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## Jurnal Studi Keislaman



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Lembaga Penerbitan, Penelitian, dan  
Pengabdian kepada Masyarakat (LP3M)

# at - t u r a s

Jurnal Studi Keislaman

Volume 10, Nomor 1, Januari-Juni 2023

P-ISSN: 2355-567X

E-ISSN: 2460-1063

# a t - t u r a s

Jurnal Studi Keislaman

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Vol. 10, No. 1, Januari-Juni 2023

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**at-turas: Jurnal Studi Keislaman** (P-ISSN: 2355-567X, E-ISSN: 2460-1063) is a peer-reviewed journal in the field of Islamic studies across disciplines, such as history, geography, political science, economics, anthropology, sociology, law, literature, religion, philosophy, international relations, environmental and developmental issues related to scientific research.

**at-turas: Jurnal Studi Keislaman** is published twice a year (January-June and July-December) by Lembaga Penerbitan, Penelitian, dan Pengabdian kepada Masyarakat (LP3M), Gedung Rektorat Lt. 2 Universitas Nurul Jadid, Paiton, Probolinggo, Jawa Timur. Email: [atturas.unuja@gmail.com](mailto:atturas.unuja@gmail.com)

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**at-turas: Jurnal Studi Keislaman**

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Website: <https://ejournal.unuja.ac.id/index.php/at-turas/index>

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Editorial Office:

at-turas: Jurnal Studi Keislaman

P-ISSN: 2355-567X, E-ISSN: 2460-1063

Lembaga Penerbitan, Penelitian, dan Pengabdian kepada Masyarakat (LP3M)

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## CRIMINAL LIABILITY OF CHILDREN FROM THE PERSPECTIVE OF ISLAMIC LAW AND POSITIVE LAW IN INDONESIA

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### Received in:

2023-02-05

### Received in revised form:

2023-06-13

### Accepted in:

2023-06-25

### Published in:

2023-06-30

### Available online in:

2023-06-30

### Citation:

Sarmadi, Akhmad  
Sukris., et al. (2023),  
*Criminal Liability of  
Children from The  
Perspective of Islamic  
Law and Positive Law in  
Indonesia*, 10(1), 116-  
127.

**Abstract:** *The position of children as legal subjects will certainly become a problem that needs to be studied in more depth. Children who physically and psychologically still need care and guidance in order to achieve perfect growth, precisely when dealing with the law will certainly experience psychological and even physical changes in a bad direction. In the case of children as legal subjects, there is a difference between Islamic law and positive law in Indonesia because of the different objectives of establishing and enforcing the law itself. To examine this problem, qualitative research methods are used with a normative juridical approach. The data collection technique was carried out using the documentation method, in which data was collected from fiqh literature and laws related to juvenile crimes, then analyzed using the content analysis method. The results of the study show that children according to Islamic law are not subject to criminal punishment because punishment in Islam is imposed on people who are mature (adults), have good sense and criminal acts are not carried out by force. However, in Islam if a child performs jarimah, a ta'zir punishment will be imposed as guidance and teaching for the child. Meanwhile, according to positive laws in Indonesia, the punishment system is different from adults.*

**Keywords:** *Criminal Liability; Juvenile Crime; Islamic Law; Positive Law*

## INTRODUCTION

An individual in interacting with other individuals certainly does not escape from a mistake that can sometimes be detrimental to others, both moral in nature which is subject to punishment in the hereafter, as well as mistakes whose sanctions are given directly in the world for these mistakes.

In connection with that, one of the issues that is important and gets a lot of attention in criminal law is the problem of punishment. In positive criminal law, it offers a distinction between the objectives of criminal law (strafrechtscholen) and the purposes of punishment (strafrechtstheorieen), because the purpose of criminal law is to protect society from crime, while the purpose of punishment is coaching and guidance. Regarding the purpose of this punishment, there is still much debate among criminal law experts.

