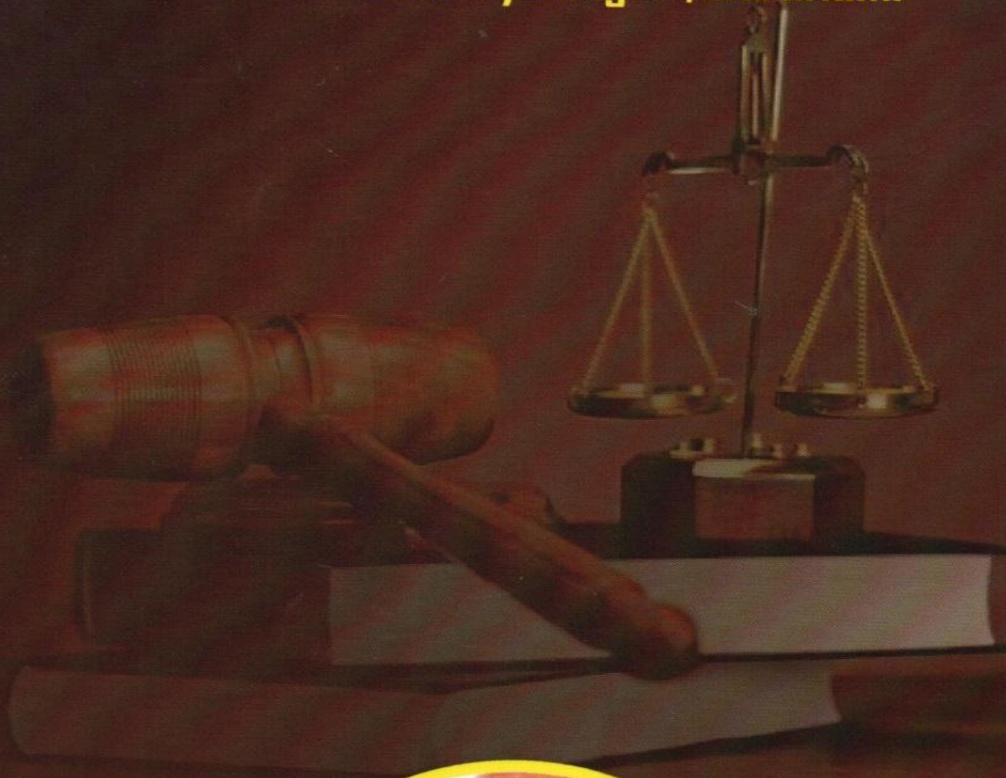


COMPARATIVE OF LAW OF CHILDREN MATURITY OF CRIMINAL JUSTICE SYSTEM IN INDONESIA AND MALAYSIA BASE ON ISLAMIC VALUE

Dr.Sri Endah Wahyuningsih,SH.M.Hum.



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FOREWORD

Bismillahirrohmaanirrohiim

Alhamdulillah, All the praise to Allah SWT for all the gifts and pleasures so the author can finish this book with title “COMPARATIVE OF LAW OF CHILDREN MATURITY OF CRIMINAL JUSTICE SYSTEM IN INDONESIA AND MALAYSIA BASE ON ISLAMIC VALUE”. Peace be upon may always devoted to the Prophet Muhammad (pbuh.), his family, friends and followers until the day of judgement.

In Act No. 23 of 2002 on Child Protection has been mentioned regulation of the rights of children there are 67 chapters starting from chapter 4 to chapter 71. From a number of articles of the dominant set of custody issues and legal protection of children under the age of 21 years. Indirectly this law asserts that a person is considered an adult (say law) when it has reached the age of 21 years. In the Law on the Election Act No. 7 of 2017, mentioned in Article 198, paragraph 1, which reads: “citizen who on election day are fulfilled, aged 17 (seventeen) years of age or older, married, or have ever been married have the right to choose”. Here is explained that the age of 17 are considered adults and are given the right to choose leaders because they thought had matured and was able to distinguish what is right and what is wrong. In this case, anyone who has the right to make E-ID card then it is considered an adult. While in Act No. 1 of 1974 on Marriage has been mentioned that the age for candidates who wish to perform a marriage is the age of 19 (nineteen) years for men and 16 (sixteen) years for women. In

Islamic law, the standard of maturity to the extent of a person already said puberty. From here we are faced with the inequality of laws in determining the size of one's manhood, when the legal certainty (Certainty) clear a matter particularly who are still called the children and anyone who is already considered mature (competent jurisdiction). As this would have implications for the workings of the law, especially in the case of sanctions / penalties (prison, jail, a fine, death or rehabilitation).

This book is actually a result from an international research cooperation between Sultan Agung Islamic University and University Utara Malaysia. The author feels the results of this study are worth distributed, given the importance of understanding the standard of maturity in law in Indonesia and Malaysia (Comparative law) and it has been adapted to the development of legislation and regulations. The authors would like to thank infinitely to all parties involved in the completion of this book. Hopefully all the good deeds we always be blessed by Allah SWT.

The author realizes that this book is still a lot of shortcomings, therefore all constructive criticism and suggestions from the readers are necessary for the perfection of this book.

Hopefully this book can contribute to law reform efforts in Indonesia and as reference, especially for law students who are steeped in the study of international comparative law.

Semarang, 12 September 2018

Sri Endah Wahyuningsih

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CHAPTER I

DEFINITIONS OF CHILDREN AND MATURITY

A. Public Understanding of Children and Maturity

In Big Indonesian Dictionary (KBBI), the child is the offspring of the second man who was a boy, while adults are age, age (not a child or a teenager), has reached maturity sex, mature (about thoughts, views, and so on).¹

Understanding children in general is a child born of a marriage between a man and a woman or a woman with a man who is not tied to marriage.

The other side in a legal perspective, every man by nature is a subject of law. The law is the subject of rights and obligations from birth until he died, even babies still in the womb could be considered as subject to the law when there is a business or legal interests require it.

Quoted from Achmad Ridwan Ichsan by Syahrani express understanding that humans are biologically, namely in natural phenomena and biological phenomena, such as living things that perceptions and culture. While people are juridical sense is a phenomenon in social life. So the law that became the center of attention is the person or persona.²

Pili Syahrani explained that every human being is recognized as a legal subject (*rechtspersoonlijkheid*), which advocates the rights and obligations. Civil rights and obligations does not depend on religion, class, gender, age, nationality or foreigners. Also civil rights and obligations does not depend on how rich or poor, high or low position in society, the authorities (officials) or ordinary

¹<http://badanbahasa.kemdikbud.go.id>, Access date of February 2, 2016.

²Pili Syahrani, op. cit., p. 68.

citizens, all are equal before the law. But there are several factors that affect the authority reserves the right to limit the authority of a person's nature reserves, such as:

1. Citizenship, in the case of Indonesian citizens who are able to have the property;
2. Residence, in the case of the prohibition of ownership of agricultural land by two people who live outside the district park land;
3. Position or department, in the case of judges and other public officials can not acquire items that are still in the matter;
4. Behavior or act, in terms of parental authority may be revoked by a court decision if it is remiss as a parent / guardian or behaving badly.³

Pili Syahrani explained that human begins at birth and ends when death or died. The exception in that it is the start of legal subjects as the Burgerlijk Wetboek (The Book of the Civil Law) in Article 2, which determine what is in the womb of a woman is considered to have been born when the interests of the child requires it and die at birth is assumed he got never been there.

This provision is often referred to as an attempt to *negate rechtsfictie injustice*, so that the child in the womb was the heir. Also at the end of a person as a supporter of the civil rights and obligations are when it died. This means that as long as one is alive during which it has the authority entitled. But not all legal subjects capable of legal actions (*rechtsbekwaamheid*), such as:

1. People who are minors, that children who have not attained the age of 18 years or has never been a marriage (Article 1330 Burgerlijk Wetboek conjunction with Article 47 of the Law of the Republic of Indonesia Number 1 Of 1974 about marriage);

³Pili Syahrani, 1991 Summary Summary Legal Studies, paint. I, Pustaka Kartini, Jakarta, p. 119.

2. People who are put under the amnesty, that is people who are mature, but in a state of stupid, crazy, dark eyes, and a spendthrift (Article 1330 in conjunction with Article 433 Burgerlijk Wetboek Burgerlijk Wetboek; and
3. People who are prohibited by law to perform certain legal acts, such as the person who is declared bankrupt (Article 1330 Burgerlijk Wetboek amended bankruptcy laws).⁴

Pili Syahrani concluded that people who are legally competent (rechtsbekwaamheid) is mature and healthy sense his mind and is not prohibited by the legislation to do the works of certain laws, while minors and those who put under the amnesty (curatele) in legal actions are represented by their parents, guardians or remission (curator). We can say that everyone is a subject of law (rechtspersoonlijkheid), which advocates the rights and obligations, but not everyone is capable to perform legal acts, and were capable of legal actions (rechtsbekwaamheid) are not always authorized to perform legal acts (rechtsbevoegheid). So rechtsbekwaamheid is a common condition.⁵

Asrofi, judicial magistrate on Oversight Board of the Supreme Court of the Republic of Indonesia, to highlight that although every human being as a subject of law but not all humans are considered legally competent. It is supposed that the law is seen as a subject of law did not say that “law, so that the legal act, they must be represented or assisted by others, such as:

1. Children who are under age, immature, or not married;
2. People who are in wardship of others, namely those who are sick memory,

⁴*Ibid.*P. 120-122.

⁵*Ibid.*

and wasters, even from the age of an adult. Asrofi clarify the legal age of majority in perspective is the age at which a person is deemed to be capable and competent to perform legal acts, examples of a deal, sign the deed, marriage, support a family, responsibility, work, and so on. Up to know the legal drinking age is important because it can result in valid and whether a legal act. When the act is committed by those who are deemed incompetent law, such as the age of a minor, then the act can be deemed unlawful and may be canceled.⁶

From the Indonesian Wikipedia, the meaning of children are:

Child (plural: children) is a man or woman who is a minor or has not yet reached puberty. Children also the second seed, in which the word “young” referring to the opposition of parents, adults are the children from their parents, even though they were adults.

According to psychologists, child development is the period spanning from infancy to age five or six years, this period is usually called the preschool period, then grow on par with primary school years.

Even so the term is often also referred to the mental development of a person, even though the biological and chronological age for someone already included adult but when the order of its age or mental development then one can only be associated with the term “child.”⁷

The meaning adults as quoted by the Indonesian Wikipedia is:

Adults symbolizes all the mature organism that normally in humans who are no longer children and has become a man or a woman. Today, the term adult can be defined in terms of biology that is puberty, the law is aged 16 years or older or married, according to the Marriage Law is 19 years for

⁶Asrofi, “Adults Age Limit In Perspective of Law and Application On the Religious”, *Varia Justice* No. 354 in May 2015, p. 48-49.

⁷<https://id.wikipedia.org/wiki/Anak>, Access date January 31, 2016.

men and 16 years for women and the personal character of the maturity and responsibility. Various aspects of adulthood are often inconsistent and contradictory. A person may be biologically an adult, and have adult behavior characteristics, but still treated as if it is a child under the age of legal adulthood. On the other hand, a person can be legally considered an adult, but do not have the maturity and responsibility that reflects the character of children.

Adults “sometimes also mean “not considered suitable for children”, mainly as a euphemism related to sexual behavior, such as adult entertainment, adult videos, adult magazines, and store adult volume. However, adult education simply means education for adults, and non-specific sex education. In the field of psychology, adult development is the period that began in the late teens or early twenties and ended the year at the age of three decades. This is the time of the formation of personal and economic independence, future career development, and for many people, time mate, learn to live with someone familiar, start a family and raise children.⁸

Instead Asrofi pointed out that there are two kinds of adult age, namely:

- a. Adulthood which refers to the act of legal competence (ably law); and
- b. Adulthood which refers to the act of legal authority (arbitrary law).⁹

B. Understanding of Children from the Other Disciplines

Understanding child can pull of sociological surveys as a social creature who constantly interact in a social environment, community, nation and state. In a social group, the subsidiary is positioned as a lower social status of the

⁸<https://id.wikipedia.org/wiki/Dewasa>, Access date January 31, 2016.

⁹Asrofi, op. cit., p. 52.

environment in which people interact with one another. Therefore the child has limitations as miniature adults, in the process of growth, learning and socialization.

On the other hand, the definition of a child under customary law / practices can not provide a clear-cut division, who said to the children and adults who are saying.

Despite the law, the size of the child to be able to say today is not based on age but on the characteristics are evident in acts of child behavior, such as being able to work, talking to do what the people in the association community and is responsible for managing his assets own.

Munadi Hidayat also highlighted the age of maturity can be determined by the provisions of law and other disciplines, such as:

1. Customary law, a person can be declared an adult when he already had a strong working or working;¹⁰
2. Islamic law, a child can be declared an adult if it is end puberty, they are already able to discern between good and bad, or already suffering from physical development, such as hair growth for women are gender, the development of the breasts and already bleeding after childbirth or menstruation. While the men have ever dreamed of intercourse with the opposite sex, besides the growth of whiskers and altered voice grew. The majority of scholars believe that the maturity of children with an average age

¹⁰Munadi Hidayat, 2014, Punishment Minors, paint. to-1, PT Alumni, Jakarta, p. 16, quoted from Dr., 1981.

of 9 (nine) years;¹¹

3. Psychologically, the older woman's maturity faster than boys. Maturity daughter is at an age limit of 14 (fourteen) years to 15 (fifteen) years, whereas boys are at an age limit of 16 (sixteen) years to 17 (seventeen) years.¹²

The Ministry of Health classified the children into four groups, namely:

1. Age 0 (zero) until five (5) years is the age of the children;
2. Minimum five (5) years to ten (10) years is the age of the children;
3. Minimum of ten (10) years to twenty (20) years is the age of adolescence;
4. The age of 20 (twenty) to 30 (thirty) years is the age of adulthood.¹³

As for the comparative study of law as part of the science of reality, which means understanding the various legal systems are conceived in terms of substance, but a better understanding of the reality and the wider context, such as in terms of motivation, policy background and philosophical values / ideological, social, cultural, economic, political and so on. Up to compare between the criminal law English to Indonesian criminal law is a matter that can be done, because of the similarity of the sources of law, for which the legal system in Indonesia is closer to the English legal system, which also comes from the unwritten laws / customs (common law).¹⁴

The term legal minors “as in the legal system in Indonesia have matching

¹¹Munadi Hidayat, 2014, Punishment Minors, paint. to-1, PT Alumni, Jakarta, p. 16, quoted Mohammad Rifai, 1978.

