



## **A Pre-Trial Standard Operation Procedure for Children in Conflict with Sharia Criminal Law in Malaysia**

Wafaa' binti Yusof

Universiti Kebangsaan Malaysia

Email: wafaa@ukm.edu.my

**Abstract:** Criminal offences committed by children in Malaysia do not only involve jurisdiction of the Child Act 2001 (Act 611), (Amendment 2016, A1511) but also jurisdiction of the states' sharia criminal enactments and acts. Children are not exempted from being a perpetrator and contribute to increased rate in statistic of sharia crime throughout states in Malaysia. The social turmoil of humanity such as birth to an illegitimate child, abandoned babies were the impact from sharia criminal conduct of these children. Among factors for statistical increase on sharia crime by child offenders is due to ambiguity in legal provision regarding the position of child offender and pre-trial procedure for related sharia criminal matter. In fact, the flaws in the enforcement and implementation of pre-trial procedural laws against child offender are evident outcome from these legal ambiguities and the absence of a specific guideline in dealing with these perpetrators. Therefore, this paper discusses on justification on the importance to formulate a better and immediate alternative i.e. to establish a standard operating procedure (SOP) specifically for child offender at the pre-trial stage under the sharia criminal jurisdiction for the states in Malaysia. A pure legalistic study methodology of qualitative approach is used to produce this article. Data is gathered through library research and fieldwork study, which includes some semi-structured interviews with religious enforcers from the Department of Federal Territory Islamic Affairs (JAWI) and the Selangor Islamic Religious Department (JAIS) as respondents. The data were then conceptually and descriptively analyzed. This article presents a substantial justification to establish a pre-trial standard operating procedure for children in conflict with the states' sharia criminal law in Malaysia.

**Keyword:** Pre-trial, child offender, suspect, Malaysian criminal law

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**Abstrak:** Tindak pidana yang dilakukan oleh anak-anak di Malaysia tidak hanya melibatkan yurisdiksi *The Child Act 2001 (Act 611) (Amandemen 2016, A1511)* tetapi juga yurisdiksi pemberlakuan pidana syariah negara. Anak-anak tidak terkecuali menjadi pelaku dan berkontribusi terhadap peningkatan angka statistik kejahatan syariah di seluruh negara bagian di Malaysia. Gejolak sosial kemanusiaan seperti lahirnya anak haram dan bayi terlantar merupakan dampak dari tindak pidana syariah anak-anak tersebut. Di antara faktor peningkatan statistik kejahatan syariah oleh pelaku anak adalah karena ketidakjelasan ketentuan hukum tentang kedudukan pelaku anak dan prosedur praperadilan untuk masalah pidana syariah terkait. Padahal, kelemahan dalam penegakan dan pelaksanaan hukum acara praperadilan terhadap pelaku anak terlihat dari ketidakjelasan hukum tersebut dan tidak adanya pedoman khusus dalam menangani pelaku tersebut. Oleh karena itu, artikel ini membahas tentang justifikasi pentingnya merumuskan alternatif yang lebih baik dan segera yaitu untuk menetapkan *Prosedur Operasi Standar (SOP)* khusus untuk pelaku anak pada tahap praperadilan di bawah yurisdiksi pidana syariah untuk negara bagian di Malaysia. Metodologi studi hukum murni dengan pendekatan kualitatif digunakan untuk menghasilkan artikel ini. Data dikumpulkan melalui penelitian kepustakaan dan studi lapangan, yang mencakup beberapa wawancara semi-terstruktur dengan para penegak agama dari *Jabatan Agama Islam Wilayah Persekutuan (JAWI)* dan *Jabatan Agama Islam Selangor (JAIS)* sebagai responden. Data kemudian dianalisis secara konseptual dan deskriptif. Artikel ini menyajikan justifikasi substansial untuk menetapkan prosedur operasi standar (SOP) pra-sidang untuk anak-anak yang berkonflik dengan hukum pidana syariah negara di Malaysia.

**Kata Kunci:** Praperadilan, pelaku anak, tersangka, hukum pidana Malaysia

## Introduction

Malaysia is divided into two legal jurisdiction which is the Federal and state jurisdiction.<sup>1</sup> Federal jurisdiction are predominant among the legislations as compared to state jurisdiction as provided in the Federal Constitution of Malaysia.<sup>2</sup> This jurisdiction include legislations related to children as provided in the *Child Act 2001 (Act 611)*, (Amedment 2016,

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<sup>1</sup>Raihan Azzahra and Farid Sufian Shuaib, "Religious Courts in Indonesia and Malaysia: History, Structure, and Jurisdiction," *Indonesian Comparative Law Review* 4, No. 2 (2022), p. 115-130. Article 73(a), Federal Constitution of Malaysia. Article 73(b), Federal Constitution of Malaysia.

