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FIQH AL-JINAYAT IN SOLVING CRIMES COMMITTED BY UNDERAGE CHILDREN

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ABSTRACT

Islamic Fiqh has laid down the rules of punishments for criminal acts, whether involving the loss of life, bodily injury or material loss. Criminal acts are not only being committed by adults, but even children are also capable of committing various types of crimes involving murder, theft, violation of human dignity, and injuries. The phenomenon of crimes committed by children are becoming more alarming by days. These criminal acts by children require a very rigid handling from various parties and authorities. In Islamic Law, there are discussions about the sentences for the underage criminals. This article discusses three types of crimes committed by underage, namely crimes related to human life, crimes that cause loss of property, and crimes related of human dignity. And through this paperwork, the writer will discuss the methods used in Islamic law, in dealing with crimes committed by underage children from various *fiqh madhab*.

Keyword: *Fiqh Al- jinayat, Underage criminals, Fiqh madhab*

Introduction

Allah S.W.T have honoured humans by appointing them as the Khalifah on earth, He also ordered the angels to prostrate to them. He created the world and within it to submit under human's power. He also grants the rights to humans, and obligations to them. The rights given include the right to live, the right to defend honours, and the right to defend wealth. Rasulullah PBUH gave a guideline regarding the human rights that is compulsory to be respected by others: "Indeed your wealth, your blood, your honour is sacred to each other" (al-Bukhari, 1987)

In order to defend the rights granted by Allah, Allah had set *Hududs* and punishment to those who violate it. To those who seized others' rights, Allah *subhanahu wa ta'ala* will punish them based on their wrongdoing. "Believers! Retribution is prescribed for you in cases of killing" (Qur'an al-Baqarah: 78). To those who defile the honor of others, (*qazaf*) will receive whipping, to those who seize others' wealth will receive hand cutting, and those who violate other rights, which the punishments are not specified according to *nas*, they will receive *Ta'zir* based on *Qadi*'s decision.

All the punishments stated will only be executed if the violator is a *mukallaf*. Hence, if the violator is a child and is not in the *mukallaf* category, will he be acquitted from the punishment? Will those whose rights were violated cannot get justice? Perhaps, is there a particular punishment for the underage violators?

The children's involvement in various criminals are becoming a concerning issue. These children who have committed crime must receive protection, attention, and education from the family and the society. If there is no action being taken, indeed there will be worse consequences and deeds done when they grow up.

This article will represent actions taken by Islamic Sharia in dealing with the underage criminals. Are they fully responsible for their crimes, and will they receive a full punishment set according to Islam?

Punishment Based on The Crime

The punishment for a crime is based on the crime itself. In Islam, there are three types of punishments that are executed for different crimes.

The first one: *Hudud*. *Hudud* is a punishment fixed by Allah *subhanahu wa ta'ala*, and is Allah's right (Ibnu al-Humam, 1997). It is named *Hudud* because the execution and limit is fixed (al-Bajirami, 1996). It does not have a minimum or maximum rate. No individual or group can abort it, since it is Allah's right (Oudah, 2003). Every kind of crime will have a negative impact on humans, and the purpose of the punishment is for human benefit, so it is categorized as Allah's right and no one can question it. The types of crimes in which the punishment is Allah's right are: zina, qazaf (accusing someone of doing zina), drinking intoxicating drinks, stealing, robbing, doing harmful things, and betraying the country. As the punishment of all these crimes are Allah's right, no one can acquit the criminals from the punishment (Abu Zuhrah, 1998).

Second: *qisas* and *diyat*. It is named so as the criminals will be punished based on their crimes (az-Zuhaily, 1989). Whereas *diyat* is the compensation for the victim, as a substitution for *qisas* (Abu Jayb, 1988). *Qisas* and *diyat* are also a fixed punishment, without minimum or maximum rate. However, it is an individual right, so the victim has the right to forgive the criminal, and acquits him from the punishment.

There are five types of crimes that will be punished with *qisas* and *diyat* : *qatl a-'amd* (intentional homicide), *qatl syibhu al-'amd* (like-intentional homicide), *qatl khata'* (unintentional homicide), intentionally hurting without killing, unintentionally hurting without killing.

