

## Children's Criminal Responsibilities: Comparative Study in Islamic and Criminal Law

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*Date received: August 2018, Last Revised: September 2018, Accepted: October 2018*

### ABSTRACT

*The study of criminal liability against child offenders based on Law No. 11 of 2012 concerning the Criminal Justice System of Children and according to Islamic Criminal Law is a very interesting phenomenon to study, especially during this time many phenomena of a minor underage sitting in the accused and detained like a big villain just because of a trivial matter. This study includes the type of research library research, so in this study, researchers conducted data collection through the study and library research on books relating to the problems the authors studied. In analyzing this study, the authors used a comparative method that is comparing child criminal liability in positive criminal law based on Law No. 11 of 2012 concerning the Child Criminal Justice System, with child criminal liability in Islamic criminal law. In Islamic law, a child will not be subject to a punishment for the crime he committed, because there is no legal responsibility for a child of any age until he reaches the age of baliq, qadhi will only have the right to reprimand him or set some restrictions for him to help improve the child in the future. It is expected that this research can contribute to the renewal of national criminal law, especially regarding criminal liability committed by children, taking into account the concepts in Islamic criminal law.*

**Keywords:** *Children's Criminal Responsibilities, Positive Criminal Law, Islamic Criminal Law*

**DOI :** <https://doi.org/10.31603/variajusticia.v14i2.2417>

### 1. INTRODUCTION

In the development of the application of criminal law in Indonesia, the existence of children who commit crimes commonly known as "children" is still being processed legally. This happens because a criminal offense committed by a child has caused harm to other parties (victims) both materially and lives. But on the other hand, law enforcement against crimes committed by children creates problems because the perpetrators of the crime are children who are legally incapable of law. Law enforcement for children turns out to be a problem. Because according to Law Number 11 of 2012 concerning the Child Criminal Justice System, children who are criminals are eligible to be processed are children who are eight years old, and processed specifically, different from law enforcement against adults.

In Islamic law a child will not be subject to a punishment for the crime he committed, because there is no legal responsibility for a child of any age until he reaches the age of birth, the judge (qadhi) will only have the right to reprimand or set some restrictions for him help repair and so that the child does not make mistakes in the future.

The study of criminal responsibility against children of criminal offenders in the perspective of positive criminal law and Islamic criminal law is a fascinating phenomenon to study, especially during this time many aspects of a minor underage sit on the accused and detained like a big criminal just because of a trivial matter.

## 2. THEORITICAL FRAMEWORK

### 2.1. Understanding of Children According to Law Number 11 of 2012

Based on Law No. 11 of 2012 concerning the Child Criminal Justice System, it is explained the definition of children who are faced with the law are children in conflict with the law, children who are victims of criminal acts and children who are witnesses of criminal acts.

A child in conflict with the law from now on referred to as a child is a child who is 12 (twelve) years old but who is not 18 (eighteen) years old who is suspected of committing a criminal act. In addition to age restrictions, legal experts also provide other restrictions on the ability of one's responsibility, among others:

Simons, someone is said to be able to be responsible, if his soul is healthy, that is if:

1. He can know and realize that his actions are against the law;
2. He can determine his will according to his consciousness.

Van Hamel, someone can be said to be responsible, if:

1. Able to understand the value of the consequences of his own actions
2. Ready to realize, that his activities were not permitted by the community
3. Able to determine his will for those actions

### 2.2. Age Limit for Children According to Islamic Criminal Law

The position of children in Islam is very high and noble. In the Islamic view, children are also seen as the mandate of God Almighty given to their parents. As a mandate, you should have the right to obtain maintenance, care, guidance, and education. (Hidayat, 2007: 470-471).