<sup>2</sup>Yayan Sofyan, "Access to Justice of Citizenship Rights for Stateless Indonesian Migrant Workers' Children in Sarawak, Malaysia," *al-Ihkam: Jurnal Hukum dan Pranata Sosial* 16, No. 2 (2021). Article 75, Federal Constitution of Malaysia.

A1511) under the Federal List.<sup>3</sup> However, the Act does not have jurisdictions over a child committing sharia offences notwithstanding it being the exclusive legislation for the children. The Act is not applicable in cases involving children in conflict with the states' sharia criminal legislation as provided in the State List.<sup>4</sup> It means that the states' sharia criminal legislations do not have jurisdiction over offences except in so far as conferred by the Ninth Schedule, List 2 of Federal Constitution of Malaysia. This legal jurisdiction only applies to those professing the religion of Islam, including the young sharia criminal offenders. At the same time, legislations which specifically deal with children under jurisdiction of sharia law has never been legislated. Under the state sharia criminal legislations, none of the states in Malaysia provides for a specific child act or enactment which is in conflict with the sharia criminal law. In fact, there are only few minimal provisions offered to young offenders, the status of the offences, and the criminal procedure governing them. This situation leads to further problem when children engaged and involved with legal issues particularly in sharia criminal law.

Children in conflict with sharia criminal legislation need to be dealt with justice accordingly, as those involve with violation of criminal legislation under the Federal jurisdiction. Young age is not an excuse to deny them from being brought to justice. The argument that sharia crime is incline towards moral offence and known as 'victimless offences', this cannot be the justification to deny the need for child offender to be dealt with justice. In fact, their involvement in sharia crimes is alarming and increase in social turmoil of humanity, as the result of more serious and severe crimes such as the crime that follows such as homicide and abandonment of child. Early prevention at the stage of sharia criminal jurisdiction should be established. However, there are some fundamental issues which constrain and prevent a criminal justice with precise, perfect, clarity and fairness towards the child offender, particularly from the perspective of sharia criminal legislation.<sup>5</sup>

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<sup>3</sup>Shohreh Mousavi, et.al., "Improving the Legal Protection of Child in Conflict with the Law: Reintegration and Rehabilitation into society," Conference: 6th International Conference Indonesia-Malaysia, Surabaya, Indonesia (2012). Tengku Fatimah Muliiana binti Tengku Muda and Engku Ahmad Zaki Engku Alwi, "Care and Protection against Child Abuse: With Special Reference to Malaysia Child Act 2001," *Asian Social Science* 8, No. 1 (2012). List I, Ninth Schedule, Federal Constitution of Malaysia.

<sup>4</sup>Nadhilah A. Kadir and Azizah Mohd, "Child Protection Through Intercountry Adoption in Malaysia: A Literature Review," *Malaysian Journal of Social Sciences and Humanities* (MJSSH) 7, No. 11 (2022). List II, Ninth Schedule, Federal Constitution of Malaysia.

<sup>5</sup>Ammar Aziz Abdul Latief, "Child Protection Systems in Indonesia and Malaysia: Between Theories and Practices," *Journal of Creativity Student* 7, No. 1 (2022),

Special laws for children in conflict with sharia penal code should be proposed, established and enforced in the jurisdiction of each country. It aims to protect the child and for the benefit of the child's future in accordance with the objectives of Islamic sharia (*maqāṣid al-sharī'ah*).<sup>6</sup> However, this effort incurs a long time and meticulous process. At the same time, the increase in sharia crime among children is alarming and demands an immediate and fair solution to the affected children as well as the community. Standard operating procedures (SOP) are therefore the most effective and quick solution to address this issue. The standard operating procedures shall comprise rules or guidelines that are structured and easy to understand would be one mode of legal mechanism for quick reference and legally enforceable in accordance with the law. Therefore, this paper presents the justification on the importance to establish a specific standard operating procedure for children in conflict with sharia criminal law at the pre-trial stage under the jurisdiction of the state religious enforcement.

