because the region's political and socio-cultural contexts do not value children's voices, especially those who committed a crime. Not listening to children contributed to undiscovered violations of child rights, as experienced by some of those interviewed, like police abuse, lack of legal representation, prolonged detention, and deprivation of liberty as a first resort. Listening to children concretizes abstract international legal frameworks by starting where the children are:

They should increase the penalty for abusive police and increase the salary of good police and improve their knowledge about us. (Philippines, Male, 16 years old)

They should attend seminars and do volunteer work in foundations catering to children who commit crimes. (Thailand, Male, 17 years old)

I hope the judge will not always get mad and will not make us feel he is the most important person in court. We should be at the same level when seated so that everyone is treated equally. (Malaysia, Female, 14 years old)

Their accounts and experiences showed the need and rationale for international standards on juvenile justice and why these rights are relevant regardless of the political, material, legal, and socio-cultural contexts of the societies where children live.

Contrary to adult perception in the region that international standards and restorative justice condone bad behavior and dismiss accountability, the

interviewed children acknowledged their mistakes but are asking for a second chance and support in choosing the right path. Another adult misconception is that most juvenile crimes are serious in nature and increasing without being evidence-based. Property-related offenses are the most common crimes committed by children, whereas serious crimes are the exception (Raoul Wallenberg Institute, 2015). However, the media often sensationalize heinous crimes committed by children but do not report on officials who fail to apply BIC properly.

Although several CICLs come from dysfunctional families, the children interviewed still prefer to be with their families. This contradicts the numerous exceptions found in international standards where the parents' presence is often exempted on the grounds of BIC. Many justice actors interviewed think that being with their families is not in the CICL's best interests and that being in institutions is better for them. Even a religious respondent said, "Young people should have their inner journey or to go far from their own place to a place of discerning, to reconnect with oneself and go into the deep and often this time and place is when they are away from their family" (S. Renoux, personal communication, December 15, 2019).

Several of the children interviewed cited the presence of drugs in their communities and schools, which led them to succumb to negative peer pressure, join gangs, miss schools, and commit offenses. Most of the serious crimes by children in the region occur under the influence of drugs. However, the drug problem is addressed more through a security and crime perspective, exemplified by "drug wars," and not from a welfare and health perspective. These approaches contradict CRC GC 15 (2013), which calls on States to "adopt a rights-based approach to substance use and recommends that, where appropriate, harm reduction strategies should be employed" (UN Committee on the Rights of the Child, 2013, para. 39).

Conclusion

The interpretation of BIC in juvenile justice in Malaysia, the Philippines, and Thailand is influenced by various factors found in the region's socio-cultural and political economy. Material resources play a limited role as higher-income countries in SEA do not necessarily fare better in juvenile justice. Although

all of them ratified the CRC with BIC mentioned in their laws, they are not fully compliant with international standards. Political climates marked by rising authoritarianism and stringent drug policies had profound implications for juvenile justice, leading to deprivation of liberty and even death for some children.

The socio-cultural context of these nations significantly shapes their interpretation of childhood, BIC, child participation, and justice. Traditional beliefs regarding hierarchy, duty, and family loyalty supersede individual child rights, impacting their application of BIC. Major religions in the region further shape perceptions of childhood and justice, with varying degrees of emphasis on punitive versus restorative approaches. Adults in the region see offending children as bringing shame to the family and community and must be disciplined through institutionalization. While in these societies, offending children are “adultified” and are expected to face the consequences of their actions, they are seen as incapable of expressing their views, particularly their best interests.

Without intending to diminish the importance of international standards, different conceptions of childhood and BIC must be recognized, and culture should not be seen as an obstacle to child rights but as an indispensable component in applying BIC in juvenile justice. Cultural frameworks offer a more nuanced understanding of child development as opposed to fixed biological benchmarks for measuring childhood (Capaldi, 2014). Restorative justice is also ingrained in SEA culture and prevalent religions.

Listening to “the other” (Harris-Short, 2001; other disciplines, cultures, non-legal actors and children themselves) does not diminish the role of universal standards. Culture is dynamic and can be influenced by globalization and social media, among others, paving the way for a common minimum set of human rights standards (Fivat, 2008). A cross-cultural dialogue that stimulates an honest search for multiple meanings of childhood and justice could find common values on BIC in juvenile justice that is valid across cultures. Principal actors in the juvenile justice system could start listening to others more by appreciating the significance of cultural differences in juvenile justice administration and listening to children throughout the justice process. Social and behavior change strategies are needed to change the long-held cultural beliefs of adults in SEA. The CRC Committee and ASEAN

regional human rights mechanisms can help facilitate cross-cultural dialogues.

