

HARMONISATION OF THE LAW RELATING TO CRIMINAL ACCOUNTABILITY OF YOUNG OFFENDERS*

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ABSTRACT

Modernisation and changes in values and way of life have greatly affected the minds of the youth. Hence, the number of crimes they commit has increased tremendously. The pertinent issue would be whether or not these young offenders can be criminally liable for their actions. To prove the liability of a criminal offender, the law requires that the offender must have reached the age of criminal responsibility, otherwise, he may be excused from any criminal liability. The principle is known as *doli incapax*, an irrebuttable presumption that a child below a certain specified age is presumed to be incapable of committing a crime. This is not only to safeguard the interest of the child but also to ensure that only those who possess a guilty mind (*mens rea*) shall be responsible for the crimes committed. This principle can be found both in the civil and *Shari'ah* legal frameworks. This paper adopts a doctrinal study of existing primary and secondary materials relating to criminal liabilities of young offenders from both civil and Islamic laws and ventures into the possibilities of the two laws being harmonised. Statutory provisions, case law and other legal literature pertaining to the topic are examined. Comparative legal research methodology is also

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adopted in this research. Findings show that there are great similarities between the two laws as far as criminal accountability of young offenders are concern – a) criminal liability depends ability to understand the nature and consequence of the act b) young offenders below certain age are excused from criminal liability c) young offenders who are found committing crimes cannot be treated as adult offenders d) if a young offender is found responsible for a crime, the court in issuing judgment must always put his best-interest as a priority (e) it is possible to harmonise the two laws since both share great similarities.

Keywords: Harmonisation, Criminal Liability of Young Offenders, *Doli Incapax*, Shari'ah Law, Civil Law.

HARMONISASI UNDANG-UNDANG YANG BERKAITAN DENGAN TANGGUNG JAWAB JENAYAH PESALAH MUDA

ABSTRAK

Pemodenan dan perubahan nilai serta cara hidup telah mempengaruhi minda para remaja. Justeru, jumlah jenayah yang dilakukan oleh golongan muda telah meningkat dengan ketara. Isu yang timbul di sini-sama ada pesalah muda ini boleh dikenakan tanggungjawab jenayah atas perbuatan mereka. Untuk membuktikan liabiliti pesalah jenayah, undang-undang memperuntukkan bahawa pesalah mestilah mencapai umur tanggungjawab jenayah. Jika pesalah di bawah umur tanggungjawab jenayah, dia boleh dikecualikan daripada sebarang liabiliti jenayah. Prinsip ini dikenali sebagai *doli incapax*, anggapan yang tidak dapat disangkal bahawa kanak-kanak di bawah umur tertentu dianggap tidak mampu melakukan jenayah. Prinsip ini bukan sahaja untuk menjaga kepentingan kanak-kanak tetapi juga untuk memastikan bahawa hanya mereka yang mempunyai niat jahat (*mens rea*) akan bertanggungjawab ke atas jenayah yang dilakukan. Prinsip ini boleh dilihat dalam rangka kerja perundangan sivil dan *Shari'ah*. Kertas kerja ini merupakan kajian doktrin yang menyelidik sumber primer dan sekunder sedia ada yang berkaitan dengan liabiliti jenayah pesalah muda dari kedua-dua undang-undang Malaysia dan Islam serta meneroka kemungkinan kedua-dua undang-undang itu boleh diselaraskan. Peruntukan undang-undang, kes-kes dan literatur undang-undang lain yang berkaitan dengan topik ini dianalisa. Metodologi kajian undang-undang perbandingan juga diguna pakai dalam penyelidikan ini. Hasil kajian menunjukkan bahawa terdapat persamaan yang jelas antara kedua-dua undang-undang berkaitan liabiliti jenayah pesalah muda – a) liabiliti jenayah bergantung kepada keupayaan untuk memahami sifat

dan akibat perbuatan itu b) pesalah muda di bawah umur tertentu dikecualikan daripada liabiliti jenayah c) pesalah muda yang didapati melakukan jenayah tidak boleh dianggap sebagai pesalah dewasa d) jika pesalah muda didapati bertanggungjawab terhadap sesuatu jenayah, mahkamah dalam mengeluarkan penghakiman hendaklah sentiasa mengutamakan kepentingannya e) kedua-dua rangka perundangan tersebut boleh diharmonikan kerana mempunyai banyak persamaan.

Kata Kunci: Harmonisasi, Tanggungjawab Jenayah Pesalah Muda, *Doli Incapax*, Undang-Undang *Shari'ah*, Undang-Undang Sivill.

INTRODUCTION

The maxim *actus non facit reum nisi mens sit rea* requires an accused person to possess both the *actus reus* (guilty act) and *mens rea* (guilty mind) before he can be criminally responsible for a crime. The primary mechanism for designating blame or culpability is through the fault element.¹ However, section 6 of the Malaysian Penal Code clearly provides that all offences shall be subject to the general defenses provided in Chapter IV of the said Code. In other words, the general defenses in Chapter IV can be used to rebut the elements of *mens rea* of an accused. If an accused successfully proves to the court that at the time of the commission of the crime, the main reason he committed the offences is because of any one of the defenses in Chapter IV, then he shall be exempted from any liability. Among the defenses available in Chapter IV is the defense of infancy under sections 82 and 83.² The exception of children below the age of ten is based on the principle of *doli incapax*. This maxim provides an irrebuttable presumption that a child below a certain age is irrebuttably presumed to be incapable of committing a crime. Cases such as *Ba Ba Sein*³, *Wali Muhammad*⁴ and *Marsh vs. Loader*⁵ are examples to illustrate that children below a certain age are totally protected by the law against any criminal

¹Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*. 3rd ed. (Singapore: LexisNexis, 2018), 45.