The methodology of pure legalistic studies of a qualitative approach is mainly used in writing of this article. Data collection is through library and field studies. The armchair research involves review and analysis of relevant legal statutes such as the Child Act 2001 (Act 611), (Amedment 2016, A1511), states' sharia criminal enactments and states' sharia criminal procedure enactments; compilation of international treaties relating to children such as the Convention on the Rights of the Child (CRC) and the United Nation Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules); journal articles, thesis and so on. While the fieldwork research involved some interviews with religious enforcers from the Operations and Investigation Division at the Enforcement Division of the Selangor Islamic Religious Department (*Jabatan Agama Islam Wilayah Persekutuan/JAIS*) and the Investigation Branch at the Enforcement Division of the Department of Federal Territory Islamic Affairs (*Jabatan Agama Islam Selangor/JAWI*) as respondents. Semi-structured interview methodology were used to obtain data. The compilation of such data were analyzed thermatically and descriptively to produce a coherent discussion.

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p. 87-112. Fajri M. Kasim, et.al., "The Protection of Women and Children Post-Divorce in Sharia Courts in Aceh: A Sociological Perspective," *Ahkam: Jurnal Ilmu Syari'ah* 22, No. 2 (2022).

<sup>6</sup>Zanariah Binti Noor and Nazirah Lee, "Preserving Child's Faith in Malaysian Law: A Maqasidic Approach," *Ulumuna: Journal of Islamic Studies* 27, No. 1 (2023). Hari Sutra Disemadi, et.al., "Indonesian Children Protection Against Commercial Sexual Exploitation through Siri Marriage Practices in Maqashid Al-Shariah Perspective," *Brawijaya Law Journal* 7, No. 2 (2020).

### **Justification for a Pre-Trial Standard Operating Procedure**

A standard operating procedure is a written instruction that documents methods to perform the routine activities of an organization, such as a process, response to a situation or policy.<sup>7</sup> SOPs are documents related to procedures performed chronologically in order to complete a task by obtaining the best outcome through the most effective and structured manner. SOPs are synonymous with laws, regulations or guidelines. SOP formation are usually based on the laws provided in the relevant acts, enactments or ordinances.

For example, the Standing Order of the S.S. Director of the State Islamic Religious Department provided SOPs on the procedure of receiving information, conducting investigations, preparing investigation papers, preparing brief case reports and handling seized items. This Standing Order elaborates and illustrates the sharia criminal procedure legislation in force at the state level. A more practical, simple-to-understand, and easier-to-follow policy, guideline, or manual for enforcement management is concisely and precisely formulated in the Standing Order. The 2007 States Islamic Religious Department Director's Standing Order summarizes and translates the terminology used in legal provisions which is very technical and complicated to understand, if not being scrutinized and read literally.<sup>8</sup> This document further details the implementation of the procedure in a structured manner for reference purposes as well as guideline for stakeholders.

The enforcement of sharia criminal procedure legislation through the Standing Orders of the Director of States Islamic Religious Department has actually been pioneered by the states of Melaka and Selangor. For instance, the Standing Orders of the Director of the Selangor Department of Islamic Religion (JAIS) 2002 were general guidelines for religious enforcement officers and contained 67 provisions that should be followed by all religious enforcement officers in carrying out and performing their duties including method in dealing with information and complaints from the public. The 2003 Standing Order of the Director of the Selangor Department of Islamic Religion (JAIS) was subsequently issued to implement preventive measures under section 31 of the Syariah Criminal Offences (State of Selangor) Enactment 1995 regarding rules in dealing and handling offences involving indecent acts in public places. At that time only the state of Selangor had

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<sup>7</sup>Doughlas Hawks, “*Standard Operating Procedures: Definition & Explanation*”, <https://study.com/academy/lesson/standard-operating-procedures-definition-lessonquiz.html>, (n.y.) Access October, 2022.

<sup>8</sup>Siti Zubaidah Ismail, “Dasar Penguatkuasaan dan Pendakwaan Jenayah Syariah di Malaysia: Satu Analisis,” *Jurnal Syariah*, Jil. 16, Keluaran Khas, (2008), p. 545-546.

specific guidelines for dealing with offences involving indecent acts in public places for the purpose of enforcing section 31 of the Syariah Criminal Offences (Selangor) Enactment 1995<sup>9</sup>. The section states: “Any person who, in any public place, wilfully acts or behaves in an indecent manner contrary to Islamic Law shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.”

