

CHAPTER 4

THE CRIMINAL RESPONSIBILITY OF DELINQUENT CHILDREN

4.1 INTRODUCTION

Malaysia is among the earliest states in Southeast Asia that undertake to design National Cyber Security Policy and among the earliest to enact cyber-related laws such as Computer Crime Act 1997 and Malaysian Communication Multimedia Act 1998.²⁴⁹ However, some of these laws are said to be insufficient and traditional in nature as they do not have any direct laws on cybercrimes. Instead, it merely covers physical laws that are implemented via internet. To answer the third research question, this chapter explores the Malaysian legal framework and Shariah principles that govern social media related to the issue of cyber delinquency as well criminal responsibility of delinquent children.

The first section analyses the overview of the relevant legislation such as Computer Crime Act 1997, the Communication and Multimedia Act 1998 (Amendment 2004) 1998, Penal Code and other related legislations.

²⁴⁹ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

While in section two, it explains the minimum age of criminal responsibility which vary between countries. The determination of the minimum age depends on the history, culture, religion, and virtue of individual discernment and understanding. Thus, this chapter focuses on the minimum age of criminal responsibility for delinquent children towards their antisocial conduct, as to answer the second research question. It studies the minimum age of criminal responsibility, determined by international instruments of Beijing Rules, the Convention on the Right of the Child (CRC), Malaysian legal framework and Syariah perspectives.

This chapter also aims to discuss about Shariah principles on criminal accountability for children who commit offenses which derived from the Quran and hadith which is discussed in section three. It concludes with the argument that children may still be accountable to their commits if the elements of a crime are fulfilled.

4.2 OVERVIEW OF MALAYSIAN LAW GOVERNING SOCIAL MEDIA

Cyber laws in Malaysia may not totally be considered as new laws as some of it have been enacted decades before the proliferation of the ubiquitous internet.²⁵⁰ At that time, it covers the mix of both traditional non-technological law (such as Penal Code, Seditions Act 1948, Defamation Act 1957, the Copyright (Amendment) Act 1997 (“Copyright Act”), and the Printing Presses and Publication Act 1984); and laws which are specifically designed for governing technology or innovation.²⁵¹ This

²⁵⁰ Zulhuda, Sonny. 2015. *Cyberlaw on pornography*. In: National Law Students Convention IV (PEMUDA IV), 2 Oct 2015, Universiti Utara Malaysia, Kedah. (Unpublished), pp. 10

²⁵¹ *Ibid*

combination of laws have been used to respond to the incidents using or taking place on the internet.²⁵²

Generally, Malaysia does not have any specific cybercrime law, instead it relies on the Telecommunications Law and the Internet Access Service Provider Sub-Code.²⁵³ According to Part 10, Chapter 2 of the Telecommunication Law, it is stated that fraudulent and improper use of the telecommunication network facilities and network services are strictly prohibited.²⁵⁴

However, some cyber-related legislations have been passed by Malaysia's Parliament since 1997 until now as their efforts to provide regulations and to control national ICT industry, to provide confidence to potential investors to Malaysia, as well as to control and combat the cybercrimes activities. These legislations including the Communications and Multimedia Act 1998, the Penal Code, the Digital Signature Act 1997, the Computer Crimes Act 1997, the Telemedicine Act 1997, the Communications and Multimedia Commission Act 1998, the Payment System Act 2003, the Electronic Commerce Act 2006, the Personal Data Protection Act 2010, the Censorship Act 2002, the Electronic Government Activities Act 2007, Communications and Multimedia Content Code and Sexual Offences Against Children Act 2017.²⁵⁵

²⁵² *Ibid*

²⁵³ Leng, O.T.S, et.al. 2015. "Anti-Sexting and Cyberlaws in Malaysia", *Australian Journal of Sustainable Business and Society*, v.1. No. 1(1), pp. 67

²⁵⁴ Leng, O.T.S, et.al. 2015. "Anti-Sexting and Cyberlaws in Malaysia", *Australian Journal of Sustainable Business and Society*, v.1. No. 1(1), pp. 67

²⁵⁵ n.a. 2016. *Child Online Protection in Malaysia*, Ministry of Women, Family and Community Development; Jayabalan, P., Roslina I., Azizah Manaf A. 2014. "Understanding Cybercrime in Malaysia: An Overview", *Sains Humanika* 2(2), pp. 113-114; Leng, O.T.S, et.al. 2015. "Anti-Sexting and Cyberlaws in Malaysia", *Australian Journal of Sustainable Business and Society*, v.1. No. 1(1), pp. 68; Pillai, D., Han YS. 2018. "Cybersecurity 2019: Malaysia", *International Comparative Legal Guides*, Oct. 16, <https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/malaysia#chaptercontent2>; Zulhuda, S. n.d. *Cyberlaw Statutes*. <http://sonnyzulhuda.com/cyberlaw-statutes/>

Therefore, to combat the online delinquency in Malaysia, some above-mentioned governing laws are also being used including Child Act 2001, Penal Code, Communication and Multimedia Act 1998, Communication and Multimedia Content Code, Personal Data Protection Act 2010 and Sexual Offences Against Children Act 2017 and many more.

The Communication and Multimedia Act 1998 which came into effect on 1st April 1999 is the main pillar of other cyber laws in Malaysia.²⁵⁶ It defines the roles and responsibility of communication and multimedia service providers.²⁵⁷ A new system of licenses also has been created. The licensees need to use their best endeavours to ensure the information security, and network reliability and integrity in Malaysia and prohibit from improper and deviant use of network facilities and services.²⁵⁸ This particular act then appointed Malaysian Communication and Multimedia Commission as the sole regulator of the new regulatory regime.²⁵⁹

Penal Code is conventional law that governs criminal offences in Malaysia, including to curbing cyber and computer crimes. This act codifies most of the criminal offences and procedures in Malaysia. As it is the main statute that covers a wide range of criminal offences, some internet-related offences such as online fraud, pornography, criminal defamation, gambling etc. which are not specifically covered

²⁵⁶ Zulhuda, S. n.d. *Cyberlaw Statutes*, <http://sonnyzulhuda.com/cyberlaw-statutes/>

²⁵⁷ Jayabalan, P., Roslina I., Azizah Manaf A. 2014. "Understanding Cybercrime in Malaysia: An Overview", *Sains Humanika* 2(2), pp. 113

²⁵⁸ Pillai, D., Han YS. 2018. "Cybersecurity 2019: Malaysia", *International Comparative Legal Guides*, Oct. 16, <https://iclg.com/practice-areas/cybersecurity-laws-and-regulations/malaysia#chaptercontent2>

²⁵⁹ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

by any statutes, might also be covered under it.²⁶⁰ The law also prescribes the age of criminal responsibility for children.

Then, the Digital Signature Act 1997 that was first enforced on 1st October 1998.²⁶¹ This law allows the development of e-commerce and provides a secure avenue (national and international) for online transactions through the use of digital signatures.²⁶² It also responsible to provide a framework for licensing and regulation of Certification Authorities, besides validate and grant a legal recognition to the digital signatures then enforce it as a real, traditional signature.²⁶³

While on 1st of June 2000, the Computer Crime Act 1997 became effective to prevent unauthorised access to computer or computer system.²⁶⁴ Through this act as well, it criminalises wrongful communication with an unauthorised person through the means of access to any computers,²⁶⁵ modification of any programs or data in computers without any authority²⁶⁶ and it is responsible to ensures passwords are safely kept and stay confidential.²⁶⁷

²⁶⁰ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

²⁶¹ *Ibid*

²⁶² Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

²⁶³ Jayabalan, P., Roslina I., Azizah Manaf A. 2014. "Understanding Cybercrime in Malaysia: An Overview", *Sains Humanika* 2(2), pp. 113

²⁶⁴ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

²⁶⁵ *Ibid*

²⁶⁶ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

²⁶⁷ Jayabalan, P., Roslina I., Azizah Manaf A. 2014. "Understanding Cybercrime in Malaysia: An Overview", *Sains Humanika* 2(2), pp. 114

Henceforth, the Copyright Act has been endorsed as the amendment from the previous Copyright Act 1987.²⁶⁸ It protects the copyright works from copying and alteration without authority over the internet by irresponsible people.²⁶⁹ It also provides and ensures adequate protection of intellectual property right (related to content creation in the ICT and multimedia environment) for companies from being infringed.²⁷⁰ It came into force on 1st April 1999.²⁷¹

However, the Telemedicine Act 1997 is still cannot be implemented as the government is implying some amendments on it.²⁷² This act allows a registered doctor to practice 'telemedicine' through audio, video and messages while other healthcare providers should obtain the license if they want to practice it.²⁷³ This act is very important as a prevention of misuse of medical related items by irresponsible people.²⁷⁴

Personal Data Protection Act was gazette in 2010 to regulate the processing of personal data regarding the commercial transaction. This Act is responsible for protecting the personal data of individual and providing for matters connected therewith an incidental thereto.