Third: *Ta'zir*, a type of punishment in the form of lesson (ta'dib), for crimes that are not stated in *hudud* (Abu Jayb, 1988). The purpose of *tazir* is to give lessons to the criminals and the society. This punishment is executed for crimes that are not categorized under *hudud* and *qisas*, such as corruption. The rates and types of *tazir* are not fixed in nas, therefore it is up to the *qadi* to decide the suitable punishment for the criminals based on the type of the crime and its impact to the society. Although Islam lets the *qadi* and the authorities to decide, it must be beneficial to the society, and is not against *sharia* and Islamic law. It also must follow the government's guideline, means it cannot exceed the maximum or surpass the minimum rate stated by the government (Oudah, 2003) In executing *tazir*, whipping is used, 30 times is the maximum, and 3 times is the minimum (Abu Jayb, 1988)

Implementing Punishment For A Crime Based on Human Developing Phase

The responsibility for a crime done by someone from *sharia* perspective is based on two key elements, the understanding and awareness of the crime, and their willingness to do so. Speaking of punishment for crimes committed by children, it is based on which growing phase they are currently on, starting from the day of birth, to a phase where they fully understand and are aware of the consequences of what they are doing, and also their willingness to do it.

The responsibility for a crime is based on what phase the criminal is in when the crime was executed. If someone is in a phase when he could not understand what he is doing (*ghayr mumayyiz*), he will not have any responsibility for whatever he does. However, if someone commits a crime when he fully understands about it (*mumayyiz*), he will be punished with *ta'dib* (lesson). And if someone commits a crime when he is already in the peak level of understanding and maturity phase (*rusyd*), he is fully responsible for the crime he committed.

Underage Category in Islamic Jurisprudence (Fiqh)

The underage or children phase is the most crucial phase in life, as it is the phase where humans are shaped. The *fuqaha* are really heedful of the underage phase, by discussing the punishments related to the phase.

According to al-Kasani's definition of children, "A child is from the day of birth, until he reaches puberty (dream)" (Al-Kasani, 1982). Whereas Ibnu Hajar defines children as "A child is from the day of birth, until he dreams (puberty) (Ibnu Hajar, 2001). Therefore, *fuqaha* defines children as someone before he reaches the age of puberty.

Al-Quran stated that someone is still categorized as a child before they dream (puberty): "And when your children reach the age of puberty, let them seek permission 'to come in', as their seniors do". (Qur'an an-Nur: 59). And Rasulullah (p.b.u.h) also set puberty by dream (puberty): "The pen (deeds record) will be elevated from three peoples: children after he dream(reach puberty), from the sleeping people until he wakes up, and from insane people until he is sane" (al-Bayhaqi, 1344H).

There are three growing phase for humans:

First: *Ghayr mumayyiz*. This phase starts from the day of birth until approximately 7 years old. In this phase, a child is considered to lack understanding. And in *fiqh* is named *ghayr mumayyiz* child. Actually,

there is no fixed age of *tamyiz*, but *fuqaha* fixed age 7 as *mumayyiz* age to ease in the process of determining punishment (Oudah, 2003).

Based on the *tamyiz* age fixed by the *fuqaha*, if a child under 7 committed a crime, there will be no punishment executed. If a child commits a crime that will be punished with *hudud*, such as hurting people, it will not be executed on him. However, if the crime he committed have to deal with fine, he must do the compensation, even though he is at *ghayr mumayyiz* phase

Second phase: *Mumayyiz*. This phase is starting from the age of 7 until puberty. Most *fuqaha* fixed this phase until the age of 15. Between the age of 7 until the age of 15, a child is considered to have an imperfect level of understanding. Abu Hanifah in one of his opinions considers puberty is at 18 years old, while his other opinion differs the age of puberty for males and females. Males are 18 years old, while females are 17 years old (as-Sarakhsi, 2000). And *madhab* Maliki agreed with *madhab* Hanafi to set 18 years old as puberty age (Ibnu Rusyd, 1988)

If a child commits a crime that takes lives when in 7 to 15 or 18 years old, (for some *fuqaha*), he will be acquitted from *qisas*. Instead, he will receive *ta'dib* (lesson)

Third phase: *Baligh*. This is the maturity phase for humans. At this phase, humans will bear the consequences of every crime they commit. They will be punished whether by *hudud*, *qisas*, or *tazir*.

Crimes Committed by *Ghayr Mumayyiz* Child

Majority of the scholars agreed to set *ghayr mumayyiz* age between the day of birth until 7 years old. By setting an age limit, it will ease the *qadi* to decide any sentence. If a *ghayr mumayyiz* child committed a crime, there will be no *hudud* or *ta'dib* punishment executed on them (Oudah, 2003), as it is impossible that a *ghayr mumayyiz* child purposely committed a crime with excellence planning, considering they are lack of intellect.

