

INFANCY AS A DEFENCE FROM CRIMINAL

LIABILITY --

A CRITIQUE : A COMPARATIVE STUDY

OF THE ENGLISH , MALAYSIAN AND

ISLAMIC CRIMINAL LAW.

THIS DISSERTATION IS SUBMITTED TO FULFILL THE PARTIAL
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BY :

MAZLENA MOHAMAD HUSSAIN

KULLIYAH OF LAWS

INTERNATIONAL ISLAMIC UNIVERSITY

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This dissertation is specially dedicated to :

Puan Puteh

the best mom in the world.....

- For her love and guidance , without which I could
never reach this far -

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Mazlena Mohamad Hussain
International Islamic University
Petaling Jaya , Selangor D.E.
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PART ONE

INTRODUCTION

A. CHILDREN IN GENERAL.

Children are gifts from God -- that is the belief of many people. Children are so special that they became one of the main reason as to why man get married i.e. to procreate. The Hindus believe that children at such a tender age , are in actuality God's children. Due to this , regardless of their beliefs and tenets , they are to be treated properly , with love and consideration. If not , man will suffer the wrath of God.

This consideration is not available to us , the adults. The distinguished treatment of children also includes matters relating to their liability , be it a civil or criminal liability.

B. LIABILITY OF CHILDREN IN CRIMINAL LAW.

The theory of childrens' liability in crimes takes roots in two separate theories of jurisdiction.¹ One of this originates from the English Common Law.² A child is said to lack the capacity to form any intention to commit a crime. The mental elementary requirements associated with a particular criminal act , play a somewhat unusual role when children are engaged in such acts. Hence , they are entirely immune from prosecution.³

On the other hand , the second theory is more a matter-of-fact. It gives an entirely separate system of juvenile justice. Here , the defendant will confront allegation that they have engaged in acts of juvenile delinquency and not charges that they had committed criminal conducts.⁴

The Juvenile Court will deal with an offence that would fall within the jurisdiction of the Criminal Court but an offender who is beyond the Court's jurisdictional reach.⁵ In short , the defence of childhood will provide immunity and special treatment from the Court. Special

¹ Charles W.Thomas & Donna M.Bishop , Criminal Law : Understanding The Basic Principles , p.114 , (1987).

² In Common Law , children under the age of seven is immune from any Criminal liability.

³ Charles W.Thomas & Donna Bishop , op.cit.

⁴ Ibid , p.115.

⁵ Ibid.

treatment here is in terms of the trial procedure and also in pronouncing sentences to the child-offenders. In such a case , the condition of childhood acts as a mitigating factors to the child.

In regards to the juveniles , in the past the law had created a most unusual division between the juveniles and the criminal justice system.⁶ However , the recent contemporary development in juvenile laws are having practical and legal effect of diminishing the distinction between juvenile and criminal law in many important as well as highly controversial ways.⁷

Criminal law is essentially an adult's business. Prisons are designed to punish and rehabilitate mature offenders. Children have no place within a system which may and will corrupt them further. The system could also break their undeveloped spirit. Hence , it is the policy of the law to keep the children away as far away as possible from criminal process.⁸

Criminal law is also concerned with blame and guilt of the offender. The notion of blameworthiness presents itself in an especially difficult way in the case

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

of children.⁹ Children may themselves engage in crimes , but it may often be that their motivation does not stem from wickedness.

Usually , their behaviour stemmed from peer pressure , the social acceptance of delinquent's behaviour in the communities where they live , or an insufficient understanding of what their conduct involves. All these considerations have led to special rules in dealing with child-offenders.

C. AGE OF RESPONSIBILITY

The condition of childhood exempts the children from accountability for their actions ; they are deemed to be not responsible actors. Where this state ends and responsibility begins is , in reality , a gradual process, with the child becoming more and more aware of his place in the order of things.¹⁰

The law sets an arbitrary age of responsibility for Criminal law purposes. This currently stands at the age of ten.¹¹ The law provides that nothing done by children who

⁹ Peter Charleton , Criminal Law : Cases & Material , p.271 , (1992).

¹⁰ Ibid.