Last but not least, The Sexual Offences Against Children Act 2017. This is the latest law enacted by the government to combat sexual offences against children.

²⁶⁸ *Ibid*

²⁶⁹ *Ibid*

²⁷⁰ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

²⁷¹ *Ibid*

²⁷² Jayabalan, P., Roslina I., Azizah Manaf A. 2014. "Understanding Cybercrime in Malaysia: An Overview", *Sains Humanika* 2(2), pp. 114

²⁷³ Portal Team. 2016. "Cyber Related Policies and Laws in Malaysia", *Cybersecurity Capacity Portal*, Dec 19, <https://www.sbs.ox.ac.uk/cybersecurity-capacity/content/cyber-related-policies-and-laws-malaysia>

²⁷⁴ *Ibid*

Parliament enacted this new law in order to protect children from being subjected to sexual abuse physically or in the virtual world and provide the administration of justice for children and connected matters.

4.3 THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY BASED ON INTERNATIONAL INSTRUMENTS

4.3.1 Convention on the Right of the Child (CRC)

The United Nations Convention on the Right of the Child (UNCRC) was developed in 1989 is the first legally binding international instruments that recognise human rights for children without discrimination in any form. It came into force in 1990 and has been ratified by the UN state parties except for Somalia and the United States.²⁷⁵ It is a recognition from the world leaders that children also have human rights and need special care and protection from adults.²⁷⁶ There are 54 articles and two Optional Protocols set out by the Convention and four core principles in this Convention which are non-discrimination, devotion to the best interest of children, the right to life, survival and development and respect to the views of the child.²⁷⁷ The Convention has set out standards in health care, education, legal, civil, and social service to protect the children's rights.²⁷⁸

All the state parties are required to report on the progress made on children's rights in their country every five years.²⁷⁹ However, further explanation regarding the

²⁷⁵ UNICEF. 2005. "Convention on the Rights of the Child". *UNICEF for Every Children*. Retrieved from https://www.unicef.org/crc/index_30229.html (Accessed on 15 November 2018)

²⁷⁶ n.a. n.d. "Minimum Ages of Criminal Responsibility in Asia". *Child Rights International Network*. Retrieved from <https://www.crin.org/en/home/ages/asia> (Accessed on 30 October 2018).

²⁷⁷ *Ibid*

²⁷⁸ *Ibid*

²⁷⁹ n.a. n.d. "Minimum Ages of Criminal Responsibility in Asia". *Child Rights International Network*. Retrieved from <https://www.crin.org/en/home/ages/asia> (Accessed on 30 October 2018).

scope and application of this provision could be obtained by referring to the ‘Concluding Observations’ that is recommendations, issued by the CRC Committee, which is responsible for monitoring the implementation of the provisions by the governments.²⁸⁰

Furthermore, the fundamental principles of the juvenile justice policy were enshrined in articles 37 to 40 in CRC.²⁸¹ The Committee had provided guidance and recommendations for the comprehensive policy for juvenile justice. Further information about the minimum age of criminal responsibility can be found in the General Comment No. 10 (2007) that specifically discussed about this issue.²⁸² This provision is intended to protect children of any age from being subjected to any criminal proceedings.²⁸³

Article 40 (3) (a) CRC makes it compulsory for every state party to determine the minimum age of criminal liability for children. It was enshrined that;

“The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;”²⁸⁴

The State parties shall seek to promote measures while dealing with the children who are in conflict with the law without resorting to judicial proceedings, whenever appropriate and desirable.²⁸⁵

²⁸⁰ *Ibid.*

²⁸¹ Aminuddin Mustaffa. 2016. *Umur Minimum Tanggungjawab Jenayah Kanak-kanak: Menilai Undang-Undang Malaysia Dari Perspektif Undang-Undang Antarabangsa*. Researchgate. 28. pp. 43-67.

²⁸² *Ibid*

²⁸³ *Ibid*

²⁸⁴ The Committee of CRC, General Comment No. 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, paragraph 24.

However, the CRC did not specify any age as an indicator to be followed by the members. Nevertheless, they are very consistent and firm that any age below twelve is not suitable to be the minimum age of criminal responsibility for the international level.²⁸⁶ Any state parties that fixed the minimum age of criminal responsibility below twelve were urged to increase the age level as bearing in mind the facts of emotional, mental and intellectual maturity.²⁸⁷

One factor that caused the CRC not to limit any specific age of minimum age of criminal responsibility is because there is no acquiescent between parties on it.²⁸⁸ Moreover, it also prevents the occurrences of conflicts among religions, traditions and cultures that vary in various legal systems around the world.²⁸⁹

4.3.2 Beijing Rules

In relation to juveniles' rights and protection, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules 1985) has set out the international legal framework concerning the minimum age of criminal responsibility. Even though it is not binding to international law, the UN encourages states to follow the rules as the minimum standards by which juvenile justice administration should be judged.²⁹⁰

²⁸⁵ The Committee of CRC, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, paragraph 24.

²⁸⁶ n.a. n.d. "Minimum Ages of Criminal Responsibility in Asia". *Child Rights International Network*. Retrieved from <https://www.crin.org/en/home/ages/asia> (Accessed on 30 October 2018).

²⁸⁷ *Ibid*

²⁸⁸ Bueren, G. Van. 2006. Article 40: Child Criminal Justice. A Commentary on the United Nations Conventions on the Rights of the Child. Leiden, Boston: Martinus Nijhoff Publishers, pg. 1-30

²⁸⁹ Aminuddin Mustafa. 2016. *Umur Minimum Tanggungjawab Jenayah Kanak-kanak: Menilai Undang-undang Malaysia Dari Perspektif Undang-Undang Antarabangsa*. Researchgate. 28, pp. 51

²⁹⁰ Bradley, L. 2003. The age of criminal responsibility revisited. *Deakin Law Review* 8(1), 73-90.

Pursuant to Article 4 on the particular rules, legal systems in any country that recognizing the concept of the age of criminal responsibility for juveniles is recommended to fix the age based on emotional, mental and intellectual maturity that is not to be fixed too low.²⁹¹

As the commentary on this article, the minimum age of criminal responsibility may vary between countries due to history and culture. The modern approach proposes to consider whether a child can be held responsible for his/her anti-social behavior by virtue of his/her individual discernment and understanding. The age of criminal responsibility should not be fixed too low, or it can be no lower age limit at all, or otherwise, the notion of responsibility would become meaningless. Generally, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities such as marital status, civil majority and so forth. Efforts should be made to agree on a reasonable age limit that is applicable globally.²⁹²

4.4 MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN MALAYSIA AND THE JUVENILE JUSTICE SYSTEM

Malaysia is very concerned about the juvenile justice. Some initial steps have been taken to protect the interest of the children who come into conflict with the law, such as drafting the Juvenile Courts Act 1947²⁹³ and the ratification of CRC in

²⁹¹ Rules, B. 1985. United Nations standard minimum rules for the administration of juvenile justice: Beijing rules. *Adopted by General Assembly Resolution*, 40, pp.33.