In order to enhance and strengthen the existing procedures in line with the goal of empowering sharia enforcement institutions, a number of proposed amendments have indeed been made. The Standing Order of the Director of States Islamic Religious Department then were reviewed and refined in 2021.<sup>10</sup>

The standard operating procedure (SOP) in the Standing Order of the S.S. Director are also applicable in cases involving child suspects. Obviously, this standard operating procedure (SOP) is in general form and can automatically be applied in cases with child suspects. However, it is necessary to consider the position on rights of child suspects as provided in Article 40 (1), the United Nation Convention on the Rights of the Child (UNCRC) which Malaysia ratified. Therefore, the pre-trial standard operating procedures (SOPs) for children in conflict with the states' sharia criminal law should be established and enforced. The importance of these standard operating procedures (SOPs) under the jurisdiction of sharia criminal justice is due to reasons and justifications in the following discussion.

### **Uncertainty Regarding the Position of Children in Conflict with the State Sharia Criminal Legislation**

The criminal conduct of a child, as in the criminal act of an adult, begins to be dealt with justice from the moment he is suspected or arrested for a criminal offence. Search, detention and the following interrogation forms a complete pre-trial procedure. This procedure should be different from the procedure of an adult offender since the issue of children's rights always accompanies anything that involves them. The Declaration of the Rights of the Child 1924 in Geneva and in the Declaration of the Rights of

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<sup>9</sup>Wafaa' binti Yusof, “Tatacara Pra Perbicaraan Jenayah Syariah Terhadap Suspek Kanak-Kanak: Analisis Perundangan di Malaysia”. PhD Thesis, Faculty of Law: Universiti Kebangsaan Malaysia, (2017), p. 211.

<sup>10</sup>Portal Rasmi JAKIM, “Pemantapan Prosedur Penguatkuasaan Melalui Cadangan Penambahbaikan Kepada Arahan Tetap Pengarah JAIN”, <https://www.islam.gov.my/ms/berita/2636-pemantapan-prosedur-penguatkuasaan-melalui-cadangan-penambahbaikan-kepada-arahan-tetap-pengarah-jain>, (April 8, 2021).

the Child which was adopted by the United Nations General Assembly on 20 November 1959 affirmed that children are entitled to special attention and treatment. Moreover, countries that ratified the United Nation Convention on the Rights of the Child (UNCRC) including Malaysia, should: "Recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."<sup>11</sup>

While the United Nation Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules) under Regulation 2.2(a) states that: "A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult".<sup>12</sup>

This rule, although not ratified by Malaysia, generally it refers to the right of a child offender to be treated with fairness and justice while the principle 'for the best interest of the child' will be the paramount consideration. This guarantee should not exclude child suspects under the states' sharia criminal jurisdiction in Malaysia.

The author's initial finding discovers that only two provisions of the states' sharia criminal procedure legislation in Malaysia specifically referred to minors i.e. young offenders or juvenile offenders and children.<sup>13</sup> Provisions relating to young offenders or juvenile offenders in each state enactment and criminal procedure legislations only affects procedure at the trial and post trial stage.<sup>14</sup> Section 128 of Syariah Criminal Procedure Enactment (State of Selangor) 2003 for instance provides:

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<sup>11</sup>The United Nations, "Convention on the Rights of the Child." Treaty Series 1577 <http://www.cirp.org/library/ethics/UN-convention/>, (1989), p.11.

<sup>12</sup>United Nations, "The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)", <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.Pdf>, p. 4 (1985).

<sup>13</sup>Wafaa' Binti Yusof and Anita Abdul Rahim, "The Age of Criminal Responsibility from the Perspective of Malaysian Shariah Law", *Asian Social Science* 10, No. 10, (2014), p. 95-104.

<sup>14</sup>Section 128, Syariah Criminal Procedure (Federal Territories) Act 1997 (Amendment 2005), Syariah Criminal Procedure Enactment (Negeri Johor) 1997 (Amendment 2003), Syariah Criminal Procedure Enactment (State of Kelantan) 2002 (Amendment 2006), Syariah Criminal Procedure Enactment (State of Melaka) 2002, Syariah Criminal Procedure Enactment (Negeri Pahang) 2002, Syariah Criminal Procedure Enactment (State of Penang) 2004, Syariah Criminal Procedure Enactment (State of Perak)

“Section 128. Young offenders.

(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-

- (a) order such offender to be discharged after due admonition if the Court shall think fit; or
- (b) 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 two hundred ringgit in any case in which such Court, after summary enquiry, is satisfied that such parent or guardian has, by neglecting to take proper care or otherwise, conducted 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.”