¹²Ibid.

¹³Munadi Hidayat, 2014, Punishment Minors, paint. to-1, PT Alumni, Jakarta, p. 56, quoted from Muhammad Thohir, 1993, Seminar on Children's Health, Islamic Hospital Surabaya, p. 6.

¹⁴Barda Nawawi Arief, 1990, Comparative Criminal Law, ed. 1, cet. 1, Rajawali, Jakarta, p. 21-21.

legal terms in English by the term “infancy. English criminal law responsibility knows no boundaries of age (the age of responsibility) as follows:

a. Under 10 years

- There is a presumption that a child under 10 years is deemed incapable of committing a crime (incapable of crime or *doli incapax*). Therefore it can not be convicted or sentenced.

b. 10 years of age but under 14 years

- There is an assumption that children in this age group deemed *doli incapax*, but this presumption can be rebutted by proving their wishes “evil (mischievous discretion) that he knew that what he did was wrong. So malicious intent add age “(Malita Supplet aetatem = Malice supplements age).

c. Above 14 years

- This age group is considered fully responsible for the act of doing.¹⁵

From this description, the criminal law in England assess and criteria child is simply in terms of age, marital status, while not included in the criteria for children in terms of criminal liability.

C. Understanding of Children and maturity in Indonesian Law System

In KBBI, the definition of the rules is the basic formula of the law, the rules that have been identified, the benchmark argument.¹⁶ Soerjono Seokanto

¹⁵*Ibid.*, P. 62.

¹⁶<http://badanbahasa.kemdikbud.go.id/kbbi/index.php>, Access date of February 8, 2016, to say ““rules.

clarify the meaning of the rules is an act by which a certain behavior is ordered, authorized, or permitted, while a legal norm means of an act that could be construed in accordance with these rules.¹⁷

While understanding the rules derived from the Arabic meaning of rules, norms, instructions, or commands on the behavior of people.¹⁸ The rule could also mean that the basic formulation of laws, rules or instructions that have been identified.¹⁹

The meaning of the law is an understanding which contains a lot of corner-faceted and covers a broad field, so that no one can catch him with the definition of complete and perfect.²⁰

Meyers defines law as a whole from the norm and moral judgments about who had contact with human actions as a member of society, norms and assessment of which the national authorities must apply the guidance in the discharge of their duties.²¹

As for Abdul Manan provide a legal definition as a set of rules governing the behavior and actions of a man in social life and have regular features, the law is an organ of the rules of abstract law to regulate the interests of the people, for whom the violation will be charged sanctions with what has been determined.²²

In connection with the implementation of positive law, Suwoto in his dissertation found that the theoretical basis of law that could lead to a legal obligation on the subject of law can be found in two ways: First, from the

¹⁷Soerjono Seokanto, 1985, the Pure Theory of Law, Alumni, Bandung, p. 6-13.

¹⁸R. Subekti, and Tjitrosoedibio, 1996, the Law Dictionary, paint. 12, MF J Peter, p. 65.

¹⁹BN Marbun, 2006, Indonesia's Law Dictionary, Pustaka Sinar Harapan, Jakarta, p. 123.

²⁰*Ibid.*, p. 289.

²¹R. Subekti, and Tjitrosoedibio, op. cit., p. 50.

²²Abdul Manan, 2006, Legal Aspects rate, cet. 3, Kencana, Jakarta, p. 2.

provisions of the law which states clearly positive; Second, through the interpretation of positive law does not set out clear.²³

The notion of positive law, as the opinion Sunaryati Hartono quoted by Siti Sundari, is a law that has been there and in Indonesia, and the Indonesian national law is a law that is not (entirely) in Indonesia, so they have to think about how their formation and what and how the framework and foundation (as well as philosophical and material).²⁴

In terms of law enforcement in a society that is always evolving inseparable from awareness, compliance function and purpose of the law itself. So Soerjono Ancol explained that the law as a means of regulating the life of society can serve as a means of social control, a way to expedite the process of social interaction and utility reformer. Therefore the purpose of the law is to create harmony between order and peace in social life, will achieve this goal if there is a strong trend and the fact that the law is observed by the majority of citizens and leaders. High and low degree of adherence to the written law is determined by the legal consciousness of society that are rooted in religious values, the values of decency, and the values of decency. Also based on factors such rules, knowledge about the contents of the rules, attitudes towards regulation, and in accordance with the rules.²⁵

In accordance with the definition above, Salim HS and Marlies Septiana

²³Munadi Hidayat, 2014, Punishment Minors, paint. to-1, PT Alumni, Jakarta, p. 19, quoted from Suwoto, 1990, Powers and Responsibilities of the President of the Republic of Indonesia, dissertation, Faculty of Law, University of Airlangga, p. 143.

²⁴Munadi Hidayat, 2014, Punishment Minors, paint. to-1, PT Alumni, Jakarta, p. 20, quoted Siti Sundari Rangkuti, 1986, Environmental Law and Policy Environment in the Process of National Legal Development Indonesia, Dissertation, Graduate Faculty, Airlangga University Surabaya, p. 7.

²⁵Soerjono Ancol, 1982, Law Awareness and Legal Compliance: An Analysis of Sociology of Law, CV. Rajawali, Jakarta, p. 271-274.

Nurbani that explores the theory Effectiveness of Law writes such legislation, whether the level is lower and higher aims for the public and law enforcement officials can perform consistently and without discrimination between a society with other people. Everyone is deemed equal before the law (equality before the law). However, in reality the laws and regulations set forth the often violated, so that the rules were not effective. Ineffectiveness of the law could be due to the law of laws vague or unclear, inconsistent and officials or the people do not support the implementation of these laws. When the law was implemented, the law, said to be effective. Said to be effective because the sound clear laws and no need for interpretation, its officers to enforce the law consistently and masyarakat affected by the rule so supportive. The theory study and analyze about it, that the effectiveness of the legal theory.

The materials which are legally binding and consist of legislation, such as:

- a. *Burgelijk Wetboek voor Indonesia* (BW), The Book of the Law of Civil Law.
- b. Law of the Republic of Indonesia Number 1 Of 1974 about marriage.
- c. Law of the Republic of Indonesia Number 4 Of 1979 on Child Welfare.
- d. Law of the Republic of Indonesia Number 8 of 1981 on Criminal Proceedings.
- e. Law of the Republic of Indonesia Number 23 of 2002 on Child Protection, as amended by the Law of the Republic of Indonesia Number 35 of 2014 on the amendment of Act No. 23 of 2002 on Child Protection.
- f. Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child.
- g. Children's Act 2001 (Act 611).
- h. Juvenile Courts Act 1947 (Act 90).
- i. Child Protection Act 1991 (Act 468).
- j. Women and Girls Protection Act 1973 (Act 106).
- k. Care Centers Act 1984 Child.

- l. Age of Majority Act 1971 (Act 21).
- m. Domestic Violence Act 1994
- n. Family Law / Act 1975, Ordinance 43 of 2001 Islamic Family Law Ordinance

D. Understanding of Children in Law of the Republic of Indonesia Number 11 of 2012 on Child Criminal Justice System

Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System who are confirmed in Jakarta on July 30, 2012 by the President of the Republic of Indonesia Dr. H. Susilo Bambang Yudhoyono, and enacted in Jakarta on 30 July 2012 in the Official Gazette of the Republic of Indonesia Of 2012 Number 153, Supplement to the State Gazette of the Republic of Indonesia Number 5332, to consist of 108 (one hundred and eight) chapters, and 14 (fourteen) chapter ,

Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System's either some of the terms of the Child, namely:

1. Children in Conflict with the Law;
2. Children in conflict with the law;
3. Children who become victims of crime; and
4. Children who become witnesses of crime.²⁶

Children in Conflict with the Law are children in conflict with law, children who are crime, and children who witness a crime.

Children in conflict with the law, hereinafter referred to child is a child who has reached the age of 12 (twelve) years, but not yet the age of 18 (eighteen) years who allegedly committed the crime.

²⁶Article 1 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child.

Children who become victims of crime, hereinafter referred to child victims were children under 18 (eighteen) years of age who have suffered physical, mental, and / or economic loss caused by the crime.

The Son of Being Witnesses Crime, hereinafter referred to Children's Witnesses are children under 18 (eighteen) years that could provide evidence for the purposes of investigation, prosecution and examination before the court on a criminal case is heard, seen, and / or his own.

CHAPTER II

RULES OF LAW ABOUT THE CHILDREN

A. Children's Rights and Responsibilities

Factors principles of legal protection for children birth to the obligations of the state / government to maintain the dignity of the child as a whole person, by giving special protection to children in conflict with the law, so that with the overall development and needs of the legal community to the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice (confirmed in Jakarta on January 3, 1997 by Indonesian President Soeharto and enacted in Jakarta on January 3, 1997 in the Official Gazette of the Republic of Indonesia Of 1997 Number 3 and Gazette of the Republic of Indonesia Number 3668) is revoked and declared deprecated by the law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System child, which has a comprehensive protection of children in conflict with the law.

Setting the rules of protection of children's rights in the Constitution of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System are more detailed than the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice.

One of them is the protection of children's rights in the Constitution of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System who are not on the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Court is not arrested, detained, or imprisoned, except as a last resort

and in the shortest time.

In case the child reaches the age of 12 (twelve) years of committing or suspected of committing a crime, investigators, counselors, community, and professional social workers decided to hand it back to the parent / guardian or include it in a program of education, training, and pemingbingan in government agencies or LPKS (Social welfare Board Operator) in agencies that deal with social welfare, both at central and local levels of 6 (six) months. So it is not limited to the punishment, the punishment is death or life imprisonment.

Also the detention of children should not be done in the case of older children obtain guarantees from the parent / guardian and / or institutions that the child will not escape, it will not remove or destroy evidence, and / or will not repeat the offense. Also the period of detention of children in the Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System shorter than the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice.

In addition, the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, officials who make arrests or detention shall inform the child and the parent / guardian's right to obtain legal aid, if this is not done then the arrest or detention of children null and void. In contrast to the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice, which does not regulate that.

From the description above, there has been a shift in the rules, if the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice regulates legal aid is a child's right for inspection without accompanied by penasehta law, the

Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System turn out to be an obligation for children to get legal aid.

The purpose of the required legal assistance is in the form given legal assistance by lawyers or legal aid organizations or community organizations that provide legal aid services, paralegal, professors, and law students, which is the expansion of the meaning of the child's right to have legal representation of the original shaped just got assistance of legal counsel to receive legal assistance from an advocate or other legal aid providers.

Legal aid is no longer the sole domain of lawyers but can also be provided by other legal aid providers. In addition to the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, hearing the child is still running and the trial did not become null and void if the child is not accompanied by a parent / guardian and reverse the trial can not be extended and consequently null and void if not accompanied by a lawyer or other legal aid providers.

So it becomes clear special protection to children more comprehensively in the Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System of the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice, for which the presence and / or the appointment of an advocate or aid other law for the accused child is an absolute must and shall be conducted by a judge.²⁷

B. The Convention on the Rights of the Child

Ratification of the Convention on the Rights of the Child which has been

²⁷Guse Prayudi, "Assistance Counsel For Children in conflict with the law", *Varia Justice* No. 348, November 2014, p. 108-119.

ratified by the Government of the Republic of Indonesia by Presidential Decree Number 36 of 1990 gave birth to the principles of legal protection that had an impact on the changing paradigm in the protection of children in conflict with the law.

The rules of special protection has been put in the form of legal norms as the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System for Children (Official Gazette of the Republic of Indonesia Of 2012 No. 153), ratified and promulgated on 30 July 2012. The Law the legal effect after two years from the date of promulgation.

As in UNISSULA Seminar on Comparative Law of Various Law Systems in the World, with papers Islamic International and Comparative Law, which is brought by Rohimi Shapiee of the National Univresitas expressed:

OIC Covenant on the Rights of the Child adopted in 2004 “Covenant recognizes this international instrument such as the UNCRC, some gaps were identified. For example, according to Article 1 of the Covenant, a child is defined as every human being who”, according to the law applicable to him / her, has not attained maturity”. Without a clear indication of an age when indicating “maturity “starts, this definiton is difficult to apply in a legal context. Furthermore, while the Covenant is based on highly ambitious objectives as provided in its article 2, the Islamic Sharia has to be respected. For example, the Covenant recognizes that every child can express his or her own views to the condition that these vies are not contrary to the Sharia.

A comparison between international human rights law and Islamic criminal law: the UNCRC provides the age of majority applicable in most States is 18 years of age, it does not prescribe an age for criminal responsibility. According the Rule 4 of the Beijing Rules: “in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional , mental and intellectual maturity”. However, by only mentioning too low an age “the Beijing Rules do not give a specific definition of such age, thus leaving room for interpretation to the courts, which may be of concern where a young offender is accused of a serious crime.

Under Islamic criminal law, various stages of development are

differentiated. The first stage, known as sabiy ghar mumayiz (meaning a child incapable to understand), spans from birth until the age of seven. The second stage, known as sabiy Mummayiz (meaning a child with weak understanding), applies to individuals age seven to 15. Thereafter, a person is in the third stage and is considered an adult with full understanding, ie consent was Rashid. Therefore the age of criminal responsibility under Islamic law is associated with a child "s attainment of puberty, along with his or her capability of complete understanding. This definition relates to the hadith of the Prophet which states that "three persons are not accountable: a child until he or she becomes age of puberty, a person in sleep until his body and an insane person becomes normal until".²⁸

From the papers mentioned above, it can be concluded that the limitation of maturity again only measured a mere age limit, no views of whether children have ever / never married.

C. Judicial Children accountability

Setting an age limit of children in the Indonesian national law there is some diversity in various law (positive law), but legally restricted should be distinguished between the age of criminal responsibility of children.

Hidayat Munadi highlighting that "The ability to perform legal acts, in fact is one of the essential requirements in determining a person can be held accountable legally or not."²⁹

Hidayat Munadi explained that the size of the child to determine whether the act satisfies the elements of the crime or not, is visible at least through three vision, namely:

1. Subject, defined as whether the child can be submitted to a conference of

²⁸Rohimi Shapiee, "Islamic International and Comparative Law: UNISSULA Seminar on Comparative Law of Various Law Systems in the World", Speaker of the National University of Malaysia, the workshop curriculum "Higher Education Curriculum Law Referring to KKNi in the face of Cover MEA "and the International Seminar on the theme: "Comparative Law of Various Law Systems in the World", Semarang, on 22-23 December 2015, p. 6-7.