A multidisciplinary approach is critical not only when a child goes through the justice system but also in developing juvenile delinquency prevention, diversion programs and other alternative measures, and specialized interventions for serious offenses. Given limited studies from the Global South, there is a need for updated and robust quantitative data on juvenile justice, listening to more children and justice actors from the region, linking culture and adolescent development, and evaluating culturally sensitive good practices.

To conclude, BIC must not be used indiscriminately without understanding the factors that influence its interpretation. Although international standards are important to protect the best interests of children in the juvenile justice system, a top-down, positivist-only approach will continue to face resistance from SEA countries. As BIC is not only a legal concept, it is necessary to go beyond the legal positivist approach towards a constructivist, multi-disciplinary, and cross-cultural approach that stimulates an honest search for shared values on BIC in juvenile justice that are valid across cultures. Only by “listening to others” can the principles behind these international standards be owned by these States Parties in SEA.

References

- Alampay, L. P., & Jocson, R. M. (2011). Attributions and attitudes of mothers and fathers in the Philippines. *Parenting: Science and Practice*, 11(2–3), 163–176. <https://doi.org/10.1080/15295192.2011.585564>
- Alderson, P. (2008). Children as researchers: Participation rights and research methods. In P. Christensen & A. James (Eds.), *Research with children: Perspectives and practices* (pp. 276–290). Routledge.
- Alston, P. (Ed.). (1994). *The best interests of the child: Reconciling culture and human rights*. Clarendon Press. https://archive.org/details/bestinterestsofc0000unse_p5c0
- Armstrong, A. (1995). A child belongs to everyone: Law, family and the construction of the best interests of the child in Zimbabwe. UNICEF International Child Development Centre. <https://www.unicef-irc.org/publications/110-a-child-belongs-to-everyone-law-family-and-the-construction-of-the-best-interests.html>
- Baker, S. (2007). Child labor and child prostitution in Thailand: Changing realities. In E. Cohen (Ed.), *Studies*