Religious enforcers and sharia judges use these provisions in most cases involving child offenders. In other words, the term 'juvenile offender' or 'young offender' is widely applied in reference to children. Furthermore, the only provision relating to children only refers to the need to obtain the

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2004, Criminal Procedure Enactment in Sharia (State of Perlis) 1991, Syariah Criminal Procedure Enactment 2004 (State of Sabah), Syariah Criminal Procedure Ordinance (State of Sarawak) 2001, Syariah Criminal Procedure Enactment (State of Selangor) 2003, Syariah Criminal Procedure (Terengganu) Enactment 2001; Section 130, Syariah Criminal Procedure Enactment (State of Kedah) 1988 (Amendment 1999); Section 132, Syariah Criminal Procedure (State of Negeri Sembilan) Enactment 2003.



child's name and address for the purpose of verifying the suspect's identity only.<sup>15</sup>

The term 'child' is not clearly defined in the states' sharia criminal enactments. However, the term is found and mentioned in these enactments except in Perlis, Kedah, Kelantan and Pahang regarding the actions of children who have not yet reached the age of *baligh*. For example, as provided in section 43 of Syariah Criminal Offences (Selangor) Enactment 1995: "Nothing is an offence which is done by a child who has not attained the age of *baligh*."

These provisions are numbered differently and for instance section 51 for Syariah Criminal Offences Act (Federal Territories), Syariah Criminal Offences (State of Johor) Enactment 1997, and Criminal Offences (State of Penang) Enactment 1996; section 10 for Syariah Offences (State of Malacca) Enactment 1991, Syariah Criminal Offences (Selangor) Enactment 2004, and Syariah Criminal Offences (Sabah) Enactment 1995; section 4 for Crimes (Syariah) (Perak) Enactment 1992; section 43 for Syariah Criminal Offences (Selangor) Enactment 1995; section 63 for Syariah Criminal Offences (Taazir) (Terengganu) Enactment 2001 and section 48 for Syariah Criminal Offences (Sarawak) Ordinance 2001.

While the state enactments and acts on sharia criminal procedure only mentioned the term 'child' once as previously mentioned in the provision for checking a person for their names and addresses, for example, section 17 of the Syariah Criminal Procedure Enactment (State of Selangor) 2003: "Every person lawfully in custody, who by reason of incapacity from intoxication, illness, mental disorder or infancy is unable to give a reasonable account of himself, may be searched for the purpose of ascertaining his name and place of residence."

The use of different terms of children causes conflicts in the implementation and enforcement of the sharia criminal law and sharia criminal procedure in all the states. These anomalies in the provisions lead to

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<sup>15</sup>Section 17, Syariah Criminal Procedure (Federal Territories) Act 1997 (Amendment 2005), Syariah Criminal Procedure Enactment (Negeri Johor) 1997 (Amendment 2003), Syariah Criminal Procedure Enactment (State of Kedah) 1988 (Amendment 1999), Syariah Criminal Procedure Enactment (State of Kelantan) 2002 (Amendment 2006), Syariah Criminal Procedure Enactment (State of Melaka) 2002, Syariah Criminal Procedure (State of Negeri Sembilan) Enactment 2003, Syariah Criminal Procedure Enactment (Negeri Pahang) 2002, Syariah Criminal Procedure Enactment (State of Penang) 2004, Syariah Criminal Procedure Enactment (State of Perak) 2004, Criminal Procedure Enactment in Sharia (State of Perlis) 1991, Syariah Criminal Procedure Enactment (State of Sabah) 2004, Syariah Criminal Procedure (State of Serawak) Ordinance 2001, Syariah Criminal Procedure (State of Selangor) Enactment 2003 and Syariah Criminal Procedure (Terengganu) Enactment 2001.

inconsistencies between the two legislations, namely the sharia criminal enactment and sharia criminal procedure enactment in determining the position of a child suspect and offender committing sharia offences.

