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Child-Friendly Justice and Children's Rights from Criminal Cases; Islamic Law Notes

Shinta Ayu Purnamawati[1*], Nurini Aprilianda[2], Lucky Endrawati[3], Faizin Sulistiyo[4]

[1] Faculty of Law, University of Muhammadiyah Malang, Malang, 65144, Indonesia

[1,2,3,4] Faculty of Law, Universitas Brawijaya, Malang, 65144, Indonesia

[*] Corresponding author: sweetest_shinta@gmail.com

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Abstract

This article aimed to discuss the Islamic law notes on child-friendly justice and the importance of protecting children's rights during the juvenile process. The reform of Juvenile Justice in Indonesia was based on the UN convention, where on January 26, 1990, in New York, the Indonesian Government signed the 1989 Convention on the Rights of Children. Thus, to protect children through criminal law, paying attention to the principles in the Convention on the Rights of the Child has been the norm. The Child Protection Law in Indonesia has regulated the age limit for a child who can be held accountable. The existence of provisions regarding the minimum age limit for children in the law is what is required by international documents, especially regarding the minimum age of criminal responsibility, namely at least 12 years. Such provisions are parallel to The Beijing Rules, which recommend an age limit that is not too low. The problem is the provision of the law that children under 12 years (meaning between 8-12 years) can still be processed for trial and can be subject to action. Even at the age of 8 years, it is still possible to process. The problem is whether the eight-year age limit needs to be higher. Even though they were not punished and were only subject to action, the experience during the process of being submitted to trial did not bring stigma and negative impacts for children of young age. Based on Islamic law notes, this article found that child-friendly justice is probably fulfilled by fulfilling children's rights due to the mukallaf doctrine.

INTRODUCTION

Under what circumstances can a child be held responsible for a criminal act? Initially, according to Wetboek van Strafrecht, it seemed as if children could not be prosecuted under criminal law if they were under ten years old. If the act is an offense

punishable by imprisonment, the civil judge can order that the perpetrator be put into what is called *rijksopvoedingsgesticht* or into a royal educational institution (Kravchuk, 2023; P.A.F. Lamintang, 1984).

However, if the perpetrator of the crime is a child who is ten years old and over but younger than sixteen, the criminal judge must investigate whether in committing the crime the perpetrator was aware (*oordeel des onderscheids*) of whether the action was justified or not (Hermawan et al., 2021). If the perpetrator is not aware of his action, the perpetrator cannot be punished (Ost & Gillespie, 2023). However, if the act is a serious crime, the criminal judge can order that the perpetrator be admitted to a royal educational institution. On the other hand, if the perpetrator can assess the criminal act he has committed, the perpetrator can be sentenced to imprisonment similar to that imposed on adult criminal offenders only with a one-third reduction. if a life sentence should apply, the sentence is replaced with a maximum imprisonment of fifteen years.

Since 1901, the year of the promulgation of Staasblad 63 dated 12 February 1901 concerning criminal responsibility for children in the Netherlands, this idea has been abandoned. Currently, most people agree that educating children should be fostered over punishing them. With the issue overlooked, it remains as to whether under-ten-year-old children who have committed criminal acts should always be punished. This does not mean that children under ten cannot be held accountable for the offence committed, but that it is normal for an act to be committed. If an act does not contain an element of *schuld* (fault), the perpetrator cannot be held responsible because he is not yet aware of his action and is not mature enough to observe the prohibited nature of his action (Tuomi & Moritz, 2024).

On another point of view, the absence of a *schuld* element in a criminal act committed by a child under ten years old is a *strafuitsluitingsgrond* (a basis that negates the crime) and a *schuld* element in the sense of the absence of *dolus* or *culpa* as a matter of irresponsibility. Furthermore, with the provisions of Article 45 of the Criminal Code, judges can take the following steps: a). returning the guilty person to his parents or guardian; b). placing the guilty person under government supervision; and c). imposing punishment on the guilty. According to Van Hamel, Simons, and Suringa (Handoyo et al., 2023), children can be punished even though the children cannot assess their actions or cannot be held accountable. The issue of when a judge can sentence a child who has committed a criminal act is explained in Memorie van Toelichting:[1]

> If it turns out that the child does not know the rules and has a nature that is always defiant, but his way of thinking and sense of decency have grown to

[1] MvT (Memorie van Toelichting) is a treatise or note containing explanations that provide the background to formulating articles in a statutory regulation as a source of legal interpretation.