²⁹Munadi Hidayat, 2014, Punishment Minors, paint. to-1, PT Alumni, Jakarta, p. 47.

children? Does the child have the ability to take responsibility for what he had done? The ability to differentiate and determine where the good and bad in committing unlawful actions concerning the moral and psychological aspects. Without the moral and spiritual strength, a person can not be legal liability for their actions;

2. Elements of the offense, defined as whether the child has committed an act that can be punished or prohibited by law. It is fundamental to avoid *straf zonder geen schuld* (no crime, if no errors);
3. The accuracy of the evidence presented to the prosecutor and the defendant to prove the truth of his allegations. Evidence must be at least two. If not met, then the accused can not be punished (Article 184 of the Criminal Penal Code). In accordance with the principle of *unus testis nullus testis* (one piece of evidence is not evidence);³⁰

Associated with the ability of responsible, Muljatno wrote that:

The ability of responsible must have:

1. The ability to distinguish between good and bad deeds; lawful and unlawful;
2. The ability to determine the conviction of his will according to his good and bad deeds earlier.³¹

The library of some description above, it can be concluded that the definition of children and adults according to the law, the Islamic perspective, and other disciplines there are still differences in age and status ever / never married.

³⁰*Ibid.*, p. 52.

³¹Munadi Hidayat, 2014, *Punishment Minors*, paint. to-1, PT Alumni, Jakarta, p. 51, quoted from Moeljatno, 1983, *Principles of Criminal Law*, paint. to-1, PT Bina Literacy, Jakarta, p. 165.

Up to the age of maturity limitation problem in Indonesia is still subject to various legal interests regulated. On the other hand, the child's maturity is one element of punishment is very important to determine the subject of criminal law.

CHAPTER III

REVIEW IN ISLAMIC PERSPECTIVE

A. Maturity in Islam

In theory and practice of law, the application of the size or boundaries on which to base the assessment on legal norms or criteria regarding maturity (children) in Indonesia's national legal systems are implemented: first, the age limit; second, and or ever / never married.³²

The use of age limits in determining maturity in some of the law does not give effect to socially significant problems of society. Problems can arise when we are faced with the children involved in the criminal case, how to determine the extent / size huku or she is still capable of forgiveness. As this will impact the sanctions that will be received, when the child otherwise is minor / underage means that sanctions will diistinbatkan to guardianship, guardian or rehabilitation, especially for children who are still in school age. That is why we need the rule of law, what are the criteria that are considered adults and which is still under the age limit minors, especially in criminal cases.

In that case, we will menqiyaskan terms of maturity in terms of age in marriage, so that when the age limit is criss with a legal act in the form of underage marriage (marriage early age, early marriage), such as children who have not attained the age of twenty-one year or eighteen, then there will be clarity on the size and the exclusions of certain ages were used as a benchmark to

³²Kusumadi Pudjosewoyo, Learning Guidelines Rules of Law in Indonesia, Cet X, (Jakarta: Sinar Grafika, 2004), p. 74

establish / permissibility of marriage as by positive law³³,

Atho Mudzhar express opinions on four important aspects related changes that are not contained in the books of classical jurisprudence, which is about the age limit issue of allowing married, marriage, restriction or violation of polygamy, and the question of the imposition of divorce³⁴, But at the center of discussion is the age limit for marriage or age differences bride men and women.

Actually, the marriage age of consent provision in the law have not been energetic high compared to other countries in the world, such as country Algeria³⁵ which set the age of 21 for men and 18 years for women to be able to perform marriages. Besides Bangladesh also set the same age as the Algerian state. While Malaysia set the age of 18 for men and 16 years for her to be able to perform marriages. Furthermore, the average country in the world that sets the age of 18 for men and 15 to 16 years for women to be able to perform marriages³⁶,

The average Laws of Malaysia said that the marriage age limit of 18 years for men and 16 years for women. One of them is contained in the Laws of Malaysia, Act 303 of the Islamic Family Law (Federal Territories) Act 1984 section 8 states:

³³Khoiruddin Nasution, *Status of Women in Southeast Asia: A Study on Legislation of Marriage in Contemporary Muslim Indonesia and Malaysia*, (Jakarta: INIS, 2002), p. 6.

³⁴Mohamad Atho movements Parking Ideas Munawir Sjadzali *Re-actualizing Islamic law in the Muslim World*, (Jakarta: Twentyfirst, 1995), p. 318

³⁵*Ibid.*

³⁶Tahir Mahmud, *Personal Law in Islamic Countries: History, Text and Comparative*, (New Delhi: Academy of Law and Religion, 1987), p. 270

“No marriage may be solemnized under this Act if the men under the age of eighteen years of age or women under the age of sixteen years unless Judge Nasyrah “i have given permission in writing in certain circumstances.³⁷”

There are differences in the determination of the age of marriage in both countries is not far adrift only difference in 1-year course for prospective her, this happens because of the culture or because of different legal systems. Regarding the marriage age limit of Malaysia in all the country set the same age.

In terms of the maturity of the standard itself is also not set any age it can be said today. Islam only use the term puberty in setting the level of maturity. In Islam the maturity of man is when he's wet dream and for women is the presence of first menstruation. When they've experienced it, then they will be charged with law and legal obligations in Islam, such as the obligatory prayer 5 times, fasting Ramadan, etc., because they have been legally called *mumaziz* (ably law) are no longer children.

Achmad Anshori, the article discusses the marriage age limit “According to jurists and Its Application in the Marriage Act in the Muslim world”. He explained that many of the differences that occur among scholars and jurists regarding berepa appropriate age for a person to perform the marriage. Especially scholars and jurists who are in other Islamic countries. The word puberty at the center of the debate, namely Hanafi opinion that one has passed the age of puberty they were 18 years for men and 17 years for women, riff “i in his opinion a person who has undergone puberty when a man aged 15 years 9 years for girls, then Hanbali found already passed puberty for boys and girls age 15 years, and Maliki

³⁷ Act 303 of the Islamic Family Law (Federal Territories) Act 1984 section 8.

expressed his opinion that the signs of puberty is caused by the growth of wool or fine hair on certain parts of the body. Given the differences that appear to cause age in each country is different³⁸,

In his discussion explained briefly about the meaning of children contained in the law and Islamic law. Because in Malaysia is all about protecting the rights of children. So if marriage is carried out by both sides that he was still a child then to submit a written application to the judge in *Sharia court* so that the judge may consider appropriate conditions going on. In addition to requesting an application to the judge syar'ie both parties must also prove that they have passed the age of puberty. This is done because the country gives benefit priority especially benefit of children.³⁹

Ahmad Ibrahim, in his work entitled "Family Law in Malaysia and Singapore", that underage marriage is not recommended since they are considered not yet have the ability to manage the property (Rushd). In addition, they feared not being able to fulfill the obligations that must be borne in life as husband and wife, especially in the management of household finances. Before the wedding, there are several requirements that must be met by certain parties. The conditions in question are: the age of the bride, the consent of both parties, a ban on marriage for their family relations, marriage and follow the procedures that have been

³⁸Achmad Anshori, "Marriage Age Limit According to Muslim jurists and Its Application In Marriage Act in "Muslim world, Al-Adalah Journal Vol. XII No 4, (Institut Agama Islam Negeri: Raden Intan Green, 2015).

³⁹*Ibid.*

determined⁴⁰.perundangan Islam to the position of Islamic Law in the federal constitution⁴¹,

a. Age Limit Maturity

Marriage is one of the deciding about the size of one's manhood, and it can not be done overnight, but everything has been arranged in Islamic law and the rule of law in a country, in order for the marriage to get a guarantee of legal protection. In addition, any legislation or other rules in place to provide security and comfort to human life, one of which provides a minimum age limit provisions for the bride who wants to perform a marriage with the consideration in terms of both physical psychological travelers bride. It is also set God in His word⁴²:

“and shall fear the God of those who if they left behind them weak offspring, would fear on (welfare) them. Therefore let them fear Allah, and let them speak right word”.

From the above verse gives a signal without any consideration of psychological and physical terms in a marriage performed by both the prospective bride, dikawatirkan will adversely affect one in Ursa Major household welfare and quality of offspring⁴³, Because based on the opinion of various parties, all people, said marriage was conducted at an early age will have a negative impact or things that do not fit with the vision and mission of the purposes of marriage, namely the achievement of comfort and tranquility within households based on affection. This goal will not be achieved if both partners are immature in terms of

⁴⁰ Ahmad Ibrahim, Family Law in Malaysia and Singapore, (Kuala Lumpur: University of Malaya, 1973).

⁴¹ *Ibid.*

⁴² Religious Affairs of the Republic of Indonesia, Al-Qur “s and translation (Surat An-Nisa: 9)

⁴³ Fatchurrahman Djamil, Philosophy of Islamic Law, part-1, (England: 1997), p. 125

soul and body. Integrity and self-balanced maturity will be very influential in solving any problems that arise when facing a bitter-sweetness of married life. The rise of divorce today, suspected of their marriage at a young age.

In other words terminology puberty (children in Islam) there are⁴⁴ :

- 1) Even 15 years for men and women
- 2) Wet dreams, both for men and women
- 3) Menstruation for women who have aged a minimum of 9 years.

Explanation and Islamic issues are as follows:

- 1) People affected by the Shari'ah obligation to serve the people who meet one of three conditions above
- 2) In the book *I'annah Thalibin Juz 1* page 30 Good puberty by the age of 15 years, out of semen or menstrual
- 3) The first is the age of 15 the right to count calendar. Backdated separation baby with his mother.
- 4) Why should a 15-year, in the Book *Durrotul Yatimah*, Subki Imam said that the age is the age for marriage has been insufficient're mounting an orgasm and orgasm agitation. In the Book of *Al Asybah wa Nadzair*, Imam Suyuti said that at this age there is a sense of maturity, strong body, able to receive wisdom and advice, could be responsible for his actions.
- 5) The second is a discharge of semen for men aged 9 years. Imam Ramli Nihayah Mughtaj author of the book and the author of the Book of Imam Khotib Syirbini Mughtaj Mughni said that the 9-year-old *tahdidiyah*

⁴⁴Abu Bakr bin Muhammad Syatho, *I'annah al-Thalibin*, (Dar Ihya 'al-Kutub al-Arabiyyah: Mecca), p. 30

(timely). Meanwhile, according to Imam Ibn Hajar al-Haytami author of the Book of Islam *Tuhfah* and Saikhul Zakaria Wahab Al Ansori author *Fath Taqribiyah* that 9 year (can be faster 2 or 3 days). According to Imam Ibn Hajar when semen could be why puberty when out until the end of the penis was arrested and then has not been calculated yet entered puberty. While Imam Ramli said during already in the penis although not until then been considered out of puberty.

- 6) The third is menstruating women aged 9 years. *Taqribiyah* calculated (if the release 15 days earlier then considered to have reached puberty) Book *Hayiyah Jamal* Juz 1 page 230.

B. Proficient Law in Islam

Based on the research of specialists *Usulfiqh*, that there are five basic elements that should be preserved and maintained and manifested in achieving or creating benefit. Five basic elements are often referred to as-Syari *Maqasid ah* “which explains *Hifdz Din* (Religion), *Hifdz Nafs* (soul), *Hifdz Aql* (intellect), *Hifdz Nasl* (Descent), *Hifdz Mal* (Property). When someone wants benefit in his life, he must maintain it well above the five basic elements. And vice versa if one can not take good care of the five elements is then obtained *mafsadat*⁴⁵,

One manifestation of the law of Indonesia namely Act No. 1 of 1974 on marriage is also legal rules governing the age limit marriage the 19 (nineteen) years for men and for women to 16 (sixteen) years prescribed in Chapter 2 Article 7 Paragraph (1) further on Article 7 Paragraph (2) explains that if a marriage is

⁴⁵Fatchurrahman Djamil, *Philosophy of Islamic Law ...* p. 125

performed by the candidate whose age has not reached the provisions set forth in paragraph (1) shall be allowed to request waivers (dispensation) to the judge or the court (other officials) who have been selected by the parents of the bride. This provision is set in order for the candidate who wants to marry already mature for his life.⁴⁶

Moreover Islam also provides rules relating to the legal drinking age, which is contained in one of the word of God:

“and test the orphans until they reach the age of marriage. then if ye find them of intelligent (smart preservation of the property), then hand over to them their fortune. and ye shall eat the wealth of orphans over the limits of decency and (do not) rush (spending) before they mature. whoever (amongst guardians) is rich, then let him abstain generously (from taking of the property of orphans) and whoever is poor, let him take thereof in a fit. Then when you release their property to them, you then take witnesses (of surrender) to them. and sufficient is Allah (Reckoner)”⁴⁷

“do not approach the orphan's property except to improve it, until he was an adult. and give full measure and weight in justice. We do not burden anyone beyond his capacity. and when you speak, you then just though it was a relative (mu), and fulfill the promise. That God commanded you that you remember”⁴⁸.

Under the terms of the paragraph above then the jurists give an assessment of the physical characteristics to be stated maturity. The scholars said, even if there is inequality limits a person's maturity in general but certainly there are similarities in terms of both the principles of reason based on the absence of a competent person in the act and the responsibility of a person in committing an act. Besides its own Islamic family law in various countries have not been spared from the effects of modernization within the colony to the present time. This leads to a minimum age of marriage was a big outcry about the Islamic family law in

⁴⁶ Act No. 1 of 1974 Article 7 Paragraph (1) and (2).