Crimes Committed by *Mumayyiz* Child

Mumayyiz in *fiqh* means a child that can understand commerce. He understands that trading will change the ownership of a certain thing from the seller to the buyer. He also can sense any cheating occurred during the transaction (Ali Haeydar, 2003). The *fuqaha* have set *mumayyiz* starting at 7 years old until the age of puberty. In setting the age of puberty, there are a few opinions of the scholars:

First opinion: A child reaches puberty if he reaches fifteen years old for both males and females. This is the opinion of *madhab* Syafii and Hanbali (Ibnu Qudamah, 2012).

Second opinion: A child reaches puberty if he reaches 18 years old for males, while 17 years old for females. This is the opinion of Abu Hanifah (as-Sarakhsi. 2000)

A child between 7 to 15 or 18 years old is a *mumayyiz*. A *mumayyiz* is imperfect in intellect, and could not distinguish positive and negative things well. If he commits crime under *hudud* or *qisas*, he will not be punished based on the crime, as he is imperfect in intellect, and did not fully acknowledge the crime he committed. He will be punished with *ta'dib* (lesson), instead, to make sure he got the lesson, fix his attitude, and does not recommit the same crime again, to keep the wellness of the society in the future (Oudah, 2003). This is because, even though he is a *mumayyiz*, he is not categorized as someone that is fully responsible for his crime.

Based on Imam al-Kasani's opinion, the term to punish someone over his crime is intellect. Everyone with intellect must be punished for the crime they committed, a master or a servant, a muslim or a non-muslim, a matured or a child, as they are fully responsible of every action they did, except for *mumayyiz*. A *mumayyiz* will only be punished with *ta'dib*, as it is the only suitable punishment for him (al-Kasani

1982). However, Islamic *sharia* did not set a fixed *ta'dib* punishment to a *mumayyiz*. It is up to *qadi* to decide the right *ta'dib* punishment based on the government's law.

Regarding the responsibility to incur loss over his action, even though a *mumayyiz* will not be punished with *hudud* or *qisas*, he is not exempted from civil responsibility. He will need to incur the loss to his victim, as there is a principle in Islam, that lives and wealth are protected. Therefore the responsibility of loss will not be acquitted even though the punishment is discharged (Oudah, 2003).

Crimes Committed by A Matured Child

When a child reaches puberty age, their intellect and maturity are perfect. The natural sign of a matured child is getting wet dreams for males, and menstruation or pregnancy for females. If there is no natural sign shown by a child, then it will be determined by age. 15 years old for males and females based on the opinion of the majority of the scholars. While 18 years old for man and 17 years old for woman, based on Abu Hanifah's opinion. When a matured person commits a crime, he is fully responsible for it, regardless if it involves *hudud*, *qisas* or *tazir* (Oudah, 2003).

Homicide Committed by An Underage Child by Himself

In Islamic law, homicide are categorized into three;

First: Deliberate homicide (*Iqatlu al-'amd*), that is killing with full will, by tools or weapons that can cause death. The punishment for deliberate homicide is *qisas*, unless the victim's family forgives the murderer, then *qisas* will be replaced with paying *diyat* (az-Zuhaili, 1989). Based on a hadith: "The punishment for deliberate homicide is *qisas*, unless the victim's family forgives the murderer" (ad-Daruqutni, 1966).

Second: Semi-deliberate homicide (*qatlu al-Khata;*). A homicide that is committed accidentally. As an example, a person throws something, and it hits someone and causes him to death. In this case, he will not be punished with *qisas*, but he needs to pay *diyat* and *kafarah*. (ar-Ru'ayni, 2003).

Third: accidental homicide (*qatlu syibhu al-'amd*). This is approved as one of the homicide categories by most of the scholars, except *madhab* Maliki (Ibnu Qudamah, 1405). If someone attacks another person with tools that are less likely to cause death, but the victim dies. As an example, someone hit another person with a can and caused the victim to die. This is categorized as accidental homicide (*qatlu syibh al-'amd*). In this case, the culprit will not be punished with *qisas*, but he will need to pay *diyat al-Mughazallah* and *kafarah* (az-Zuhaili, 1989).

If a child commits a homicide, under which category will the homicide be categorized in?

First opinion: An intentional homicide by a child will be categorized as accidental homicide (*qatlu al-Khata'*). This is the opinion of the majority of scholars, *madhab* Hanafi, (as-Sarakhsy, 2000), Maliki (Ibnu Juza), Hanbali (Ibnu Qudamah, 1405), one of the Syafii's opinion on *ghayr mumayyiz* child (asy-Syarbini, 1997). This is according to hadith narrated by Aisyah *radiyallahu 'anha* : "The pen (deeds record) will be elevated from three peoples: a child after he dream (hit puberty), from the sleeping people until he wakes up, and from insane people until he is sane" .