The size of a child can be said to be baligh if on him there is one of the following properties:

1. Has reached the age of 15 years
2. Semen has been released for boys
3. There has been menstrual bleeding for girls

This is by the words of Rasul SAW:

قال الشافعي رضي الله عنه : اخبرنا سفيان بن عيينة , عن عبد الله بن عمر بن حفص , عن نافع , عن ابن عمر قال : عرضت على النبي ص م عام واحد وانا ابن اربع عشرة فردني , وعرضت عليه عام الخندق وانا ابن خمس عشرة فاجازني , قال نافع : فحدثت به عمر بن عبد العزيز فقال عمر : هذا فرق بين الذرية والمقاتلة , ثم كتب الى عماله : ان يفرضوا لابن خمس عشرة في المقاتلة , ولابن اربع عشرة في الذرية .

Meaning: " Shafi'i Imam said: we were told by Sufyan ibn Uyaynah, from Abdillah ibn Umar ibn Hafshin from Nafi from ibn Umar, said I came (to join the war) the Prophet SAW in Uhud, and I was fourteen years old then Rasulallah refused me, then I went to the Messenger of Allah back in the year of Khandak, and I was fifteen years old, then the Messenger of Allah allowed me to fight, Nafi said I told Umar ibn Abdil Aziz, then Umar said this was the difference

*between small children and adults ( in terms of war) then Umar obliged his workers to require their children to fight at the age of fifteen, and at the age of fourteen they were children”.*

Ijma 'ulama agreed that the age of baligh was at the age of fifteen. However, some scholars argue about the age of baligh for men and women who have no signs of dreaming of semen (itilam) and menstruation, namely (Audah, 1991: 253):

1. According to Imam Malik there were three opinions: at the age of seventeen, eighteen years and fifteen years
2. According to Imam Abu Hanifa there were two opinions: at the age of eighteen and seventeen for a slave
3. Whereas according to Imam Abu Daud Azh-Zhahiri and his friends, it is believed that there is no definite age limit regarding the age limit of baligh.
4. According to the jurists, thinking skills in children began when he was fifteen years old. If the child has reached that age, he or she is considered legally mature. Imam Abu Hanifa limited his maturity at the age of eighteen; according to a history of nineteen years for men and seventeen for women. Popular opinion in the Maliki school is in line with Abu Hanifah's view because they determine the age of eighteen years and according to some others nineteen years.

### **2.3. Child Crime According to Islamic Law**

According to Islamic law, criminal acts are identical to the words "jinayat" which have the plural form of the word "jinayah" which means the act of sin, wrongdoing or evil. Jinayah is masdar (original word) of the verb (fi'il madhi) janaa which implies a keja intended for male units that have sinned or are wrong. The perpetrator of the crime itself is called jaani. The female perpetrators of crime are jaaniah, which means women who commit sins. The person who is the target or object of the perpetrator's deed is named alaih mujnaa or victim (Hanafi, 1967: 305).

Dr. Abdul Qadir Audah in his book *At-Tasyri Al Jina'i Al Islamy* explained the meaning of the word Jinayah is all acts that are forbidden. Forbidden actions are actions that are prohibited and prevented by syara '(Islamic law). If done, the act has consequences that endanger religion, soul, reason, honor, and property. The term jinayah literally means the same as jarimah. Jarimah comes from the word jarama which is synonymous with kasaba wa qatha'a which means: effort and work. It's just that the definition of business here is specifically for a company that is not good or a business that is hated by humans (Djazuli, 1997:166). In terms of Imam Al Mawardi suggested jarimah as follows: Jarimah are actions that are prohibited by syara 'which are threatened with punishments of had or ta'zir.

Islamic law has governed all aspects of human life, so that with these rules peace and peace can be achieved. The provisions of Islamic law are global and some are detailed. In the Islamic Shari'a, actions that do not yet have legal provisions become ijtehad of the ulama who will produce legal provisions for the problems faced by referring to the provisions of Al-quran and hadith. The legal product can take the form of takzir, ie the type of punishment that is not determined by the texts both in the Qur'an and hadith, is applied to people who commit immorality or commit certain types of crimes that have no sanctions or kiparat, both related to Allah SWT such as eating during the day of Ramadan without udzur, leaving prayer, consuming usury and throwing unclean in the middle of public roads, or relating to human rights such as intercourse with wives through an anus, bribing judges, insulting or harassing others and others.