²Section 82 provides for the liability of children under the age of 10 and section 83 provides for liability of those who are above 10 but below 12.

³*King v Ba Ba Sein* (1938) Rangoon High Court, p. 400.

⁴*E v. Wali Mohamed* (1926) AIR 677

⁵*Marsh v. Loader* 14 CNBS 535

liability. Before going any further, it is important for us to first understand who a child is?⁶ The understanding of who a child is will help us to understand the criminal liability of children.

METHODOLOGY

This paper adopts doctrinal research by analysing legal provisions and cases related to criminal liabilities of young offenders from the civil law and Islamic law perspectives and ventures into possibilities of the two laws being harmonised. The research is mainly library-based research. Data is obtained through the collection and compilation of written sources. Statutory provisions, case law and other legal literature pertaining to the topic are examined. The Qur'an and Sunnah (in light of the legal exegesis and interpretation of the two sources) are analysed to derive the basic principles governing the issue of criminal liabilities of young offenders. A thorough examination of *fiqh* literature of the four Sunni scholars and their disciples on the subject matter is carried out and the principle of “*tarjih*” is used to determine the strongest and practicable opinion. Similarly, the secondary and tertiary sources are examined. Contemporary books and journals are also analysed. Apart from literature, data are also collected from unpublished materials such as seminar papers, theses, etc. Comparative legal research methodology is also adopted in this research.

DEFINITION OF A CHILD UNDER INTERNATIONAL LEGAL FRAMEWORK

Locke and Bentham, two famous jurists regarded children as those who are incapable of calculating actions, lack a certain amount of reason and understanding, and can neither be free as adults or as their equals.⁷ Hence, it is important to examine the definition of a child or minor or infant⁸ under the international framework to determine whether or not

⁶The term ‘child’ is sometimes interchangeably referred to as ‘minor’ or ‘infant’.

⁷Jeremy Bentham, *An Introduction to the Principles of Morals and Legislations* (Kitchener: Batoche Books, 1781), 74-80.

⁸The terms ‘child’, ‘infant’ and ‘minor’ will interchangeably be used throughout this article.

the law in Malaysia is consistent with the international legal framework. The term 'child' is defined under many international conventions; however, the most important ones as far as criminal accountability is concerned are the following definitions:

a) UN Convention on the Rights of the Child (UNCRC)

The UN Convention on the Rights of the Child (UNCRC) is an important, legally binding agreement signed by 196 countries (as of 12 July 2022) which outlines the fundamental rights of every child, regardless of their race, religion or abilities. The Convention contains the idea that children are not objects who belong to their parents and for whom decisions are made, or adults in training. Childhood is the time for a child to grow, learn, play, develop and flourish with dignity. The Convention is based on four main principles; non-discrimination, right to life, survival and development, doing what is right for the children and meaningfully engaging and respecting children's views. This Convention had a significant impact on the children, as many governments have made efforts to better safeguard the lives and the interests of young children.

Article 1 of the convention defines children as those who are below the age of 18. This age limit is actually applicable in most countries. Age is usually determined based on the date of birth. In Malaysia, the birth certificate is the *ipso facto* proof of the age of a person. Article 3 mentions that the best interest of the child must be a top priority in all decisions and actions that affect the children. This is consistent with the objective of the Convention itself that is to provide safeguards for the physical, psychological and emotional interests of every child, including ensuring the welfare and rights of a child. As far as juvenile justice is concerned, Article 40 provides that a child who is accused or found guilty of breaking the law must be treated with dignity and respect. It should be borne in mind that the concept of criminal justice is to ensure the rights of an accused person be he a minor or an adult.⁹ They have the right to legal assistance and a fair trial that takes account of their age. The Article also mentions that it is the government's responsibility to set a minimum age for children to be tried in a criminal court and the government must manage a justice

⁹Peter Joyce & Wendy Laverick, *Criminal Justice: An Introduction*, 4th ed. (London: Routledge, 2022), 435-474.

system that enables children who have been in conflict with the law to reintegrate into society.

b) Standard Minimum Rules for the Administration of Juvenile Justice [The Beijing Rules] (UN) 1985¹⁰

The Beijing Rules provide the minimum standard of rules for juvenile justice. The objectives of the Rules are, among others, to ensure that the interests of young offenders within the criminal justice system are well taken care of by the state members. The Rules are also to reduce the interference by law, and fair and humane treatment of a teenager in conflict with the law; the principle of proportionality (limitation of punitive sanctions) and the individualisation of the responsibility of minors etc.¹¹

Rule 2.2 defines a juvenile as a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult. In fact, the Rules emphasise that there should not be any discrimination between young offenders who have committed minor or major offences. The fact remains, regardless of the type of offences committed by a young offender, a child shall be treated as a child.¹² It is worth noting that the age limit of a child may differ from one country to another. Thus, the age of juvenile offenders may range from seven to eighteen years of age, depending on the law of each state member.¹³

Both the UNCRC and the Beijing Rules provide clear guidelines as to who are children and what are the rights of children. Hence, member states should be using the guidelines for their legal framework and when introducing any policies regarding the welfare and wellbeing

¹⁰From here onwards will be known as the Rules.

¹¹Olga Shirokova-Murarash, "Improvement of The Juvenile Justice System Under the Minimum UN Standard Rules (Beijing Rules)," in *International Relations*, 5 (2020), 118.

¹²Ursula, Kilkelly & Stefaan, Pleysier, *Rights of the Child in the Child Justice System, Youth Justice*, 23(2) (2023), 135-139. See also Nessa, Lynch & Ton, Liefwaard, "What is left in the 'too hard basket'? Developments and challenges for the rights of children in conflict with the law," in *The International Journal of Children's Rights* 28(1) (2020), 89–110.