⁴⁷ Ministry of Religious Affairs, Republic of Indonesia, the Qur "an, An-Nisa '(4): 6

⁴⁸ Ministry of Religious Affairs, Republic of Indonesia, the Qur "an, Al-An 'am (6): 152

many countries, including Indonesia and Malaysia. Bessel said that Indonesia itself,⁴⁹

While in the Malaysian state also has laws related to underage marriage contained in the Family Law are managed competently both for the Muslims and non-Muslims. For those who are not Muslims then set in section 10 of the reform law (Marriage and Divorce) Act 1976 (act 164) stipulates that the minimum marriage age of 18 years.²⁸ Furthermore, for the marriage of minors to Islam, there is the Law Islamic family (federal territories) Act 1984 and the Islamic family Law (state of Selangor) Enactment 2003 states that the minimum age for marriage contained in section 8 as follows:

“can not get married or do wedding registry where the marriage age, respectively under the age of 18 for men and under 16 for women, but the judge allowed be registered in certain circumstances.⁵⁰

Based on article above that, the implementation of marriage under age must obtain the consent of the Sharia Court”. The provision is intended to provide an opportunity for the court to find out the background of the woman concerned, physical condition, the ability to manage the household and the child's future needs⁵¹, After Sharia judge gives written permission for a marriage to be under the age, the child can be married by the father or grandfather. If your father or grandfather to wed minors who are on the minimum age for marriage yet, without the express written permission of the Sharia court judge, then that is contrary to

⁴⁹ Bessel, Sharon, Policy and Governance Department, (Australia: Australian National University Press, 2006).

⁵⁰ Ministry of Women, Family and Community Development, Underage Marriage, Kuala Lumpur 2015

⁵¹ Tahir Mahmood, Personal Law in Islamic Countries (New Delhi: Academy of Law and Religion, 1987), p. 224.

the provisions of article 40 of the law stipulating the Selangor Islamic Family. Based on the belief that the person concerned is guilty of the offense, a fine of less than 1000 ringgit or to imprisonment for less than 6 months or both. Sharia law in other states also have similar provisions concerning the minimum age of marriage.⁵² Which in Article 37 states:

“Except as permitted under the legal rulings of each person who uses violence or threats of any kind (a) forcing someone to marry against their will, or (b) prevents a man who has attained the age of eighteen years or a woman who has reached 16 years to make the agreement valid marriage is a crime and should be punished with a fine not exceeding one thousand ringgit or to imprisonment not exceeding six months or punished by both such fine and imprisonment”.⁵³

See rule above that age assessments will have a diverse background that risks to physical health of girls who married early, especially if they are pregnant at a very young age. As a result, Malaysia is a country of its citizens who died at a young age, due to health complications while giving birth. Judge Nasyrat that “i also very cautious in considering morality, personality, the future and the interests of both partners. Because marriage is not just to satisfy the desire, but it is a sacred bond that is filled with great responsibility.”⁵⁴

Assessments, then review the minimum age limit for men to get married between the different provisions of the Act in Indonesia with the existing Act in Malaysia. Determination of age are not much different because of the background of the establishment of age who are not much different that is also seen in terms of physical, psychological and socio-economic conditions. In this case the most

⁵² Ministry of Women, Family and Community Development, Underage Marriage, (Cambridge: 2015).

⁵³ Tahir Mahmood. Op.cit. 226 pp

⁵⁴ Teddy Kurniawan, Marriage under the age controversy in Malaysia, (stalling Jaya: 2013)

disadvantaged are the women because they have to bear higher risk than men, but there are similarities to be associated with someone who is not a marriage but he was not yet in accordance with the rules in the Act in both countries. So both countries grant a dispensation to both the prospective bride who do not meet the age requirements specified in the Act.

C. The Islamic view of Child Criminal

Definition of the child in the realm of criminal law and civil law in Indonesia national legal systems provide different restrictions, especially in the case that a child / adult and ever / never married. Adult age restrictions and ever / never married in the national legal system of Indonesia does not have uniformity in determining the criteria child / adult. Matters concerning maturity there is a difference, such as in the case of politically mature, adult in criminal and civil law, as well as mature sexually.

In theory and practice of law, the application of the size or boundaries on which to base the assessment on legal norms or criteria regarding maturity (children) in Indonesia's national legal systems are implemented: first, the age limit; second, and or ever / never married.

The use of age limits in determining maturity in some of the law does not give effect to socially significant problems of society. Problems can arise when the age limit is criss with a legal act in the form of underage marriage (marriage early age, early marriage), such as children who have not attained the age of twenty-one years or eighteen years old, but had a marriage that has received the permission of the second old person. Marriage is implemented as based on local

customary law (living habits) have regarded these children have mental maturity to get married, so it is not certain that the age limit be used as a benchmark to establish the permissibility of marriage as by positive law.

The phenomenon of marriage early age that occurred in the community can be proved by Data Health Research 2010 showed early marriage, 19 (nineteen) down with the number forty six point seven percent, and marriage in the age group of 10 (ten) years up to 14 (fourteen) years with the figure almost five percent.⁵⁵

As an axiom, that statement can be accepted as true without proof, that society governed by the rule. Without government regulation caused by the behavior of individuals and communities will turn into a situation without rules and enter into a variety of possible radicals.⁵⁶

Inconsistency on the age limit adult (children) to have / have not been married in the determination of the criteria adult (child) has had an impact on policymakers law criminal law, which is not consistent, as the Law of the Republic of Indonesia Number 3 of 1997 on juvenile court then revoked and declared effective on 30 July 2014 by the law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System child. On the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice lists “has never married, but then on the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child not placing restrictions have / have not been married for the determination of a person is considered a child.

⁵⁵“High Maternal Mortality Related to Early Marriage”, Kompas, October 6, 2015, p. 1.

⁵⁶Fred Dallmayr, 2008, “hermeneutics and the Rule of Law”, in Gregory Leyh (ed.), *Hermeneutics of Law: History, Theory and Practice*, part. I, M. translation Khozim, New Media, Bandung, p. 15.

In the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, maturity someone to build a marriage in the household is no longer considered an adult size. Size maturity with age restrictions are merely provide legal certainty in determining adult for children, but adults with age restrictions relatively true when associated with a particular place and time in the social environment of Indonesian law.

A sense of injustice in a society that considers the limitations of ever / never married are as a benchmark maturity will hurt. It would thus be contrary to the situation which is expected to occur (irony), when a child who has a marriage and committed a crime, then brought to trial as a child. Something odd if someone already has a child in her marriage and then commits an offense and is still regarded as children, not as adults in the criminal justice system of children.

Correspondingly, when the children who witness or Roban in an offense in criminal law, Act No. 8 of 1981 on Criminal Procedure regulates the age limit of 15 (fifteen) years and have never been married, but rather on Legal Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System do not wear such restrictions.

On the other hand, Islamic law the term puberty that a person who has reached maturity. In this case Masrum introduce the principle of puberty according to Islamic law is for men have sperm and the woman was menstruating. On the other hand, the phenomenon of marriage early age as part of the life of indigenous peoples of Indonesia have an impact on the public perception that children who have a marriage has the capability to act either by law or in the social life of indigenous peoples, but that case is closed and restricted by Article 1

3 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System child.

As the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, children in conflict with the law only by the limitations of age, the child has reached the age of 12 (twelve) years but not the age of eighteen (18) years, and no longer accommodate the limitations “and “has never married, as well as on the Law of the Republic of Indonesia Number 3 of 1997 on Juvenile Justice.

Islamic law as the law of life and grow in the community is supposed to be a benchmark in the development of law in the future, by absorbing the values of Islamic law to determine the rules of legal maturity in the juvenile justice system to satisfy the sense of justice and respect for law living in community. From the foregoing, it is necessary to reconstruct the rule of law maturity in the juvenile justice system derived from the values of Islamic law in Indonesia and Malaysia.

CHAPTER IV

MATURITY OF CHILDREN IN INDONESIA AND MALAYSIA

A. Maturity in the Criminal Justice System in Indonesia

Children are a gift from God and trust in God Almighty who must be cared for, nurtured and educated because in the inherent dignity, dignity, and human rights that must be upheld. Children are the hope for the generation and older people, nations and countries. Socio-economic conditions of families and children as well as various other factors at this time to bring some of the children are in difficult and dangerous situations. This situation makes children lose childhood and even bring them into acts of delinquency, lawlessness and criminality.

Bambang Waluyo revealed that the influence of scientific advancement, cultural progress and development in general, not only adults, but children are also caught in violation of legal norms, especially norms. Children caught up in consumerism and asocial pattern of more and can lead to crime, such as narcotic, extortion, theft, assault, rape, etc.⁵⁷

Behavior that is not in accordance with the norm or be called perversion of norms that are not agreed upon reality disrupt order and peace of mankind. Such deviations are usually labeled by society as an offense and even a crime. Evil in human life social is an issue that may be encountered by every man, society, and even countries. Reality has proved that crime can only be prevented and reduced, but difficult to eradicate completely.

⁵⁷Bambang Waluyo, 2004, *Crime and Punishment*, Jakarta, Sinar Grafika, p. 3.

Anticipation for such crimes can be done by the proper functioning of the legal instruments (criminal) effectively through law enforcement (law enforcement). Through legal instruments, attempted unlawful behavior dealt preventive and repressive. Reduction of crime is often referred to as a political criminal. Apply the next trial and subsequent sentencing to community members who are convicted of a crime, an act of repression.⁵⁸

Deviations behavior or legal act performed by children, caused by various factors. Some of these factors include the negative impact of rapid development, globalization in the field of communication and information, advanced science and technology, and lifestyle changes that most parents eventually bring fundamental social changes in people's lives. It is very influential on the values and behaviors that are less children. They get affection, guidance, development and supervision of parents can be dragged in the current society and socially unhealthy environment and may be detrimental to personal development. The increase in delinquency and crime are not merely nuisance and order, but as danger that could threaten the future of a nation.

For Indonesia under Pancasila, thinking about the function of punishment not only in itself but also a rehabilitation and social reintegration of prisoners. The project was implemented in an integrated among builders who built, and the community in order to improve the quality of prisoners. The ultimate goal of these efforts in order to realize the error of inmates, corrections, and also not to repeat the crime in the future. In this case, Dahlan Soerjobroto argued that a life and a life that exists between individual offenders with correctional described as an

⁵⁸*Ibid.* p. 1-2.

effort to achieve unity of life, personal as a man, between offenders with fellow human beings, between offenders with society and nature,⁵⁹

In Act No. 11 of 2012 on the Criminal Justice System Child Article 1 (2) “Children in conflict with the law are children in conflict with law, children who are victims of crime, children who become criminal sanctions”. In this paper the study on children in conflict with the law, in Article 1 (3) of Law Number 11 of 2012 on the Criminal Justice System Child states “Children in conflict with the law, hereinafter referred to Child is a child who has reached the age of 12 (two fifteen) years but has not aged eighteen (18) years who allegedly committed the crime”.

The issue of children in conflict with the law have long stated by scientist. State had acted in dealing with children in conflict with the law. So many cases have sprung up which always ended with children crime, and law enforcement officials will give punishment “intelligent” when fuss in the media.⁶⁰

Children in conflict with the law or who become perpetrators remain accountable for the act of doing but do it the right way, criminal responsibility is defined as the continuation of censure that objective have on crime and subjectively that there are qualified to be convicted of the offense⁶¹,

In Indonesia there are laws governing juvenile justice for children who commit offenses in the face to the courts is not affiliated with the conference an adult who committed a crime, it is intended to protect the lives of children so as not to suffer the trauma that can cause the soul of the child disrupted. Act No. 11

⁵⁹Dahlan Soerjobroto, 1986, Penal Sciences (Glimpse), Jakarta, AKIP, p. 8

⁶⁰Hadi Supeno, 2010, Criminalization of the Child, Jakarta, PT Gramedia Pustaka Utama, p. 2.

⁶¹Mahrus Ali, 2012, Fundamentals of Criminal Law, Jakarta, Sinar Grafika, p. 156.

of 2012 on the Criminal Justice System Child, more intended to educate children in order not to fall back into crime, while provisions in the Law of Criminal Procedure Code (TPC) sentence given much is to provide a deterrent against criminal , in this case the public more amenable Act No. 11 of 2012 on the criminal Justice System child, applied to children who commit criminal acts. Some examples of cases of criminal child in Indonesia, among others: the Case of theft of flip-flops made by Anjar Andreas Lagaronda vocational students aged 15 who were tried in Palu District Court, Tuesday 20 December 2011 for allegedly stealing sandals belonging to Brigadier Police Ahmad Rusdi Harahap. Vocational students in grade 1 was charged with article 362 of the Criminal Code with a penalty of five (5) years in prison. The judge said the defendant was found guilty⁶². The case of Foni Nubatonis, teens 16 years old, second grade students of SMK Kristen SoE, South Central Timor (TTS), East Nusa Tenggara (NTT). Foni Nubatonis reported adoptive mother for stealing eight Adenium flower stems and the neighbour sold for Rp 5 thousand to Rp 10 thousand. Theft case that ensnared Foni Nubatonis interest demanded two months in jail, convicted for theft of eight Adenium flower stems.⁶³

1. Pattern construction

Coaching or mentoring is a means to support the success of the country makes prisoners into society. Prison inmates play a role in fostering young children who treat prisoners in order to become better, to be built is the personal prisoner, evoke a sense of self-esteem with a peaceful and prosperous life in the

⁶² <http://www.negarahukum.com/hukum/menyoal-revisi-peradilanpidana-anak-record-short-law-number-11-year-2012.html>, Retrieved on Thursday, November 24, 2017, at, 22:20 .WIB.

⁶³ *Ibid.*

community, so the potential to become human personality and morally upright⁶⁴,

Construction according to regulations Legislation About Correctional Book to VI of Development, namely: “Construction of prisoners and students that all efforts aimed at improving repairing and morals (morality), prisoners and students who are in prison”.

Construction according to Government Regulation No. 31 of 1999 Article 1 (1) is another sense “construction activities to improve the quality of devotion to God Almighty, intellectual, attitude and professional behavior, physical and mental health of prisoners and correctional”.

Construction in prisons in accordance with Article 5 of Act No. 12 of 1995 About Corrections, the treatment of prisoners in order to protect the public from the possibility of repeated offenses by prisoners in order to become useful citizens in society.⁶⁵

2. Children understanding

According to the law in Indonesia, the provisions concerning the definition of a child is set for variety. Act No. 11 of 2012 on Criminal Justice System Child Article 1 (2), concluded that

“Children are people in delinquent child who has attained the age of 8 (eight) years but has not attained the age of eighteen (18)”. The Book of the Law of Civil Law Article 330 says, “People are minors are those who have not even reached the age of 21 (twenty-one) years and not earlier been married”.

From these provisions it can be concluded that the children are those who

⁶⁴Muidin Gultom, 2008, Comparative Law Against Children in the Criminal Justice System Children in Indonesia, Jakarta, Refika Aditama, p. 126.