Second opinion: *madhab* Syafii' stated that deliberate homicide committed by a child is categorized as deliberate homicide. Therefore, he must pay the *diyat* himself, and not by his family. If he could not pay the *diyat*, it is considered as a debt. (Asy-Syafii', 1393H).

Third opinion: *madhab* az-Zahiri. Crimes committed by a child do not have any punishment. The crimes they committed is equalized as action done by animals (Ibnu Hazam n.d.).

Homicide Committed by An Underage Child Abetted With An Adult.

If a child committed a homicide directly or indirectly, will he receive the same punishment?

If a child was involved directly in a homicide, such as shooting a person to death, the *fuqaha* opine:

First: Maliki (al-Adawy, 1412H) and Syafii (Asy-Syafii, 1393H) opine that if it is a deliberate homicide, then the adult culprit will be punished with *qisas*, while the kid will need to pay half of *diyat*, as to a child, deliberate (*qatlu al-A'amd*) and semi-deliberate (*khata' al-amd*) homicide are considered the same.

Second opinion : From Hanafi, Syafii (in one of his opinion), and Hanbali in his popular opinion, the adult culprit whom coed with the child will not be punished with *qisas*, but need to pay *diyat* instead (al-Kasani, 1982). This is due to the fact that the homicide was committed by two people. One of them must be punished with *qisas*, as he is an adult, while the other could not be punished with *qisas*, as he is still a child. Besides, it is unclear who is the murderer. Hence, *qisas* could not be executed, in this situation, as there is a cooperation in it (al-Mawardi n.d.).

Crime Committed by An Underage Child That Caused Disability

In Islam, humans are protected from any harm. Anyone who harms someone that caused death, or disability, or injury will be punished. If the harm was intentional without any ambiguity (*syubhat*), Allah had fixed the type of punishment: “And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution” (Qur’an al-Ma’idah: 45). The type of punishment stated in the *ayah* is for crime committed by adults with perfect intellect. But what about children who did harm that caused disability, what punishment will be executed?

Fuqaha agreed that if the harm was unintentional, therefore the family is the one that needs to pay *diyat* to the victim (*aqilah*) (Ibnu Qudamah, 1405). However if the harm was intentional, there are three opinions from *fuqaha*:

First: Opinion of Hanafi, Maliki, Syafii (in one of his opinion), and Hanbali (*masyhur*), harm that was committed by a child intentionally but did not cause death is considered as semi-deliberate (al-Qatl al-Khata’). Hence, the family is the one that needs to pay *diyat* (Ibnu Qudamah, 1405H).

Second: Another opinion of Hanbali (Ibnu Muflih, 2003) and Syafii. If a child harms someone intentionally but did not cause death, he must pay *diyat* by himself, using his wealth. As the harm was intentional, he can be punished with *ta’dib* (lesson) (an-Nawawi).

Third: According to *madhab* az-Zahiri, crimes that were committed by children are dismissed, as children are deemed in a group of people that will not be punished in Islam. Hence, they will not get any punishment for their wrongdoings (Ibnu Hazam n.d)

Theft Committed by Underage Children

In protecting human’s wealth from larceny, *Allah subhanahu wa ta’ala* had fixed a punishment for the thief for both men and women. “[As for] the thief, the male and the female, amputate their hands in recompense for what they earned [i.e., committed] as a deterrent [punishment] from Allah” (Qur’an al-Maidah: 38). The punishment will be executed to adult thieves if they are qualified and there is no ambiguity.

However, an underage thief (child) that committed larceny cannot be punished with hand cutting, according to the *fuqaha*, as children cannot be punished with *hudud*.

But, if the child is a *mumayyiz*, he will be punished with *ta'dib* and *tazir*. This is to make sure he got the lesson, and can lead him to the right path, and to not recommit the crime (Abu Zuhrah, 1998).