In Islamic criminal law, crimes or criminal acts are usually defined by various terms such as; al-jarimah, al-jinayah, al-janiyah, or al-mukhalafah. The four terms have in common, namely as a form of unlawful action.

Imam al-Mawardi suggested the notion of jarimah as follows:

تَعَزَّرَ أَوْ يَحَدِّدُ عَنْهَا تَعَالَى اللَّهُ زَجَرَ شَرْعِيَّةً مَحْظُورَاتٍ الْجَرَائِمُ

“Jarimah is an act prohibited by syara 'which is threatened by Allah with the punishment of had or ta'zir.” (Muslich, 2004: 9)

Another term for jarimah is jinayah. Abdul Qadir Also interpret jinayah as follows :

دَلِكْ غَيْرِ أَوْ مَلِي أَوْ نَفْسِي عَلَى الْفِعْلِ وَقَعَ سَوَاءً، عَاشَرَ مُحَرَّمٍ لِفِعْلِ إِسْمٍ فَالْجِنَايَةُ

“ Jinayah is a term for actions which are prohibited by syara ', both of these actions are about the soul, property, or other things.”

The difference between these terms is the classification of legal experts on each intended action. The jurists often use the term al-jinayah in terming criminal acts or all acts prohibited by syara 'are active or not active (commission and omission). There are those who see that the term al-jarimah is synonymous with the term al-jinayah. (Audah, 1968: 66)

However, there are among the jurists who limit the understanding of al-jinayah only to evil concerning the soul and members of the human body, such as; murder, injury, beatings, abortion, etc. Among the jurisprudence also there are those which limit the notion of al-jarimah only regarding the criminal acts of had and qishos.

The term that is widely used by classical jurists is the term jinayah so that the law which deals with common criminal names is termed fiqh al-jinayah. While some contemporary jurists often use the term jarimah in their writings on criminal acts of Islam. Apparently in using terminology usually depends on the tendencies and understanding of the jurists about the term (Nur, 2018: 127)

Islam jarimah in terms of the sentence is divided into three parts, namely jarimah huduh, jarimah qishash and diat, jarimah ta'zir. (Wardi Muslich, Ahmad, 2005. Hukum Pidana Islam, Jakarta: Sinar Grafika. P. 1).

### 3. RESEARCH METHODS

The type of research in this study is normative legal research, namely in research using relevant legal theories to explain the concept of child criminal offenses of criminal offenders in positive criminal law and Islamic criminal law. The primary method of approach used in this study is a comparative method that is comparing the criminal liability of offenders in positive criminal law and Islamic criminal law. This approach is carried out using the approach of Law Number 11 of 2012 concerning the Child Criminal Justice System as a basis for thinking in conducting studies or discussions so as to be able to answer questions about how the criminal offenders are responsible.

Data analysis is the process of simplifying data into a form that is more readable, data that has been collected is analyzed qualitatively by using deductive methods, namely drawing conclusions starting from general knowledge and then drawing a specific outcome. In analyzing this study, the authors used a comparative method that is comparing child criminal liability in positive criminal law based on Law No. 11 of 2012 concerning the Child Criminal Justice System, with child criminal liability in Islamic criminal law. Besides that, it also uses descriptive methods that attempt to describe, analyze and assess related data.