²⁹² Rule 4.1 of the Beijing Rules

²⁹³ Shamsiah Abdul Rahman. 2004. *Jenayah Juvenil: Peranan Jabatan Kebajikan Masyarakat*. The paperwork was presented in *Seminar Kebangsaan Pencegahan Jenayah Juvana*. Institut Kefahaman Islam Malaysia.

1995²⁹⁴. Apart from that, Malaysia is also amongst the earliest country that provides the legislation regarding juvenile justice system that is Child Act 2001.²⁹⁵

The Child Act 2001 legislation is in consonance with the enforcement of amendments to the Penal Code, which includes some aspects that cannot be included in the Child Act 2001.²⁹⁶ It has been gazette on 1st March 2001 and officially enforced on 1st August 2002. The Child Act 2001 is a consolidation of three former acts, namely Child Protection Act 1991, Women and Girls Protection Act 1973 and Juvenile Courts Act 1947, and later repealed by Act 611 through section 130.²⁹⁷ Meanwhile, the Child Protection Act 1991 and Juvenile Courts were fully consolidated into the Child Act 2001, while some provisions from the Women and Girls Protection Act that cannot be consolidated into the Child Act 2001 were inserted into the Penal Code.²⁹⁸ The current Child Act 2001 now governs four main categories of children, namely children who in need of protection and care, children who in need of protection and rehabilitation, children who in conflict with the law enforcement, and children who are “beyond control”.²⁹⁹

²⁹⁴ Aminuddin Mustaffa, and Kamaliah Salleh. 2005. “Evidence by Child in Criminal Proceedings in Malaysian Courts: A Study on Post Ratification of Convention of Rights of Child” in *Malaysian Current Law Journal* 6 CLJ, 2010.

²⁹⁵ Shamsiah Abdul Rahman. 2004. Jenayah Juvenil: Peranan Jabatan Kebajikan Masyarakat. The paperwork was presented in *Seminar Kebangsaan Pencegahan Jenayah Juvana*. Institut Kefahaman Islam Malaysia.

²⁹⁶ Sarirah Che Rose. 2011. “Prosedur Perbicaraan Kes Jenayah Kanak-kanak di Mahkamah Tinggi”. *Voice of Academia*, Vol.6 No. 2, pp. 109

²⁹⁷ Mimi Kamariah Majid. 2001. Akta Kanak-kanak 2001: Satu Pendekatan Undang-undang untuk Menangani Masalah Kanak-kanak dan Remaja di Malaysia. The Paperwork was presented in *Seminar Undang-undang dan Kerja Sosial*. Universiti Utara Malaysia

²⁹⁸ Mimi Kamariah Majid. 2001. Akta Kanak-kanak 2001: Satu Pendekatan Undang-undang untuk Menangani Masalah Kanak-kanak dan Remaja di Malaysia. The Paperwork was presented in *Seminar Undang-undang dan Kerja Sosial*. Universiti Utara Malaysia

²⁹⁹ Muhammad Razmee A.R. 2017. “The Juvenile Justice System in Malaysia. The paperwork was presented in *Work Product of the 164th International Training Course*. United Nation Asia and Far East Institute.

Moreover, it is clearly mentioned under this Act, in relation to criminal proceedings, a person must attain the age of criminal responsibility as prescribed in the section 82 of Penal Code. This section allocates the absolute protection for children under the age of ten years old,

*“Nothing is an offence which is done by a child under ten years of age”*³⁰⁰

Thus, it also includes a doctrine of *doli incapax*, which states that any action of a child under ten years of age is always not an offense. *Doli incapax* is adopted from the Latin word, which means incapable of doing wrong.³⁰¹ This presumption is irrebuttable and conclusive where the prosecution is prohibited from offering evidence that the children had the capacity to appreciate the wrongfulness of what they had done. The children are also presumed to be immature, innocent, and decent.

Another category of protection for children above ten years of age and below twelve is that they still got the protection from the Act 574, but the protection given is conditional and partial.³⁰² They are also given exemption with some conditions from being responsible for their delinquent behavior, where it depends on the degree of understanding the consequences nature of their conduct at the time of the commission of the crime.³⁰³ They may rely on section 83 of the Penal Code as a defense where it is stated that:

³⁰⁰ Penal Code (Act 574), Section 82

³⁰¹ A.W.G Kean. 1937. “The History of the Criminal Liability of Children”, *Law Quarterly Review*, pp.364

³⁰² Anita Abdul Rahim, *et.al.* 2014. “School Students Committing Crime: The Position under the Malaysian Criminal Law”, *International Conference on Innovative Trends in Multidisciplinary Academic Research*, Turkey; Istanbul

³⁰³ Nasimah Hussin, 2007. “Juvenile Delinquency in Malaysia: Legal Framework and Prospects for Reforms”, *IIUM Law Journal*. Vol. 15, No.2, p.204-205

*“Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion”.*³⁰⁴

This presumption is also under *doli incapax*, nevertheless, it is a rebuttable presumption where the prosecution can overcome the presumption by proving that the child had the capacity to appreciate the wrongfulness of his/her commits.³⁰⁵ At the same time, the children can also rebut from being accused by proving with a clear and strong evidence that they have insufficient maturity to understand the wrongfulness and the nature and consequences of their actions.³⁰⁶

However, the minimum age fixed by Malaysia seems to be too low compared to the age suggested by the CRC. CRC had suggested the age of twelve and above as the most suitable age for minimum age of criminal responsibility.³⁰⁷ Based on the UNCRC Committee’s report, Malaysia was urged to raise the minimum age of criminal responsibility to twelve years of age.³⁰⁸ Nonetheless, until now, Malaysia still retains 10 as the age of criminal responsibility.³⁰⁹

³⁰⁴ Penal Code Section 83

³⁰⁵ Muzaffar Syah Mallow. 2015. “Juvenile Delinquency in Malaysia: Current Issues and Promising Approaches”, *Proceedings of INTCESS15- 2nd International Conference on Education and Social Sciences*, Turkey; Istanbul. pp. 263

³⁰⁶ Muzaffar Syah Mallow. 2015. “Juvenile Delinquency in Malaysia: Current Issues and Promising Approaches”, *Proceedings of INTCESS15- 2nd International Conference on Education and Social Sciences*, Turkey; Istanbul. pp. 263

³⁰⁷ Aminuddin Mustaffa. 2016. “Umur Minimum Tanggungjawab Jenayah Kanak-kanak: Menilai Undang-Undang Malaysia Dari Perspektif Undang-Undang Antarabangsa”. *Researchgate*. 28. pp. 43-67.

³⁰⁸ CRC Committee’s Report (Concluding Observations), Malaysia, U.N. Doc. CRC/C/MYS/CO/1, 2 February 2007, paragraph 103.

³⁰⁹ Anita Abdul Rahim. 2012.” *Jenayah Kanak-kanak dan Undang-undang Malaysia*”, Dewan Bahasa & Pustaka Kuala Lumpur.

One of the issues that have arisen now whether Malaysia should retain this special provision while England has long abolished this special protection? The provision seems vague, confusing and not suitable anymore to be implemented.³¹⁰ The term “*has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion*” as the most important essence yet does not have any clear interpretation from neither the Penal Code nor court decisions that caused ambiguity on that section.³¹¹

The suggestion to raise the minimum age of criminal responsibility may overcome this problem by amending section 82 to increase the minimum age of criminal responsibility into twelve years old or above so that the provision of *doli incapax* could be abolished. Section 83 also could be repealed as the rebuttable presumption for children aged ten to twelve is no longer relevant.³¹²

On the other hand, regarding the juvenile justice system, the Child Act 2001 highlights the main structure, process, and procedure in responding with the children who commit an offence. Special procedures while handling the child offenders are provided in Part X in the Act, including the procedure of arresting, remand or bailing, trial and sentencing of the children. The roles of authorised bodies such as police, probation officers, the Court of the Children and institutions involved are also defined in this Part.³¹³ Pursuant to section 83(1), a child who is arrested, detained and tried for any offence (subject to certain limitations) must be handled according to the provisions of the Child Act 2001, rather than the standard procedures where it applies

³¹⁰ Anita Abdul Rahim. 2012.” *Jenayah Kanak-kanak dan Undang-undang Malaysia*”, Dewan Bahasa & Pustaka Kuala Lumpur.