> such an extent that his sense of responsibility can be reawakened simply by simple means of discipline, then the judge will impose a criminal sentence because in this case, this action is not only a more appropriate action but also an action that is simpler in nature than a forced education.

Then, what can a judge use to impose a crime or take other actions? Memorie van Toelichting explains "What must be used as a consideration in choosing other such actions is whether the child's character really requires that the child be given a long and systematic education, or because of the circumstances of his environment, so that the child for a long period of time must be kept away from the environment." Van Hamel disagrees with the MVT and states that "Practically these reasons are actually correct, but theoretically, these reasons seem to have been made up and are of a dubious nature. It should be noted that the act of generating a sense of responsibility itself is actually also an educational act. Isn't it said in the MvT itself that the application of simple means of discipline is also a form of guidance and education that cannot be dispensed with for every child?"

From the description above, the legislators do not want *oordeel des onderscheids* as a guide by judges in determining whether a child who has committed a criminal act can be punished or not (Oktaviani et al., 2023). Judges must realize that when dealing with children who have committed crimes, they must consider what actions should be taken to educate the children, rather than considering whether the children can be punished or not (Kaimudin & Ashsyarofi, 2023). That is, judges must understand that a crime is a simpler means of educating a child than sending the child to a forced educational institution where the child needs to be educated systematically for a long period, which may be more costly (Riska & Z, 2023). Meanwhile, the types of punishment to be imposed on the perpetrators of various criminal acts in the Criminal Code are not the key aspect in juveniles, but the special measures that apply to them are more instrumental.

The juvenile criminal law (Fathurokhman, 2013; Kravchuk, 2023; Oktaviani et al., 2023) only applies to children, as opposed to adults, not yet reaching eighteen at the time the judge's decision from the court of first instance is pronounced, as mentioned in Article 78 paragraph (2) of the Criminal Code "For persons who have not yet reached the age of eighteen before committing a criminal act, each expiry period mentioned above shall be reduced by one-third." The provisions of Article 78 paragraph (2) of the Criminal Code do not apply to children who are married before the age of eighteen. The next issue lies in the condition where the child has grown into an adult at the time of hearing at an appeal or cassation, leading to a quandary of deciding whether this is the juvenile law or adult law that should be referred to by the judges. In his arrest on December 18, 1933, NJ 1934, Hoge Raad, among other things, decided that the appeal judge or cassation judge was still bound by the penitentiary law for minor children.

Meanwhile, in Islamic law, a person is still categorized as a child until he reaches puberty, with the benchmark being biological maturity (for men, when sperm has passed and women have menstruated) (Amir et al., 2023). Islamic law is guided by determining whether a person is a child or not, not based on age (Indra et al., 2023). Therefore, according to Islamic law, children who commit criminal acts will not be subject to any sanctions, whether hudud, qishas/diyat, or ta'zir. Their parents bear the punishment for children who are guilty in Islam because parents are obliged to educate their children to become good people. If a child becomes a criminal, it means that the parents do not carry out their obligations properly, and then the parents are the ones who bear the consequences, namely being given sanctions for their negligence (Pramono et al., 2023). In response to that debate, this article aims to discuss the age limit for children to get justice in Indonesia's judicial system. Moreover, due to the case tabulated by the authors, this article also intends to protect children's rights in the juvenile criminal justice system in Indonesia, especially in the norms of the Criminal Code.

METHOD

This article examines the history of juvenile criminal law and its differences with legal research methods (Al-Fatih, 2023). The approaches used are historical, comparative, and conceptual approaches (Ansari & Negara, 2023). The analysis was carried out using descriptive methods to describe the flow of the debate on protecting children's rights in the juvenile criminal system in Indonesia. In order to get richer and produce a strong novelty, this article uses comparisons in Islamic law notes. In response to that debate, this article aims to discuss the age limit for children to get justice in Indonesia's judicial system. Moreover, due to the case tabulated by the authors, this article also intends to protect children's rights in the juvenile system, especially in the norms of the Criminal Code.