¹³The Minimum UN Standard Rules for the Administration of Juvenile Justice (Beijing Rules).

of children. The difference in the age limit of children between one country to another is not so great. Regardless of the age limits, both UNCHR and the Beijing Rules recognise the importance of ensuring the welfare and interests of children even when they become offenders.

LEGAL FRAMEWORK OF CRIMINAL ACCOUNTABILITY OF YOUNG OFFENDERS IN MALAYSIA

Malaysia, a country that was once under the colonisation of the British, inherited the English laws. Consequently, it is of no surprise that quite a substantial number of statutes that are implemented in Malaysia found their origin in English law. There are great similarities between the law in England and the law in Malaysia, particularly statutes drafted and passed by the English government when the Malay States were colonised. Statutes passed in the olden days, such as the Penal Code of Malaysia adopted the Indian Penal Code which was drafted by the first Law Commission of India under the chairmanship of Lord Thomas Babington Macaulay. In fact, the Penal Code of Malaysia is *pari materia* with the Penal Code of India.

Definition of Children in Malaysia

There are a few definitions of who is a ‘child’ under Malaysian law. The most important definition as far as criminal accountability of children is concerned, would be the definition of a child under the Child Act 2001 (Act 611). Section 2 of Act 611 defines a child as (a) a person under the age of eighteen years and (b) 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 [Act 574]. According to section 82 of the Penal Code, nothing is an offence if it is done by a child below the age of ten. The court, in considering the liability of the child, will consider his age at the time of the commission of the crime. The section provides an irrebuttable presumption to young offenders based on the principle of *doli incapax*. The Age of Majority Act 1971 (Act 21) in the amendment [A1] of section 3 of the Age of Majority Act 1971 provides that the age of majority in Malaysia is above eighteen years. It means, one who has not celebrated their eighteenth birthday shall be considered a minor. These definitions are

consistent with the definitions of children as provided by Article 1 of UNCHR and Rule number four of the Beijing Rules.¹⁴

Age of Criminal Accountability in Malaysia

The age limit for criminal accountability is provided in the main statute dealing with criminal law, that is the Penal Code [Act 574]

a) Section 82 of the Penal Code – absolute protection

The age of criminal accountability in Malaysia is provided under section 82 of the Penal Code [Act 574]. The section states – nothing is an offence if it is done by a child under the age of ten years. This provision is in line with the maxim of *doli incapax* as found under English law. The age of a person is based on his or her date of birth, and that can easily be proven by the birth certificate. This is an irrebuttable presumption; meaning that it provides total exemption from any criminal liability as long as the crime is committed by a child who is below the age of ten. The behaviour, attributes or mischief of the child is not a consideration under section 82. It provides absolute protection to the child against any criminal liability. At this age, a child is considered innocent, immature and decent. Therefore, he shall not be made criminally liable.¹⁵ Even though there have been some suggestions that the age limit should be reviewed, considering that today's children are much wiser compared to the past, the age limit remains till now.

b) Section 83 of the Penal Code – conditional protection

On the other hand, by virtue of section 83, a child above ten but below twelve may be excused from any criminal liability if at the time of the commission of the crime he has not attained sufficient maturity of understanding to understand the nature and quality of his act. The burden of proof, as provided under section 105 of the Evidence Act, is

¹⁴See Nasimah Hussin & Hanifah Haydar Ali Tajuddin. “An Islamic Perspective on Preventing Sexual Abuse against Children”, in *IIUM Law Journal* 29(S1) (2021), 153-176.

¹⁵Anita Abdul Rahim & others, “School Students Committing Crime: The Position Under the Malaysian Criminal Law.” *Full Paper Proceeding ITMAR*, Vol.1, (2014), 542-549.

on the child offender. He needs to prove that at the time of the commission of the crime, he had not attained sufficient maturity of understanding. The maxim applicable for section 83 is *doli capax* - that is a child is assumed to be capable of committing an offence unless he can prove to the court that at the time of commission of the crime, he has yet to attain sufficient maturity of understanding.

The issue of whether or not the child has attained sufficient maturity of understanding is a question of fact. The court in deciding as such usually will take into consideration factors such as the report regarding the child offender prepared by the welfare officer, the act of the child before and after the commission of the crime, his motive (if any), his demeanor during the trial and also his criminal record (if any).¹⁶ If a child is capable of having a motive, the court has a basis to infer that he has attained sufficient maturity of understanding as *malitia supplet aetatum*.¹⁷

In the case of *PP v. Lim Ah Leng*,¹⁸ the accused has been convicted twice before he was convicted and punished with a two-year imprisonment for another offence at the age of 24 years old. The Magistrate referred the case to the Higher Court to confirm the two-year imprisonment sentence. However, Ong Hock Sim J. reduced the sentence to one year imprisonment, stating that the court will not consider his first conviction of theft when he was only 10 years old. The judge was of the opinion that there was a possibility that he had not attained sufficient maturity of understanding when he committed the offence.

¹⁶Molly Cheang, *Criminal Law of Malaysia and Singapore: Principles of Liability*, (Kuala Lumpur: Professional (Law) Books Publishers, 1990), 86. See also Yeo, Morgan & Cheong, 864 – 866. See also Ulla Mahapatra [1950] A.I.R (Cut) 293, *C (A minor) v DPP [1996] AC 1*.

¹⁷The legal maxim "malitia supplet aetatem" translates to "malice supplies age." It means that the presence of malice (a malicious intent or bad faith) can make a person responsible for a wrongful act, even if they are underage.

