

# **Criminal Accountability and Juvenile Offenders : A Study Under Islamic Principles, International Law and the Children Act, 2013**

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## **Abstract**

*The perception of offence, judicial method, justice and penalty prescribed in sharia is different from the secular law. The Islamic Criminal law has approved many crimes with providing deterrent, reformative, retaliative and other kinds of penalties in order to uphold peace in the society and reform the criminals. In the Islamic law juvenile shall not be punished with Qisas and Hadd. This paper aims to examine the Islamic principles of justice to juvenile offender which explains by the Quran and hadith. This study tries to discover the exact position of international law towards juvenile offender. It also investigates the newly enacted legislation in Bangladesh to protect the juvenile offender from inhuman treatment in the judicial proceedings.*

**Key words:** Juvenile offender, Criminal accountability, UNCRC, the Children Act, Qisas

## **1. Introduction**

Allah creates human being with intellect to execute both right and wrong. Allah says, “And its enlightenment as to its wrong and its right.”(Quran 91-8) Doing wrong is inherent nature of mankind which started from the initial stage of human being creation. Allah prescribed punishment for evil deeds and reward for good deeds in the day of ultimate judgment. In fact, Allah also identifies punishment to offences for safeguard individual and society in the world. The object of the Islamic criminal law is to control the commission of the offences to defend the rights and interest of the public and assure peace in the society. (Anwarullah, 1997) Punishment is the actual method to protect and safeguard society against crimes and is thus a social need. The Holy Quran states, “whoever works evil, will be requited accordingly.”

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(Quran 4:123) (A. Y. Ali, 1999) Al Quran states in another verse, "And anyone who has done an atom's weight of evil, shall see it." (Quran 99:8)

The general *fitrat* (nature) of juvenile is committing erroneous and mistake out of intent and thoughtful. (Islam, 2015) Accordingly, Juveniles are often commits wrong or offences in the society by the lacking of proper knowledge about crime or without intent to crime. Islamic basic principle is intent or guilty mind of crime is essential component to grand punishment. (Islam, 2015) The Prophet is reported "The reward of deeds depends upon the intentions and every person will get the reward according to what he has intended..." (Bukhâri & Khan, 1997) hadith no-01 Juvenile and child are the future of nation and for proper guide, create potential leadership in the country Islam exceptionally treats towards juvenile through providing basic principles related to trial in respect of commits crime. The practices of the prophet (s.m) and righteous *khalifa* are exemplary in this regard. The ultimate objectives of this study are to highlights the Islamic distinctive principles towards juvenile offender, to expose the present rule of International law for treat the juvenile offender and finally to discuss the provision concerning particular measures to juvenile offender under The Children Act, 2013

## 2. Concept of Criminal Accountability

Criminal Accountability indicates that a person should bear the consequence of the crime which he commits intentionally with full consciousness of the significance and consequence thereof. (Anwarullah, 1997) Islamic criminal law holds accountability only those alive persons who are under responsibility. The wrong deeds of the children are not responsible till they reach the age of puberty. Al Quran says, "But when the children among you come of age, let them (also) ask for permission, as do those senior to them (in age): Thus does Allah make clear His Signs to you: for Allah is full of knowledge and wisdom." (Quran 24:59) The Holy Prophet (s.m) said, "Three persons are not accountable, a child until he reaches the age of puberty, a sleeping person until he awakes and an insane person until he become sane." (Hanbal, 1999) This hadith also includes insane and sleeping person is out of criminal responsibility. "Sane" means a person who knows what he speaks and gives rational answers to the questions put to him. (Anwarullah, 1997) The Qur'an states, "O ye who believe! Approach not prayers with a mind befogged, until ye can understand all that ye say,- nor in a state of ceremonial impurity (Except when travelling on the road), until after washing your whole body." (Quran 4:43)

The Islamic law does not create accountable anyone who commits a crime under pressure, coercion and compulsion as well as anybody who is unable of deliberate choice. (Anwarullah, 1997) Allah says in the Quran, "But if one is forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless." (Quran 2:173) The Prophet

(s.m) says, “My Ummah is exempted from mistake, forgetfulness and the act done under coercion.” (Tirmizi, 1980) Hence, in respect of commission of the offences in the following circumstances will be considered exception to the criminal responsibility; Minority, Lunacy, Intoxication and Coercion. In Islamic criminal law the criminal accountability and responsibility rests on three bases, namely,

- i. The person commits a forbidden act.
- ii. The person commits a crime with his free consent.
- iii. The person who commits an offence is mature and sound and can differentiate between the correct and wrong.

