

DEFINITION OF THE CHILD (Art. 1)

131. In Malaysia, the definition of a child is governed under the relevant legislations in accordance with their respective purposes. Notwithstanding the various legislations, Malaysia's legislations with regard to the definition of a child in civil and Syariah law is consistent with Article 1 of the CRC with the exception of the Adoption Act of 1952 [Act 253] which defines a child as a person below 21 years of age. The following legislations are of relevance:

(a) Under the Age of Majority Act 1971 [Act 21], the age of majority is eighteen years.

(b) The Children and Young Persons (Employment) Act 1966 [Act 350], which governs the appointment of a child and young persons, defines a child as any person who has not completed his or her fourteenth year of age while someone above fourteen but has not completed his or her sixteenth year of age is considered as young person. No child or young person shall be required or permitted to be engaged in any employment other than those specified in the said Act. (Please refer to Chapter 10, paragraphs 22 and 23)

(c) Under the Law Reform (Marriage and Divorce) Act 1976 [Act 164], the minimum age for marriage is eighteen years. However, the Chief Minister of a particular State may in his discretion grant a license authorising the solemnisation of a marriage of the girl child who is under the age of eighteen years and has completed her sixteenth year.

(d) The Islamic Family Law Act (Federal Territory) 1984 (IFLA) provides that the minimum age for marriage is eighteen years for male and sixteen years for female. If any person wishes to marry below the minimum age requirement, section 18 (1)(a) provides that an application may be made to a Syariah Judge to obtain permission to solemnise such marriage.

(e) The Child Act 2001 [Act 611] defines a "child" as a person under the age of eighteen years.

(f) In relation to criminal proceedings, section 82 of the Penal Code [Act 374] stipulates the minimum age of criminal responsibility is ten years old. A child (a person who has attained the age of ten years and below the age of eighteen) who is alleged to have committed an offence may be arrested with or without a warrant and may be detained for the purpose of investigation under section 117 of the Criminal Procedure Code [Act 593]. When an investigation on a child cannot be completed within the period of twenty four hours, the police officer making the investigation shall transmit immediately to a Magistrate a copy of the entries in the investigation diary relating to the case. The child shall at the same time be produced before the Magistrate who may authorise the detention of the child in such custody as he thinks fit for a term not exceeding fifteen days in whole. The Magistrate authorising the detention shall record his reasons for doing so. The Magistrate also has a responsibility to inquire whether the child has any complaints to make and to record and make an order in relation to the complaint. Section 85 of Act 611 provides for the separation of a child from adults while being detained in a police station.

(g) Under section 375 of Act 374, it is an offence for a man to have sexual intercourse with a woman under sixteen years of age with or without her consent.

(h) Under the Syariah law, the liability for criminal act is attributed to the act of a person who has attained *baligh*, of sound mind and of free will. A Muslim child is not held responsible for any criminal act until the child reaches the age of puberty. This is reflected in the provision of the Syariah Criminal Offences (Federal Territories) Act 1997 [Act 559] and the respective states' legislations pertaining to Syariah criminal offences which provide that "nothing is an offence which is done by a child who is not *baligh*". The provision of Act 559 and the respective states' legislation pertaining to Syariah criminal offences further provides that "*baligh* means having attained the age of puberty according to Islamic law".

(i) Generally, under the Syariah law, the sign of puberty for a male is ejaculation of sperm and for a female is the first menses she experiences. In the absence of these signs, puberty of a person will be determined according to his or her age. Muslim scholars however have different views in determining the appropriate age

of puberty. Their views are as follows:

- According to the Hanafiyah, the age of puberty for both male and female is 15.
- According to Imam Abu Hanifah, the age of puberty for male is 18 and for female is 17.
- According to the Malikiyah, the age of puberty for both male and female is 18.
- According to the Syafi'iyah and the Hanabilah, the age of puberty for both male and female is 15.

In Malaysia, *Mazhab Shafie* is the main source of the authoritative applicable principles in the administration of Islamic religion or Islamic Law especially in matters pertaining to *ibadah*. Only if there is no *Shafie* jurist answering the particular legal questions, reference may be made to the authoritative works of other *Sunni* schools of law. *Hukum Syarak* is defined in the Administration of Islamic Law as "*hukum Syarak* according to *Mazhab Shafie* or any one of *Mazhab Maliki, Hanafi or Hanbali*". It can be concluded that from the provisions of Act 559 and the respective state legislations on criminal offences, a child's criminal liability is not determined by the minimum age requirement but is dependent on the attainment of his or her puberty.