¹⁸[1967] 1MLJ 284, See also *Muhamad Zakwan Bin Zainuddin v Public Prosecutor anor appeal* [2019] MLJU 1462.

c) Section 113 of the Evidence Act – absolute protection

Section 113 provides an irrebuttable presumption pertaining to liability of boys below the age of thirteen in rape cases. Since rape in Malaysia is a gender specific offence, that is only a man is capable of committing rape, section 113 uses the term ‘boy’. Under this section, in addition to the accused in rape cases as provided by section 375 of the Penal Code must be a man, the age of the accused must be above the age of 13. Since this section provides an irrebuttable presumption, any boy under thirteen years of age will be absolutely protected by this section. The irrebuttable presumption of exempting boys below certain age from criminal liability of rape has been criticised as it does not reflect the actual current situation where young boys are having sexual experiences at very young age. This presumption has been abolished in some places such as England and New South Wales. The abolishment of ‘*doli incapax*’ is part of the government’s effort to combat youth crimes.¹⁹

Based on the above discussion, it can be concluded that except for the offence of rape, the age of criminal responsibility in Malaysia is above ten. Any child offender who is above the age of ten but below eighteen may be found liable by the court for committing any offence. The law in Malaysia is consistent with the international legal framework on young offenders’ criminal accountability.²⁰

However, the procedures and punishments provided for young offenders are different compared to those procedures and punishments provided for adult offenders. The procedures will be briefly discussed in the following discussion.

¹⁹Taylor, L, *Elliot & Quinn’s Criminal Law*, 12th ed. (England: Pearson Pub, 2018), 352-353.

²⁰Randawar, D.K., Ikhsan, M.I. & Monil, F. “Sentencing Child Offenders in Malaysia: When Practice Meets Its Purpose”, in *International Journal of Academic Research in Business and Social Sciences* 12(7) (2022), 1226-1236.

Procedures Governing Young Offenders in Malaysia

The criminal procedures regarding young offenders in Malaysia are governed by Part X of the Child Act 2001.²¹ A child who is accused of committing any offence shall not be arrested, detained or tried except in accordance with the Child Act.²² Unlike adult offenders who are tried in an open court, child offenders will have their trial in a closed court known as the Special Court for Children.²³ The Court for Children has the jurisdiction to hear all cases regarding child offenders except for offences punishable with death. The only exception to this rule, is if the child committed the offence with an adult offender. As such the trial will be conducted in an open court.²⁴ However, the young offender will still be treated as a young offender, not as an adult.

The Child Act also provides that the identity of the child offender or any information that may lead to the identification of the child offender shall remain confidential. Hence, no information about the identity of the child offender can be published in any newspaper, magazine or any medium be it hard copy or digital.²⁵ Terms such as ‘conviction’ or ‘sentence’ shall not be used in relation to any child offender.²⁶ The court shall instead use the term ‘upon finding of guilt’ and ‘an order made upon finding of guilt’ respectively.²⁷

Section 91 also provides jurisdiction of the court in making any necessary order for the child offenders. The orders that may be made by the court are as follows:

- if a Court for Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this act, have power to —

²¹The Child Act 2001 was amended in 2016. The Act provides for the protection, care and rehabilitation of children. The Act repealed Juvenile Courts Act 1947 [Act 90], Women and Young Girls Protection Act 1973 [Act 106] and Child Protection Act 1991 [Act 468].

²²Section 83(1), Child Act 2001.

²³Section 83(1), Child Act 2001. The court shall consist of a Magistrate, and he will be assisted by two advisers appointed by the Minister. The adviser must be of one male and one female.

²⁴Section 83(4), Child Act 2001

²⁵Section 15, Child Act 2001

²⁶Section 91(2), Child Act 2001

²⁷Section 91(2), Child Act 2001

- (a) admonish and discharge the child;
- (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;
- (c) order the child to be placed in the care of a relative or other fit and proper person— (i) for such period to be specified by the Court; and (ii) with such conditions as may be imposed by the Court;
- (d) order the child to pay a fine, compensation or costs;
- (e) make a probation order under section 98;
- (f) order the child to be sent to an approved school or a Henry Gurney school;
- (g) order the child, if a male, to be whipped with not more than ten strokes of a light cane—
 - (i) within the Court premises; and
 - (ii) in the presence, if he desires to be present, of the parent or guardian of the child;
- (h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96, any term of imprisonment which could be awarded by a sessions Court.

The Act also provides restrictions on the order of imprisonment for child offenders below the age of fourteen²⁸ and the death penalty for young offenders below the age of eighteen.²⁹ In lieu of the death penalty, the child may be detained in prison at the pleasure of the Yang Di-Pertuan Agung or Ruler of the State, depending on where the crime was committed. The rule not to sentence a child to death is a general rule applicable in almost every part of the world. However, as usual, for every general rule there must be an exception. The court in *Lim Hang Seoh v. PP*³⁰ held that the general rule is not applicable in cases tried under the Essential (Security Cases) Regulation (ESCAR) 1975. Regulation 3 of the ESCAR provides that where a person is accused or

²⁸Section 96, Child Act 2001.

²⁹Section 97, Child Act 2001.

³⁰[1978] 1 MLJ 68.

charged with security offences under the Regulation, he shall be dealt with and tried in accordance with the provisions in the Regulations, regardless of his age. With the new trend of improving the protection of children, it is doubtful that the present court would have followed the decision made in *Lim Hang Seoh*.