### 4. RESULT AND DISCUSSION

#### 4.1. Child Criminal Liability in Positive Criminal Law

The juridical responsibility of minors in the Criminal Code and criminal liability of minors according to Law No. 11 of 2012 concerning the Child Criminal Justice System, it is clear that juveniles who commit murder will be processed according to the applicable provisions namely by looking at the elements the article charged is the article contained in the Criminal Code namely Article 338, but the trial process is in accordance with what is regulated by Law Number 11 of 2012 concerning the Child Criminal Justice System. If it turns out that the element of the article of murder is proven and carried out by mistake, then according to Article 81 paragraph (2) of Law Number 11 of 2012 concerning Child Criminal Justice System, the sentence of imprisonment that can be imposed on minors who have committed a crime is the longest  $\frac{1}{2}$  (one half) of the maximum imprisonment for adults. And in Article 81 paragraph (6) it is stated that "If a criminal offense committed by a child constitutes a criminal offense threatened with capital punishment or imprisonment for life, the sentence imposed shall be a maximum of 10 (ten) years imprisonment.

The criminal liability of minors in conflict with the law is in accordance with the provisions stipulated in the Criminal Code and Law No. 11 of 2012 concerning the Child Criminal Justice System. The responsibility of a child who commits a criminal offense is that the threat of punishment for a child committing an act that is against the law is determined by the Criminal Code, where the imposition of criminal sanctions is half of the maximum criminal threat from an adult, while imposing a life sentence and criminal death does not apply to children. Criminal liability for children with legal age limits is provided with the protection of children's rights in handling child cases, the legal apparatus must pay attention to the best interests of the child and maintain a family atmosphere that is maintained.

#### 4.2. Child Criminal Liability in Islamic Criminal Law

In Islamic criminal law, accountability is only charged to people who are still alive, and the person has said, if someone has not reached the age of mukallaf or not yet high, then the law does not impose anything on him, Islamic law also does not impose a law on people who are forced or forced. Not also for people who lose their minds because it is not a deliberate cause such as getting drunk from drinking khamar drinks or other intoxicating drinks.

Criminal liability in Islamic Shari'a is defined as the imposition of a person with a result (effect) of action (or no action) which he does with his own volition, where he knows the intentions and consequences of his actions (Hanafi, 1967: 154). The imposition is because the actions carried out are caused by something that is contrary to the law, in the sense that acts which are prohibited by syar'i are prohibited from doing or prohibited from leaving. Imposition is also because the action itself is done based on the desires and desires that arise in him rather than the impulse that is caused by another person by force (forced).

It can be considered as a criminal liability, if a person fulfills three conditions, namely;

1. The existence of prohibited acts,
2. Having the will and will, and
3. Knowing the consequences.

But if there are no three things stated there is no accountability for him, this release is supported by the Hadith argument.

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يكبر حتى الصبي وعن حسيباً المبتلى وعن يستيقظ حتى النائم عن ثلاثة عن القلم رفع.

" The provisions of three things were abolished; from a person sleeping until he wakes up, from a person who is crazy until he is cured and from a small child until he is an adult "

## VARIA JUSTICIA

Ta'zir is a punishment that is educational for sin (immorality) whose sentence has not been determined by syara '. This definition implies that every immoral act that cannot be subject to hudud sanctions (including qishash) or kaffarat is qualified as jarimah ta'zir. The scholars of fiqh agree that what is meant by immoral acts is to abandon obligations and do things that are prohibited.

In Islamic law, there are four kinds of causes that can eliminate punishment (Audah, 2004: 116).

1. Because of Coercion (Al-Ikrah)

The jurists argued that in compulsion there must be real acts inflicted on people who are forced to make him commit acts that can be forced upon him because coercion must be material and preceded by acts of torture inflicted on people who are effected.

2. Drunk (As-Syukru)

Drunk is a loss of common sense as a result of drinking or something like that. The ulama 'fiqh agreed that getting drunk can eliminate common sense. Majority' scholars argue that there is no criminal liability for people who are drunk when drunk is forced by others, drunk because they do not know the drink they drink or the food they eat, then when they are doing drunken acts or actions, they are punished with crazy people.