In the nonappearance of the first basis there is no criminal obligation and thus question of punishment does not rise. In the absence of the second and the third bases, criminal accountability is there but there is no sentence. (Anwarullah, 1997) The purpose of criminal responsibility is to ensure protection the public interest and make peace in the society because the commission of offences is harmful to collective order and system of beliefs as well as to the life, property, honor and feelings of the individual interest. Deeds that appear prejudice to the welfares of the individuals adversely affect combined interests in the final analysis. (Anwarullah, 1997)

### **3. Concept of Juvenile**

The Prophet acquitted immature persons entirely from accountability by stating that, “three (categories of) people are free from responsibility, the insane until he is sane, the sleeping until he wakes up and the child until his reaching maturity.” (Dawud & Hasan, 1984), kitabul hudud, hadith no-4402 In terms of juveniles, a minor is considered “a person who has not attained the age of maturity as specified by Islamic jurisprudence”. According to the Article 1 of OIC Covenant on the Rights of the Child in Islam (CRCI), child is “... every human being who, according to the law applicable to him/her, has not attained maturity.” (CRCI) For this matter Islamic law deliberates every person who has not reached puberty to be a minor for all purposes of religious and legal accountabilities. (Islam, 2015) Childhood under Islamic Law is, therefore, not firmly definite by age, as different child reach puberty at different ages as a matter of fact. (Almihdar, 2008)

A child becomes adult either by reaching a definite limit of age or puberty. (Anwarullah, 1997) The age regarding the attainment of majority varies in the different schools of theology and although there is uncertainty over the physical symbols of puberty. (Munir, 2014) Imam Malik, Imam Shafi and Imam Ahmad opine that whether male or female, a child becomes adult by reaching the age of 15 years. But according to Imam Abu Hanifah a female child come to be adult by attaining the age of 17 years while a male child becomes adult by

reaching the age of 18 years. Puberty is achieved by a child when his or her sex glands become functional and the secondary sexual features appear. The symbol of puberty in a male adolescent is known by his strength to impregnate a woman and the release of sperm, and a girl's puberty is identified by her menstruation, nocturnal pollution and pregnancy. (Anwarullah, 1997) In the advancement of the Shari'ah, it is acceptable for the State to adopt a policy to prevent maltreatment in the society, under the doctrine of public interest (*maslaha*) or that of inspiring good and stopping harm (*hisbah*). (Munir, 2014)

Islamic law deliberates a person as fully accountable when he/she has attained the age of *bulugh*. This means the physical maturity, not necessarily the mental maturity. (Tellenbach, 2004) Criminal accountability firms not by a person's age but by biological maturity. Only people who are *balig* (of legal age in the logic of biological sexual maturity) can be criminally liable. They are punishable, however, only if a complete possession of their mental abilities (*aqil*). (Ende & Steinbach, 2010)

In the matter of juvenile, According to Article 1 of the United Nations Convention on the Rights of the Child, 1989 a child is defined as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". (UNCRC, 1989) In The Children Act 2013, a child is defined in section 4 and includes anyone up to the age of 18 years.

#### **4. The Position of Juvenile Offenders in Islam**

Islam is such religion and way of guide considered the all individual's right and safety. The common policy of the prophet (s.m) towards child was love, mercy and compassion. The prophet (s.m) declares: "He is not one of us who does not have mercy on our young and does not respect our elders." (Tirmizi, 1980) hadith no 1919 & 1920. He also said in another hadith, "The one who does not demonstrate sympathy to human being he will not be shown sympathy by Allah." (Tirmizi, 1980) hadith no1922. The jurists have ascertains the three major elements of a crime and by the absent of these elements, the offender shall not be accountable to the penalty. These elements are:

- i. A clear provision for forbidding an act constituting offence and announcing punishment thereof, it is known as legal element.
- ii. Doing of an act which extends to the commission of the crime it's called substantial element.
- iii. The maturity, competence and accountability of the offender which means cultural element. (Anwarullah, 1997)

In this regard, the elementary principles in the Islam towards the juvenile offenders are: (1) There shall be no crime without law; (2) there shall be no punishment without law; (3) there shall be no retroactive punishment without law; (4) presumption of innocence unless proven guilty; (5) every person has the right to the protection of life, liberty, and property; (6) the right to a fair and public trial before an impartial judge. (Munir, 2014)