¹¹ Children And Young Persons Act (hereinafter will be known as the CYPA) , sec. 50 as ammended in 1963. Previously , at Common law , the age of reponsibility is at seven. the statutory provision had later raised the age limit to eight. However , due to the exergencies of time , the age limit was once again

are below the age of ten , is an offence.¹² Section 4 of the CYPA 1969 , raised the age of children to become punishable at the age of fourteen. However , this has never been implemented ; nor likely to be.¹³

In Islam the age of responsibility is not fixed as in the Common law. Liabilities lies on two main characteristics , mainly , the consciousness or understanding (Al-Adak)¹⁴ and free will or choice (Al-Ikhtiar).¹⁵ As long as the doer is aware of the nature and consequence of his act , he will be liable for the act , regardless of his age at the time of the commission of the crime. However , for the better uniformity in exercising the law , the jurists had attempted to fix the age limit concerning to the age of responsibility.¹⁶

D. JUVENILE DELINQUENT -- THE PRESENT SITUATION : IS IT A PROPER WORD ?.

At present , the spirit of keeping away children from the criminal proceedings , is being criticised by the

raised. This time the age was raised to ten.

¹² C.M.V.Clarkson & H.M.Keating , Criminal Law : Text & Materials , p.316 , (1986).

¹³ M.D.A.Freeman , The Rights Of Children When They Do Wrong , p.210 , (1981).

¹⁴ Abdul Qadeer Oudah Shaheed , Criminal Law Of Islam , Vol.2 , p.331 , (1987).

¹⁵ Ibid.

¹⁶ Ibid. In Islam , one who reaches the age of responsibility is said to be a 'baligh' person.

society. It is one of the many paradoxes of current thoughts that troublesome children should be made more responsible for their actions without , giving them any additional rights.

The critics came into being due to the large contribution of child-offender in crimes , particularly in crimes involving indictable offences.¹⁷ The society are of the opinion that , at present , 'juvenile delinquent' is not anymore a proper word to protect children from being responsible for their conduct due to the argument of legal impossibility.¹⁸

An old writer , so very long ago , wrote in respect to the incapacity of children :

" The law protects their persons , preserves their rights and estates , excuses their laches , and assists them in their pleadings ; the judges are their counsellors , the jury are their servants and the law is their guardian " .¹⁹

¹⁷ Caroline Ball , "Young Offenders And The Youth Court" , in Criminal Law Review , pp.277 - 287 , [1992].

¹⁸ Legal impossibility means that action that could be taken against children are quite limited due to the presumption of doli incapax. Sometimes , even when the presumption is not applicable due to the age of the offender , the law tend to protect the child to the extent that when dealing with child-offenders the Court's hands are tied.

¹⁹ The Infants' Lawyer , Lond. 1712.

Due to the attitude of the law towards them , two-third of offenders under the age of seventeen are cautioned.²⁰ Only one-third of the youthful-offenders are prosecuted.²¹ Nearly ninety percent of the first offenders who are prosecuted by the Courts were only given warning and admonishment by the Court. In other words , rather than being punished , they are usually discharged.²²

The policy here , is to delay the entry of the juveniles into formal criminal-justice system. The belief is that a caution is no less likely to be effective in preventing further offences and that labelling a juvenile a delinquent , can only reinforce in that young person's tendency to behave like a delinquent.²³

The society in trying to change this belief , argued that the children at present , are not anymore the weak and simple-minded creatures. In line with the rapid development of the world , so are their understanding.²⁴

²⁰ Charles W.Thomas & Donna M.Bishop , op.cit. , p.7

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ The existence of the new system of education plus with the help of the mass media , led to the growth of their thoughts to be not far different from the adults. e.g. three under-aged boys robbed a shop and managed to escape. When asked by the authority on how they learnt to rob and ran away , they claimed that they learnt as such from the television. See also " Macam-macam Boleh Jadi " , Berita Harian , 25th.Mei,1994 , p.1.

They are fully capable of understanding the nature and consequences of their conduct.

There are instances where the way they committed the crimes even 'impressed' the Court. In the murder of James Bulger²⁵, the Court of Preston Crown found that the two boys, (Robert and Jon) both were only ten at the time of the commission of the crime, guilty of murder at first degree. Their act was described by the Court to be " unparalleled evil and barbarity ".²⁶

The children seemed to know their special rights granted by the law. At present precocious children, get to know the age of criminal liability and are quite apt to say to the policeman: " You cannot touch me ! I am under ten". Ironically they are right.