RESULTS AND DISCUSSION

Stelsel Punishment for Children and the Guidelines for Punishment

As has also been explained above, a very interesting issue is about what type of punishment can be imposed on children who have committed criminal offenses. This issue is also linked to penal law, which, according to van Bemmelen, is the law relating to the objectives, working capacity, and organization of penal institutions (P.A.F. Lamintang, 1984). If penitentiary law (*penitentiare recht*) is interpreted as a criminal offense or punishment, it raises the question of whether our Criminal Code only regulates crimes or criminal penalties (Butt, 2023). Indonesian criminal law not only regulates criminal matters and punishment but also regulates actions (*maatregelen*) and policy matters as regulated in Article 45 of the Criminal Code. The action taken by a judge to hand a defendant back to his parents, to his guardian, or to those who take

care of the defendant is not a punishment and is not an action, but a policy. Likewise, the action taken by a judge to place a defendant under government supervision is neither a punishment nor a policy but is an action.

Penal institutions are not only institutions where convicts must carry out their sentences, such as correctional institutions, but also other institutions such as criminal institutions mentioned in letters a and b of the Criminal Code, closed criminal institutions, conditional criminal institutions, aggravated institutions, and imprisonment and institutions where people carry out sentences (Faisal et al., 2023). Meanwhile, enforcement institutions are those that are not a punishment or a policy, including forced education institutions and state work institutions, such as Placement institutions under government supervision (Article 45 of the Criminal Code), separate closure institutions, closure institutions with a person in a cage with iron bars, a placement institution in a state work institution. Policy institutions are those that are directly related to the judge's decision in adjudicating criminal cases that are not a punishment or prosecution, such as institutions for returning defendants to their parents or guardians, conditional release institutions, permission institutions for convicts to live freely, outside correctional institutions, and institutions that seek to improve the fate of people sentenced to imprisonment.

In principle, the imposition of corporal punishment (imprisonment) on children should be avoided wherever possible and the most important part of juvenile justice and crime prevention (prevention *of crimes and treatment of offenders*) is the aim of punishing children, namely how to link criminal institutions and punishment with the goals to be achieved in juvenile justice. Thinking about the purpose of punishment is actually not a new thought because it is heavily influenced by the thoughts of its predecessors. In general, criminal experts are of the opinion that there are basically three ideas to be achieved from a punishment (P.A.F. Lamintang, 1984): 1). improving the person of the criminal himself; 2). deterring people from committing crimes; and 3). making certain criminals incapable of committing other crimes, namely criminals who by other means are beyond repair.

Hence Burnet, an English judge, said to a man who had stolen a horse "Thou art to be hanged, not for having stolen the horse, but in order that other horses may not be stolen" (Saleh, 1983). Currently, various efforts are being made to reform and renovate the use of imprisonment as one of the main means of the repressive nature of the law. This can be seen in various legal systems of countries in the world, especially those based on the Anglo-Saxon system and continental European legal systems (Aulia & Al-Fatih, 2017). Meanwhile, according to Donald Clemer, the longer a prison sentence is imposed, the more likely a prisoner will become individualized (Saleh, 1983). Based on several descriptions, people who have been imprisoned are more likely to re-offend after leaving prison. Imprisonment also has other negative impacts which

are very dangerous for the continuity of society, especially for convicts sentenced to prison for committing a crime for the first time (Saleh, 1983).

In connection with the negative risks posed by imprisonment, the 5th United Nations Congress of 1975 on *the Treatment of Offenders* (Baranenko et al., 2023), in one of its reports, stated that the experience of imprisonment is dangerous and damages or seriously hinders the ability of the offender to return to a law-abiding state after released from prison. In connection with the dangers posed by imprisonment, the 2nd United Nations Congress on the Prevention of Crime and the Promotion of Law Violations in 1960 in London in connection with *Standard Minimum Rules*, has issued recommendations to limit or reduce the widespread use of short prison sentences.