The most significant and fundamental principles are '*No crime without law*' and '*No one shall be punished without law.*' In order to consider an act as a crime, a clear and unambiguous provision of Shariah must be declared that act illegal and unlawful with prescribing punishment. Such provision must be compulsory. The Holy Quran states, "As to the thief, Male or female, cut off his or her hands.." (Quran 5:38) Al Quran further declares, "The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes.." (Quran 24:2) "O ye who believe! the law of equality is prescribed to you in cases of murder.." (Quran 2:178) According to Al-Mawardi, "crimes are wrongful acts in *Shariah* for which punishments have been prescribed by God whether *hadd* (fixed punishment) or *Tazir* (discretionary punishment)." (Al-Mawardi & Muhammad, 1960) Both in Islamic law as well as in conventional law the commission or omission of a deed is not measured crime until punishment has been arranged for that. (Audah)

'*Non-retroactivity*' of criminal law is another elementary rule of the Shariah. In the Islamic law system guilt and responsibility is strictly personal. This principle denotes that unless appropriate provisions exist, a person shall not be penalized for any act. This is marked from many verses of the Quran. Allah says, "No bearer of burdens can bear the burden of another: nor would We visit with Our Wrath until We had sent an messenger (to give warning)." (Quran 17:15) Allah further mention, "Nor was thy Lord the one to destroy a population until He had sent to its center a messenger, rehearsing to them Our Signs; nor are We going to destroy a population except when its members practice iniquity." (Quran 28:59) "...that he may taste of the penalty of his deed. Allah forgives what is past: for repetition Allah will exact from him the penalty. For Allah is Exalted, and Lord of Retribution." (Quran 5:95) In another verse of Al Quran states, "Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear of burdens can bear the burden of another." (Quran 6:164) The principal meaning of all these verses is that there is no punishment without a preexistent law criminalizing such behavior. (KAMALI, 2000)

The principle of '*presumption of innocence*' is the most important elements of the Islamic legal systems. According to Islamic view man is considered as initially innocent and pure. Hence every individual is recognized to act righteously and justly until the dissimilar is proved. (Husseini, 2003) The presumption of innocence is accepted in Islamic law that the burden of proof of the claim is on the prosecution; it is not the offender who has to verify his

purity and innocence.(Al-Saleh, 1982) This principle is recognized from the following expression of the Prophet (s.m): “The burden of proof is on him who makes the claim, whereas the oath is on him who denies.” (KAMALI, 2000) The Prophet said: “Repeal the *hudud* punishments from Muslims as far as you can, so if there is a way out, leave him alone, for it is better for a ruler to make a mistake in forgiving someone rather than in punishing him.” (Tirmizi, 1980) The principle of presumption of innocence applies to other crimes as well such as *qisas* crimes (punishing the accused in the similar mode as the victim) and *ta‘zir* (in which the court has the discretion of granting the level of penalty). The *Sunnah* wants concrete evidence to prove the allegation and mere complaint is not enough to impose punishment. Furthermore, “an accuser who is an interested party cannot provide the sole basis of evidence sufficient to sustain a criminal conviction. The accuser who pledges the criminal action must appear before the court personally and be go together with at least one witness who has the legal capability to testify to the facts constituting the crime charged and to corroborate some or all of the facts that the accuser asserts.” (Bussiuuni, 1997)

‘Every person has the right to the protection of life, liberty, and property’ is another elementary principle for established justice recognized and practiced by Islam. The Islamic law announces the right to life and property as inviolable.(Anwarullah, 1997) Numerous Quranic verse and hadith emphasizes on this rule. The Holy Quran declares: “And do not kill the soul which Allah has forbidden, except by right.” (Quran 17:33, 6:151) In this matter the Prophet delivered on the occasion of the Farewell Hajj, he said: "Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection."(Bukhâri & Khan, 1997) The Law of Allah firmly declares: "Do not devour one another's wealth by false and illegal means." (Quran 2: 288) Islam does not allow to state or court to take the life and property of anyone either by arbitrary and by unfair trial before the court. Another important rule under Islam concerning trial of juvenile is ‘The right to a fair and public trial before an impartial judge’. Fair and impartial trial is key point to ensure justice which is the highest moral virtue. The Quran sets great highlighting on the justice and the obligation of judge to do justice. The Quran says: “O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor..” (Quran 4:135) Al Quran further declares: “and I am commanded to judge justly between you.” (Quran 42:15) Allah categorically says: “And if you judge, judge between them with justice. Indeed, Allah loves who act justly.” (Quran 5:42) These all verses firmly established that, assurance justice is divine responsibility and obligation upon the judge and godlike right to the accused. All these above principles are similarly apply to a child accused of an offence.