The absence of detailed provisions for pre-trial procedures which begins with arrest, search, detention and interrogation of children does not appear to cause issues for the religious authorities or the sharia judges. They apply provisions in the enactments and acts of sharia criminal procedure which applicable to adult offenders. This approach is based on the position for the age of criminal responsibility of a child according to Islamic rules which commences when a child reached the age of puberty or *baligh*.<sup>16</sup> In other words, '*baligh*' becomes the indicator to place criminal responsibility on children according to Islamic rules and some differences of opinion among Islamic jurists in this matter. These different views affect the inconsistency in provisions of the sharia criminal law among states in Malaysia in determining the age of *baligh* as well as the enforcement of pre-trial criminal procedure in dealing with children. The definition of *baligh* is provided in most of the states' sharia criminal enactments, acts and ordinances, except for Kedah, Kelantan, and Perlis. Thus, there are no provisions on the status of *baligh* in Shariah Criminal Code (State of Kedah) Enactment 1988, Shariah Criminal Code (Amendment) (State of Kelantan) Enactment 1987 and Criminal Offences in the Syarak (Amendment) (State of Perlis) Enactment 2007.

Legal provisions on the issue of puberty or *baligh* were deeply analysed in 2014.<sup>17</sup> There are several different provisions regarding *baligh* in the states' sharia criminal legislation in Malaysia. Firstly, there are provisions referring to the status of *baligh* in accordance with Muslim jurists in general. Some jurists opined that *baligh* indicates a child is physically and mentally fully grown or developed or as a sign of puberty trait of a child's intellect maturity and wisdom.<sup>18</sup> *Baligh* marks the end of adolescence and

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<sup>16</sup>Muhammad Rabī Sabāhī, "*Jarā'im al-ahdāth fi al-shari'āt al-Islāmīyah, al-mushkilāt wa al-<sup>o</sup>ilāj*", (2008), p. 79. °Abdul Rahmān bin Abi Bakr Jalāl al-Addīn al-Sayūfī, "*Al-ashbāh wa al-nazā'ir*", (1990), p. 40, 240-243. °Abd al-Qādir °Awdah, "*al-Tashrī' al-jana'i al-Islam muqāranan bi al-qānun al-wad'i*", Jil.1, (1987), p. 602.

<sup>17</sup>Wafaa' Binti Yusof and Anita Abdul Rahim, "The Age of Criminal Responsibility from the Perspective of Malaysian Shariah Law", *Asian Social Science* 10, No. 10 (2014), p. 95-104. Anita Abdul Rahim and Wafaa' Binti Yusof, "Umur Pesalah Kanak-kanak: Ketidakteragaman dalam Enakmen Jenayah Syariah dan Enakmen Tatacara Jenayah Syariah di Malaysia", *Kanun: Jurnal Undang-Undang Malaysia* 24, no.1, (2012), p. 1-23.

<sup>18</sup>Al-Āmīdī, °Alī ibn Abī °Alī ibn Muḥammad. "*al-Iḥkām fī Uṣūl al-Aḥkam*," Bayrūt: Dār al-Kutub al-°Ilmiyyah, (n.d.).

the beginning of adulthood, placing full responsibility for their conduct.<sup>19</sup> The disclosure of physiological signs indicates the end of childhood and the proof of physical development and maturity of the child's mind. Secondly, a person is considered *baligh* when he has attained the age of twelve years old according to *qamariah* years and it is only provided under the Syariah Criminal (Negeri Sembilan) (Amendment) Enactment 2004<sup>20</sup> exclusively. Section 2 of the enactment states:

“Section 2 (1) In this Enactment, unless the content of the sentence requires a different meaning -"baligh" means a person who has reached the age of twelve lunar years;”

On the other hand, the two states, Malacca and Sabah legislations do not define *baligh* but they have established a level of a certain age to be considered as the age of a non-*baligh* child. It involves a person under the age of fifteen *qamariah* years<sup>21</sup> and a person under the age of twelve *qamariah* years<sup>22</sup> to be presumed as a child or a non-*baligh*. This would mean that children who reach the age of fifteen years according to Malacca sharia criminal legislation are considered to have attained the age of *baligh* when there are no signs of physiology. Section 10 of the Malacca enactment states:

“Section 10. Acts of minors. It is not an offense for anything done by a child who has not reached puberty. Description - a person who is less than 15 years old Kamariah should be considered a minor.” While the Syariah Criminal Offences (Sabah) Enactment 1995 provides:

“Section 10. Acts of minors. It is not an offence for anything done by a child who has not reached puberty. Description - a person who is less than 12 lunar years old should be considered a minor.”

Finally, *baligh* and *rushd* are required simultaneously in the states' provision. The state of Perak<sup>23</sup> and Pahang<sup>24</sup> legislations require not only *baligh* but also *rushd* for children considered to be committing a crime. Section 4, Crimes (Syariah) Enactment 1992 (State of Perak) for instance states: “Section 4. Act of a child not yet akil baligh. Nothing is an offence which is done by a child who is not yet *aqil baligh*.”