Likewise with the purpose of punishing children where punishment for child crimes needs to be considered so that the purpose of the punishment does not affect the physical and psychological growth and development of a child. Children as the younger generation are potential and successors to the ideals of the nation's struggle, so that parents, especially fathers, must provide protection and guidance both physically and psychologically, including from trafficking crimes. (Karimuddin, 2015). Children are the assets of development that will maintain, and develop existing development results. By Therefore, children need protection in order to ensure their growth and complete development, harmonious and physical balanced, mental and social development (Abdullah, 2021).

According to national law, children are also included in legal subjects whose actions have legal impacts or consequences. Indonesia is a constitutional state so that all actions or behavior of its people cannot be separated from its legal consequences, including children. Because law enforcement is one of the important efforts in creating order and peace in society, both preventive and repressive in the event of a violation of a law. Therefore, it is very necessary to have concrete rules which become the legal basis in accordance with the state philosophy and the nation's outlook on life. Thus, it is hoped that there will be a movement, steps and views in the framework of law enforcement, so that the target can be achieved as much as possible.



Seeing the history of the formation of courts, and the function of the court as the main pillar and foundation of the rule of law (Karimuddin, 2020) , the regulations that are formed must provide benefits, the judiciary stands firmly/strongly and is free from any influence, which can give strength to legal rules that are placed in the law relating to child criminal liability .

The law, which is a way of imposing criminal liability, is intended to maintain peace and order in society or in other words, as a tool to prevent crime from occurring in society, including child crime from deviating behavior from Islamic law (Karimuddin, 2021) . Therefore, the amount of punishment must also be adjusted to the needs of the community, that is, it should not exceed what is necessary to protect the interests of the community or less than what is required to keep away the bad consequences of the act of *jarimah*.

The differences in treatment and threats stipulated in this law are intended to provide more protection for children in facing their long future. In addition, these differences are intended to provide opportunities for children so that after going through coaching they will gain their identity to become better human beings, useful for themselves, their families, the community, the nation and the state (Soetadjo, 2008) .

Leave of these problems, it is very significant and urgent to further research on accountability Juvenile crimes according to Islamic law and positive law in Indonesia , because based on a literature study, a solution has not been found for juvenile criminal liability in Indonesia . The intended literary studies include Yusnanik Bakhtiar's research which discusses legal protection for perpetrators of child crimes. This study discusses the protection of children who commit criminal acts at the Siak Polres, Bekasi Regency . The results of his research concluded that the legal protection provided by the Siak Police was in accordance with the law on child protection (Bakhtiar, 2019) . So Yusnanik Bakhtiar's research only discusses legal protection, while the study that the researchers are currently conducting is related to criminal liability , thus concluding that there are no similarities between these two studies.

Apart from that, there is also Muhammad Ridwan Lubis' study which examines the punishment of children who are in conflict with the law . This

study is included in a theoretical study that discusses the factors that cause children to be involved in crime in theory. The results of his research concluded that the main factor children involved in crime is the lack of attention and supervision of parents or families towards children (Lubis & Putra, 2021) . Furthermore, Lawang's study examines the criminal act of rape according to fiqh and qanun in Aceh. This study also discusses criminal acts even though it is a crime of rape in general which includes the crime of rape against children as well. (Lawang, 2022) . Based on the review of the literature, it can be concluded that this study which discusses criminal liability for children is very different from previous studies which examine legal protection for children, factors that cause child crime and criminal acts of rape against children , so there is no specific discussion about child criminal liability. Islamic law and positional law in Indonesia.

## **METHOD**

The research method used in this study is a qualitative research method (Jahja, 2023) with a normative juridical approach, namely the author tries to examine legal material in the form of theories, concepts and legal principles related to juvenile crime, either in the form of books or scientific articles which directly related to criminal liability of children according to Islamic law and positive law in Indonesia. This research is descriptive in nature (Moleong, 2007) , the author tries to explain the criminal liability of children under Islamic law and positive law and tries to provide solutions to these problems . Furthermore, the existing data is described and analyzed using the method of content analysis so that conclusions can be drawn what are the findings and what needs to be followed up for further research.