³¹¹ *Ibid*

³¹² *Ibid*

³¹³ Anita Abdul Rahim. 2012.” *Jenayah Kanak-kanak dan Undang-undang Malaysia*”, Dewan Bahasa & Pustaka Kuala Lumpur.

to adults only.³¹⁴ The special procedures under the particular Act modify and take precedent over any written laws relating to procedures for arrest, detention and trial of the juvenile.³¹⁵ However, if the Child Act 2001 does not address a specific issue, then reference may be made according to the standard procedures under the Malaysian Criminal Procedure Code (Act 593).³¹⁶ Section 11(6) of the Child Act 2001 clearly states that “Except as modified or extended by this Part, the Criminal Procedure Code shall apply to Courts for Children as if Courts for Children were Magistrates’ Courts”.³¹⁷

The court of children was first established in June 2017 by former Prime Minister, Najib Tun Razak under Part IV of the Child Act 2001.³¹⁸ The main function of this court is to hear, determine or dispose of any charge against the child (above ten years old) as spelled out in section 11(1), in the Act itself.³¹⁹ It also has the power to try all offences except those which can be punished with death.³²⁰ There are some exceptions for children where they can be tried in the normal criminal courts; when they committed an offence punishable with death³²¹ and if the children have reached their 18 years old when they are charged, even the crime was committed when they were below 18.³²²

³¹⁴ Anita Abdul Rahim. 2012.” *Jenayah Kanak-kanak dan Undang-undang Malaysia*”, Dewan Bahasa & Pustaka Kuala Lumpur.

³¹⁵ Anita Abdul Rahim. 2012.” *Jenayah Kanak-kanak dan Undang-undang Malaysia*”, Dewan Bahasa & Pustaka Kuala Lumpur.

³¹⁶ *Ibid*

³¹⁷ *Ibid*

³¹⁸ n.a. 2014. “What is a Court for Children? What are the functions of the Court for Children?”, *Lawyerment*, Feb 28th, https://www.lawyerment.com/library/kb/Legal_Institutions/Judiciary/1509.htm

³¹⁹ Malaysia. 2001. *Child Act 2001*. (Amendment 2017). (Act 611). Section 11(1)

³²⁰ *Ibid*. Section 11(5)

³²¹ Malaysia. 2001. *Child Act 2001*. (Amendment 2017). (Act 611). Section 11(5)

³²² *Ibid*. Section 83(5)

Some improvements have been made, by amending some existing laws and formulation of a new law in order to protect the children's welfare. For instance, the amendments to the Child Act 2001 in 2016 has made it a comprehensive law in protecting children nationwide.³²³ Apart from that, a new Act was being enacted in the form of Sexual Offences Against Children Act 2017 in order to counter sexual offences not covered under the Child Act 2001.³²⁴

4.5 THE RESPONSIBILITY OF DELINQUENT ACTS IN SOCIAL MEDIA

In any juvenile justice system around the world, the treatment of young offenders is varying to one another. Usually, the term of 'crime', 'arrested' and etc. cannot be used as the juveniles are not charged under the criminal statutes.³²⁵ If someone who is underage commit an unlawful act - which is resulted to jail or prison if committed by an adult (with some exemption), the term used is 'delinquent act' or 'conduct in need of supervision' if the act would result to a fine if committed by an adult as well as the act that is not illegal when committed by an adult.³²⁶

According to the International Standard of UNCRC as well as Malaysian Juvenile Justice System, when minors break the law, they are legally not responsible for their actions in anyways. These underage offenders have been treated differently

³²³ NST Team. 2018. Child Act 2001 Comprehensive in Protecting Children from Neglect and Abuse. New Straits Times. 28th March 2018. Retrieved from <https://www.nst.com.my/news/government-public-policy/2018/03/350370/child-act-2001-comprehensive-protecting-children> (Accessed on 27th December 2018).

³²⁴ NST Team. 2018. Child Act 2001 Comprehensive in Protecting Children from Neglect and Abuse. New Straits Times. 28th March 2018. Retrieved from <https://www.nst.com.my/news/government-public-policy/2018/03/350370/child-act-2001-comprehensive-protecting-children> (Accessed on 27th December 2018).

³²⁵ Flower Ronald B. 1986. *Children and Criminality: The Children as Victim and Perpetrators*, Connecticut; Greenwood Press

³²⁶ *Ibid*

and kept separated from adult criminals.³²⁷ They, including child recidivists, have the right to be treated in ways that develop their reintegration and the child assumes a constructive role in society which in consonance with the Art 40(1) of this convention.³²⁸ Some alternative ways also had been taken by the justice bodies in assuring their dignity, rights and freedom are fully respected and protected.³²⁹

Pursuant to Section 6 of the Penal Code, the ‘General Exception’ also known as ‘partial defences’ are the defences of mistakes, infancy, insanity, communication in good faith, duress, intoxicant, consent, necessity, the act causing slight harm and private defence.³³⁰ As discussed in the previous topic, children under 10 years old are not deemed to be criminally responsible while those who are above ten and under twelve could be punished if only they have sufficient maturity and capability to judge the nature and consequences of their behaviour.³³¹

To impose a criminal responsibility upon an offender, two main elements must be present, which are criminal conduct (*actus reus*) and intention or knowledge (*mens rea*).³³² It comes from the Latin phrase ‘*Actus non facit reum nisi mens sit rea*’, which means a conviction of a crime requires proof of a criminal act and intent.³³³ If one of these elements is missing, then there is no criminal liability.³³⁴ *Actus reus* not only

³²⁷ Flower Ronald B. 1986. *Children and Criminality: The Children as Victim and Perpetrators*, Connecticut; Greenwood Press

³²⁸ The Committee of CRC, General Comment No. 10: Children’s Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, paragraph 23.

³²⁹ *Ibid*, paragraph 13

³³⁰ Dayang Nurhidaya. 2013. “Exceptions/Defences to Criminal Liability in Penal Code”, <https://www.slideshare.net/DayangNurhidayah1/3exceptions-as-defences>

³³¹ Malaysia. n.d. *Penal Code*. (Act 574), Section 83

³³² Hallevey, G. 2010. “Virtual Criminal Responsibility”. *Original Law Review*, v.6(2), pp. 9

³³³ Duhaime’s Law Dictionary on Legal Dictionary, <http://www.duhaime.org/LegalDictionary/A/ActusReusNonFacitReumNisiMensSitRea.aspx>

³³⁴ Dobson P. 2002. *Nutshells; Criminal Law*, Kuala Lumpur: Sweet & Maxwell Asia, pp. 1

referred as a guilty conduct, but it also can be in the form of omission to act (failure to do an act).³³⁵

Since children may have the insufficient capability to understand and to judge the nature and consequences of their behaviour, they are considered as lack of *mens rea* which is incapable to form criminal intent too.³³⁶ In fact, there is no direct method to assess the children's knowledge at the time of the alleged offences were committed.³³⁷ For instance, New South Wales (NSW) Supreme Court used some indirect factors to determine the children's knowledge at the relevant time such as; 1) the admission of the guilty child, 2) the child's criminal history, 3) circumstances surrounding the commission of the alleged act and 4) evidence of normal development.³³⁸ Thus, psychological evidence may provide direct evidence of the children's understanding of their behaviour through assessing the child's moral development.³³⁹

The existing element of *mens rea* is vital to charge a child with an offence. If there is *no mens rea*, the child cannot be accountable to any criminal act.³⁴⁰ Thus, it would be unfair to subject child offenders to the adult's criminal punishments as their mental and intellectual capacity is clearly different compared to adults.³⁴¹

³³⁵ *Ibid*

³³⁶ Maher, G. 2005. "Age and Criminal Responsibility", *Ohio State Journal of Criminal Law*, v.2, pp. 502.