The inconsistent provision in the states' sharia criminal enactment regarding the age of *baligh* issue and the provision of the states' sharia criminal procedural law regarding young or juvenile offenders which cause

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<sup>19</sup> Ibn 'Abidin, “*Hashiyah Radd Al-Muhtār 'ala Al-Durr Al-Mukhtār*”, (2000).

<sup>20</sup> Section 2, Syariah Criminal (Negeri Sembilan) (Amendment) Enactment 2004.

<sup>21</sup> Section 10, Syariah Offences (State of Malacca) Enactment 1991.

<sup>22</sup> Section 10, Syariah Criminal Offences (Sabah) Enactment 1995.

<sup>23</sup> Section 4, Crimes (Syariah) Enactment 1992 (State of Perak).

<sup>24</sup> Section 62, Syariah Criminal Offences (Pahang) Enactment 2013.

difficulties in implementation of sharia criminal justice against child suspects in Malaysia. This situation has resulted as inconsistent implementation of sharia criminal procedure law by religious authorities or related institutions.

According to the states' sharia criminal procedural enactment and act, the age between ten and sixteen years old has impliedly considered to have attained the age of *baligh*. The ruling states *baligh* as the age for criminal responsibility for children, and that the term young offender or juvenile offender aged between 10 to 16 years in the states' sharia criminal procedure enactment and act were inconsistent, therefore the position of the child is treated in the same position as an adult. This is different as compared to the pre-trial criminal procedure of a child suspect under the jurisdiction of the Child Act 2001 (Act 611), (Amendment 2016, A1511) which retains the status of a child at any stage of a criminal procedure as long as he/she is 18 years of age and below, despite the commencement of the age of criminal responsibility prescribed in the Penal Code is the same as provided for in the sharia criminal acts and enactments which is 10 years.

The ambiguity on the position of child suspect and offender in the states' sharia criminal law whether subsidiary or procedural law affects the criminal justice towards them. Emphasis should be given to the absence of clear legal mechanisms in the implementation and enforcement of pre-trial sharia criminal procedure against child suspects. Certainly, revision and amendment to existing laws can be implemented and the drafting of new laws can be proposed and made, however, immediate measures must be taken to ensure justice for the affected children. Therefore, the move to establish this particular Standard Operating Procedure (SOP) is the fastest alternative to address this issue.

### **Inconsistent Enforcement Actions in Dealing With Cases Involving Children in Conflict with Sharia Law**

The state sharia criminal jurisdiction does not elaborate on the sharia criminal procedures for child suspects and offenders including specific provisions on children regarding pre-trial procedures. The ambiguity in the legal provisions relating to the position of children in conflict with sharia criminal law has a significant impact on the state religious enforcers. Their actions are without clear guidance, vary and are vulnerable to the discretionary power of the acting officer. Ultimately they are inclined towards executing and enforcing procedures on arrest, search, detention and investigation towards child suspects in the same manner as adult suspects. However, their actions can be disputed and may result in a violation of the rights towards the affected child. Article 40 (3) of the United Nation

Convention on the Rights of the Child (UNCRC) states: “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

This Article clearly demands the establishment of separate laws and procedures specifically applicable to children charged with criminal cases. It is the obligation of the state parties to formulate special rules and procedures for criminal proceedings. The demands also involve the jurisdiction of states' sharia criminal dan procedural law in Malaysia. There is actually no comprehensive separate procedure governing children's criminal proceedings at the pre-trial, trial and post-trial stages under the jurisdiction of the Child Act 2001 (Act 611), (Amendment 2016, A1511). The Criminal Procedure Code of Malaysia which controls the entire process of criminal procedure are generally referred if whether there is a lacuna in the Child Act 2001 (Act 611), (Amendment 2016, A1511) relating to the criminal procedure. The Act specifically includes clauses that directly justify the Criminal Procedure Code (CPC) applicability in some criminal proceedings. For instance, Section 11(6) of the Act expressly states that, in the absence of a particular provision providing for a separate or distinct procedure, criminal procedure relevant to criminal proceedings provided under the Criminal Procedure Code (CPC) must apply to Court for Children. Nevertheless, the situation is different under the jurisdiction of the states' sharia criminal procedure. In contrast to the Child Act 2001 (Act 611), (Amendment 2016, A1511), there is no safety clause offered which permits the states' sharia criminal procedure legislation for adult suspects and offenders to be referred to and implemented in the event of a lacuna in the relevant law. Either the Criminal Procedure Code (CPC) or states' sharia criminal procedure enactment as general statutes are designed to be made applicable to adults. The criminal procedures provided are too formal, rigid, not child-friendly and inappropriate for children. Aminuddin Mustaffa went on to emphasize that it is the weakest part of Malaysia's juvenile justice system.<sup>25</sup>