In cases such as *Pendakwaraya v Chong Waijun*³¹ and *Pendakwaraya v Pesalah Kanak-kanak*³² the courts emphasised the concept of proportionality in sentencing young offenders. A rigid or excessive punishment risks undermining the rehabilitative objectives. In fact, juvenile offenders should not be classified as the worst offenders or treated as adult offenders.³³

In the case of *PP v. SAK (the child)*,³⁴ a young offender who was below 18 was charged for statutory rape. The court considered all evidence, including the child's demeanour during the trial, his advisor's and probationary reports, before deciding the most appropriate sentence for him. He was sent to the Henry Gurney School till he reached the age of 21. Meanwhile, in *Zawawi Salleh JC (now FCJ) in Pendakwa Raya v. Muhamad Abdul Rahim bin Adnan*³⁵ had aptly spelt out the dilemma in considering the appropriate order for a child who is found guilty of an offence. His Lordship remarked, in making an order against a child, the Court "should have its eye for the future". The decision-making process inevitably attracts conflict of perspectives between the Court, the prosecution, the defence, the probation officer, the psychologist and other parties, for there are various determinative factors that exist.

Similarly, Ismail Ibrahim JC, in *PP v. I.I.I. (Child Offender)*³⁶ observed:

"It is not an easy task to impose a sentence on a child offender, as the court must always bear in mind the fact that a child offender lacks the maturity of adults. At the same time the court must also ensure that it does not send a wrong message to the public that a child offender will normally receive a lesser sentence

³¹[2025] MLJU 514

³²[2023] MLJU 476

³³*Roper v Simmons* (03-633) 543 U.S. 551 (2005)

³⁴[2021] MLJU 1707.

³⁵[2008] 7 MLJ 883.

³⁶[2016] 1 LNS 1102

compared to an adult accused person charged with the same offence, more so in cases where the offence committed is a serious offence. It is for the said reasons, the court would have to evaluate the child's background through the probation report before imposing a sentence on the child.

Visu Sinnadurai J in *Public Prosecutor v Nazarudin Bin Ahmad & 2 Ors.*³⁷ also made the same observation pertaining to the punishment of the young offenders. Thomas in his book, on Principles of Sentencing, 1st edition, relating to public interest and the young offender.³⁸ He pointed out that in the case of a young offender, there can hardly ever be any conflict between the public interest and that of the offender. The public has no greater interest than that he should become a good citizen. The difficult task of the Court is to determine what treatment gives the best chance of realising that object. That realisation is the first and by far the most important consideration.

The above discussion proves that the criminal justice system in Malaysia provides special procedures and punishments for young offenders. The purpose of the special procedures and punishment is not to discriminate against young and adult offenders but rather as an acknowledgement that young offenders should be treated in accordance with their age and maturity. Their interest and welfare must always be given priority without compromising the public interest.

LEGAL FRAMEWORK OF CRIMINAL ACCOUNTABILITY OF YOUNG OFFENDERS UNDER THE *SHARI'AH* LAW

Similar to the civil law, the *Shari'ah* law also provides certain principles pertaining to criminal accountability of young offenders. The Qur'an, in Surah al-Nisa, 4:98, clearly mentions: "*Except the weak ones among men, women and children who cannot devise a plan, nor are they able to direct their way*". This verse shows that a child is not

³⁷[1993] 2 CLJ 543

³⁸Thomas, D. A., & Radzinowicz, L. Principles of sentencing: the sentencing policy of the Court of Appeal Criminal Division (Vol. 27). (London: Heinemann, 1970), 5-6. See also Brooks, T. (Ed.), *Juvenile Offending*, 1st ed. (London: Routledge, 2014), <https://doi.org/10.4324/9781003424086>

capable of having a guilty mind as they are not able to think and devise any act.³⁹

Basis of Criminal Accountability

In Islam, one who intentionally commits an unlawful act shall bear the consequence of their act. Once the elements of a crime of which he has been accused are established, the offender shall be punished accordingly. In other words, he must be accountable for his act. There are three bases for criminal accountability in Islam; a) the act done is unlawful, b) the act is done willfully or voluntarily (*ikhhtiyar*) and c) the offender is an adult who is of sound mind capable of distinguishing right and wrong in his actions (*idrak*). Whether or not an act is unlawful, it shall be prescribed by the law.⁴⁰ There are three types of offences in Islam known as *hudud*⁴¹, *qisas*⁴² and *taa'zir*.⁴³ In the absence of any one of these three bases, an offender shall not be liable

³⁹See also Surah al-Nisa, 4:6 and Surah al-An'am, 6:152

⁴⁰Awdah, 'Abd al-Qadir, *al-Tashri' al-Jina'i al-Islami*, vol.i, 13th ed. (Beirut: Muassasah al-Risalah, 1994), 402. See also Farid Sufian Shuaib et.al., *Halsbury's Laws of Malaysia: Islamic Law*, reissue 14(2) (Singapore: LexisNexis, 2016), 253.

⁴¹*Hudud* or singular *Hadd* are crimes punishable with a fixed punishment imposed as a right of the public, or known as the right of Allah s.w.t. The punishments for these offences are specifically mentioned in the Holy Quran and the Sunnah of the Prophet Muhammad (s.a.w.). The *Hudud* crimes are *zina* (adultery or fornication) *qazf* (false accusation of *zina*), theft, robbery, drinking intoxicants, apostasy and rebellion. Since the punishment is fixed, the courts do not have any discretion to change or reduce the punishment. See Awdah, 79.

⁴²*Qisas* is a crime punishable with punishments prescribed by Allah s.w.t. in the Holy Quran and the Sunnah of the Prophet (s.a.w.). The offences under *Qisas* are homicide and causing bodily injuries to another. However, since it is considered as the right of an individual, the victim or his family have the right to choose whether to inflict punishment as prescribed by Islam or to pardon the offender. Victims also have the right to demand compensation known as *Diyat*. See Awdah, 79.

⁴³*Taa'zir* are crimes other than the ones prescribed as *hudud* or *qisas* and are punishable with punishments decided by the courts. The judges are given the discretion to decide the punishment that they think suits best for the crime committed. See: Awdah, 79.

for committing the offence. Islam only provides criminal accountability for one who is indeed accountable for their act.