³³⁷ Apler, A. 2000. "Naughty or Bad? The Role of Expert Evidence in Rebuttal of the *doli incapax* Presumption", *Psychiatry, Psychology and Law*, v.7(1), pp.207

³³⁸ *Ibid*, pp.207

³³⁹ Apler, A. 2000. "Naughty or Bad? The Role of Expert Evidence in Rebuttal of the *doli incapax* Presumption", *Psychiatry, Psychology and Law*, v.7(1), pp. 208

³⁴⁰ Maher, G. 2005. "Age and Criminal Responsibility", *Ohio State Journal of Criminal Law*, v.2, pp. 503

³⁴¹ *Ibid*, pp. 495.

The same thing will happen if the children commit wrong on social media without any criminal intent, they cannot be charged under the law. If they have sufficient intellectual capacity, they could be criminally liable. However, the punishment may differ from the punishment in any written laws. Their punishment will be determined by the public prosecutor, which could be in the form of rehabilitation other than deterrence.

4.6 SHARIAH PRINCIPLES ON CRIMINAL ACCOUNTABILITY OF CHILDREN

It is a natural when children always commit erroneous, wrongful act and mistake in the society out of intent and proper knowledge as it is the way of their learning process. As discussed in the previous chapter, it described the age of responsibility and the capability to differentiate between right and wrong for children. But in this chapter, it discusses the component of criminal accountability for a person.

There are five stages in human life³⁴²;

- 1) Fetal
- 2) childhood before their discernment age (*ghair mumayyiz*),
- 3) childhood after their discernment age (*mumayyiz*),
- 4) puberty,
- 5) puberty with discernment (*ar-rushd*).

³⁴² Mahjoob, A. 1987. *Ushool Al-fikr At-tarbawi fil Islam*, Beirut: Dar Ibn Kathir, pp. 221-234

Stage	Description
Fetal	Prenatal human being between the embryonic stage and birth.
childhood before their discernment age (<i>ghair mumayyiz</i>)	Newborn baby until they reach the age of 9 years
childhood after their discernment age (<i>mumayyiz</i>)	Children who attained 7 years old until they reach 12 years old.
Puberty	Beginning at 13 years old until 21 years old
Puberty with discernment	Beginning at 21 years old.

In Islam, the concept of responsibility in Islamic Law is subsumed under the legal capacity (*ahliyyah*) which is capacity of acquisition/obligation (*ahliyyah al wujoob*) and capacity of execution (*ahliyyah al-ada*).³⁴³ It is closely related to the power of understanding of human in order to distinguish the accountability of a person towards his/her duties and deeds. As Allah says in the Quran;

﴿إِنَّا عَرَضْنَا الْأَمَانَةَ عَلَى السَّمَاوَاتِ وَالْأَرْضِ وَالْجِبَالِ فَأَبَيْنَ أَنْ يَحْمِلْنَهَا وَأَشْفَقْنَ مِنْهَا وَحَمَلَهَا
الْإِنْسَانُ إِنَّهُ كَانَ ظَلُومًا جَهُولًا﴾

“We did offer the Trust to the heavens and the Earth and the mountains, but they refused to bear its burden and were afraid of it, and man picked it up. Indeed, he is unjust (to himself), unaware (of the end).”³⁴⁴

From this verse, we can understand that the legal capacity for human in Islam relates to acquire and perform the duties and rights, as well as to perform worship and Allah’s commands (*khitab as-syari*’).

³⁴³ Az-Zarqa’, M.A. n.d. “*Al-Fiqh al-Islamiy fi Thaubihi al-Jadid*”. Damascus: Mathba’ah al-Hayaah, v 2, pp. 753.

³⁴⁴ Al-Quran. *Al-Ahzab*. 33;72

The capacity of acquisition is the capacity to acquire duties and rights such as inheritance, bequest and parentage, whereas the capacity of execution is the capacity to perform such duties and rights.³⁴⁵ The fundamental element of capacity of acquisition is alive, where a person is considered to have complete capacity wherever he/she was born until his/her deceased.³⁴⁶ Whilst, the ability to understand (*al-‘aql wa al-fahm*) and the ability to perform the duties (physical ability) become the fundamental element of capacity of execution.³⁴⁷ Thus, a person who has attained the maturity age according to *syara’*, of a good state of mind, and not deaf nor blind is considered to be *mukallaf* (responsible for his duties and rights).

Muslim jurists have divided the understanding passed by human from the moment they were born until they reached their puberty into three stages, namely;

1. absence of understanding stage,
2. infirm understanding stage and
3. full power of understanding stage.

These divisions are essential as to understand the nature of each stage of child growth in overcoming the difficulties associated with the education and development of children and their readiness and motivation during the passage of those stages. Some scholars agreed that the stage begins since fertilization and fetus development and ends at elderly age, while others said that it only started whenever the baby was

³⁴⁵ Al-Bukhari, A.A.A. n.d., *Kashf al-Asrar Syarhu Usool al-Bazdawi*, Beirut: Dar al Kitab al Arabiy, v.4, p.p. 237

³⁴⁶ Abu Zahrah, M. 1957. *Ushool al-Fiqh*, Beirut: Dar al-Fikr al-Arabiyy, pp 308

³⁴⁷ Al-Bukhari, A.A.A. n.d., *Kashf al-Asrar Syarhu Usool al-Bazdawi*, Beirut: Dar al-Fikr al-Arabiyy, v.4, pp 248

born. Every single stage shows different power of understanding and maturity among children and the consequences from their actions.

The unborn baby that is still in the mother's womb or fetus stage is assumed to have a deficient capacity of acquisition (*ahliyyah al- wujoob naqisah*) and no capacity of execution (*'adeem al-ahliyyah*).³⁴⁸ They can only acquire some rights, like inheritance, bequest and parentage, yet they have lack capacity to perform some obligations as their physical conditions are still deficient.³⁴⁹

Children are who categorised as '*sabiyy ghayr mumayyiz*' or a minor are generally assumed to have a complete capacity of acquisition (*ahliyyah al wujoob kamilah*), yet absent capacity of execution until they are *mumayyiz*.³⁵⁰ According to the view of As-Shafi'i, children at this age are not accountable to engage in transactions such as purchasing something and making charity as it is not valid even with the permission from his/her guardians. It is because puberty and discernment are the prerequisites for validation of the transaction.³⁵¹ They are also not accountable for their antisocial behavior otherwise, it is related to property damages, the compensation paid using their own property, or their guardians have to pay it.³⁵² If it is related to violent offences, they cannot be punished either by retaliation punishment (*qisas*³⁵³),

³⁴⁸ Hasbullah, A. 1964. "*Ushool at-Tasyri' al-Islamiyy*". Cairo: Dar-al Maa'rif, pp. 357.

³⁴⁹ Al-Bukhari, A.A.A. n.d., *Kashf al-Asrar Syarhu Usool al-Bazdawi*, Beirut: Dar al-Fikr al-Arabiyy, v.4, p.p. 240.

³⁵⁰ Az-Zarqa', M.A. n.d. "*Al-Fiqh al-Islamiy fi Thaubihi al-Jadid*". Damascus: Matba'ah al-Hayaah, v 2., pp. 753.

³⁵¹ Ibn As-Subki, T. A. W. 1991. "*Al-Ashbah wa an-Nazhair*". Beirut: Dar al-Kutoob al-Ilmiyyah. v. 1, pp. 364; As-Sarakhsi, M. A. 1993. "*Ushool As-Sarkhasi*". Beirut: Dar al-Maa'rifah, v. 2, p.p. 340.

³⁵² Al-Qarafi, A. I. n.d. "*Al-Farqu baina qa'idah khitab at-taklif wa qa'idah khitab al-wadh'i*", *Al-Farouq*, Beirut: Dar al-Maa'rifah, v. 1, p.p. 164.