It is known that, Islamic criminal law comprises of three types of punishment on the basis of crimes. Two of them, the *hadd* and *qisas* offences were considered as recommended by God whereas the offences of the last category, the *ta'zir* crimes, the punishments were gone to the discretionary power of the ruler, judge and his/her delegates. (Tellenbach, 2004) They are, however, bound to the common principles of Islam. In Islamic law only persons who have attained the age of adulthood (*bulugh*) can be penalized for a *hadd* crime. In the *qisas* law the crime of a juvenile is never regarded as committed by intent but only by clean carelessness. This means that retribution can never be do exercises against a juvenile and that the blood money that has to be paid has to be paid by the whole kinship, not by the juvenile himself. Again, fixed rules in the field of the *ta'zir* crimes are absent but the rules in the field of *hadd* crimes and *qisas* crimes show a common principle of Islamic law namely to take into account the age. (Tellenbach, 2004)

### 5. Example from Islamic Rulings

It is stated that a boy was alleged of accusing chaste woman in his poesy and was presented to 'Umar b. Al-Khattab. He queried whether the boy had grasped puberty and was stated that he had not. He thereby did not apply the *hadd* punishment against him. (Al-Jawziyya, 1999) It is further reported that a boy was blamed of theft and was presented to 'Uthman b. 'Affan. The boy was checked but had not reached the age of puberty and was thereby not penalized. (Al-Jawziyya, 1999) According to Islamic law the common principle is that a juvenile cannot create intent to commit a crime and his intention will be measured as a mistake. As a result, if juvenile killed somebody his family will pay the blood money. (Ustarushani, 1982) In case of divorce, *Talaq* pronounced by a child on his wife will not be in effect because the Prophet (s.m) said, "Every *talaq* is effective except the *talaq* of a child and insane." (Tirmizi, 1980), kitab al-talaq, bab talaq al-Ma'tuh, hadith no-1191. The rule of Islamic law of inheritance is a murderer does not get inheritance from the deceased, though, this rule is not appropriate to a minor and an insane because omission from inheritance is a penalty and they are not capable of punishment. (Ustarushani, 1982)

If any minor hurt, injured or killed another child, *qisas* (retribution) is not relevant to juvenile wrongdoers. It was narrated from Aysha binth Abu Bakr the Prophet said, "Three (categories of) people are free from responsibility, the insane until he is sane, the sleeping until he wakes and the child until his reaching maturity." (Hanbal, 1999) If a man commits sex with a female child out of marital relationship, he will be liable for *hadd* punishment. (Al-Sarakhsi & Ahmad, 1978) However, if a boy commits sex with a girl and both are minor, the boy as well as the girl will not be considered for *hadd* punishment, but he will be liable to pay *mahr*

(dower) to the girl. The girl is not capable of giving consent to sex. (Ustarushani, 1982) If the boy (juvenile) has occurred sex with a woman who was not agreeable, he shall not be punished by *hadd* punishment, but will have to pay her dower. However, if the woman is fully willing to commit sex with him, she will not be given the dower. (*Al-Fatawa Al-Khaniyah*, vol. 3) (Munir, 2014)

If certain people committed theft and one of the accused is a minor, the *hadd* punishment will not be imposed on all of them. However, if a person has illegal sex with a girl child, the adulterer will be penalized by *hadd* punishment. (Ustarushani, 1982) Equally, if a child is among the robbers group, the sentence of *hadd* shall not be implemented on all of them. (Al-Sarakhsi & Ahmad, 1978) Furthermore, in civil cases if a juvenile or an insane damaged something, they will be liable to pay compensation. (Ustarushani, 1982)

## **6. Juvenile Offender under International Law**

In the international law juvenile's rights are definite in various ways, covering a large range of political, civil, social, cultural and economic rights. The first international legally binding instrument addressed to child is The United Nations Convention on the Right of the Child (UNCRC), recommended to the United Nations on the 20th of November 1989 (UNICEF, 1989). It was the process of raising consciousness before the world community that child need different protections for fulfill basic human rights for everybody under the age of eighteen. By the sign and approve the CRC the state parties agree to arrange the required changes in their national legislation. For example Bangladesh enacts the Child Act, 2013, and China enhanced its criminal law to prohibit the death penalty for juvenile offenders in 1997. (International, 2007) Before this document various instruments were adopted to protect the right of juvenile offenders.