3. Crazy (Al-Junun)

Criminal liability is imposed on someone who is forgiving, that is, who can think and choose to act. If these two factors are not owned by someone, then they cannot be held accountable. The ability to think of someone can or can be lost because of natural birth or because of a cause of interference from the outside. Humans, when they reach maturity, can mature using the power of thought, but because of a disturbance or because of a disease attack either part or all of the nature of thinking is lost can be anytime and anywhere without a particular time. The loss of thinking skills (common sense) in everyday life can be called crazy.

Abdul Qadir 'has given a crazy definition, as follows;

ضعفه أو اختلاله أو العقل زوال بأنه الجنون

Meaning: "Crazy is the loss of mind, broken or weak."

The complete loss of thinking power is sometimes continuous, so it is called crazy continuously, but the loss of thinking ability is perfect but not consistently, meaning the loss of control is only a few moments (crazy recurrence / intermittent). From a legal standpoint, if a crime is committed, the perpetrator's condition is insane, there is no punishment for him (exempt from punishment). Crazy does not mean giving skill but in a state of madness abolishing the punishment from the perpetrator. Both national law (positive law) and Islamic law have no difference in the problem of a criminal offense. In criminal terms, insanity cannot be punished, but civilly the actions of crazy people are accounted for by the family as long as these rights are under family guardianship, there will be civil liability in the form of compensation. If there are no four conditions, the person who commits a crime must be accounted for according to the rules that have been fixed by Islamic law.

4. Under Age (Sikhrus Sinni)

Concerning criminal liability, Islamic law only imposes penalties on people who are still alive and deceitful, Islamic law also forgives children from punishments that should be inflicted on adults unless they have been baliqh. This is based on the postal al-Qur'an letter an-Nur, verse 59, namely;

(٥٩) ... قَبْلِهِمْ مِنَ الَّذِينَ اسْتَأْذَنَ كَمَا يَسْتَأْذِنُ وَاُولَئِكَ هُمُ الْاَطْقَالُ بَلَغَ وَاِذَا

Meaning : "And if your children have reached adulthood, then they should (also) ask permission, like more mature people asking for permission"

Islamic law is seen as the first law in the world that perfectly distinguishes between small children and adults in terms of criminal responsibility. In Islamic law criminal responsibility consists of two elements, namely having the power of thinking and having choices. According to the jurists, the basis for determining adulthood is the words of the Prophet Muhammad, which means; "Appointed legal imposition of three types of people; children until he is high, people sleep until he wakes up and the person is crazy until he is healed / conscious."

From the meaning of the hadith and the verse above "lifted load" indicates that there are conditions or causes so that there is a demand for *syara* '. Children until they are high show that the condition / reason that must be there is to dream wet, this is the original law that has been established in Islam. If a child has not yet experienced a wet dream at the age of reaching *baligh*, what is considered to have been something of a damage / abnormality in that person, because it must be considered that the person has been *baligh* who obliges him to impose the law. The reason for this view is to limit the age of eighteen or nineteen years.

## 5. CONCLUSION

The criminal liability of minors in conflict with the law is by the provisions stipulated in the Criminal Code and Law No. 11 of 2012 concerning the Child Criminal Justice System. The responsibility of a child who commits a criminal offense is that the threat of punishment for a child committing an act that is against the law is determined by the Criminal Code, where the imposition of criminal sanctions is half of the maximum criminal threat from an adult, while imposing a life sentence and unlawful death does not apply to children. In Islamic criminal law, accountability is only borne by people who are still alive and the person has said, if someone has not reached the age of *mukallaf* or not yet high, then the law does not impose anything on him, Islamic law also does not impose regulations on people who are forced or forced not even for people who lose their senses because they are not intentional because they are drunk from drinking *khamar* drinks or other intoxicating drinks. It can be considered as criminal liability, if a person fulfills three conditions, namely;(a) The existence of prohibited acts, (b) Having the will and will, and (c) Knowing the consequences. Islamic law also forgives children from punishments that should be imposed on adults unless they have been *baligh*. This is based on the postal *al-Qur'an* letter *an-Nur*, verse 59.

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