## **DISCUSSION**

### **THE CONCEPT OF CRIMINAL LIABILITY**

Before discussing further about the age limit in child criminal liability, the author wants to explain in advance what is meant by accountability itself. There are three main things in material criminal law , namely the formulation of prohibited acts, accountability criminal answers (mistakes) and threatened sanctions (Muladi, 1995) . If you look at material criminal problems, the discussion of criminal liability is quite an interesting discussion, speaking of criminal liability, it cannot be separated from the discussion of mistakes.

This is based on the principle of criminal liability which is based on the principle of "no crime without fault" which is known as the " principle of guilt ". That is, criminal offenders can be punished if they commit criminal acts based on wrong or evil attitudes. Although in its development there is also criminal liability that deviates from the principle of error (Muladi, 1995)

According to the *fuqaha*, in Islamic criminal law two general rules are used which can determine whether a person is guilty . By applying both, it can be known whether someone is guilty or not. The first rule , if the perpetrator commits an act that is permissible (no prohibited) or thought that the act was permissible later the act creates a situation that is not permissible, ia criminally responsible, regardless of whether the circumstances arose intentionally or unintentionally .If it turns out that the perpetrator was actually able to avoid it , if he really is unable to avoid it, there is no criminal liability for him. The second rule , if an act is not permitted (prohibited), but the perpetrator does it, either intentionally or unintentionally without any compelling emergency, it is considered not an emergency and what results from it causes the perpetrator to be criminally responsible, whether the act can be avoided or not (Alie Yafie, 2002) .

Criminal accountability also implies that a person is legally responsible for a criminal act and has been arranged by *nash* ( *syar'i* ). If there is no text , then there is no charge or punishment against the culprit (Muslich, 2004) .

So from these two rules it can be concluded that there is no *jarimah* and no punishment, except with a text that regulates the matter. In *fiqh jinayah* , criminal liability is based on three principles, firstly committing acts that are prohibited and or leaving obligatory actions , both actions are done on their own volition, meaning that the perpetrator has a free choice to do or not do it , and thirdly the perpetrator knows that he will as a result of the actions taken (Djazuli, 2000) .

With these conditions, it can be seen that those who can be burdened with criminal liability in Islam are only people who are mature ( adult), have a sound mind, and have their own will ( *ikhtiar* ) which no party forces them to do ( *mukrah* ). If these three elements are not met, then there is no criminal liability to him, because the perpetrator did this not consciously for the actions he had committed.

In other words, in Islamic law, the perpetrator of a crime who can be held accountable is a *mukallaf*, that is, a person who is an adult, has common sense and whose actions were not committed because someone forced them. Crazy people are people who don't make sense, so that crazy people are not people who have a choice of an action, so that punishment cannot be imposed on their actions. The same goes for immature people cannot be sentenced because of his immature mental and psychological condition.

The level of maturity cannot be based on age limits, because the physical and mental development of each child varies according to the conditions of their social environment, so that the level of maturity is also different. Based on this, Islamic Shari'at does not recognize the place (subject) of criminal liability except for living human beings, *mukallaf* who enjoy freedom of choice when committing acts. *Nash - nash shari'at* confirms this meaning clearly through the hadith of Rasulullah SAW. In a hadith narrated by Abu Daud from Aisha ra, he said: Rasulullah SAW said:

إن الله تجاوز لى عن أمتى الخطأ والنسيان وما استكرهوا عليه

Meaning: the provisions of three things are abolished, from a sleeping person until he wakes up, from a crazy person until he recovers, and a small child until he becomes an adult (Hambal, n.d.) .