BEIJING RULES, 1985 emphasizes on Formation of laws, rules & provisions specifically for juvenile offenders & distinct institutions for administering justice to them. (ALI, 2014) Havana Rules 1990 considers care of juvenile.

In Article 6, The International Covenant on Civil and Political Rights (ICCPR) states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age." (ICCPR, 1966) Convention on the Rights of the Child (CRC) unambiguously eliminates juvenile offenders from the death penalty. In Article 37 states, "Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age." (UNCRC, 1989) This provision is fundamental principles of juvenile justice.

The Universal Declaration of Human Rights (UDHR), 1948 stress on the principle of the right to be presumed innocent until proved guilty. The Cairo Declaration on Human Rights in Islam (CDHRI) and The Organization of the Islamic Cooperation (OIC) which proclaims Islamic Shari'a as its single source and provides an outline on the Islamic perspective of human rights including juvenile. (Stop Child Execution, 2009)

## **7. The Children Act, 2013**

Bangladesh has passed new legislation for the advantage of its estimated 70 million children. This enactment is for the purpose of applying the United Nations Convention on the Rights of the Child. This law basically reflects some of the provisions of the Convention on the Rights of the Child (CRC). In addition, some provisions have been amalgamated in response to guidelines of the Supreme Court of Bangladesh as well as the necessities of other international instruments such as the Beijing Rules, 1985 (ALI, 2014) This Act newly introduced some unique provisions such as:

- a. National, District and Upazila Child Welfare Boards
- b. Child Affairs Desk at the Police Stations
- c. Child Affairs Police Officer
- d. Probation Officers
- e. Establishment of Children's Courts
- f. Alternative Dispute Resolution
- g. Establishment of Child Development Centers and Certified Institutes
- h. Alternative Care
- i. Legal Representation etc. ("The Children Act," 2013)

Section 16 of this Act provides that, for the purpose of the Act and for trial of offences thereunder, at least one court is to be established in every district headquarter and in every metropolitan area as the case may be. According to section 44(1) another important point is, no child below the age of 9 years may be arrested under any circumstances. ("The Children Act," 2013) These provisions explicitly show that, juvenile offender less than 9 years will be out of arrest and measures for ensuring smooth judicial process and justice.

## **8. Restriction Regarding Punishment**

Section 33(1) of The Children Act, 2013 provides that no child shall be sentenced with death, imprisonment for life or imprisonment. Moreover, Section 33 also denotes, when a child is

originate to have committed an crime so serious in nature that in the view of the court the sentence provided by this law is not adequate, or if the court is pleased that the child is so disorderly that he cannot be sent to a certified institute, or that any other alternative methods in which he may be dealt with are not appropriate in his case, then the court may verdict the child to imprisonment and send him to prison. But, the period of sentence may not outstrip the maximum period to which the child could have been punished. He may be ordered to be detained in a certified institute as a substitute of prison until he reaches the age of 18. When a child is penalized to imprisonment, he or she shall not be permitted to associate with any adult in the prison. ("The Children Act," 2013)

## 9. Conclusion

Juveniles are naturally different from adult in respect of physical; psychological and mental strength. They need to be treated specially. Islam pronounces directions to show mercy, compassionate and kind treatment to child. (Islam, 2015) Islamic law of criminal proceedings laid down several important principles to safe and sustains prospective life of juvenile. Hence, Islamic law does not apply *Qisas* and *Hadd* punishment commits by juvenile offender. According to international laws, including the Convention on the Rights of Child (CRC) and the Beijing Rules every human being under the age of eighteen years old is considered to be a child and shall not be subject to any criminal punishment. It is also internationally established that neither capital penalty nor life imprisonment shall be enforced for offences committed by children. This provision also adopt in the Children Act, 2013. Therefore, refrain from capital punishment, imprisonment and corporal punishment are divine human rights of juvenile and these are will be confirmed by the judge and proper authority. If anybody refusing these rights that have been guaranteed by Islamic law; the finding of the Holy Quran is strong and explicit: "Those who do not judge by what Allah has sent down are the disbelievers. They are the wrong-doers (*zalimun*). They are the evil-livers (*fasiqun*).” (Quran 5:44-45)

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