⁶⁵Darwan Prinst, 2003, Law Anak Indonesia, Bandung, Citra Aditya Bakti, p. 68.

have not attained the age of 21 (twenty-one) years old and had never been married.

Article 7 (1) of Act No. 1 of 1974 on Marriage Tree said, “A man is allowed to marry only when they have reached the age of 19 (nineteen) years old and the woman has reached the age of 16 (sixteen) years”. From these provisions it can be concluded that the child is a man who has not attained the age of 19 (nineteen) years and women who have not attained the age of sixteen (16) years. Article 1 of Act No. 35 of 2014 on Child Protection, “Child is one who has not aged eighteen (18) years, including an unborn child”. Act No. 4 of 1976 on the Welfare of Children. According to Article 1 paragraph 2, states that “Son is a person who has not attained the age of 21 years and have never been married”.

3. Definition of the Crime

The offense is the act of a person or group of people who pose a criminal event or act in violation of the criminal law and threatened with punishment, in this case not only adults who can commit a crime but can also be done by minors. Children who commit criminal acts motivated by several factors, including lack of parental factors, economic factors, environmental factors, factors of social and educational factors.⁶⁶

In a known criminal elements subjective and objective elements. Objective element is that there are elements outside themselves criminal.⁶⁷ Objective element is the element that has to do with the situation that is in a state on the actions of the perpetrator to be objective elements, including:

⁶⁶[http://lib.atmajaya.ac.id/default.aspx?Head=61 & src = k & id = 130770](http://lib.atmajaya.ac.id/default.aspx?Head=61&src=k&id=130770) Accessed on Thursday, November 24, 2016 at 23:15 pm.

⁶⁷PAF Lamintang, 1989, designated offenses, Bandung, Sinar Baru, p. 142.

- a) Actions or human behavior.
- b) As a result of that an absolute requirement of the offense.
- c) Elements against the law.
- d) Another element that determines the nature of the crime.
- e) Aggravating criminal elements.
- f) Additional elements that define criminal offenses.

The subjective element is the element of the perpetrators themselves, which include:⁶⁸

- a) Intentional (dolus)
- b) Negligence (culpa)
- c) Intention (voor nermen)
- d) Aim (oogmert)

4. Child Criminal Justice system.

The criminal justice system of children who applied this time seems still concerned to punish the perpetrators of the crime in retaliation for acts committed. With emphasis like this, the dimensions of the crime seems to only be seen from one side, that side of the perpetrator of the crime itself.⁶⁹ If you want to be more, the dimensions of crime can indeed beyond. Crime is not simply a criminal. However, these crimes would be no such thing as a victim of the evil acts which are classified, there are losses that are caused, there are people who structured disturbed, and furthermore, will have implications later on. Thus, the handling of a criminal act should be viewed with a broader perspective anyway. Is not always

⁶⁸*Ibid.* p. 43.

⁶⁹Nastia Aviandari et al, 2008, Dismantling Memory Sharing Experiences, Rights of the Child Advocacy Institute (NONE) bekerjasama with the Community Children Solidarity Foundation (CHECK), Yayasan Kalyanamandira and SKEPO the support Terre des Hommes Netherlands, Singapore, p. 3.

just a matter of revenge on the criminals⁷⁰.

In general, the criminal justice system of children who grow in various parts of the world today is still likely to only be responding to crime: new action after the crime took place. It can be seen from the criminal justice actors involved, namely the police, prosecutors, courts and prisons. All of these actors are the institutions of state representation in law enforcement. They are the ones who will respond to crime by taking action against the perpetrators.⁷¹

Maturity is a person characterized by stability and maturity in terms of physical and psychological / psychiatric and generally in line with the age of both men and women. Someone already said today, meaning it is referred to as the competent law. And when he committed the crime, then he deserves to be sentenced in accordance with the criminal offense he was doing. However, in case of criminal offenses committed by minors government, especially law enforcement officials should use and how different perspective in handling it. In this regard in the State of Indonesia has laws governing the legal protection of minors, formally included in the Law of the Republic of Indonesia Number 35 Of 2014 regarding the amendment of Act No. 23 of 2002 on Child Protection. Also in Malaysia, because it is a federal state, every country has the rule of law (Law) itself on this issue, but still based on the Federal Constitution of Malaysia. The issue of children's rights in the country of Malaysia is set in the Child Act 2001 (Act 611).

Each country should have guidelines for determining the standard of its citizens in the age of a person is said to have grown up creates legal certainty and

⁷⁰ *Ibid.*

⁷¹ PAF Lamintang, op.cit., P. 154

fairness in applying it. Guidelines or mold in question in this case is a legal requirement that must and can be resized in law, norms or rules.

Definition of the child in the realm of criminal law and civil law in the Indonesian legal system provides different restrictions, especially in the case that a child / adult and ever / never married. Adult age restrictions and ever / never married in the national legal system of Indonesia does not have uniformity in determining the criteria child / adult. Matters concerning maturity there is a difference, such as in the case of politically mature, adult in criminal and civil law, as well as sexually mature.⁷²

B. Maturity in the Criminal Justice System in Malaysia

Historical development of law in Malaysia is generally divided into two periods. First time before the arrival of the colonists the second time when the arrival of the invaders⁷³, The legal recognition of Islamic marriages and divorces initiated in 1880 by the English who then introduced the Mohammedan Marriage Ordinance, No. V 1880 to be enforced in countries straits. According to Abdul Munir, before the arrival of the English, the applicable law is the law at that time Islam which refers to customary law.

After independence, India started using the law made by civilians, although Malaysia did not forget on Islamic law. But it is undeniable that civil law be the main thing in Malaysia rule to the rule of Islamic law, under-emphasized. Islamic law is still used by the state that one of the rules of law that apply in

⁷² Wirihardjo Mufti, the Indonesian Legal Procedure, Cet I, (Yogyakarta: Gadjah Mada Foundation Publishers, 1972), pp, 6

⁷³Aminuddin Bin Ramli, Legal ah “Syari and Civil Law in Malaysia: A Comparative, (Jakarta: Thesis Jinayah Siyasa Studies Program, Faculty of Law and Syari “ah, UniversitasIslam Syarif Hidayatullah State, 2008), p. 24

respect of family law only. Each state still adheres to sharia law ah “this is in accordance with the Constitution of Malaysia, which states that: implementation of Sharia law court shaded by Sharia. As a result of sharia “still used by the Malaysian state”.

Applicability of the law in some states that have not mixed by the English pepatuh the average is nine Malay states and the region of the peninsula of Malacca. While the Malay community who are in the country Sarawak follow Islamic law of Sarawak. The influence of the Islamic law making state laws governing marriage, divorce and finance. While the imposition of Registration of Mohammedan Marriages and Divorces Enactment 1885 for the Malay states associated (Perak, Selangor, Negeri Sembilan and Pahang), while the implementation of the Divorces Regulation 1907 for the Malay states not associated or countries ruled by (Kelantan, Trengganu, Perlis, Kedah and Johor):

1. Law which follows the federal act Selangor, Negeri Sembilan, Penang, Pahang, Perlis, Trengganu, Sarawak and Sabah.
2. Kelantan, Johor, Malacca and Kedah although the rules a lot in common, but there are considerable differences visible, ie there is a difference of 49 times of 134 articles.

Some family law in Malaysia during the period 1983-1985.

1. 1983 removed the Islamic Family Law (Enactment) in Klantan, Negeri Sembilan and Malacca.
2. 1984 in Kedah, Selangor and Federal Territory.
3. 1985 in Penang.

The law had previously been replaced by the Family Law Act 1984 Islam Malaysia (applicable in federal district), namely, Selangor Enactment 1952. The law in force in the region, have content similar to the law in force in other states in the know 1983-1985.⁷⁴

In general, the law is used by states in Malaysia can be divided into two categories noted above, namely: first, adhere to the Islamic Family Law (Federal Territories to) 1984 or called (act 303). States that adopt this act include: Selangor, Negeri Sembilan, Penang, Pahang, Perlis, Trengganu, Sarawak and Sabah. However, there are also some differences and similarities with the Family Law Act Islam Wilayah Persekutuan 1984. The difference lies in the composition section, the shape change and the law. States that adopt the act include: Kelantan, Johor, Malacca and Kedah⁷⁵, Second, Ordinance 43 of the Family Law of State in 2001 embracing act of Islamic Family Law (Federal Territories) 1984 or referred to (act 303).

In Malaysia, the law says elements of the so-called (A law that applies across the state in Malaysia) passed by parliament and of the State (a law is only applied in a given state) passed by the State Legislature Section, except for Sabah and Sarawak. Enactment "State" known as the State Ordinance. This understanding involves all the laws that have been passed by legislative bodies before independence (in the West) and before Hari Malaysia (East Malaysia)

⁷⁴Tahir Mahmood. Personal Law in Islamic Countries (Tripathi: New Delhi, 1987), p. 221-222.

⁷⁵Abdul Munir Yaakob, Islamic Family Law and Women in the ASEAN Countries (Kuala Lumpur: Islamic Foundation, 2001), p. 23-24

known in the statute books as the Ordinance or Enactment. All of the above law called the Statute.⁷⁶

At first, the Indigenous Law was adopted. However, Customary Law was finally added and altered to suit the elements of Islam, because the Malays are Muslims. Malaysia also generally divide the family law into two categories, namely, first involving the non-renewal of the Act Act (Marriage and Divorce) Act 1976 and the Second Islamic Family Law. Act of the Islamic Family Law (Federal Territory) 1984 (IFLA (WP) 1984) is a model of that Act.⁷⁷

After independence, Malaysia has a national law stemming from the Act and common law stemming from the judge's decision. Extraction of law or Islamic legal principles of English common law at the same time when that was tried by several judges there. Therefore, the existence of federal cases that appear related to Islamic law. For example, in cases where the financial case is the authority of the federal government, but due to the rapid development of sharia “ah then, the federal government is also handle cases keaungan shari ah”. In addition, the rule of law in Malaysia to provide religious freedom legislation, so that the cases experienced by the Muslim community can also be decided in federal court. Nevertheless.

The states are allowed to establish sharia court ah “that is set up in Malaysia's constitution, so that the handling of the case can be resolved sharia each region of the state. While things can be dealt with by the courts sharia in

⁷⁶Sabi Hashim yeop A, *How Our Laws Made?* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1990), p. 10.

⁷⁷Nabiela ily and Kemal Riza, *Islamic Family Law Contemporary Southeast Asia: History, Formation and Dynamics in Malaysia*, (Institute for Research and Community Service: the State Islamic University Sunan Ampel Surabaya, 2013), p. 12

each region of the state, about the proposal, marriage, divorce, child support, child custody, adoption, and guardianship lineage, so that these matters can be decided in court sharia in each state and territory. Subject matter Islamic inheritance has not made a rule in court sharia beneficiaries until the problems are resolved by jurisprudence. Thus the sharia courts to cooperate with the federal court in resolving the dispute over inheritance, because the federal courts have been set up on the material.

Adult age according to Islamic Law is when a person reaches the age of puberty. In terms of Islamic Law, a girl is considered an adult when she began menstruating, the minimum age of nine. If he missed period or without other signs of age, according to Imam Abu Hanifah, the girl's age of majority is 16 years old. While a boy is considered mature when dreaming or out of semen, as early as 12 years. Otherwise, according to Imam Abu Hanifah a boy considered adults when they reach the age of 18. The disciples of Imam Abu Hanifa differ from him. Imam Abu Yusuf and Imam Muhammad al-Shaybani thought if a boy dreaming and out of semen or a woman begins to menstruate or they simply 12 years, they can be considered as adults.⁷⁸

The size of one's manhood, provided with growth and development, both physical and psychological. Physical in this case it is considered feasible and affordable for a family when his organs are functioning perfectly. Similarly, psychic development, a person is considered an adult when he was able to solve the problem wisely necessarily correspond to what adults do. For example in the battle of Badr and Uhud, many youth present and active in the activities. Strong

⁷⁸Ahmad Ibrahim, *Islamic Family Law in Malaysia*. (Malaysia: Malayan Law Journal Sdn Bhd, 1999), p 36

physique, stamina, intelligence, memory, knowledge and wisdom showed a mature age when he wants to be called up. In addition, his knowledge of the Qur'an and the Hadith response and warning of the Prophet Muhammad clearly shows that the measure was the maturity with terms of maturity of thought.⁷⁹

Meanwhile, the Islamic Family Law in different countries can not deny the influence of the government and their former colonies modernization related to aspects affecting marriage age limit. So one of the big problems in the Islamic state that is a minimum limit allowed to marry, which Indonesia and Malaysia included. Bessel states that, in Indonesia regarding the determination of the age of marriage encouraged by their influence in the colonial period or the influence of the western world. Common Law based on the provision that, if a person has reached the age of 21 they are considered adults. However, several western countries reduced the assessment of 21 years of age to 18 years in its laws because there are a number of reasons.⁸⁰

However, there are differences in the age of marriage by Muslims and non-Muslims that is contained in the child care setting of 1961. Thus the adult age for a non-Muslim is 21 years while for Muslims is 18 years old.⁸¹ Islamic Family Law (State of Selangor) Enactment 2003, and enactment or any other part of State Ordinance states that the minimum age for marriage contained in Section 8 of the Act of the Islamic Family Law (Federal Territories) Act 1984;

⁷⁹ Bessel, Sharon, Policy and Governance Department, (Australia: Australian National University Press, 2006).

⁸⁰BC Cretney, Principles of Family Law, (London: Sweet & Maxwell, 1984), 465; HA Finaly & RJ Bailey-Harris, Family Law in Australia (Sydney: Butterworths, 1989), p. 215

⁸¹Child Care Act 1961, section 2 (a) (i) (ii); See Case Kanagalingam v Kanagarajah (1982) I MLJ 264.

“No marriage may be solemnized under this act if the man was aged less than eighteen years of age or women under the age of sixteen years unless the law Nasyr ah “i has granted his permission in writing in certain circumstances”.

According to Section above that marriages performed by someone who was still a child then required to get permission from the court Syari ah”. The provisions in the above section is not contrary to the statements of the four schools. Actually the permission of the court shari ah “so that the court can ascertain the circumstances of a child's physical, mental as well as their ability to be responsible so that they can overcome the problems that will come a time in the household. After investigating judge ah “Syari children under the age of marriage to be implemented and provide written consent for marriage, the children may be married by the father or grandfather.