Law Number 11 of 2012 concerning the Juvenile Justice System only regulates provisions regarding the types of sanctions (criminal and action) and the length of the sentence as described above. Unfortunately, there are no guidelines regarding what principles judges should pay attention to when imposing sanctions (crimes and actions) on children, especially in the case of imposing a crime of deprivation of liberty. It is these guidelines or principles for imposing criminal penalties on children that are very important to be stated in the provisions regarding justice because this problem is the center of attention of international documents:

1. The SMR-JJ (*The Beijing Rules*) states, among other things:

Rule 17:1:

Decision-making by authorized officials (including judges) must be guided by the following principles:

a. The reaction taken (including criminal sanctions) must always be balanced not only with the circumstances and the weight/seriousness of the criminal act (*The circumstances and the gravity*), but also with the circumstances and needs of the child (*the circumstances and the needs of the juvenile)* and with the needs of the community (T*he needs of the society*);
b. *on the* personal liberty of juveniles are only due to careful consideration and are limited to a minimum;
c. *Deprivation of personal* liberty should not be imposed unless the child commits serious acts (including acts of violence against other people) or continues to commit serious criminal acts, and so long as another more appropriate form of response/sanction exists;
d. The welfare of the child should be a guiding factor in considering the child's case.

Rule 17.4:

"The authorized official (meaning the judge, pen.), has the power to stop or not continue the examination process at any time."

Notes :

a. The authority as above is known as " *diversion" authority* which in rule 11.2 is also given to the Police or Prosecutor. According to the terms in the SMRJJ, this authority is " *an inherent characteristic in the handling of juvenile offenders".*
b. Based on Rule 17.4 above, the judge may stop the judicial process. In other words, the judge may not impose any sanctions (criminal/action).

Rule 19.1:

"Placement of a child in an institution should always be designated as a last resort and for the minimum period necessary."

2. UN Resolution 45/113 concerning " *UN Rules for the Protection of Juveniles Deprived of their Liberty* " states, among other things:
   a. Imprisonment should be used as a last resort
   b. Deprivation of a child's liberty must be determined as a last resort and for the minimum period necessary and limited to extraordinary/exceptional cases.

Considering the guidelines or principles above, we believe they should be formulated explicitly in the draft Juvenile Justice Law. In addition, such guidelines are essential for judges to strengthen efforts to protect children in the judicial process, which starts with basic ideas and characteristics that are different from those of the judicial process for adults. The system of criminal responsibility for children is the same as that for adults, namely that it is oriented towards the perpetrator personally. Suppose this adheres to a punishment system or "Individual/personal responsibility." Regarding this matter,

a. It is a reasonable general principle that criminal responsibility is personal. That is, it is only imposed on the person/perpetrator himself (personal principle) and only imposed on the person in question (birth principle/culpability principle).
b. The application of such general principles of criminalization (i.e. individual responsibility) to adults is natural because adults should indeed be seen as free and independent individuals ("independent") and fully responsible for the actions they commit. This general approach to "children" is still worth studying because children do not need to be said to be fully independent individuals. Therefore, the application of this general principle must be careful and selective, taking into account the different levels of "maturity" of each child. Apart from that, considering the nature of "*dependencs*" (complete dependence/independence) in children, the application of this general principle should also be balanced with the possibility of "vicarious liability" being *shown* to other people.
c. Starting from the description, it would be good to develop an idea to balance the individual criminal/accountability system with a

structural/functional accountability system. One of the weaknesses/limitations of the individual criminal system in crime prevention efforts is that it is very " *fragmetair* " in nature. That is, it only looks at the individual perpetrator's crime prevention/control efforts. The main goal is to prevent individuals from committing criminal acts. So there is less emphasis on structural/functional crime prevention efforts. Such a strategy should be questioned in dealing with juvenile crime problems. The problem is whether it is enough to deal with children simply by punishing/acting against children, even though the "child problem" is more of a structural problem or "environmental victim". Therefore, it is appropriate to develop thoughts/ideas/strategies about "structural/functional responsibility". This means that punishment not only functions to account for or develop (treat) the child as a criminal but also functions to develop/prevent other parties who structurally/functionally have the potential and make a big contribution to the crime/criminal act being committed by children. For example, in customary law, punishment/responsibility can also be imposed on parents and "customary leaders" (officials). This example may be too classic, but the "idea" and "application" are worth developing and modifying.