- on contemporary Thailand Issue No. 18 (pp. 23-25). White Lotus Press, Bangkok.
- Beshir, F. H. (2012, September 25). Article 3 of the Convention of the Rights of the Child: The best interest of the child [Unpublished paper for Diploma of Public Policies and Child Rights]. Children's Rights European Academic Network. Retrieved from <https://dppcr.files.wordpress.com/2012/09/best-interest-of-the-child-fatma-beshir-cairo1.pdf>
- Cantwell, N. (2016). The concept of the best interests of the child: What does it add to children's human rights? In M. Sormunen (Ed.), *The best interests of the child- a dialogue between theory and practice* (pp. 18–26). Council of Europe Publishing. <https://rm.coe.int/1680657e56>
- Capaldi, M. (2014). The child's journey in search of rights: Determining and addressing points of vulnerability in independent child migration in Thailand. *Terre des Hommes Netherlands*. https://resourcecentre.savethechildren.net/pdf/icm-thailand_summary-report_english_20.3.14.pdf/
- Child Act 2001, Act 611 (2001). <https://tcclaw.com.my/wp-content/uploads/2020/12/Child-Act-2001.pdf>
- Child Protection Act of 2003, Thailand (2003). <https://www.refworld.org/pdfid/46b2f91f2.pdf>
- Constitution of the Kingdom of Thailand, B.E. 2557, sec. 23 (2014 as amended). <https://www.refworld.org/docid/46b326e42.html>
- Constitution of the Republic of the Philippines, Art. 2 (1987). <https://www.officialgazette.gov.ph/constitutions/1987-constitution/>
- Dixon, P. (2013). Child rights situation analysis guidelines. Save the Children. https://resourcecentre.savethechildren.net/pdf/crsa_guidelines2.pdf/
- Estorninos, K. (2017). A legal analysis of selected ASEAN declarations and conventions from a child rights perspective [Master of Laws thesis, Leiden University]. <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jr-estorninos-thesis-2017.pdf>
- Fivat, N. (2008). The International Labor Organization's policy on child labor: A critical review. Free University Berlin. https://creannetwork.org/application/files/9415/0702/7255/202_ilo_policy_on_child_labor_a_critical_revue.pdf
- Gavilan, J. (2022, July 4). Duterte's violent war on drugs, as recorded by rights groups., int'l bodies. *Rappler*. <https://www.rappler.com/nation/list-reports-documentation-rodrigo-duterte-drug-war-killings>
- H.B.M., K.I.B.M., K.A.B.S. v. Public Prosecutor, High Court of Sabah and Sarawak at Tawau. MY SSHC 419 (2010). <http://www.commonlii.org/cgi-bin/disp.pl/my/cases/MYSSHC/2010/419.html?stem=0&synonyms=0&query=child%20offender>
- Harris-Short, S. (2001). Listening to 'the other'? The Convention on the Rights of the Child. *Melbourne Journal of International Law*, 2(2), 304–350. https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1680217/Harris-Short.pdf
- Hoang, V. N. (2009). The 'Asian Values' perspective of human rights: A challenge to universal human rights. <http://dx.doi.org/10.2139/ssrn.1405436>.
- Human Rights Watch. (2021). Thailand. In *World Report 2021: Events of 2020* (pp. 654–661). https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf
- Johnny, L. (2006). Reconceptualizing childhood: Children's rights and youth participation in schools. *International Education Journal*, 7(1), 17–25. <https://files.eric.ed.gov/fulltext/EJ847201.pdf>
- Juvenile and Family Court and Procedure Act, B.E. 2553 (2010, as amended). https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=89334&cs=1FXlz1pVQy1GRHrTYc3j7-aFjMdWPTJkZog5mVDhB4RTroZ6jv0lsNS8X_7Zra0RLiHcAA0rFxl4_YPEjCrGw
- Juvenile Justice and Welfare Act of 2006, Republic Act No. 9344 (2006). <https://www.officialgazette.gov.ph/2006/04/28/republic-act-no-9344-s-2006/>
- Khazova, O. (2016). Interpreting and applying the best interests of the child: The main challenges. In M. Sormunen (Ed.), *The best interests of the child- a dialogue between theory and practice* (pp. 27–30). Council of Europe Publishing. <https://publications.hse.ru/en/chapters/303032961>
- Knutsson, K. E. (1997). *Children: Noble causes or worthy citizens?* Routledge. <https://www.routledge.com/Children-Noble-Causes-or-Worthy-Citizens/Knutsson/p/book/9781857424201>
- Lansdown, G. (2005). *Innocenti insight: The evolving capacities of the child*. UNICEF & Save the Children. <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>
- Lee, Y. N. (2021, August 20). Malaysia gets a new prime minister — the country's third in 3 years. *CNBC*. <https://www.cnn.com/2021/08/20/malaysia-king-appoints-ismail-sabri-yaakob-as-new-prime-minister.html>
- Liefaard, T. (2008). *Deprivation of liberty of children in light of international human rights law and standards* (1st ed.). Intersentia. <https://searchlibrary.ohchr.org/record/10161/>
- Lister, R. (2007). Why citizenship: Where, when and how children? *Theoretical Inquiries in Law*, 8(2), 693–718. <https://doi.org/10.2202/1565-3404.1165>
- Loy, D. R. (2000). How to reform a serial killer: The Buddhist approach to restorative justice. *Journal of Buddhist Ethics*, 7, 145–168. <https://web.lemoyne.edu/~glennon/loy001.pdf>
- Madkoar, M. (n.d.). *Human rights from an Islamic worldview: An outline of Hudud, Ta'zir & Qisas*. Islam