Mental capacity is a vital element of criminal accountability. Even if the crime is committed intentionally by the offender, the first thing that must be determined by the court is whether or not the offender has the mental capacity to understand the nature and consequences of their act. If he is able to understand the nature and consequence of his act, then only he shall be criminally responsible and be punished accordingly. Nevertheless, the degree of ability to understand may differ from one person to another depending on factors such as one's age and experience. Consequently, Islam provides different categories of offenders based on their ability to understand.⁴⁴

Age of Criminal Accountability in the *Shari'ah* Law

In the *Shari'ah* law, the stages of a person's life as far as his ability to understand is divided into three main stages. The stages are as follows:

a) *Sabiyy ghayr mumayyiz* – absence of understanding

This stage begins as soon as one is born until they reach the age of which he is capable of distinguishing between the good and bad. Islam does not specify the actual age for this, as the ability to understand may differ from one child to another. Nevertheless, for better implementation and uniformity of the law, the Muslim jurists limit the age of *sabiyy ghayr mumayyiz* to seven years of age.⁴⁵ The age limit is based on the average occurrence. A child under the age of seven is given absolute immunity from any criminal responsibility by the *Shari'ah* law. This is based on a hadith of the Prophet (s.a.w.) that states:

*“Three persons are excused from responsibilities; a child until he attains the age of puberty; a sleeping man until he is awake and an insane until he becomes sane”*⁴⁶

⁴⁴Awdah, 601. See also Bahnasi, al-Mas'uliyah al-Jina'iyyah fi al-Fiqh al-Islami, 3rd ed. (Cairo: Dar al-Shuruq, 1984), 271.

⁴⁵Awdah, 601, Bahnasi, 271.

⁴⁶Abu Dawud, Sulayman bin al-Ash'ath al-Sajastani, *Sunan Abi Dawud*, (Beirut: Dar Ibn Hazm, 1998), Hadith no.4402.

Based on the hadith, in general a child cannot be held liable for committing the offence until he attains the second stage as below.

b) Sabiyy Mumayyiz – infirm understanding

At this stage, the child is already able to distinguish between right and wrong, good and bad. However, the ability is not a full ability. This stage begins at the age of seven till he reaches the age of puberty. The age-limit for puberty is also different from one jurist to another. Mazhabs al-Shafi'is, Hanbali and some of the followers of Imam Malik fixed the age limit from seven to fifteen. Imam Abu Hanifah however, set the age of puberty to be eighteen.⁴⁷ The dominant opinion of the Maliki school is similar to Imam Abu Hanifah's view, while some limit it to nineteen.⁴⁸

A child who is *mumayyiz* can be criminally liable. However, their criminal liability differs from the liability of adult offenders, especially in cases involving the commission of offences under *hudud* and *qisas*. In such cases, they shall be disciplined with *ta'zir* punishment. The usual punishments are either reprimand or light beatings.⁴⁹ Even though to a certain extent they may be punished under *ta'zir* but they will not be considered as criminals. A hadith by the Prophet (s.a.w.) that states: “*Teach your children to perform prayer when they reach the age of seven and beat them (for failure to perform prayer) by the age of ten.*”⁵⁰ is the basis on the age limit and punishment set for criminal liability of those who are *mumayyiz*.

c) Baligh – full power of understanding

This stage is when the child is able to understand and distinguish every action properly and completely. At this stage, he is known as *baligh wa rashid* (a mature person). The actual age of puberty is not specifically mentioned in primary sources, however it is said to start when sexual

⁴⁷In another report he fixed it at nineteen years old for boys and seventeen years old for girls.

⁴⁸Awdah, *al-Tashri' al-Jina'i al-Islami*, 601, Bahnasi, *al-Mas'uliyah al-Jina'iyyah*, 271. See also Anwarullah, *The Criminal Law of Islam* (Kuala Lumpur: A.S. Noordeen, 2008), 19.

⁴⁹Awdah, 602, Bahnasi, 275.

⁵⁰Abu Dawud, *Sunan*, Hadith No.495.

maturity occurs i.e. the start of menstruation for females and autoerotism for males.⁵¹ Once a person reaches the age of puberty, they can be criminally responsible for their act since they are considered to have fully understood the consequences of the criminal act that he has committed.

Age of Criminal Accountability of Young Offenders under the *Shari'ah* Law in Malaysia

In Malaysia, matters regarding criminal matters are considered as federal matters as listed in the Federal Constitution.⁵² Nevertheless, the Federal Constitution also provides that matters related to the *Shari'ah* law are considered state matters. Consequently, each state has legislated laws pertaining to Islamic matters.⁵³

Section 51 of the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) provides: nothing is an offence which is done by a child who is not *baligh*. The term *baligh* is interpreted in section 2 of the Act as having attained the age of puberty under the *Shari'ah* law. There is no age limit prescribed in the interpretation of *baligh*. However, section 2 of the Syariah Criminal Procedure (Federal Territories) Act 1997 (Act 560) defines a youthful offender as any offender who is above the age of ten and below the age of sixteen years old. If this provision is to be considered, it means a child is considered as a *baligh* once he reaches the age of sixteen. The Syariah High Court in *Syarie Prosecutor v Siti Nurazniza binti Kamaruddin*⁵⁴ held that the accused was found guilty of committing sexual intercourse out of wedlock when she was 15 years old. The judge decided that she be fined RM2700 and ordered her to be of good behaviour for a period of 6 months and to attend the court for a counselling session every 3 months.

⁵¹MS Islam, Criminal Accountability and Juvenile Offenders: A Study Under Islamic Principles, International Law and Children Act, 2013,3(2) *Int J Ethics SocSci* (2015), 51.

⁵²Ninth Schedule of Malaysia Federal Constitution. The Federal Constitution is considered as the supreme law of Malaysia.