Approval of the children is indispensable if the existence of the marriage, because without the consent of the burden they will provide for themselves physically and psychologically, and any time they would be difficult to accept the situation that can not be passed before their time. The Prophet said: “Do not be wed to a daughter who is not a virgin (widow) until you get control over marriage and do not wed a virgin until requested permission”. (Narrated by Al-Bukhari).

Actually, the barometer in determining the extent of maturity can be viewed from various aspects of one of the women that when they are menstruating, and her womb was able to contain the baby until birth. Meanwhile for men when they are having a wet dream by releasing semen and already starting to like the opposite sex.

According to maturity basis, that there is a similarity in setting the age of consent for a woman who wants to marry is 16 years of age. Halini on Marriage Act No. 1 of 1974, article 1, paragraph (1) as follows:

“The marriage is only permitted if the man has reached the age of 19 (nineteen) years and a woman aged 16 (sixteen) years”.⁸²

While in Act 303 of the Islamic Family Law (Federal Territories) Act 1984 or ordinances that are in the states of Malaysia include:

Section 8: The minimum age to perform marriages, No marriage may be solemnized if men below the age of 18 or women under the age of 16 years unless the judge Nasyrarh “i have given permission in writing in certain circumstances”⁸³,

Of the above Act that the determination of the age for women to be able to perform the marriage is 16 years. And viewed from the Marriage Act and the Family Law Act in the determination of the age of majority for women viewed from the biological aspect when you're menstruating and was ready or willing to pregnancy and childbirth. Furthermore, if the terms of the psychological, that women who are ready to marry is already mentally prepared to face and solve psychological problems that come up in domestic life and can be held responsible for their deeds and their children. Furthermore, if viewed in terms of health, women are women who are ready to reproduce, so avoid the great risk when it contains to give birth soon.

And for women who have not reached the age of 16 years, in order to get permission from parents and the court, while the women were still far reaching

⁸² Act No. 1 of 1974.

⁸³ 303 of the Islamic Family Act Malaysia (Federal Territories) Act 1984

adult age completely. Because the ultimate goal of any age restriction for the bride to be implemented in order to realize marriage is an eternal home, accompanied by happiness. Adult bride is expected to provide a good influence regarding the future home life can resolve any problems that arise with the way the logical solution as well as adults.

Each country must have a legal system that is different, especially regarding the determination of the age of marriage. Indonesia and Malaysia are the countries that are close together but it is very different from the country's legal system, which has been delivered at the beginning that Indonesia adopts a civil law country while Malaysia devotes common law countries. Malaysia's legal system adheres to the civil law, legal / law marriage that is used in each country is different. The Malaysian government has also been trying to standardize Islamic Family Law led by Tengku Zaid. Then get the agreement of the council, the draft of this Law given to all states in Malaysia to be used as legal Family law. However, not all states in Malaysia have received the Law family. For example, the state of Kelantan that implements the federal government. In effect, the lack of uniformity of the law in force in Malaysia, so that is not the same among the states with one another since before independence until today⁸⁴,

For example the Netherlands, to practice and apply the law in some Southeast Asian countries such as Malaysia, Singapore and Brunei Darussalam. Indonesia is the country's democratic system, which the legal system in accordance intangible laws that apply to all people in all parts of Indonesia. With the difference in the legal system brought by the colonizers in colonies then give

⁸⁴Dedi Supriyadi and Mustafa, Comparative Law Marriage in the Islamic world, (Bandung: Pustaka Al-Fikriis, 2009), p. 32-33

rise to the imposition of a legal system that is used by each country both Islamic and non-Islamic countries.⁸⁵

Starting from differences between legal systems used by both countries, namely Indonesia and Malaysia obvious impact of regulations relating to the determination of the rules on marriage age listed on undangnomor Law 1 of 1974 in Indonesia and Malaysia's Islamic Family Law. These differences include matters relating to the determination of the age of marriage to the provisions of the bride both adult men and women.

Methodologically that, the setting of a minimum age of marriage based on the method of mursalah benefits. For mashlahat mursalah ijtihady is so tangible in the general authorization and not rigid. This means that if the bride perform a marriage at that age is still fairly young and has not reached the predetermined number, then dedicated to the woman can ask for waivers to the court. From this we can see that this age limit is set for the realization of the Vegas family mawaddah, Peace. Hence the importance of marriage be restricted in the initial process of forming a domestic life.

The difference in the setting of a minimum age for marriage at the show by the Marriage Act in Indonesia, namely 19 years, while the Islamic Family Law in Malaysia set 18 years for male candidates. This shows that Indonesia determining the age of one year is higher that 19 years of Malaysia namely 18 years. In Indonesia give dispensation to the court for that age has not reached 19 years for men, while the potential of men and women who have not reached the age of 21 (twenty-one) years, makaaharus prompting her parents. In accordance

⁸⁵Muhammad Amin Suma, *Islamic marriage law in the Muslim World*, (Jakarta: PT. Persada Raja Grafindo, 2005), p. 204

with article 7, paragraph (2) of Law Marital Indonesia, that the need to seek relief from the courts by judges appointed by the parents of both parties.

Under the provisions of the Islamic Family Law contained in the provisions of section in each country, one of which I took from Act 303 Islamic Family Law (Federal Territories) Act 1984 in Section 8 “No marriage may be solemnized below if the man aged less than eighteen years of age or women under the age of sixteen years unless the judge Nasyrh “i have given permission in writing in certain circumstances”. If you look and observe technically⁸⁶, Then not much difference with the Indonesian marriage law that the administration set out to be the consent of a parent for couples who want to get married but has not yet reached the age specified resolution area, this is to avoid marriage at a young age.

The differences in age for prospective groom between Indonesia and Malaysia, which is only one year did not result in a huge impact. It is still an effect on both the maturity and the maturity to think and act in carrying out the duties and responsibilities of domestic life. The minimum age for candidates can marry the groom is 19 years for which the figures are the result of the ijtihad of fiqh that have been defined (enacted) by the Indonesian state. Meanwhile, the situation and condition of each region is different which affects the level of maturity of men and this is in accordance with the factors that maturity that support, namely social, cultural, economic, educational, health to determinants other.

From the above analysis regarding the similarities and differences regarding the age limit marriage according to the law of Indonesia and Malaysia

⁸⁶Dedi VI and Mustafa, Comparison of Islamic law in the Muslim World, (Bandung: Pustaka Al-Fikriis, 2009), p. 51

there are similarities in terms of the rules of the two countries were more dominant in administration or procedure, of matters relating to the juridical philosophical. Also other similarity is the principal source of law of the Qur'an and the Hadith is used as a reference in setting the marriage age. While the differences between the two countries is the historical permanence law marriage with the social life of the community, the different legal systems that are used in these two countries, the two traditions or the culture of the two countries are also being affected by the difference in the age of marriage.

CHAPTER V

JUDICIAL SYSTEM OF CHILDREN

A. Understanding of Children of the Criminal Justice System

Understanding child of a review of national laws Indonesian have some understanding. Because in Indonesia there is pluralism of national law on the meaning of the child. This is due to any legislation of its own set of rules and the children themselves.

While plenty of maturity in Indonesian national legal system includes a number of different treatment, depending on the side where the legal age of maturity benchmark used, such as in terms of civil law is different from the age of maturity age of maturity in terms of criminal law.

Definition of the child in the realm of criminal law and civil law in Indonesia national legal systems provide different restrictions in terms of age limits and ever / never married. Adult age restrictions and ever / never married in the national legal system of Indonesia does not have uniformity in determining the criteria child / maturity, such as:

1. *Burgelijk Wetboek voor Indonesia* (BW) provides a definition of minor child (children) are those who have not even reached the age of twenty-one years old and not married earlier (Article 330 BW);
2. Law of the Republic of Indonesia No. 1 of 1974 on Marriage, which is the marriage of which has not reached the age of 21 (twenty one) years of age must have the consent of both parents (Article 6 (2)), while in Article 7 (1) : Marriage is only allowed if the man has reached the age of 19 (nineteen) years

old and the woman has reached the age of 16 (sixteen) years. In Article 47, paragraph (1): Children who have not attained the age of eighteen (18) years of age or marriage never existed under the rule of his parents for they are not deprived of his power;

3. Law of the Republic of Indonesia Number 4 Of 1979 on Child Welfare, the Son is a person who has not attained the age of 21 (twenty-one) years old and have never married (Article 1 paragraph 2);
4. Law of the Republic of Indonesia Number 8 of 1981 on Criminal Proceedings, which can be examined to testify without oath is: a. child who was not quite fifteen years and have never been married (Article 171);
5. Law of the Republic of Indonesia Number 39 of 1999 on Human Rights, the Son is every human being below the age of eighteen (18) years old and unmarried, including children who are still in the womb when it is in his best interests (Article 1 paragraph 5) ;
6. Law of the Republic of Indonesia Number 23 of 2002 on Child Protection, as amended by the Law of the Republic of Indonesia Number 35 of 2014 on the amendment of Act No. 23 of 2002 on Child Protection, the Son is a person under 18 (eighteen) years, including the unborn child (Article I, paragraph 1);
7. Law of the Republic of Indonesia Number 13 Of 2003, the Child is any person below the age of eighteen (18) years (Article 1 point 26);
8. Law of the Republic of Indonesia Number 30 of 2004 concerning Notary, as amended by the Law of the Republic of Indonesia Number 2 Of 2014 concerning the Amendment to Law Number 30 of 2004 concerning Notary,

repairing must meet the following requirements: a. The lowest age of eighteen (18) years or has been married; and b. Legally competent (Article 39, paragraph (1));

9. Law of the Republic of Indonesia Number 12 of 2006 on Citizenship of the Republic of Indonesia, Indonesian Child citizen who was born outside of a legal marriage, yet 18 (eighteen) years old and not yet married legally recognized by his father, who is a foreign citizen is recognized as a citizen Indonesia (Article 5 (1)); Children as Indonesian citizens who are no older than 15 (fifteen) years elected legally as a child by a foreign citizen by a court decision is recognized as an Indonesian citizen (Article 5 (2)); while the naturalization application may be filed by the applicant if they meet the following requirements: a. has met eighteen (18) years old or already married (Article 9 letter a);
10. Law of the Republic of Indonesia Number 21 of 2007 on the Eradication of Trafficking in Persons, the Son is a person under eighteen (18) years, including the unborn child (Article 1 paragraph 5);
11. Law of the Republic of Indonesia Number 2 of 2008 on Political Parties, as amended by the Law of the Republic of Indonesia Number 2 Of 2011 concerning the Amendment Act No. 2 of 2008 on Political Parties, Indonesian citizen can be a member of political parties when old 17 (seventeen) years or are / have been married (Article 14 paragraph (1));
12. Law of the Republic of Indonesia Number 8 Of 2012 concerning Election of members of the House of Representatives, Regional Representatives Council, and Regional House of Representatives, voters are Indonesian citizens who

have reached the age of 17 (seventeen) years of age or older or are / have been married (Article 1 point 25);

13. Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System, Children in Conflict with the Law are children in conflict with law, children who are victims of crime, and children who witness crime (Article 1 paragraph 2); Children in conflict with the law, hereinafter referred to child is a child who has reached the age of 12 (twelve) years, but not yet the age of 18 (eighteen) years who allegedly committed the offenses (Article 1 paragraph 3); Children who become victims of crime, hereinafter referred to child victims were children under 18 (eighteen) years of age who have suffered physical, mental, and / or economic loss caused by crime (Article 1 paragraph 4);

From some regulation as mentioned above, the size of the basis of assessment or criteria concerning the maturity of the concept of (children) in Indonesia's national legal systems are applied:

1. The age limit; and / or
2. Ever / never married.

The age limit in determining maturity in some of the law does not give effect to socially significant problems of society. Problems can arise when the age limit is criss with a legal act of underage marriage, like a child who has not attained the age of twenty-one years or eighteen years old, but had a marriage that has received the permission of both parents.

Marriage is implemented as based on local customary law (living habits)

have regarded these children have mental maturity to get married, so it is not certain that the age limit be used as a benchmark to establish the permissibility of marriage as by positive law.

B. Children Criminal Justice Practice in Indonesia

Understanding the juvenile justice system contained four words, the system, the judiciary, criminal, and children. As for the meaning of the system, as cited by Rustam⁸⁷, Simon M. Amrin expressed about the composition of the system is made up of parts (sub-systems) that are interconnected with each other so as to integrate the whole and intact. Each part or sub-system is not independent, but are related to each other and in relation to the whole, to work together to achieve the objectives of the system, so that if one part is disturbed then the other or all of the involved subject. If one is disturbed, destroyed or altered but no impact on the other, it can no longer be called a system.

As is the criminal justice system, Barda Nawawi Arief explained, as quoted by Rustam,⁸⁸ can be viewed from three aspects of the integral, namely as normative system, as system administration, and as a social system. It can also be seen from several aspek, among others:

Viewed from the aspect / component substance of the law (legal substance), the criminal justice system in reality is a system of enforcement of the substance of criminal law, including criminal law material, criminal law and formal law enforcement criminal, so in terms of the substantive law and the judicial system / enforcement system law in fact is “integrated legal system.

⁸⁷Rustam, Protection of Children in Conflict with the Law After the introduction of Act No. 11 of 2012 on the Criminal Justice System Child, Thesis, Master Program (S2) of Law, Graduate School of Sultan Agung Islamic University, Semarang, 2013, p 39.

⁸⁸*Ibid.*, p. 41-42.

Viewed from the aspect / component structural (legal structure) the criminal justice system is basically a system working / functioning of bodies / institutions / law enforcement agencies in carrying out the functions / authority of each field of law enforcement, such as the system of investigation, prosecution system, the system of judge , the penal system and the system of legal aid.

From the aspects / components of the culture of law (legal culture), the criminal justice system is essentially a manifestation of the cultural values of the law (which may include philosophy of law, principles of law, legal theory, jurisprudence and awareness / attitude behavior law). Thus from the point of law, the criminal justice system can be said to be an integrated legal culture “Integrated cultural or legal system.