- Awareness. https://www.islamawareness.net/Shariah/sh_article002.html
- Malaysia. (2010). Reservations and declarations. International Committee of the Red Cross. <https://ihl-databases.icrc.org/en/ihl-treaties/crc-1989/state-parties/my>
- Moore, S., Wrights, E., & Spohn, R. (2017). Status offenders and the juvenile justice system. University of Nebraska at Omaha. <https://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1090&context=ncjrreports>
- M.I.B.A. et al. v. Public Prosecutor, Q-05-123-2009, 2011, Court of Appeal of Malaysia. (2011). <https://www.yumpu.com/en/document/view/17728622/court-of-appeal-criminal-appeal-no-q-05-123-2009-between>
- Muhammad, R. W., & Salam, K. A. (2018). The concept of retributive and restorative justice in Islamic criminal law with reference to the Malaysian Syariah court. *Journal of Law and Judicial System*, 1(4), 8–16. <https://sryahwapublications.com/article/abstract/2637-5893.0104002>
- Mustafa, C. (2015). Restorative justice and Islam. University of Stirling. <https://cecepmustafa.wordpress.stir.ac.uk/files/2016/06/Restorative-Justice-and-Islam.pdf>
- Neale, B. (2002). Dialogues with children: Children, divorce and citizenship. *Childhood*, 9(4), 455–475. <http://dx.doi.org/10.1177/0907568202009004006>
- Office of the High Commissioner on Human Rights. (2007). Legislative history of the convention of the rights of the child. <https://digitallibrary.un.org/record/602462?ln=en>
- Palmer, C., & Bolderston, A. (2006). A brief introduction to qualitative research. *Canadian Journal of Medical Radiation Technology*, 37(1), 16–19. [https://doi.org/10.1016/S0820-5930\(09\)60112-2](https://doi.org/10.1016/S0820-5930(09)60112-2)
- Penal Code, Act No. 574 (1997, as amended). Laws of Malaysia. https://lom.agc.gov.my/ilims/upload/portal/akta/LOM/EN/Penal%20Code%20ACT%20574%20-%20TP%20LULUS%2021_2_2018.pdf
- Public Prosecutor v. A.A.B.D., Criminal Appeal No. K41-97-2010-I, 2012). 2 A.M.R. (2012). <https://www.coursehero.com/file/34549533/Public-Prosecutor-v-Azmadi-Aznan-bin-Duminpdf/>
- Public Prosecutor v. S.A.B.M.F., Malaysia High Court (Kota Bharu) 4 MLJ 309 (1996).
- Qafisheh, M. M. (2012). Restorative justice in the Islamic penal law: A contribution to the global system. *International Journal of Criminal Justice Sciences*, 7(1), 487–507.
- Raoul Wallenberg Institute. (2015). A measure of last resort? The current status of juvenile justice in ASEAN member states. <https://rwi.lu.se/publications/measure-last-resort-current-status-juvenile-justice-asean-member-states/>
- Samuels, H. (1999). Hongkong on women, Asian values, and the law. *Human Rights Quarterly*, 21(3), 707–734. <https://www.jstor.org/stable/762671>
- Sanapo, M. (2012). What Filipino mothers say: Disciplinary practices of Filipino mothers in rural Philippines. *Ugong*, 5(1), 2–15.
- Sarre, R., & Young, J. (2011). Christian approaches to the restorative justice movement: Observations on scripture and praxis. *Contemporary Justice Review*, 14(3), 345–355. <https://doi.org/10.1080/10282580.2011.589670>
- Smith, A. B. (2006). The state of research on the effects of physical punishment. *Social Policy Journal of New Zealand*, (27), 114–127. <https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj27/27-pages114-127.pdf>
- Tanguay, P. (2011). Policy responses to drug issues (IDPC Briefing Paper). International Drug Policy Consortium. <http://dx.doi.org/10.2139/ssrn.1908799>
- United Nations. (2019). The United Nations global study on children deprived of liberty. United Nations. <https://www.ohchr.org/en/treaty-bodies/crc/united-nations-global-study-children-deprived-liberty>
- UN Convention on the Rights of the Child. (1989). <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>
- UN Committee on the Rights of the Child. (2019). General comment no. 24 (2019) on children's rights in the child justice system. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child>
- UN Committee on the Rights of the Child. (2013). General comment no. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf
- UN Committee on the Rights of the Child. (2007). Concluding Observations: Malaysia, CRC/C/MYS/CO/1.
- Underwood, L., & Washington, A. (2016). Mental illness and juvenile offenders. *International Journal of Environmental Research of Public Health*, 13(2), 228–242. <https://doi.org/10.3390/ijerph13020228>
- UNICEF. (2020). Access to justice for children in the era of COVID-19: Notes from the field. <https://www.unicef.org/documents/access-justice-children-era-covid-19-notes-field>
- UNICEF East Asia and the Pacific Regional Office. (2018). Diversion not detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific. <https://www.unicef.org/eap/media/2401/file/Diversion%20not%20Detention.pdf>

- Van Bueren, G. (2008). Pushing and pulling in different directions: The best interests of the child and the margin of appreciation of states. In *Child Rights in Europe: Convergence and divergence in judicial protection* (pp. 30-37). Council of Europe Publishing. <https://book.coe.int/en/europeans-and-their-rights/3988-europeans-and-their-rights-child-rights-in-europe.html>
- Zvobgo, K., Sandholtz, W., & Mulesky, S. (2020). Reserving rights: Explaining human rights treaty reservations. *International Studies Quarterly*, 64(4), 785–2797. <https://doi.org/10.1093/isq/sqaa070>