⁵³See Nasimah Hussin. "Juvenile Delinquency in Malaysia: Legal Framework and Prospects for Reforms", in *IIUM Law Journal*, 15 (2007), 197-214.

⁵⁴Jurnal Hukum Vol. 32 (1). JH (1432H)) March 2011M, 141-153.

Section 128(1) of Act 560 provides that when any youthful offender is convicted before any court of any offence punishable with fine or imprisonment, such court shall instead of imposing any imprisonment sentence in default of payment of the fine or passing a sentence of imprisonment: a) order such offender to be discharged after due admonition if the court shall think fit; or b) order such offender to be delivered to his parents or guardian, relative or any other person executing a bond with a surety, as the court may require, that he will be responsible for good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond, make an order in respect of such offender ordering him to be of good behaviour for any period not exceeding two years and containing directions to such offender which the court shall think fit to give.

In addition, the court may also use its discretion to impose fines not exceeding two hundred ringgits upon the parents or guardians if the court is of the opinion that the parents have neglected the child or did not take proper care of the child.

Overall, we can see that the position of a young offender under the *Shari'ah* law is very similar to the criminal law implemented in Malaysia.

COMPARATIVE ANALYSIS BETWEEN THE CIVIL LAW AND *SHARI'AH* LAW

Based on the above-mentioned discussion, there are similarities and differences between the law of young offenders' criminal accountability under the civil and *Shari'ah* law. It is interesting to observe that the civil and *Shari'ah* law have so much in common. The similarities are as follows:

a) Similarities

Both laws recognise that:

- i. admonish and discharge the child;

- ii. Criminal accountability of children depends on the age of the child at the time of the commission of the crime. As we can see both Islamic law and Civil law prescribe the age of criminal liability, albeit the differences in the age limit. This proves that both laws acknowledge that children within certain age limits, being young and have not developed proper mental faculty to discern the good and bad of their act should be excused from any criminal liability.
- iii. Children below a certain age are incapable of understanding the nature and consequences of their actions. Consequently, they should not be made liable or responsible for the crimes that they have committed. Both laws acknowledge that children within a certain age are indeed incapable of understanding the nature and quality of their act.
- iv. In all cases involving children, utmost priority should be given to the interest of the young offenders. The fact that both laws excused children within a certain age from criminal accountability and provide various methods to treat young offenders indicated that young offenders are indeed special and different from adult offenders.
- v. There are certain similarities in terms of punishments that can be imposed upon children such as admonishment or a bond of good behaviour. The purpose of the 'punishment' is actually to discipline and rehabilitate the child offender. This proves that the laws acknowledge that at a young age, what the young offenders need are actually proper discipline and opportunity to become better.

We can see all the above clearly enumerated by the provisions in sections 82 and 83 of the Penal Code and Muslim jurists. As far as the age limit of a child is concerned in Islam, there are slight differences among the jurists, but that is understandable as the difference in age limit to criminal accountability could also be found under the criminal law of each country.

The exemption of a child from any criminal liability is also stated in Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559).

Summarily, both laws recognise that children within a certain age are incapable of understanding the nature of their actions. Hence, it is not fair if criminal liability is imposed on such children. This is in line with the principle of *actus non facit reum nisi mens sit rea* and section 6 of the Penal Code that all offences shall be subjected to the exceptions in Chapter IV.

If a child is accused of committing a crime, he has the right to raise the defence of infancy as provided in the Chapter. If the defence is not available to him, the court must still consider his youth and young age in sentencing.

b) Differences

The differences between the two laws are:

- i. The age limit of criminal accountability under Malaysian criminal law is clearly mentioned in the Penal Code i.e. above ten. There is also provision for liability of children over ten and below twelve under section 83. Under the *Shari'ah* law in Malaysia, for example in Act 559, the age limit is not specifically prescribed, but rather the term *baligh* is used. The term is rather vague and is open to various interpretations. In addition, the term *baligh* that is closely associated with sexual maturity, may have caused misinterpretations in determining the criminal accountability of a young offender.

The different age limits also indicate that there is no standardisation pertaining to the age of young offenders. This may cause injustice to the young offenders as they will be treated differently, depending on which law that actions are taken against them. The age-difference may also cause confusion among members of the society as to who actually should be considered as 'children' or young offenders' and what is the age of criminal accountability.

- ii. Under the existing criminal law, the criteria to be adhered to in order to determine whether a child has attained sufficient maturity of understanding can be found mostly in decided cases. But it is not as such under the *Shari'ah* law in Malaysia. To a certain extent, this is understandable as the offences prescribed under Act 559 are very limited and children are seldom accused of such offences under the Act.

However, there may be a need to specify the specific criteria of the various types of young offenders in future, considering that the number of cases involving child offenders is on the rise

- iii. The procedures governing young offenders and the punishments that may be imposed upon them under the Child Act are very comprehensive compared to the provisions under Act 559. Considering that there is a special court for children governing matters regarding them may reflect the seriousness of the state in ensuring the rights and interest of children are adequately protected.

Hence, it is strongly suggested that a special court for children is also established to deal with matters related to children. It will also help to amend Act 559 to be more comprehensive by specifying the types of punishment or methods available for young offenders.

- iv. Since managing matters regarding young offenders may involve several enforcement agencies, for example, the police, welfare departments and the courts, it is proposed that the related agencies should work hand in hand on this matter. This is to ensure that the young offenders can be treated as fairly as possible. Their interest and welfare must always be given utmost priority.

CONCLUSION

The principles of criminal and juvenile justice ensure that the rights of all young offenders are properly protected. It is understandable that sometimes these young offenders commit crimes because they lack the maturity to appreciate their actions. There must be some flexibility in the law when dealing with young offenders. They are going to continue our legacy in the future. The law must be responsible to guide and lead them to the right path if they are found to have strayed away.