Barda Nawawi Arief, was quoted as saying by Rustam,⁸⁹ explain the fact that the criminal justice system is a power system “criminal law enforcement “or “system of judicial authority in the field of criminal law”, and created / implemented within four (4) subsystem that powers of investigation, prosecution authority, the power to judge and rule enforcement of the award / punishment. Fourth stage / subsystems that constitute a unity of criminal law enforcement system integral or commonly known as “the criminal justice system (SPP) integrated “(Integrated criminal justice system). While Muladi explain the criminal justice system is a network of judicial use of criminal law as a primary means, either a substantial criminal law, criminal law and formal criminal law enforcement.

Law of the Republic of Indonesia Number 11 of 2012 on the Children

⁸⁹*Ibid.*, p. 44.

Criminal Justice System⁹⁰ give the meaning of the Criminal Justice System Child as in Article 1, namely: “the whole process of settlement of Children in conflict with the law, from the research level to the level of supervision after serving a criminal. “As is the Children in Conflict with the Law is “Children in conflict with the law, children who are victims of crime, and children who witness a crime.”

In Article 1 paragraph 3 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, is a child in conflict with the law, hereinafter referred to Children's “children aged 12 (twelve) years but not yet 18 (eighteen) years who allegedly committed the crime. “In Article 1 paragraph 3 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child, which is a subsidiary of the Victims of Crime, hereinafter referred to as the victim is a child who has not “18 (eighteen) years suffered physical, mental, and / or economic loss caused by the crime. “Whereas in Article 1 paragraph 5 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child is the Son of Being Witnesses of Crime is hereinafter referred to as the Child Witness “children under 18 (eighteen) years old who can give evidence for the purposes of investigation, prosecution and examination before the court on a criminal case is heard, seen and / or experienced.”

Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child mandates the principle of legal protection of the child should

⁹⁰Official Gazette of the Republic of Indonesia No. 153, 2012 and the Supplement to the Republic of Indonesia Number 5332, ratified in Jakarta on July 30, 2012 by Indonesian President Susilo Bambang Yudhoyono and enacted in Jakarta on July 30, 2012.

be in accordance with the Convention on the Rights of the Child (Convention on the Rights of the Child) which has been ratified by the government of the Republic of Indonesia by Presidential Decree Number 36 Of 1990 on the Ratification of the Convention on the Right of the child (Convention on the Rights of the child).

Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System use the name of the Children Criminal Justice System are not to be interpreted as the judiciary as provided for in Article 24 (2) of the Constitution of the Republic of Indonesia of 1945 which states that the judicial power carried out by a Supreme Court and judicial bodies underneath it in the public courts, religious courts, military courts, administrative courts, and by a Constitutional Court, but the Law of the Republic of Indonesia Number 11 Of 2012 on judicial System criminal Son as part of the general courts.

Substance matters set forth in the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child is about placing children who undergo the judicial process at the Board of Management of Special Children (LPKA), restorative justice and diversion intended to prevent and eliminate child process the judiciary so as to avoid stigmatization of children in conflict with the law and is expected to be returned to the child in a social environment fairly.

Law of the Republic of Indonesia Number 11 of 2012 on the Children Criminal Justice System also highlighted the differences sanctions are based on differences in age kids, for kids who are aged less than 12 (twelve) years only penalized, while for children who have reached the age 12 (twelve) years up to

eighteen (18) years may be imposed and criminal action.

Therefore the Son has the features and characteristics as well as the protection of the child, the child in conflict with the law must be tried in a criminal court Children who are in general peradilan environment. It thus lead to legal proceedings for Kids things since being arrested, detained and prosecuted its construction must be done by a special office to understand the problems of the Child.

In addition, before items Children enter the judicial process, law enforcement, family, and society must strive for progress outside the courts, namely through the Restorative Justice Diversion based approach, which led to the best interests of the child. The best interests of the child are all decision-making must always take into account the survival and development of children.

In Article 1 point 6 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Child explains Restorative Justice is “completion of criminal cases involving perpetrators, victims, families and perpetrators / victims, and other relevant parties to work together to find a solution that is fair to emphasize the restoration of the original state, and not revenge.”

In Article 1 paragraph 7 of the Law of the Republic of Indonesia Number 11 of 2012 on the Criminal Justice System Diversion is Subsidiaries mean “take over the Children of the criminal justice process to outside the criminal justice process.”

C. Children Criminal Justice Practice in Malaysia

In the Malaysian state of children covered under the Act in 2001 consists of:

(a) children in need of care and protection, (b) a child in need of protection and

rehabilitation, (c) trade and refugee children, (d) a child who committed a criminal offense, (e) children who are not controlled.

1. Children in need of care and protection

Section 17 (1) of the Act in 2001 to provide the definition of children in need of care and protection include those who have been abused physically, mentally, neglected, children who require treatment changes, children who behave that may harm himself, a rift in the relationship family and children begging and hawking. Abuse or neglect is done by mother or father or guardian of the child itself. Provisions relating to child begging and peddling was included after it was found that the incidence is increasing. Mom or dad or guardian of the child is more than happy to use children for the purpose of begging or hawking because people will be more sympathetic with the child and be willing to donate or purchase of goods sold than if the work is done by an adult. Both children and people in this situation have been manipulated by the mother or the father or guardian of the child for profit. With this provision, it is expected that the problems related to this situation can be resolved and the children who beg and hawk are given the opportunity to receive education as it should be Both children and people in this situation have been manipulated by the mother or the father or guardian of the child for profit. With this provision, it is expected that the problems related to this situation can be resolved and the children who beg and hawk are given the opportunity to receive education as it should be Both children and people in this situation have been manipulated by the mother or the father or guardian of the child for profit. With this provision, it is expected that the problems related to this

situation can be resolved and the children who beg and hawk are given the opportunity to receive education as it should be⁹¹,

2. Children in need of protection and recovery

Section 38 (1) of the 2001 Act defines this group as they were driven to commit any sexual act, or are in an environment that leads to the act, live or frequently visit a brothel and they habitually together or are under the control of brothels. In addition to this group, Section 42 of the Act of 2001 that put the children bought to be brought in or out of Malaysia for the purpose pelacuran²⁰ as children who also need protection and recovery.

In addition to identifying children in need of protection, Section 43 (1) of 2001 that put the offense in connection with these children, especially those related to prostitution. A new offense has been introduced in paragraph makes it an offense for any person to subscribe for or hire for any valuable consideration, of a child to provide services to meet the sexual desire of the person. Third-makers thought it was time to also make it an offense for people who subscribe to the service of children for sexual purposes. It is hoped that this new provision can be an obstacle for these activities from continuing.

Section 41 also mentioned the children who need immediate protection if they are located in the circumstances specified in Subsection (2) provides that if a child was conceived out of wedlock. This provision is included to allow children who are pregnant out of wedlock have a lot of support and shelter while awaiting the birth of his son. The provision is expected to reduce the symptoms of throwing the

⁹¹Siti Zaharah Jamaluddin, 2002, the Children Act: Implication to Parent, Government Agencies, the Judiciary and the Media, Kuala Lumpur: University of Malaya, p. 43-44.

baby because the child is protected and can be given help when they need it. For children who have made mistakes, help and counseling is needed by him at the time she was pregnant until she gave birth to her son. Making a mistake does not mean the rest of his life he was wrong and inexcusable.

However, the inclusion of this provision is not intended to encourage this situation continue, but as an instrument that can be used if such a situation occurs. Both of them, that the child and her unborn child need assistance for their survival.

3. Children who committed a criminal offense

Children who are accused of a criminal offense will also use the hearing procedures laid down by the Act of 2001 (Section 83 (1) of the Act of 2001). To enable this condition implemented, section 11 (5) Act 2001 provides that the Court For Children shall have jurisdiction to try all offenses except offenses sentenced to death⁹²,

4. Children who are not controlled

No definition is given for a child's expression is not controlled in Act 2001. However, if it is seen to Section 46 (1) of the Act of 2001, it can be understood that the child is said to be controlled if the mother or father or guardian written request to Court for children so that these children could not be detained because it is controlled by the mother or father or guardian, the child is also subject to the application of Act 2001⁹³,

⁹² See Section 2 (1) of the 2001 Act defines prostitution means the act of a person's body to gratify sexual desire for wages either in the form of money or goods, and prostitutes shall be construed accordingly.

⁹³ *Ibid*, p. 46.

5. The responsibility of the parent or guardian and family

When social problems among teenagers deepened, many thought that these symptoms are caused by disharmony of the family institution. Act 2001 recognizes the important role of parents, carers and families in overcoming this problem. The approach taken by this Act is to continue to emphasize the responsibilities of a parent, guardian or relative, especially when the child is having problems. In addition to defining⁹⁴ “family “as including parents, guardians or family members of someone knowledgeable, who are members of a children's home, the 2001 Act also provides broad definition of family “as people who are related through consanguinity, affinity or adoption to that person. Act 2001 also recognizes the concept of fosterage with Section 2 (1) defines a parent pets “as someone who is not a parent or sibling of someone the child can receive the child in accordance with his pet. Section 30 (1) (e) or section 35 or 37 of 2001. This will leave more space to the court in making an order in connection with the child. If no parent or guardian or relative, he may be placed under the custody of a foster parent if it's the best choice for him. The definition given to the caregivers of children under the 2001 Act is broad to encompass not only nanny in the nursery, but also individuals who receive payments for the care of the child privately.⁹⁵

6. The role of the teacher

Act 2001 also introduced the role of teachers in helping children with problems. The court may require the parent or guardian of a child placed in educational institutions in consultation with the teacher or the principal of the

⁹⁴*Ibid.*, P. 47. See also Sridevi Thambapillay, *Chil Family Act 2001 Selected Issues*, (Kuala Lumpur: University of Malaya, 2003), p. 180.

⁹⁵Zulazhar, *stirred Review of Child Abuse Issues from the Perspective of Children Act 2001* (Kuala Lumpur: University Malaya Publishers, 2002), p. 85.

institution once a month. This group must ensure that the negotiations made it meets the objectives in order to help children and to inform the parent or guardian of the child's performance, problems encountered and the measures necessary to help these children. These negotiations must not be made a formal suit your needs. Teachers and knowledge necessary to ensure meetings are held as required. Although there is no punishment if the teachers and principals do not, but their integrity as educators would ensure implementation of the new responsibilities as best as possible. The role of teachers in general can also be seen when the probation officer or guardian provides probation report or reports of a child because the report must contain, among other school records of the child. Probation officer or guardian will meet with the teachers of the child for these purposes and here again the correct and relevant information is provided to assist the officer prepare a comprehensive report. A probation report or statement is important because it will be considered by the court before making a decision with regard to whether the command is appropriate for the child (Section 90 (12) and (13) of 2001.⁹⁶

7. The role of the media

Children's Court is a court closed. To ensure that this condition is met, the provisions to prevent media reporting and publication of the case is heard in court included. Additional restrictions have been introduced under the 2001 Act is to ensure that children's rights is guaranteed.

Additional first seen in Section 15 (1) (a) to prevent any media reporting at any level, whether before, during or after the trial. Moreover, additional in

⁹⁶Siti Zaharah Jamaluddin, the Child Act, p. 61.

connection with the publication of the images is also included in which the image of the child or any person, place or thing which may enable the children to be identified can not be published in any newspaper or transmitted through electronic media, including through radio and television (Section 15 (2) and (5) of the Act of 2001). Barriers will also be considered to prevent pictures of children who were detained at the police station, brought into or out of court or while waiting before or after attendance in court of being recorded in any manner on tape or film or by any electronic medium (Section 85 (b) of the Act of 2001).⁹⁷

8. Government agencies

Act 2001 also emphasized the government agencies the same as in the three previous Act, the Social Welfare Department and the police. The role of the Social Welfare Department officers as guards and probation officers is maintained (Sections 8 and 10 of the Act of 2001). They are very big role in the whole of 2001.⁹⁸

9. Protector

As a patron, he will be responsible for the child's perceived need of care and protection (Section 18 of the Act of 2001). If it receives a report with regard to children who are in this situation, then it is your responsibility to take the child and brought him before the court as soon as possible (Section 19 of the Act of 2001). If the guard found the child in need of treatment that needs to be done. The same needs to be given to a police officer if they were taking the child (Section 21 of the Act of 2001). Protector also required to provide a report on the child who

⁹⁷*Ibid*, p. 62. See Aziah Mohd Awal Noor, *Child Act 2001 How Far Does it Conform to the UNCRC ?*, (Kuala Lumpur: University of Malaya, 2003), p. 210.

⁹⁸Norchaya Talib, *Series Law of the Child Act 2001* (Kuala Lumpur: University Malaya Publishers, 2002), p. 107.

will be considered by the court before making a decision relating to them (Section 30 (6) of the Act of 2001). Since Act 2001 now introduces the concept of fosterage whether formal or de facto the Protector is the person who will be contacted if the child is placed under the care of the foster parent to be returned (Section 30 (3) of the Act of 2001) or if the decision viewer custody by order makhkamah, but made de facto, the shield must be contacted and informed of this situation (Section 35 of the Act of 2001). Notification should also be given if the child would be returned (Section 36 of 2001) the shield must be contacted and informed of this situation (Section 35 of the Act of 2001). Notification should also be given if the child would be returned (Section 36 of 2001) the shield must be contacted and informed of this situation (Section 35 of the Act of 2001). Notification should also be given if the child would be returned (Section 36 of 2001)⁹⁹.

10. Probation officer

An official of the Social Welfare also is an officer (Section 10 of the Act of 2001). As a probation officer other than provide the probation report if necessary (Section 46 (1) of 2001, he also was ordered to supervise the child in accordance with Section 46 (2) (b) of the Act of 2001. If this occurs, the probation officer in the duration of the order must visit, advise and befriend the children and if need be, bring the child before the Supervising Court (Section 47 (1) (a) (b) of the Act of 2001. it is clear here that the role of the should be played not only meet the requirements of a formal, provision is made for a probation officer is taking the time to identify children who are under their supervision, trying to gain the trust

⁹⁹*Ibid*, p. 109.

of the child before it can be advised. All these tasks require time, skill and labor intensive¹⁰⁰,

11. Police

In addition also the power to bring children who need medical care in the state of the child in need of care and protection, Section 19 (5) of the Act 2001 requires police officers to take the child to inform the state of affairs.

Children who commits a criminal offense as well, when arrested to be brought before a court or magistrate under Section 84 (1) Act 2001. The police must ensure that these children are separated from adults while he was detained at the police station, brought into or of any court or while waiting before or after attendance in any court (Section 85 (a) of the Act of 2001). Moreover, the police must inform protector, parent or guardian as soon as the child is arrested for a criminal offense (Section 87 (a) of the Act of 2001). To facilitate the protection necessary to provide the probation report and other information relevant to protection (Section 87 (b) of the Act of 2001).