Even though the child will not be punished with *hudud*, he needs to return the stolen goods to the owner. If the goods are still around, he must return it to the owner. However if the stolen goods are missing, he must return the values of the goods to the owner. If he is short of money, he must return it when he can afford it (al-Kasani, 1982). This is based on a hadith: "The stealing hand is bounded to responsibility until he return it (the stolen goods)" (Abu Daud)

For larceny that involves a child and an adult, there are two opinions from *fuqaha* regarding the punishment to the adult:

First: Opinion of Maliki, Syafii and Hanbali (in a narrative), cutting hands punishment will be executed to the adult that was cooperating (Ibnu Qudamah, 1405H). However, if a child stole a specific amount, then the adult did the same, but the value of the stolen goods by the adult did not reach *nisab*, then hand cutting will not be executed to the adult (Malik, n.d)

At the same time, Syafii and Hanbali distinguish between *ghayr mumayyiz* and *mumayyiz*. If the adult was abetted with a *ghayr mumayyiz*, then the adult will be punished with hand cutting. However, if the adult was abetted with a *mumayyiz*, the adult will not be punished with hand cutting. The reason is because the *ghayr mumayyiz* that was commanded to steal goods by the adult is considered as a tool that the adult has control on (Ibu Qudamah, 1405H). The kid was just following the commands without knowing anything about it.

Second: The opinion of Abu Hanifah and Zufar. The adult that was abetted with a child in committing larceny will not be punished with hand cutting. The reason is, the larceny is one and there is uncertainty in it (it is unclear who steals the goods). Therefore, hand cutting punishment is not a must, as the thief may be the one that can be punished with *hudud* (the adult), or the one that cannot be punished with *hudud* (the child). Hence, hand cutting is not a must for both of them (as-Sarakhsy, 2000).

Zina Committed by Underage Children

Fuqaha defined *zina* as intercourse between a muslim mukallaf and a person intentionally and voluntarily outside the institution of marriage or the institution of slavery (al-Maliki, 1412H).

Based on the definition, *zina* will only be punished with *hudud* if it was done by someone who has reached puberty and is sane.

Whereas *zina* done by underage children are not in the *zina* defined by the *fuqaha*. It also will not be punished with *hudud*. Regarding this situation, *Imam* Malik stated: "*Hudud* cannot be executed to boys and girls that commit *zina* until he gets a dream or she starts her menstruation, or when the hair grows, or reaches adulthood" (Malik, n.d). However, if the kids are already a *mumayyiz*, then they will be punished with *tazir* and *ta'dib* as a lesson (al-Mardawi, n.d). According to *madhab* Hanafi, the boy must give *mahar* to the girl even though the *zina* was done voluntarily (az-Zaya'i, 1313H).

If the *zina* was involved by a underage boy and an adult woman, based on the agreement of the *fuqaha*, the boy will not be punished with *hudud* (Ibnu Juza, 1982). And if the boy has reached *mumayyiz* age, then he will be punished with *tazir* (Oudah, 2003). Whereas the punishment for the women, there are two opinions:

First: The opinion of Hanafi and Maliki, the woman will not be punished with *hudud*, but with *tazir* instead (Ibnu Juza, 1982). And according to Hanafi, if the woman was forced to do the *zina*, the boy must pay *mahar* to the woman. However, if the woman voluntarily does it, the boy does not need to pay *mahar*, as the boy was ordered to do the *zina* (az-Zayla'i, 1313H).

Second: The opinion of Syafii, Imam Ahmad, and Zufar, if the woman seduces the boy to do *zina* with her, therefore the woman will be punished with *hudud* (asy-Syarbini.). However, *Madhab* Hanbali opines that the woman will not be punished with *hudud* if the *zina* was done with a boy under 10 years old, whereas if the boy is older than 10, she will be punished with *hudud* (Ibnu Qudamah, 1405).

Conclusion

The phenomenon of crimes committed by children is becoming more alarming by days. These criminal acts by children require a very rigid handling from various parties and authorities. It has been discussed in Fiqh about the division of the age phases of children who commit crimes. Different age phases of delinquents will be given different verdict of the sanction imposed towards the criminal acts done by them. Regarding the criminal acts by children in the age category of minors, the Fuqaha have divided them into two phases, namely the age phase of *ghayr mumayyiz* and the age phase of *mumayyiz*. For children in the age phase of *ghayr mumayyiz*, any criminal acts committed would not be subjected to the punishment of *Qisas*, *Hudud* or *Ta'dib*. However, if the punishment towards the criminal act involves financial consequences, the criminals who are at the age of *ghayr mumayyiz* hold the responsibility to fulfill the financial obligation towards the victim. As for children who are in the age phase of *mumayyiz* who have committed criminal acts in regard with the punishment of *Qisas* and *Hudud*, the type of punishment that could be imposed is the punishment of *Ta'dib* (education), in which the punishment rate and types are determined by the Qadi. They would also be obliged to bear the material losses as the result of their actions.

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