Punishment is a way of imposing liability Criminal response is intended to maintain public order and security, in other words as a means of upholding the interests of the community, therefore the amount of punishment must be adjusted to the needs and awareness of society. Islamic Shari'at exists with a very clear and broad purpose, so that the existence of these provisions will guarantee security from the needs of human life.

In Islamic law there are special provisions that can reduce criminal liability for someone, one of the factors is because the perpetrators are children. A child who does *jarimah* will also receive accountability. However, provisions in Islam state that the responsibility that will be imposed on a child is different from the responsibility that is imposed on adults (*mukallaf*). According to the Syafi'i and several other *fuqaha*, it is agreed that a child who has not reached puberty will only be subject to *ta'zir* and *diyat* punishments for the *jarimah* he has committed (Rusyd, 2007) .

## **Limitations of Child Criminal Liability from the Perspective of Islamic Law and Positive Law**

The age limit is something that is very important in juvenile criminal cases, because it is used to determine whether someone suspected of committing a crime is included in the category of a child or not. Regarding the age limit for children, there are variations in various countries that regulate the age of children who can be punished. In Switzerland the age limit for a child who can be punished is when they reach the age of 6 years, in England it is 8 years, in Germany it is 14 years so it is known as can be guilty if any offence which means that over that age they can be relatively accountable for their actions like an adult who gets a verdict in the form of acts or crimes that are punitive (Purnomo, 1983) .

Talking about the age limit of one's maturity cannot be separated from two things namely the power of thought and choice, then every human being must go through several different periods in living his life from the time he is born to maturity and is competent in law. For this reason, here the author wants to explain in advance about who is called the child.

According to Islamic law, criminal liability is based on two cases, namely the power of thought (*idrak*) and choice (*ikhtiar*). Therefore, the position of young children varies according to the different periods in their lives, from the time of their birth to the time they have these two things.

Judging from the juridical aspect, the definition of a child in the eyes of the law can be interpreted as an immature person, a minor or also referred to as a child under the supervision of parents (Mulyadi, 2005) . So by starting from this understanding, it can be said that Indonesian positive law does not regulate the existence of a unification of standard and universally applicable laws to determine the age limit criteria for a child. If you look at Law Number 11 of 2012 Concerning Juvenile Justice, in Article 1 it is stated that what is meant by a child in a criminal case is a child who has reached the age of 12 but has not yet reached the age of 18. (Satya Prema, 2020) .

The definition of a child in article 1 of the Convention on the Rights of the Child (legal convention on children) , a child is defined as anyone under 18 years of age, unless under the law that applies to children, maturity has been obtained before. What is meant by children are those who are

immature and who become adults because of certain regulations , mentally, physically are adults (Dellyana, 1988) .

Law Number 39 of 1999 concerning human rights defines a child as every human being under the age of 18 and who is not married, including children who are still in the womb if this is in his interests. This definition is almost the same as the definition of a child in law Number 23 of 2002 Article 1 paragraph (1) concerning Child Protection , a child is someone who is 18 years old including children who are still in the womb. Whereas in Article 1 paragraph ( 2 ) of Law Number 11 of 2012 concerning Juvenile Courts, the definition of a child is a person who in a case has reached the age of 12 but has not yet reached the age of 18 . From this it can be seen that there is no specific standard in positive law in Indonesia in defining the meaning of a child because the child is defined depending on the needs that define it, namely the law.

As for Article 1 paragraph 1 of law number 23 of 2002 concerning child protection, it is stated that a child is someone who is not yet 18 years old, including children who are still in the womb. From this formulation it can be seen that children who are entitled to legal protection do not have a minimum age limit (Yustisia, 2010) . From the child is still in the womb, until he is entitled to protection. In Article 1 paragraph 2 of law number 4 of 1979 concerning Child Welfare, what is called a child is someone who has not reached the age of 21 years and has never been married (Yustisia, 2010) .