E. ADEQUACY OF THE LAW.

The number of crimes committed by children are increasing at such a rapid rate. Nevertheless, very few actions can be taken against them as long as they have the law on their side. Hence, we need to reevaluate the law and make whatever ammendments which are necessary to solve this problem.

²⁵ Id.

²⁶ Ibid.

In addition to that , the Courts also need to change their attitudes. They should not continue treating child-offenders so leniently that the law is being taken advantage of by these children. Children should not remain the 'untouchables' forever.

In the case of Robert Thompson and Jon Venables²⁷, it was reported that the two boys , at the age of ten had brutally murdered a two year old toddler by the name of James Bulger. They lured the victim from his mother and brought him to a railway at Walton.

There , James was beaten to death and his body was left on the railroad with the intention that the body would be crushed by a passing train. The murder became one of the most horrible crimes that had ever happened in Britain. Furthermore , the murder was committed by young boys who were only ten years old.

Both were found guilty by the Court of Preston Crown. The sentence was that they are going to be sent to the detention center "during the Majesty's pleasure"²⁸, meaning indefinitely. The usual practice is that such offender will be detained for many , many years until the Secretary of the State is satisfied that the offender had

²⁷ The Malay Mail , 25th.Nov,1993 , p.8.

²⁸ Ibid.

been fully rehabilitated and no longer a danger to others.²⁹

The two boys were the youngest Britons to be convicted since 1748 when a ten year old strangled to death a girl half his age.³⁰ This shows that more often than not, the Courts adopted the attitude of giving excuse³¹ to child-offenders.

The strange thing was , despite of the condemnation of the Court of the two boys act , they were released from detention after staying at the institution for seven months only.³² Their released was badly criticised by the public. Dr.Dorothy Eimon , a physciaterist at the University College of London , was in the opinion that seven months is definitely not enough to rehabilitate the two boys.³³ Since the crime committed by them was a serious crime , they will need a longer period to rehabilitate.³⁴

²⁹ Ibid.

³⁰ Ibid.

³¹ Usually , an act which is excused by the law , is originally a bad act. However , due to the circumstances , the offender is excused from liability. See also J.C.Smith , Justification And Excuse In The Criminal Law , p.11 , (1989).

³² Wan Nurmawati Abd.Rani , " Sistem Keadilan Britain Menguntungkan Pembunuh" , Berita Minggu , 20th. March, 1994 , p.16.

³³ Ibid.

³⁴ Ibid.

Several questions could be posed from the two boys' case. First , is the law pertaining to childrens' liability in crime adequate ?. And secondly , if it is not adequate , what are the steps that should to be taken to remedy the situation ?. Thirdly , if the law is adequate , why is that , the crime rates among children are on the increase ?. Does this have anything to do with the implementation of the law itself ?.

These are the questions that are going to be discussed in this paper. However , before doing so , we have to go through the rules and principles governing the defence of infancy from Criminal liability. In addition to that , all the relevant statutory provisions and cases relating to the defence need to be studied.

Since , at present , the defence of infancy from criminal liability provides two alternatives to the child-offenders , i.e either absolute immunity or a less severe punishment , this paper is basically divided into two main parts. One , deals with infants who are given absolute immunity by the law and the other , with juveniles , who use the defence to plead for a lesser punishment in accordance to their age.

For the purpose of this paper , special references will be made to the English , Malaysian and Islamic Criminal laws. This is to give a narrower scope to

this study and enable the laws to be adequately compared. It is my hope that , at the end of this study , we will be able to have a firm grasp as to what infancy is, as a defence from criminal liability and its adequacy in upholding justice.

PART TWO

CONCEPT OF INFANCY.

A. LITERAL DEFINITION.

Literally , infants are those who are of a very young age (up to the age of sixteen for the purpose of some Acts of Parliament and under the age of fourteen in Criminal law). Childhood is the state of being a child.¹ The word 'child' is sometimes used interchangeably with the word 'infant' or 'minor'.² In England , the term 'infant' is usually used in the Criminal law while the word 'minor' is usually used in the cases of contracts or torts.

In the statutory language , an infant could be divided into several categories³ :

¹ Chambers English Dictionary , p.247 , (1988).

² Interpretation Act 1967 , sec.2 : minor means a person who has not attain the age of majority prescribed by the law applicable to him.

³ Glanville Williams , Textbook Of Criminal Law , p.639, (1983).