Mental capability must be a determining factor in deciding the liability of a criminal offender. If the offender does not have the ability to understand and comprehend his actions, then he needs to be excused from any liability. The main aspiration is to balance the rights of young offenders to be treated in accordance with their age and the right of the public to have a safe life.⁵⁵ Society needs to play a more active role in ensuring the rights of children are well protected.⁵⁶ It is good to observe that there is not much difference between the criminal law and *Shari'ah* law in Malaysia. This proves that both laws have been in co-existence for many years.

Despite some differences between the existing criminal law and Malaysian *Shari'ah* law, we can see that the gist of both laws regarding criminal accountability of young offenders is the same i.e. young offenders who have not attained sufficient maturity of understanding must be excused from liability. Any differences (if any) can always be improved by the harmonisation of the civil and *Shari'ah* law.

⁵⁵ Rod Morgan, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*. By Don Cipriani (Farnham: Ashgate, 2009, 232), *The British Journal of Criminology*, Volume 50, Issue 5, September (2010), 990-991. <https://doi.org/10.1093/bjc/azq044> accessed 12 May, 2024.

⁵⁶ Abdul Hadi Zakaria, "Juvenile Delinquency: Its Relationship to the Family and Social Support", in *Caring Society Emerging Issues and Future Directions* Ed. (Kuala Lumpur: ISIS, 1990).

It is time for the Malaysian *Shari'ah* law to be properly codified for better implementation and uniformity. Efforts must be made for both laws to be synchronous. First, there must be a proper discussion on how the age limit for criminal liabilities of children can be standardised in both laws. In addition, there must also be proper guidelines on how to determine the maturity and degree of understanding of a child. The guideline when ready may be applied by both courts.

REFERENCES

- Abdul Hadi Zakaria. "Juvenile Delinquency: Its Relationship to the Family and Social Support", in *Caring Society Emerging Issues and Future Directions* (ed.). Kuala Lumpur: ISIS, 1990.
- Abu Dawud, Sulayman bin al-Ash'ath al-Sajastani. *Sunan Abi Dawud*. Beirut: Dar Ibn Hazm, 1998.
- Allen, Michael J. *Textbook on Criminal Law*. London:Blackstone Press Ltd., 1991.
- Anita Abdul Rahim & others. "School Students Committing Crime: The Position Under the Malaysian Criminal Law". *Full Paper Proceeding ITMAR*, Vol.1. 2014, 542-549.
- Anwarullah. *The Criminal Law of Islam*. Kuala Lumpur: A.S. Noordeen, 2008.
- Awdah, 'Abd al-Qadir. *Al-Tashri 'al-Jina'i al-Islami*, Vol.1. 13th ed. Beirut: Muassasah al-Risalah, 1994.
- Bahnasi, Ahmad Fathi. *Al-Mas'uliyah al-Jina'iyah fi al-Fiqh al-Islami*, 3rd ed. Cairo: Dar al-Shuruq, 1984.
- Bentham, J. *An Introduction to the Principles of Morals and Legislation*. Kitchener: Batoche Books, 1781.
- Farid Sufian Shuaib et.al. *Halsbury's Laws of Malaysia: Islamic Law*, reissue 14(2). Singapore: LexisNexis, 2016.
- Halsbury's Laws of Malaysia, vol. 14. Kuala Lumpur: Malayan Law Journal, 2002.

- Joyce, Peter. & Laverick, Wendy. *Criminal Justice: An Introduction*. 4th ed. London: Routledge, 2022.
- Kilkelly, U., & Pleysier, S. Rights of the Child in the Child Justice System. *Youth Justice*, 23(2). 2023, 135-139.
<https://doi.org/10.1177/14732254231185820>
- Lynch, N., & Liefwaard, T. “What is Left in the “Too Hard Basket”? Developments and Challenges for the Rights of Children in Conflict with the Law”. *The International Journal of Children's Rights*, 28(1), 2020, 89-110.
- Molly Cheang. *Criminal Law of Malaysia and Singapore: Principles of Liability, Professional (Law)*. Kuala Lumpur: Books Publishers, 1990.
- Mohd. Shariff & Asidah Ali. *Alman Criminal Law in Malaysia. International Law*. Petaling Jaya: Book Services, 2012.
- Morgan, R. Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective. By Don Cipriani (Farnham: Ashgate, 2009). *The British Journal of Criminology*. Volume 50, Issue 5, September 2010.
- Nasimah Hussin & Hanifah Haydar Ali Tajuddin. An Islamic perspective on preventing sexual abuse against children. *IJUM Law Journal*, 29 (S1), 2021, 153-176.
- Nasimah Hussin. Juvenile Delinquency in Malaysia: Legal Framework and Prospects for Reforms. *IJUM Law Journal*, 15, 2007, 197-214.
- Randawar, D.K., Ikhsan, M.I. & Monil, F. “Sentencing Child Offenders in Malaysia: When Practice Meets Its Purpose”. *International Journal of Academic Research in Business and Social Sciences*. 12(7), 2022.
- Shirokova-Murarash, O. Improvement of The Juvenile Justice System Under the Minimum Un Standard Rules (Beijing Rules). *International Relations*, 5, 2020, 117.
- Standard Minimum Rules for the Administration of Juvenile Justice [The Beijing Rules] (UN), 1985.

Taylor, L. *Elliot and Quinn's Criminal Law*. 12th ed. England: Pearson Pub., 2018.

Yeo, Stanley, Morgan, Neil & Chan, Wing. Cheong. *Criminal Law in Malaysia and Singapore*, 3rd ed. Singapore: LexisNexis, 2018.