Defining a child and reaching the age of maturity is a fundamental discussion in Islamic law, because when a child reaches puberty ( maturity), he is burdened with *taklif* , which makes his deeds count as a reward and a sin. Similarly, children who have reached puberty are considered worthy of being responsible for all their actions. Inappropriate definition of children has implications for the perspective of children which later also contributes to the emergence of child crimes. Islam defines children as those who have not yet reached puberty. *A l-bulugh* is the end of childhood. For men, puberty is marked by wet dreams (*al ibtilam*), and for women it is marked by menstruation. So it is understood that a child who has reached *puberty* has received the burden of *taklif* , namely the obligation to carry out *syara* ' law, and is brought to account as an implication of this burden. This means that at the time of puberty , the child is considered an adult and can be treated as an adult before the law.

In Islam, adulthood or puberty does not only cause physical or psychological changes, but also affects the obligation to fulfill Allah's call. When they reach puberty, a person is obliged to carry out syara' law, has the eligibility to get a task (*expertise al-wujub*), as well as the feasibility and ability to carry out tasks perfectly (*expert al-'ada*). If he obeys the rules, then he will get a reward, and vice versa if he violates the rules of the Shari'a, then he will be subject to sanctions. Everything that is done will be accounted for alone. Cannot be delegated or replaced by another person. Likewise before criminal law, when a child reaches the age of puberty, he can be held accountable and subject to sanctions as a consequence of the actions he has committed. In Islam, this is possible, because when a person reaches puberty, he also reaches " *aqil* ", so he deserves to be faced with legal consequences.

If the child is not yet mature, he cannot be punished with punishment like an adult. This is because the principle in giving punishment is that the perpetrator must have clear and perfect intentions and objectives (truly intentional). Young children do not have clear goals or intentions for their crimes, because their minds are not yet perfect, their awareness is incomplete, including their understanding of the nature of crime. He also has not been able to understand *the khitab syar'i* perfectly. Therefore the child is not sentenced to a criminal sentence. Even though they were not sentenced to a criminal sentence, the jury of fiqh scholars was of the opinion that in a murder case, the child as the perpetrator is subject to a diyat for accidental or wrongful killing. If the child does not have assets, then this diyat obligation is borne by the guardian. even so, the state may take special policies if there is a problem of juvenile crime. The state can force parents or guardians to educate their children, or the state can take children from their caregivers and hand them over to other capable caregivers from among relatives who are entitled to child care. if a lonely child does not have a caregiver and guardian, then the state is obliged to look after the child and educate him so that he does not become a criminal.

Islam solves the problem of child crime not only fixating on the punishment that must be imposed on children. Islam puts forward a systemic approach that will prevent children from becoming criminals. as the first bastion, Islam obliges parents including mothers to educate their children as well as possible (Karimuddin, 2014) . Even Islam gives hope to

parents by praying that pious children will become an investment in rewards that will continue to flow for them even though death has picked up. Islam guarantees the livelihood of children through a series of laws that must be applied. The maintenance of the child is borne by the guardians. If the guardian is absent or unable to afford it, the state is obligated to guarantee the child's maintenance. Thus the child does not need to think about the needs of his life that will drag him to commit crimes. Islam also has a policy in education by making its curriculum based on Islamic creed so that it has the impetus for children to apply sharia values and laws.

## CONCLUSION

Based on the results of the research and discussion, it can be concluded that Islamic law is oriented towards enforcing *amar ma'ruf nahi munkar* with the aim of providing protection for religion, life, lineage, property and reason. While the sanctions regulated in positive law aim to provide protection and protection for children in facing their long future. Children according to Islamic law are not subject to punishment because punishment in Islam is imposed on people who are mature (adults), have good sense and criminal acts are not carried out by force. However, in Islam if a child performs *jarimah*, a *ta'zir* punishment will be imposed as guidance and teaching for the child. While under positive law in Indonesia children are also subject to punishment, but the system of punishment is different from the punishment of adults.

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