The role of the police as a whole is shaped and assist enforcement officers of Social Welfare in its duty to protect children, especially in their situation and in need of care and protection of those involved in trafficking and refugee children. The situation is urgent because the officers of Social Welfare does not have the skills and competencies such as the police, especially if it involves raid (Section

¹⁰⁰*Ibid*, p. 168. See Norcahaya Talib, *Child Act 2001 Enter The Powerful Proxy*, (Kuala Lumpur: University of Malaya, 2003), p. 245.

53 (3) (a) to (d) of the Act of 2001. This is supported by the possibility of the parties wants to overrun it may use violence or armed¹⁰¹.)

Thus, with the merger of the three existing Act with a few changes that have been introduced will hopefully be able to help and protect children. As a matter of complete will not count if the parties involved are not willing to act to achieve the objectives and purposes of the Act. The Act recognizes the right of a child to Malaysia through the statement in its preamble, to be protected and assisted to enable him to participate and contribute positively towards the development and prosperity of the country.

¹⁰¹*Ibid*, p. 169. See also Chew Li Hua, *Criminal Procedure Under Part X of the Child Act 2001 (Act 611)*, (Kuala Lumpur: University of Malaya, 2003), p. 235.

CHAPTER VI

COMPARATIVE LAW OF LEGAL PROTECTION OF CHILDREN IN

INDONESIA AND MALAYSIA

Children's rights are part of human rights contained in Article 28 B (2) of the Act of 1945 the second amendment mentioned “every child has the right to live, grow, and expand and is entitled to protection from violence and discrimination”.

Implementation of child protection based on Pancasila and based on the Constitution of the Republic of Indonesia Of 1945 as well as the basic principles of the Convention on the Rights of the Child covers, the principle of non-discrimination, the principle of the best interests of the child, the basic right to life, survival and development, and basic respect for the views of the child. In other action Maulana Hasan Wadong say “a Muslim must adhere to uphold the rights of children by adhering to national laws”.

Abdul Majid Hussein stated as follows: “If the seeds of good kids in the community then the community will undoubtedly formed a good society, the more it is said: Islam states that children are the seeds that will grow to shape society in the future come”, the maintenance and care of children (of custody) are the responsibility of their parents.

Ibrahim Muhammad al-Jamal said that "Islam has great attention to the rules on the welfare and safety of the entire community. Therefore, he delivered the child to her mother “maintenance”. Therefore Darwan, stated that the legal protection of children must come first “and implementation.

Children's rights in the perspective of the law have a universal aspect to the interests of the child. Putting children's rights in the eyes of the law, giving the impression that the basic purpose of human life is to build a humanity that uphold religion. Thus, the rights of children in view of the legal aspect of environmental law in one's life.

And how, with children who committed the crime? Are we still required to make the protection and defense of law against it? The answer is yes. However, here we have a little problem of how to determine the size of the law anyone who is still in the category of children and anyone who is already considered mature (competent jurisdiction). Therefore, the law in our country has different standards in determining the size of one's manhood, especially in terms of age.

In Act No. 23 of 2002 on Child Protection has been mentioned regulation of the rights of children there are 67 chapters starting from chapter 4 to chapter 71. From a number of articles of the dominant set of custody issues and legal protection of children under the age of 21 years. Indirectly this law asserts that a person is considered an adult (say law) when it has reached the age of 21 years. In the Law on the Election Act No. 7 of 2017, mentioned in Article 198, paragraph 1, which reads: "citizen who on election day are fulfilled, aged 17 (seventeen) years of age or older, married, or have ever been married have the right to choose". Here is explained that the age of 17 are considered adults and are given the right to choose leaders because they thought had matured and was able to distinguish what is right and what is wrong. In this case, anyone who has the right to make E-ID card then it is considered an adult. While in Law 1 of 1974 on Marriage has been mentioned that the age for candidates who wish to perform a marriage is the age

of 19 (nineteen) years for men and 16 (sixteen) years for women. From here we are faced with the inequality of laws in determining the size of maturity, when the legal certainty (Certainty) clear a matter particularly who are still called the children and anyone who is already considered mature (competent jurisdiction) ,

The issue of children's rights in the country of Malaysia has organized the Child Act 2001 (Act 611)¹⁰², Which is an act to consolidate a number of laws relating to the care and protection of children and the restoration to be allocated on matters relating to children.¹⁰³

Judging from the age limit of children under the Child Act 2000 (Act 611) mentions a child is a person under the age of eighteen (18) years. In the Juvenile Courts Act 1947 stipulates a child is a person under the age of 18 (eighteen) years. At that time a juvenile is divided into two, namely a child “aged under 14 years, and between 14 to 18 years is called young people”.¹⁰⁴

Child Protection Act 1991 (Act 468) mentions a child is a person under the age of 18 (eighteen)¹⁰⁵, While the Women and Girls Protection Act covers the age

¹⁰² See Board of Inquiry Act, the Child Act 2001 (Act 611), (Kuala Lumpur: International Law Book Services, 2002)

¹⁰³ See the incorporation of Law or Act, the Juvenile Court Act 1947 Child Protection Act 1991 (GER), the Protection of Women and Girls 1973 (APWG) and the Center for the Child Care Act 1984 (CHD) is one of the Child Act 2001 (AKK).

¹⁰⁴Lunar Mini Majid, the Children Act 2001: Proposed Amendments to By-Undan Related Symptoms Social (Kuala Lumpur: University Malaya Publishers, 2002), p. 1-2. Compare with Adults Act 1971 that 18 years as the age of majority in Malaysia, and it can be married and not married or renew the Act violates the law (marriage and divorce, 1976. View Faizah Nazri Abd. Rahman, Little Children Who Kill Monters, (Kuala Lumpur : University of Malaya, 2003), p. 115.

¹⁰⁵See Board of Inquiry Act, the Child Protection Act 1991 (Act 468), (Kuala Lumpur: International Law Book Services, 2001). View Abd. Hadi Zakaria, The Child Act 2001 Some Significant Features, Kuala Lumpur: University of Malaya, 2003), p. 139

of 21 (twenty-one) years. But with the children act 2001, the women were aged between 18 and 21 years should be protected under the penal code¹⁰⁶,

Thus the age limit of children in Malaysia is between 14 and 18 years, and is under the age of 7 years called slaves, not children nor young people.

For the Indonesian state and that understanding explicitly limit the child's age, the wording of Article 1 paragraph 1 of Act No. 23 of 2002 on Child Protection are as follows: "Son is a person under eighteen (18) years, including children who are still content in".

Within the meaning and limitations of the child as defined in Article 1 paragraph 1 of Act No. 23 of 2002 is covered by two (2) issues that are important elements in the sense of a child, the first, a person under eighteen (18) years. Thus, any person who has passed the age limit of 18 years, including those who are mentally incompetent, not qualified as children, the adults. In this case the question is not whether its status is married or not. Second, the child still in the womb. Thus, Act No. 23 of 2002 is expanded to protect children, including the unborn child.

Table
Comparison Maturity in Indonesia and Malaysia

No.	Difference	Indonesia	Malaysia
1	Rule	Act No. 23 of 2002 on Child Protection as amended. Act No. 35 of 2014 on	The children 2001, (Act 611), the Juvenile Courts Act 1947 (Act

¹⁰⁶Mini Cat Majid, the Children Act 2001 Education Act For Dealing With Children and Adolescents in Malaysia., P. 24. See Zalina Abdul Halim, Right of Access to Court Proceedings: Its Application Under The Child Act 2001, (Kuala Lumpur: University of Malaya, 2003), p. 157.

		<p>amendments to the law on child protection, Act No. 4 of 1979 on Social Welfare, Act No. 23 of 2002 on Child Protection, Act No. 12 of 1995 concerning Corrections and Law 39 of 1999 on Human Rights, Act No. 7 of 2017 on Elections are, of Act No. 1 Year 1974 On Marriage and Impres No. 1 of 1991 about the Compilation of Islamic Law, Act No. 11 of 2012 on the Criminal Justice System Child.</p>	<p>90), the Protection of Children Act 1991 (Act 468), the Protection of Women and Girls 1973 (Act 106), and the Center for Child Care in 1984 , Age of Majority Act 1971 (Act 21), the Domestic Violence Act 1994, Family Law / Act 1975, Ordinance 43 of 2001 Ordinance of the Islamic Family Law</p>
2	Dispute Settlement Procedures	Through the General Board and Off the Court	Through Sharia court
3	Child Protection Agency maintenance	Not available	Baitul Mal
4	Giving limit Hadhonah	Not available	As Adults (21 years old)

5	Choosing the Right Age Limit in the Election	A 17-year-old and have e-ID	Aged min. 21 years old and have Blue IC
6	Marriage age limit	For men min. Age 19 years and for females min. 16 years.	For men min. Ages 18 years and for females min. 16 years old
7	Considered competent law imposed criminal sanctions and adults	Age min. 18, was submitted to the board under the rehabilitation / return to parents through the Restorative Justice / Diversion	Age min. 18 years, under the Court's decision was served on Sharia.
8	Great <i>hadhahah</i>	Not Available	According to the needs and abilities of children
9	Age Restrictions In Childcare	Not yet <i>Mumayyiz</i> (12 years old) Provided To Mother. Submitted to the child has been <i>Mumayyiz</i> can choose.	Men Women Not Aged 7 years old and 9 years old Custody In the capital, if more than that then the Voting Rights Granted.

10	Sanctions Criminal Procedure	Court Decision	Sharia court decision based on the reports of the Court Welfare (Section 10 of the Act of 2001).
11	The average size Maturity In Indonesia and Malaysia, as well as Islamic Jurisprudence	<p>Minimum age of adult criminal punishment in Indonesia is the 18 years old, and in Malaysia is 21 years old. Meanwhile, in the opinion of Imam Hanafi Islamic jurisprudence that an adolescent he was 18th for men and 17 years old for women, Imam Shafi'i give standard-old man 15 years old and 9 years old for women, Hanbali further argued that puberty has been passed to son Men and women 15 years of age. From this data we can grab the ratio range / average age of maturity of the two countries with the calculation;</p> <p>Islamic Jurisprudence = (18 + 17 + 15 + 9 + 15): 5 = 14.8 th, we circle the 15 years old.</p>	
12	Reconstruction of the Rule of Law maturity of the Children Criminal Justice System In	<p>Minimum age of adult criminal punishment in Indonesia is 18 years old, and in Malaysia is 21 years old, and in Islamic Jurisprudence is 15 years old. So that the average can be obtained as follows;</p> <p>(21 + 18 + 15): 2 = 18 years old.</p>	

	Indonesia and Malaysia Based on the values of Islamic Law	
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In determining the age limit of children associated with or perform certain legal actions, the guidelines for initial report utilized Committee on the Rights of the Child, the states participants (states parties) are requested to provide relevant information concerning Article 1 The Convention on the Rights of the child. That is, the participants were asked to provide legal provisions that impose limits the minimum age for the purposes or certain legal actions, including but not limited to obtaining legal advice and medical without the permission of parents (legal of medical Councelling without parental concent), jobs are dangerous (hazardous employment), part-time work (part time employment), work full time (full time employment), married (marriage), permission to have sex (sexual concent).¹⁰⁷

Are nominally there are various age limit of children, which are formulated in accordance with the terms of the governing law each act of law, such as the Civil Code, Criminal Code, Act No. 3 of 1997 on Juvenile Justice, Act No. 4 of 1979 on Child Welfare, Act No. 1 of 1974 on Marriage, Act No. 39 of 1999 on Human Rights, Act No. 23 of 2002 on child Protection, and others. So it can be argued that there are three (3) issues crucial in determining what and how understanding / age limit of children involving three (3) aspects, namely: First, the quantitative limit age of the child, whether 18 years, 21 years, 17 years, 16 years,

¹⁰⁷*Ibid.*, P. 2 and 3.

15 years, and so forth. Secondly, the issue of married or unmarried as a determinant (determination) within the range of children (compare Act No. 23 of 2002 by Act No. 39 of 1999 and Act No. 3 of 1997). Third, the issue of the unborn child or not (Act No. 23 of 2002 and Article 1 of the Convention on the Rights of the Child)¹⁰⁸,

Comparison between national law of Malaysia and Indonesia there are many similarities, but the difference is only a matter of age. For Malaysia, when already 18 years old, according to the deed of 1971 children are considered adults and are able to consent to marry (married). While in Indonesia according to Act No. 1 of 1974 on Marriage, which has been mentioned for women aged 16 and men aged 19 years have been able to get married (marriage). But in the age limit (16 to 19) years of age are not married, then still considered child still in legal protection of the rights of children.

From statement above we can draw the conclusion that there are two criteria referred to adult, the first is a mature physically and psychologically in terms of marriage, ie with an average age of 18, while an adult in the sense of saying law and could be sentenced to a maximum adult is age 21 years, under the criminal punishment will be handed over to the child rehabilitation institutions.

¹⁰⁸ See Muhammad Joni, *Harmonisasi Substansi Hukum Tentang Perlindungan Anak Dari Konflik Bersenjata*, makalah sebagai pembahas yang disampaikan pada Seminar Pembahasan atas Draf Laporan Penelitian dari Tim Peneliti International Committee of The Red Cross (ICRC) berjudul *Perlindungan Hukum Bagi Anak yang Terlibat Atau Terkena Dampak Dari Situasi Konflik di Indonesia*, bekerjasama Depkeh dan HAM dengan ICRC, tanggal 2 Desember 2002.

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Pencipta

Nama : **Sri Endah Wahyuningsih**
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Jenis Ciptaan : **Buku**
Judul Ciptaan : **COMPARATIVE OF LAW OF CHILDREN MATURITY OF CRIMINAL JUSTICE SYSTEM IN INDONESIA AND MALAYSIA BASE ON ISLAMIC VALUE**

Tanggal dan tempat diumumkan untuk pertama kali di wilayah Indonesia atau di luar wilayah Indonesia : 3 September 2018, di Semarang

Jangka waktu perlindungan : Berlaku selama hidup Pencipta dan terus berlangsung selama 70 (tujuh puluh) tahun setelah Pencipta meninggal dunia, terhitung mulai tanggal 1 Januari tahun berikutnya.

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