In contrast to these various regulations, from the perspective of Islamic law, children cannot be sentenced to any criminal punishment (Alamsyah & V. Pillai, 2022). The ones being punished are their parents. Until the child reaches maturity, the responsibility lies with the parents. In this context, it is clear that Islamic law assumes a vital role for parents in looking after, educating, and raising their children until they are adults or *mukallaf* and capable of being responsible for themselves (Jamal, 2020; Uin et al., 2023). In the context of Jinayah, *mukallaf* is seen as puberty (Turnip et al., 2022), the pinnacle of both al-'aql and rusyd. A person can only fully possess these three qualities when they are eighteen. With this understanding, the criminal can be sanctioned at eighteen and held responsible for his conduct. If a minor under eighteen commits a crime, he or she needs educational instruction to be aware of the adverse effects his actions will have on the community and himself (Jamal, 2020).

Integrated Criminal Justice System in Juvenile Justice

The welfare approach is used as the basis for the philosophy of handling juvenile offenders, the following two factors: 1). Children are considered not to fully understand the act they have committed, so it is appropriate for them to be given/notified a reduced sentence, as well as a different notification of punishment for children and adults; and 2). Compared to adults, children are believed to be easier to discipline and to be made aware of mistakes they should not have made. Thus, it is not appropriate for the treatment of children to be guided by the retributive school of

thought (as a treatment method for adult law violators), but it is more appropriate to use the rehabilitation school (Asquith, 1996).

This is the case with the United Nations Convention on the Rights of the Child which states that legal action taken against those under 18 must take into account the best interests of the child. This is based on the assumption children who do not commit crimes or *commit crimes* cannot be fully responsible for their actions. All countries have regulations regarding prosecution procedures in juvenile justice. The police in a criminal justice system are the beginning of this process. In many countries, the police have legal authority called discretion (*discretionary power*), where the police authority has the right to continue or not to continue a case. The possibility of the police carrying out or using this discretionary authority is very large in several countries. Through discretionary authority, after carrying out an initial investigation, the police can determine the form of diversion *in* a child's case. In handling young perpetrators of legal violations (offences), the police can be expected to carry out more or exercise discretion (in accordance with the spirit of the Convention on Children's Rights, the Beijing Rules) (Kilkelly & Pleysier, 2023). Discretion is the authority with which they have to stop case investigations by releasing children's cases *or* carrying out diversion *with* the aim of preventing children from further legal proceedings. Based on the statistics obtained, it appears that the police do not pay special attention to recording cases of legal violations committed by children. This neglect also occurs in the registration of cases involving adults. So far, police statistics are very general and their impact is more focused on recording fluctuations in crime rates that occur in one year.

As per the principles of the welfare approach in handling juvenile delinquency, apart from the police having discretionary authority, public prosecutors can also take action to ignore or not take a child's case to the next stage and make a decision in the form of diversion from further formal legal proceedings. (Charles R. Swanson. Jr. Neil. Chamelin, 1984) with the aim of minimizing the likelihood of further losses experienced by children, resulting from their existence in the criminal transition system. In the initial stages of examining children who are suspected of committing criminal law violations, apart from efforts to find facts carried out by investigators, ideally, there should also be an examination of the child's condition both in terms of social conditions carried out by community officers (from BAPAS/*Balai Pemasyarakatan*) and psychological examinations. The results of these examinations are the basis for consideration in whether or not to prosecute the child's case in question.

The principles contained in *the welfare approach*, especially in the prosecution of cases of children suspected of violating criminal law, are actually in local instruments, namely Law Number 8 of 1981 concerning Criminal Procedure Law Article 14 (h). Public prosecutors have the authority to close cases in the public interest. The authority to stop this case is usually referred to as disposition. Thus, if the prosecutors are sensitive to the importance of keeping children away from the formal justice process,

detention, especially imprisonment, legally the prosecutors can actually be used to terminate children's cases in the spirit as stated in the Convention on the Rights of the Child, Article 37. b, *the Beijing Rules* (items 11.1,3,4, items 13.1,2) and Article 66 of Law no. 39 of 1999 concerning Human Rights.