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<sup>25</sup>Aminuddin Mustaffa, “Rights of Children in Criminal Proceedings: A Comparative Analysis on The Compatibility of The Malaysian Juvenile Justice System with The Standards of The Convention on Rights of Children (CRC)”, PhD Thesis, Law School: Lancaster University, (2016), p. 232.

Therefore, the implementation of pre trial procedures which are performed on child suspects, for instance, should be different from adult suspects.<sup>26</sup> According to Hinkle,<sup>27</sup> the authorities are not allowed to use handcuffs while handling child suspects unless they are forced to do so and if the location of an arrest is to be made at a school, then the authorities cannot wear their official uniform. The offence committed by a child does not suspend their rights at all. Authorities will normally detain and warn a child suspect before allowing him to be free, or detain the child until both parents are present or place the child in custody until his case is referred to court.

The effectiveness of legal mechanism in enforcement and implementation of existing pre-trial procedural continue to raise questions and concerns when statistics shows an increase in sharia criminal cases involving child perpetrators. The writer views this situation as an impact of the enforcement and implementation of pre-trial criminal procedures that are too tolerant, simple and loose. For example, the data that shows the arrest of children who commit certain crimes even if not been consistently recorded, already demonstrate those arrest procedures as not a priority or an option. Mostly they were released with a warning or sent for counselling without going through the arrest process.<sup>28</sup>

The broad and unlimited discretionary powers of the authorities in the process of arrest, search, detention and interrogation are the main reason for the violation of the rights of child suspects. This is particularly obvious if the provisions enacted are still at a minimum stage without further detail and too general which allows a wide opportunity for such discretionary powers. For instance, the prohibition against harsh treatment and excessive pressure exerted on child suspects during arrest and interrogation was not adequately explained and clearly addressed. These are a few of the deficiencies of the child-related legal provisions in various statutes. Such a situation occurred due to the enforcement and application of pre-trial procedural laws of adult

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<sup>26</sup>United Nations, "The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)", <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.Pdf>, (1985), p. 4.

<sup>27</sup>Hinkle, et.al., "When A minor Commits A Crime", (2007), p.12.

<sup>28</sup>Interview with Respondent 1, Senior Assistant Director, Enforcement Management Division, 17 July 2017. Interview with Respondent 2, Assistant Director of Investigation Unit, Enforcement Management Division. 17 July 2017. Interview with Respondent 3, Assistant Director of Planning & Strategic Unit Enforcement Management Division 17 July 2017. Interview with Respondent 4, Assistant Director of Investigations, Investigations Division, JAWI, 23 April 2017. Wafaa' binti Yusof, "Tatacara pra perbicaraan jenayah syariah terhadap suspek kanak-kanak: analisis perundangan di Malaysia". PhD Thesis, Faculty of Law: Universiti Kebangsaan Malaysia, 2017), p. 22.

suspects or offenders against the affected children. In other words, this situation can be avoided if a specific law is enacted and implemented towards child suspects.

### **Conclusion**

The tendency of studies relating to children under the sharia criminal jurisdiction was previously focused on substantive law compared to procedural law. Even if there were any, it only revolves around the procedure for execution of a child suspect, whereby the study on pre-trial procedures is primarily not being scrutinized in depth. Therefore, a study on the pre-trial sharia criminal procedural laws on child suspects in Malaysia should be performed. Investigation and exploration of the principles and rules for pre-trial sharia criminal procedural laws towards children should be performed, and minimising the legal gaps and flaws in the implementation of procedures should be addressed. The child suspects and offenders should have special treatment due to their right to be treated in a manner consistent with the promotion of the child's sense of dignity. The pre-trial criminal procedures of a child and an adult differ because the child's sensitivity has to be considered with respect to his dignity and tender age. The establishment and formation of a standard guideline is therefore the fastest and most immediate step to address this issue while efforts towards enacting the relevant laws are being made. The right of a child suspect and offender to be treated with fairness and justice while the principle 'for the best interest of the child' will be the paramount consideration in this endeavour.

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