³⁵³ Qisas is a crime punishable with a fixed punishment imposed as the right of individual. The punishment is clearly stated in the Quran and the Sunnah including homicide and causing harms to others. The victim has the right to choose whether to demand the infliction of punishment on the offender or pardon him.

disambiguation punishment (*hadd*³⁵⁴) or discretionary punishment (*ta'zir*³⁵⁵) because they are assumed to be unconscious of the illegality of their actions and lack of criminal intent.³⁵⁶

Then, the children will experience the age of discretion or *sabiy mumayyiz*. Generally, *at-tamyiz* means the ability to distinguish between harm and benefit. It begins from the moment of the child aged seven or eight to fifteen or until they attained their puberty,³⁵⁷ at this stage, it is known as an infirm understanding stage. There are two arguments in limiting this discriminative age. The first argument comes from some jurists of Hanafi's school, majority of Hanbali's school and an opinion of Shafi'i's school where discriminative age is at seven years old.³⁵⁸ This is adopted from hadith Prophet (PBUH):

“Narrated by Abdullah bin Amr bin Aas that the Prophet said,
‘Train your children to pray when they become seven years old,

³⁵⁴ *Hadd* (plural: *hudud*) is considered as direct violations against Allah's rights. It is punishable with a fixed punishment as clearly mentioned in the Quran and the Sunnah. The crimes under this category are *zina* (adultery), theft, robbery, drinking intoxicants, *qazf* (false accusation of *zina*), apostacy and rebellion. the punishment cannot be reduced nor pardon once the crime was established.

³⁵⁵ Al-Mursi defines *ta'zir* as “a disciplinary and deterrence penalty on certain individual(s) for a forbidden and inappropriate conduct that cannot be punished by *hadd*, *qisas*, *diyyat* or *kaffara* (penance)

³⁵⁶ As-Shirazi, A. I. I. A. 1992. “*Kitab al-Hudud*, Subtopic; *az-zina*, v. 3, p.p. 335, subtopic; *had al-qazaf- wa in qazafa ghaira muhshan*, v. 3, p.p. 346; *kitab al-jinayat*; subtopic: *tahrim al-qatl wa man yajib 'alaihi qisas*, v. 3, p.p. 170”, *Al-Muhadzab fi al-fiqh Al-Imam As-Syafi'i*, Beirut; Dar al-Kutoob al-Ilmiyyah; Khatib As-Syarbini, S. M. A. (1994), “*Kitab az-zina*, v. 4, p.p. 146, *kitab as-sirqah*, v. 4, p.p. 174, *kitab had al-qazaf*, v. 4, p.p. 155, *kitab al-asyribah*, v. 4, p.p. 187”, *Mughni al-Muhtaj ila Maa'rifati Maa'ni Alfaz al-Minhaj*, Beirut; Dar al-Kutoob al-Ilmiyyah; Al-Kassani, I. A. B. M. (1986), “*Kitab al-Hudud*, subtopic: *hadd az-zina*, v. 7, p.p. 38, *kitab al-jinayat*, subtopic *syaraiith wajoob al-qisas*, v. 7, p.p. 234, *kitab al-qazaf*, *syaraiith wujoobuhu*, v.7, p.p. 40”, *Badai'i Shanai'i fi Tartib as-Syarai'i*, Beirut; Dar al-Kutoob al-Ilmiyyah; Az-Zarqani, A. B. Y. A. (2002). “*fi Ahkam ad-Dima' wa al-Qisas*, v. 2, p.p. 8, *az-zina*, v. 8, p.p. 74-75, *hadd as-sirqah*, v. 8, p.p. 92”, *Syarh Az-Zarqani 'alaa Mukhtasar Khalil*, Beirut; Dar al-Kitab al-Ilmiyyah.

³⁵⁷ Sadr as-Syariah, *at-Tanqih wa at-Taudhih 'alaihi*, v.3, pp. 158

³⁵⁸ As-Sarakhsi, M. A. 1993. “*Al-Mabsut*”. Beirut; Dar al-Maa'rifah, v.24, p.p. 162; Abidin. I.M.A.U., 1992. “*Radd al-Muhtar 'ala ad-Dar al-Mukhtar*”, Beirut; Dar al-Fikr, v.4, pp. 257

*and immerse/envelope them for it (prayer) when they become ten years old; and arrange their beds separately”.*³⁵⁹

While Imam An-Nawawi (May Allah have mercy on him), some jurists of Hanafi's school³⁶⁰, jurists of Maliki's school³⁶¹ and jurists of Hanbali's school³⁶² agreed that there is no limitation or certain age for discriminative age. Imam Nawawi said every child has different ability to understand where there is no certain age of capable to distinguish between good and bad since some children might do so earlier than others.³⁶³ The limitation was made based on the common occurrence,³⁶⁴

Children also have the deficient capacity of execution (*ahliyyah al-ada' naqisah*) where they will be responsible for some duties, but the capacity is still weak.³⁶⁵ The power to understand and their discernment is weak and still not complete. With regard to transactions done by the children without permission of the guardian, it is considered as not valid. The validation of such transaction is subject to the permission and approval by their guardians.³⁶⁶

At this stage, when the children commit any offences related to material damages (other than violent offences), they need to pay the compensation using their

³⁵⁹ Narrated by Ahmad, v.3, p.p. 387, hadith num. 6717; Abu Daud, in *Kitab as-Salah*, subtopic *mataa yu'maru al-ghulam bis salah*, v1, p.p. 187, hadith num. 495.

³⁶⁰ Ibn Najim, Z. I. M. n.d. "al-hadhanah", *Al-Bahru Ar-Ra'iq Syarhu Kanz Ad-Daqa'iq*, Cairo: Dar al-Kitab al-Islamiyy, v.4, p.p. 184; "Hasyiyah Ibn 'Abidin", v. 2, p.p. 640

³⁶¹ Az-Zarqani, A. B. Y. A. 2002. "al-ghasbu", *Syarh Az-Zarqani 'alaa Mukhtasar Khalil*, Beirut: Dar al-Kitab al-Ilmiyyah, v. 6, p. 138.

³⁶² Ibn al-Lahham, I. A. H. A. 1983. "Al-Qawa'id wa al-Fawaid al-Ushooliyah wa ma yatba'uha min al-Ahkam al-Far'iyah", Beirut: Dar al-Kutoob al-Ilmiyyah, pp. 16

³⁶³ An-Nawawi, A. Z. M. Y. 1987. "Tahrir Alfaz at-Tanbih", *Kitab al-jim*, pp. 153

³⁶⁴ *Ibid*

³⁶⁵ Al-Bukhari, A.A.A. n.d. "Kashf al-Asrar Syarhu Usool al-Bazdawi", n.p, v.4, p.p. 248

³⁶⁶ According to Imam As-Syafi'i, *bulooḡ* and *ar-rushd* as prerequisites for validation of any transaction. Hence, children who did not attain their puberty, or children who have attained their puberty but cannot manage his/her property, (prevent from being deceived or bad use of money (waste of money), they must seek their guardian's permission. He in his opinion, stated even though the person, had reached their old age, if they cannot manage their property, the property cannot be given to him/her until they are able to manage it properly (by doing some tests first).

property (if any), or else their guardians are responsible for doing it.³⁶⁷ Whilst, if they commit any violent offences, they are not accountable for any physical punishment, but they have to pay the *diyyat*³⁶⁸ or *ta'zir* and it is burdened on his/her own property or their guardian's.³⁶⁹ The punishment of *hudud* and *qisas* is too harsh on a child and should not be imposed on them as they are not yet a *mukallaf*.³⁷⁰ According to Al-'Izz ibn 'Abd As-Salam, it is compulsory to the guardians, to immerse the convicted children as the way of *ta'dib* (rehabilitation) if he/she committed an offence (that can be punished under *ta'zir* if committed by an adult).³⁷¹ *At-ta'dib* falls under the category of *ta'zir*.³⁷² *Sabiyy mumayyiz* can be punished under *ta'zir* as the condition to be punished with *ta'zir* is *mumayyiz* and not necessary to be *buloogh*.³⁷³

In these two particular stages, there are no Shariah effects (rewards and sins) towards their words and actions because they are still developing their intellectual abilities in order to understand the nature and consequences of their acts.³⁷⁴ The other reasons why children are not accountable to be punished with *qisas* and *hadd* are because the offender must have a full capacity that is *buloogh* and *ar-rushd*, children's wrongs or fault cannot be considered as a crime (*qisas* and *hadd* only can be done if

³⁶⁷ Al-Qarafi, A. I. n.d. "Al-Farqu baina qa'idah khitab at-taklif wa qa'idah khitab al-wadh'i", *Al-Farouq*, Beirut: Dar al-Maa'rifah, v. 1, p.p. 164.