Section 2 of the Syariah Criminal Procedure (Federal Territory) Act 1997 [Act 560] provides for the age of youthful offender as "an offender above the age of ten and below the age of sixteen years". Any Muslim child who is above the age of ten is presumed to have the ability to understand the nature of the act committed but the child lacks the understanding of legal consequences of such act. Thus, the legislation provides for such category of person not to be punished by imprisonment as follows:

"128 (1) When any youthful offender is convicted before any Court of any offence punishable by fine or imprisonment, such Court shall instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment:

(i) order such offender to be discharged after due admonition if the Court shall think fit; or

(ii) order such offender to be delivered to his parent or to his guardian or nearest adult relative or to such other person, as the Court shall designate, on such parent, guardian, relative or other person executing a bond with a surety, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or, without requiring any person to enter into any bond, make an order in respect

of such offender ordering him to be of good behaviour for any period not exceeding two years and containing any directions to such offender in the nature of the condition referred to in paragraphs 130(a), (b) and (c) which the Court shall think fit to give**.

(2) The Court before which a youthful offender is convicted may, in addition to or instead of punishing such offender in the manner provided in this section, inflict on his parent or guardian a fine not exceeding RM200.00 in any case in which such Court, after summary inquiry, is satisfied that such parent or guardian has, by neglecting to take proper care or otherwise, conduced to the misconduct of such offender: Provided that no parent or guardian shall be fined without his having had an opportunity of being heard and, if he desires it, of adducing evidence in his defence.”

(j) Under Act 611, a child below the age of ten years shall not be sent to a probation hostel or an approved school and a child below fourteen years shall not be sent to a Henry Gurney School (an institution under the administration of the Prisons Department). A child under the age of fourteen years shall not be ordered to be imprisoned for any offence or be committed to prison in default of payment of a fine, compensation or cost. A child aged fourteen years or above shall not be ordered to be imprisoned for any offence if he can be suitably dealt with in any other way whether by probation, or fine, or being sent to a place of detention or an approved school, or a Henry Gurney School. The Act 611 also provides that a child below eighteen years who is in need of protection may be taken into temporary custody by the police or Protector until he or she can be brought before the Court for Children for further orders.

(k) Section 3 of the Essential (Security Cases) Regulations 1975 (ESCAR) provides that where a person is accused of or charged with a security offence, he shall, regardless of his age be dealt with in accordance with the provision of this regulation and the Juvenile Courts Act 1948 [Act 90], shall not apply to such a person. Section 16 of the Juvenile Courts Act [Act 90] prohibits the pronouncement or the recording of the sentence of death on a juvenile. To date there has only been one case on the issue of the pronouncement of the death sentence on a juvenile which is the case of Lim Hang Seoh v PP [1978] 1 MLJ 68. The Federal Court in the said case affirmed the death sentence on the accused who was a boy of the age of 14. He was found guilty of the offence of possession of a pistol and ammunition. However, in this case the King exercised his prerogative power of pardon and commuted the death sentence to a detention in the Henry Gurney School until the juvenile reached the age of 21. As of today there have not been any similar cases to the above. Section 16 of the repealed Juvenile Courts Act 1948 is now contained in section 97 of the Act 611.

(l) The Evidence Act 1950 [Act 56] provides that the evidence of a child of tender years who does not understand the nature of an oath may be received if in the opinion of the Court he possesses sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Where such evidence is admitted on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof.

(m) Under the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] evidence of a child of tender years who does not understand the nature of an oath may be considered if in the opinion of the Syariah Court he possesses sufficient intelligence to justify the evidence and understands the duty of speaking the truth. This is provided for under section 83(4) of Act 561.

(n) Generally, a person under the age of eighteen years does not have the capacity to enter into a contract. However, the Contracts Act 1976 [Act 136] provides that no scholarship agreement shall be invalidated on the ground that the scholar entering into such contract is not of the age of majority i.e. below the age of eighteen years.

(o) It is provided under the Armed Forces Act 1972 [Act 77] that a person below the age of seventeen and a half shall not be appointed as midshipman or cadet officer without the consent of his parents and a recruiting officer shall not enlist any person under the age of seventeen and a half without the written consent of his parents. In actual practice, only persons of the age of eighteen and above are recruited to join the Malaysian Armed Forces.

(p) The Control of Tobacco Product Regulations 1993 stipulates that the sales of tobacco products to a person under the age of eighteen is an offence and if convicted, shall be liable to a fine not exceeding RM1,000.00.

132. Malaysia takes the view that laws which are not consistent with the definition of the child under Article 1 of the CRC should be reviewed to ensure full compliance with the Convention. Therefore, concerted efforts are taken by the Ministry of Women, Family and Community Development, with the assistance of the Attorney General’s Chambers, to address this matter.

** Section 130 of the Model Law on Syariah Criminal Procedure provides “When any person is required by any Court to execute a bond with sureties, and in such bond the person executing it binds himself to keep the peace or binds himself to be of good behaviour, the Court may require that there be included in such bond one or more of the following conditions, namely:

(a) a condition that such person shall remain under the supervision of some other person named in the bond during such period as may be therein specified;

(b) such conditions for securing such supervision as the Court may think it desirable to impose;

(c) such conditions with respect to residence, employment, associations, abstention from intoxicating liquors or drugs or with respect to any other matter as the Court may think it desirable to impose.”