In cases where children are required to have a social research report (Litmas) or social report or casework (*The Beijing Rules* Point 16. l), especially during initial examinations, also at court hearings and while serving sentences, It is highly recommended by several instruments children who conflict with the law be protected, so that this social report can be used as a guide for investigators to make decisions as to whether to continue or stop the informal process. According to *The Beijing Rules*, social examination reports are an indispensable aid in most legal justice processes involving children. The legal authorities will be informed of relevant facts about the child, such as social and family background, school history, educational experience and others. The preparation of social reports in Indonesia is carried out by the Correctional Center Community Officer. *Social reports* function as input for consideration for judges in making or handing down decisions on children, so that in every case the child is required to have a social officer from the correctional centre present to submit or explain the *social report* he or she has made. According to Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, *social reports or casework* must be taken into consideration by the judge.

However, even though this article determines the future of children who have been sentenced to justice, the instrument created by the Directorate General of Corrections for the reporters of this community research (BAPAS officers or community counsellors) turns out to be an unreliable instrument with poor data collection mechanisms. Thus, it can be said that a juvenile court decision that is based on the recommendations contained in the article will be a decision that does not have a justifiable basis. For example, data or information about children is sometimes obtained from people who are not actually competent in answering the questions asked in the instrument. Or, often during interviews, community officers have difficulty capturing or interpreting and writing down the meaning of children's answers concisely (because limited space in the report format means that answers from data sources or informants must be written as concisely as possible). So a decision was taken that the officer wrote it in his own language or his own understanding while adhering to his belief that what was written was the same as what was meant by the child.

Children who are in conflict with the law in any judicial process, whether the child is in a court trial (Ghoni & Pujiyono, 2020), basically have the right to be accompanied or represented by a lawyer, to be accompanied by a social officer from BAPAS and also have the right to be accompanied by a parent or guardian. However, in reality, the lawyer, the child's parents, or guardians and the BAPAS community officials are often not present. The absence of these parties is often related to the way the police work.

The justice system in Indonesia places judges as the final institution that has the final say over the fate of children. From several cases, it is clear that the judge, when giving a child's disposition, prefers to punish by placing the child in an institution instead of giving an alternative decision (Sauri, 2023) (Larner & Smithson, 2023).

In the context of the implementation of Islamic law to punish children with crimes, there was no punishment needed because in Islam, for a child who faces crimes, parents should be punished. Islamic criminal law is unquestionably based on revelations that uphold human dignity and value human life (Alotaibi & Boateng, 2021; Puspoayu et al., 2023). Indonesia, as a country with a majority Muslim population, should look at the principles of Islamic law, especially in the context of providing punishment for children, as well as children's rights, which must be protected during the juvenile criminal justice process. Unfortunately, that idea may be difficult to realize due to secular principles among legislators and scholars.

CONCLUSION

The problems of children in Indonesia are almost the same as the problems faced by children in other developing countries. The most prominent thing lies in the problems of child labor, perpetrators of delinquency, and criminal acts committed by children, as well as children as victims of criminal acts committed by adults. Things like the above certainly cannot be left alone. Efforts need to be made to deal with this issue. To make these efforts, the involvement of the parents of the child concerned alone or a group of people is not enough; it must take the whole parties consisting of parents, the community, and the government to cope with the issue continuously. Delinquency in children or teenagers can occur because the child's family situation is less favorable because of either the family's economic difficulties or the situation that forces the child to become an orphan. Criminal violations that children or teenagers often commit are theft, fraud, embezzlement, abuse, beatings, crimes against morality, and drug-related crimes. Apart from children as perpetrators of criminal acts, children are also often victims of criminal acts committed by adults, namely as victims of abuse (by their parents or other adults), children as workers, or children as objects of abuse or sexual offenses. Even though the government has ratified international conventions concerning children's rights and their protection and has issued various laws and regulations governing children and their rights, these regulations have not been widely introduced, making them unfit for optimal implementation. In the juvenile trial process, apart from the special juvenile judge, attention must be paid to the child's rights, the principles of juvenile justice, and other specialties that differentiate it from the trial process against adults. For children's rights to be fulfilled and to obtain justice, the author recommends that legislators consider the principles and rules of Islamic law in making policies, including in their implementation by law enforcement officers.

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