³⁶⁸ *Diyyat* is a financial or pecuniary compensation paid to the victim or heirs of the victim in the case of murder, bodily harm, or property damage. It is an alternative punishment to *qisas* when the family of the victim can compromise with the guilty party, otherwise the *qisas* will be applied. It is also known as blood money or ransom.

³⁶⁹ Al-Qarafi, A. I. n.d. "Al-Farqu baina qa'idah khitab at-taklif wa qa'idah khitab al-wadh'i", *Al-Farouq*, Beirut: Dar al-Maa'rifah, v. 1, p.p. 164.

³⁷⁰ Abidin, I., & Umar, M. A. I. 2000. "*Hashiyah radd al-mukhtar ala al-darr al-mukhtar*", Beirut: Dar al-Kitab al-Arabiyy, v.6

³⁷¹ Sultan 'Ulama', I. A. S. 1991. "Bayan Haqa'iq at-Tasharrufat: At-Ta'dib wa az-Zajr", *Qawa'id al-Ahkam fi Mashalih al-Anam*, Beirut: Dar al-Kutoob al-Ilmiyyah, pp. 509.

³⁷² 'Audah, A. Q. n. d. "*at-Tasyri' al-Jina'iy al-Islam Muqaranan bi al-Qanun al-Wadha'iy*", Beirut: Dar al-Kitab, v. 1

³⁷³ Al-Kassani, I. A. B. M. 1986. "*kitab hadd al-qazaf, qaluhu wa amma at-ta'zir*", *Badai'i Shanai'i fi Tartib as-Syarai'i*, Beirut: Dar al-Kutoob al-Ilmiyyah v.7, p.p. 63-64

³⁷⁴ Ibn Muaqqat, S. M. M. 1983. "Al-Bab al-Awwal fi al-Ahkam (first topic)", *At-Taqrir wa At-Tahbir*, Beirut: Dar al-Kutoob al-Ilmiyyah, v. 2, p.p. 79, (forth subtopic) about *mahkum 'alaih*, v. 2, p.p. 164, 166-167.

there is a criminal),³⁷⁵ there is no *mens rea* or intention among children (their intention to commit criminal is equal to false action),³⁷⁶ and children are not accountable to sin when they commit wrong acts (because they are not *mukallaf*)³⁷⁷. The general exemption for children from being liable for their delinquent deeds was narrated in a hadith by Ali and ‘A’ishah (may Allah pleased be them both) reported from Prophet Muhammad (PBUH):

*“The pen is raised from (the book) of three (individuals): the sleeper until he awakes, the child until he reaches puberty, and the insane until he regains his sanity.”*³⁷⁸

Whenever the child attained his/her puberty, they are assumed to have complete capacity of acquisition and complete capacity of execution where they are considered to be *mukallaf*.³⁷⁹ Children who have attained their puberty whether from their physical maturity or determined through their age are considered to be *bulough wa ar-rusyd* where they have the full power of understanding. Shariah Islamiyah has put a limit for the endpoint of childhood stage whenever they have attained their puberty. The Almighty Allah says in the Quran;

³⁷⁵ Az-Zuhayli, W. M. 1984. *Fiqh al-Islamiy wa Adillatuhu*, Damsyiq: Dar al-Fikr, v. 5, p.p. 754, v.6, p.p. 23 & 265.

³⁷⁶ Al-Asrushni, M. M. H. 1994. *Jami’ Ahkam as-Sighar*, Cairo: Dar al-Fadhilah li an-Nashri wa at -Tauzi’ wa at-Tashdir, v. 2, p.p. 171& 179.

³⁷⁷ Al-Qarafi, A. I. n.d. “Al-Farqu baina qa’idah khitab at-taklif wa qa’idah khitab al-wadh’i”, *Al-Farouq*, Beirut: Dar al-Maa’rifah, v. 1, p.p. 162.

³⁷⁸ Narrated by Ibn Majah, *Bab al-Ghulam wa al-Maa’tuh wa as-Saghir wa an-Naim*, *Kitab At-Talaq*, v.2, p.p. 657, hadith number 2041; Abu Dawud, *Bab fi al-Majnun Yasruq au Yushib Haddan*, *Kitab al-Hudud*, v. 2, p.p. 545, hadith num. 4399, 4401, 4402; An-Nasai’e, *Bab Man La Yaq’a’ Thalaquhu*, v.6, p.p. 156; Al-Baihaqi, *Bab al-Majnun Yushib Haddan*, *Kitab as-Sirqah*, v.8, p.p. 264.

³⁷⁹ Abidin, I., & Umar, M. A. I. 2000. “Hashiyah radd al-mukhtar ala al-darr al-mukhtar”, Beirut: Dar al-Kitab al-Arabiyy, v.6,

﴿وَإِذَا بَلَغَ الْأَطْفَالُ مِنْكُمُ الْحُلُمَ فَلْيَسْتَأْذِنُوا كَمَا اسْتَأْذَنَ الَّذِينَ مِنْ قَبْلِهِمْ ۚ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ

آيَاتِهِ ۗ وَاللَّهُ عَلِيمٌ حَكِيمٌ﴾

*“When the children from among you reach puberty, they must seek permission, as the permission is sought by those before them. This is how Allah explains His verses to you. Allah is All-Knowing, All-Wise”.*³⁸⁰

However, there is no specific age of puberty as every child will experience it at a different age. Islamic jurisprudence considered the natural puberty for a boy begins whenever he is capable of manifesting the masculinity, having sexual desires, and they have the ability to marry.³⁸¹ Nevertheless, the physical puberty occurs when they had the nocturnal emission, or ‘wet dream’ and the jurist had limited the age for the wet dream for a boy between the age of nine until 15 years old. For a girl, the physical puberty may occur through menstrual, wet dreams or pregnancy.³⁸²

Meanwhile, if there are no natural or physical puberty signs, the majority of Islamic jurists put a limit on specific age as an end for the childhood age. According to a hadith narrated by Abdullah ibn Umar (may Allah be pleased with him) from Prophet Muhammad (PBUH);

“I was presented to the Messenger of Allah (PBUH) on the Day of Uhud, when I was fourteen years old, but he did not permit

³⁸⁰ Al-Quran, An-Nur, 24:59

³⁸¹ Ibrahim Fakhhar, H. 2015. *Al-Himayah Al-Jinai'yyah li At-Tifl fi At-Tashrii' Al-Jazaairi wa Al-Qanun Al-Muqaaran*. Thesis. Muhammad Khaidhar University. pp. 16

³⁸² *Ibid*

*me to fight. I was presented to him on the Day of Khandaq, when I was fifteen years old, and he permitted me to fight”.*³⁸³

Two jurists from Hanafi's school³⁸⁴, jurists from Shafi'i's school, Hanbali's school fixed fifteen years old as the age of puberty.³⁸⁵ Whenever a child reaches fifteen years old, he is considered as having reached puberty legally even though the puberty did not happen physically. Besides that, Maliki school's jurists fixed eighteen years old as the age of puberty, this is from Ibn Al-Qasim's opinion.³⁸⁶ Abu Hanifah, however, on his second opinion, limited the age of puberty at eighteen, and in another report, he fixed it at nineteen years old for a boy and seventeen years old for a girl.³⁸⁷ The dominant opinion of Maliki School agrees with the opinion of Abu Hanifah, which limits it at eighteen, while some others limit it at nineteen.³⁸⁸

Allah says in the holy Quran;

﴿وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ ۖ وَلَا تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَن يَكْبَرُوا ۚ وَمَن كَانَ غَنِيًّا فَلْيَسْتَعِظْ ۖ وَمَن كَانَ فَقِيرًا فَلْيَأْكُلْ بِالْمَعْرُوفِ ۚ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهَدُوا عَلَيْهِمْ ۚ وَكَفَىٰ بِاللَّهِ حَسِيبًا﴾

“Test the orphan until they reach the marriageable age. Then, if you perceive in them proper understanding, hand their property

³⁸³ Narrated by Al-Bukhari in *as-Syahadat*, in topic *bulooḡ as-sibyan wa syahadatihim*, v.2, p.p. 948; Al-Baihaqi, A. A. “*Kitab al-Hajar*”, *Bal al-buloḡ as-sin*, *Al-Sunan Al-Kubra*; Al-A'tha A.Q.M. 2003. Dar Al-Kutoob Al-Ilmiyah: Labenon, num. 11302, v.6, pp. 92

³⁸⁴ Abu Yusuf and Muhammad bin Hassan.

³⁸⁵ Al-Asrushni, M. M. H. 1994. “*Bab masail al-buloḡ*”, *Jami' Ahkam as-Sighar*, Cairo: Dar al-Fadhilah li an-Nashri wa at-Tauzi' wa at-Tashdir, v.1, pp. 177; *Raudhat at-Thalibeen*, v.4, pp. 178; al-Hawi al-Kabir, v. 6, pp. 344.

³⁸⁶ Ad-Dusuqi, M. A. U'. n.d. “*Hasyiah Ad-Dusuqi ala Syarh al-kabir*”, n.p., v.3, pp. 293; Al-Qarafi, S. A. I. 1994. “*Adz-Dzakhirah*”, Beirut: Dar al- Gharb al-Islamiyy, v. 8, pp. 237.

³⁸⁷ Al-Asrushni, M. M. H. 1994, *Jami' Ahkam as-Sighar*, Cairo: Dar al-Fadhilah li an-Nashri wa at-Tauzi' wa at-Tashdir, v.1, pp. 77; *Takmilah Fath Al-Qadir*, v. 9, pp. 270

³⁸⁸ ‘Awdah, *al-Tashri' al-Jina'i al-Islami*, vol. 1. pp. 601; Bahnasi, *Al-Mas'uliyah al-Jina'iyah fi al-Fiqh al-Islami*, pp. 271.

over to them, and do not consume it extravagantly and hastily,
lest they should grow up...³⁸⁹

What can be understood from this verse is, the children should be tested to know whether they are wise and matured enough to manage their property by delegating them to buy and sell. From that, it may be determined whether they can be easily cheated or not. Thus, the transaction only will be valid whenever the children are wise and they got permission from their guardians, like a slave.³⁹⁰ If they already have the prudence (*ar-rushd*), the transaction, contracts and charity engaged by them will be valid even without the guardian's permission.³⁹¹

A nature of *buloogh* and *ar-rushd* entitles someone to become *taklif* (person who reached the legal prerequisites to be a *mukallaf*) set by Allah and to be accepted and recognised as a *mukallaf*.³⁹² It also demonstrates the perfect development of mind and wisdom. Whenever children reached their puberty, they have full responsibility towards *khitab as-syari'*, where it is compulsory upon them to practice the religious such as covering their *'aurah*, performing *salah* (prayer), fasting, being cautious with *ikhtilat* (free intermingling between men and women) etc.

They can be liable to perform in any contract and transaction and legally answerable for their faults. They are responsible for their sins and rewards as Allah the Almighty stated in the Quran;

³⁸⁹ Al-Quran. *An-nisa'*, 4:6

³⁹⁰ Ibn Munzir, A. B. M. 2004. "*Al-Ijma' li Ibn Munzir*", Riyadh: Dar al-Muslim li An-Nashr wa At-Tauzi', pp. 86; Al-Qurthubi, A. A. M. 1964. "*Surah An-Nisa'*", *Tafseer al-Qurthubi*". Cairo: Dar al-Kutoob, v.5, pp. 38.

³⁹¹ As-Saghdi, A. H. A. 1984. "*An-Natfu fi Al-Fatawa*", Amman: Muassasah ar-Risalah, v. 2, pp. 750; Hasyiah Ibn Abidin, v. 5, pp. 94-95

³⁹² Al-Amidiy, A. H. S. A. 1968. "*Al-Asl ar-Rabi' fi al- Mahkum Alaihi: al-masalah al-ulaa*", *Al-Ihkam fi Ushool al-Ahkam*, Beirut: Dar al-Kitab al-Arabiyy, v. 1, pp. 199.

﴿فَمَنْ يَعْمَلْ مِثْقَالَ ذَرَّةٍ خَيْرًا يَرَهُ﴾. ﴿وَمَنْ يَعْمَلْ مِثْقَالَ ذَرَّةٍ شَرًّا يَرَهُ﴾

*So, whoever does any good act (even) to the weight of a particle will see it. And whoever does evil (even) to the weight of a particle will see it.*³⁹³

Children are considered guiltless due the minority as Allah said in the Holy Quran

﴿...فَمَنْ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ...﴾

*“But if one is forced by necessity without willful disobedience, nor transgressing due limits, then is he guiltless”*³⁹⁴

and Prophet Muhammad (PBUH) said *“My Ummah is exempted from mistake, forgetfulness and the act done under coercion”*.³⁹⁵ Thus, intention or guilty mind, are essential components to grand a punishment for someone who commits offences.³⁹⁶

4.7 CONCLUDING REMARKS

From this chapter, it has achieved the second objective of the thesis where the criminal responsibility of the children has been discussed. Most of the current juvenile justice system had put a specific minimum age of criminal responsibility limit which has disconnected the notion of the age of criminal liability from the element of

³⁹³ Al-Quran; Al-Zalzalah. 99:7-8

³⁹⁴ Al-Quran; Al-Baqarah, 2:173

³⁹⁵ Tirmizi, A. I. M. a. 1980. Sunan al-Tirmizi: Beirut: Dar al-Fikr.

³⁹⁶ Islam, M. S. 2015. Fundamental Human Rights towards Childhood: Islamic Guidelines are Unique to Protect the Child, *Journal of Asia Pasific Studies*, v.4(2), pp. 189

capacity.³⁹⁷ Children who are under the age of criminal responsibility may automatically be absolved from being prosecuted in any criminal liability while children who are aged above the minimum age of criminal responsibility are deemed answerable to a criminal charge, as an adult, without being inquired into their own capacity.³⁹⁸

As we can see the child age limit set by the Malaysian Government is consistent with Article 1 of CRC together with the age limit from Syariah perspective. The determination of child age by the Malaysian Law is fixed by the age of 18 years old meanwhile Shariah has limit the age of child based on their puberty age that is between fifteen years old until nineteen years old. However, there are distinctions among Islamic jurists' ideas in limiting the age of puberty if they did not attained puberty physically. All the limitations are upon the basis of the power of the child's understanding, ability to think, make choices and make good decisions.

Perhaps, there should be a general guideline that may provide the solution to this issue in which criminal liability is measured based on the capacity and maturity of a child. Children are eligible to get the protection by observing their ability to distinguish between good and bad and between right and wrong also understanding of nature and consequence of their own conduct. The researcher believes, if some elements of Islamic law are applied to Malaysian law, it may help to reduce this alarming problem.

In the next chapter, it discusses on the Malaysian Legal framework and Shariah

³⁹⁷ Akmal Mohamad, *et.al.*. 2017. " Criminal Responsibility of Children under Malaysian Law: Time for a Re-Evaluation", *World Applied Science Journal*, v. 35(9), pp. 1784.

³⁹⁸ Akmal Mohamad, *et.al.*. 2017." Criminal Responsibility of Children under Malaysian Law: Time for a Re-Evaluation", *World Applied Science Journal*, v. 35(9), pp. 1784.

principles that govern social and the government and NGOs' efforts in curbing this
alarming situation

