

**A COMPARATIVE STUDY OF AGE OF MAJORITY AND
TAMYIZ IN ISLAMIC AND CIVIL LAW IN MALAYSIA**

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AUTHOR DECLARATION

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries, which have been duly, acknowledged.

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In the name of Allah Most Gracious Most Merciful.

All praise be to Allah, the Lord of all-being in the Universe, peace and blessing upon His messengers, their respected family and all their followers till the end of the days.

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ABSTRACT

This research is relating to the comparative study of two different laws that have been practiced in Malaysia i.e Islamic and Civil laws. Since these two sets of law are merely a vast field, the research emphasizes more on the age that, make someone liable under the laws, which is termed as *bulugh* and *tamyiz* under Islamic law and age of majority under Civil law of Malaysia. The main objective of the research is to find the similarity and identifying the inconsistency of these two laws. In achieving the goal, various references have been used, for instance *Mughni Muhtaj*, *Syarhu az-Zarqani* and *al-Majmu' li an-Nawawi* for Islamic law and statutes such as Age of Majority Act 1971, Evidence Act 1950, Family Reform Act 1969 for civil law of Malaysia. Hopefully, the research would provide a knowledge that Syariah is a dynamic law to be used throughout the centuries as strengthen by some similarities with the Civil law that have just been applied in this century.

ABSTRAK

Kajian ini adalah berkenaan dengan perbandingan di antara dua undang-undang yang diguna pakai di Malaysia iaitu undang-undang Syariah dan Sivil. Oleh kerana bidang perundangan ini begitu luas, kajian ini lebih memberi penumpuan dari sudut umur yang mempertanggungkan seseorang itu dari sudut perundangan, yang diistilahkan sebagai *bulugh* dan *tamyiz* di dalam perundangan Islam dan umur dewasa seperti yang diistilahkan di dalam undang-undang Sivil. Matlamat utama kajian ini adalah untuk mencari sesuatu titik persamaan dan cuba mengenal pasti percanggahan-percanggahan yang terdapat kedua-dua undang-undang ini. Untuk tujuan ini, beberapa rujukan utama telah digunakan seperti kitab *Mughni Muhtaj*, *Syarhu az-Zarqani*, dan *al-Majmu' li an-Nawawi* bagi perundangan Islam dan statut-statut seperti The Age of Majority Act 1971, Evidence Act 1950 dan Law Reform Act 1969 bagi undang-undang Sivil di Malaysia. Semoga kajian ini dapat memberi maklumat kepada masyarakat umum bahawa Syariah merupakan undang-undang yang dinamik untuk digunapakai di sepanjang zaman yang diperkukuhkan lagi dengan beberapa persamaan yang terdapat di dalam undang-undang Sivil yang hanya dilaksanakan dizaman ini.

ملخص البحث

هذا البحث تتعلق موازين بين قانون التي تستعملها في ماليزيا وهي الشريعة والوضعية. وبوسطة قوانين يتحقق هذا البحث في مجال عمر المكلف بما الشخص يصطلحها بالميز والبلوغ . في قانون الإسلامي والوضعي. ويهدف هذا البحث ليطلب التسوية والمتعارضة الموجودة. في هذه القانون, وليقصد بهذا البحث, يستخدم الباحث مراجع الأولى لمغنى المحتاج وشرح الزرقيني, المجموع للنواوي وغير ذلك خاصا لقانون الإسلامي, ولقانون الوضعي بماليزيا؛ Age of Majority Act 1971, Evidence Act 1950, و Law Reform Act 1969. وسجعل هذا البحث لزيادة الأعلام ملامة بأن الشريعة من أشمل القانون بتحقيق قانون الوضعي التي ستخدمها طول الزمن والتساوي بينهما في هذا الزمن.

TRANSLITERATION

1. Alphabet

<u>Arabic Alphabet</u>	<u>Latin Alphabet</u>	<u>Example</u>	<u>Transliteration</u>
ء	,	فأر	fa'r
ب	b	برد	burd
ت	t	تلّ	tall
ث	th	ثوب	thawb
ج	j	جدار	jidār
ح	h	حليب	halīb
خ	kh	خادم	khādim
د	d	ديك	dīk
ذ	dh	ذهب	dhahab
ر	r	رفيق	rafīq
ز	z	زميل	zamīl
س	s	سلام	salām
ش	sh	شعب	sha ^c b
ص	s	صخر	sakhr
ض	d	ضيق	dayq
ط	t	طازج	tāzij
ظ	z	ظالم	zalim
ع	c	عقل	^c aq̄l
غ	gh	غلام	ghulām
ف	f	فيل	fīl
ق	q	قلب	qalb
ك	k	كلام	kalām
ل	l	لبّ	lubb

م	m	مال	māl
ن	n	نجم	najm
هـ	h	هول	hawl
و	w	ورق	waraq
ي	y	يم	yamm

2. Short Vocal

<u>Arabic Alphabet</u>	<u>Latin Alphabet</u>	<u>Example</u>	<u>Transliteration</u>
_____	a	كَتَبَ	kataba
_____	i	عَلِمَ	‘alima
_____	u	غَلِبَ	ghuliba

3. Long Vocal

<u>Arabic Alphabet</u>	<u>Latin Alphabet</u>	<u>Example</u>	<u>Transliteration</u>
أ, إ, ي	ā	عالم، فتى	‘ālim, fatā
ي	ī	عليم، داعي	‘alīm, dā‘ī
و	ū	علوم، أدعو	‘ulūm, Ad‘ū

4. Diphthong

<u>Arabic Alphabet</u>	<u>Latin Alphabet</u>	<u>Example</u>	<u>Transliteration</u>
و	aw	نوم	nawm
ي	ay	ليل	layl
يَّ	iyy	شافعي	shaf‘iyy (at the end)
وَّ	uww	علو	‘uluww (at the end)

5. Exception

5.1 Arabic alphabet ؤ (hamzah) is translated into (a) not (') when it is at the beginning of the word

Example: أكبر transliteration: akbar (not 'akbar).

5.2 Arabic alphabet ة (ta' marbutah) is translated into (t) when the alphabet is in the word without ال (al) and that word merges with other word that has ال (al).

Example: مكتبة الإمام transliteration: maktabat al-Imam

But if the alphabet is in the word that has (al), or in the single word, or in the last word, ta' marbutah is translated into (h).

Example: المكتبة الأهلية transliteration: al-maktabah al-ahliyyah

قلعة qal'ah

دار وهبة dār wahbah

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RESEARCH BACKGROUND

This research is about a comparative study between Islamic and Civil law in Malaysia relating to age of majority and *tamyiz*. In Islamic law, it would focus on views from four different schools in *Fiqhul Islami*; Hanafi, Hambali, Shafi'iy and Maliki in fixing the exact age to be *bulugh* and *tamyiz*. In conjunction with the matter, this research would analyze which age that suit to the in modern world. The study also would emphasize the compulsions and prohibitions that are not imposed on person who is under age. Besides, this study would discover the difference between *bulugh* and *tamyiz*. In Civil law, would only focus on its application in Malaysia. However the emphasis would be given to the Criminal and Evidence laws as these laws are more related to the study. A few cases would be quoted in analyzing the procedures that applied for under age person in Malaysia legal system.

AIM OF RESEARCH

The main purpose of this research is to identify the similarities and differences in Islamic and Civil laws in order to clarify to society that there are a few Islamic elements in the application of Civil law in Malaysia. It also tries to explain the disagreements among the Islamic Jurists about the ruling of *bulugh* and *tamyiz* in a certain matter which only a branch of Islamic principles in Islamic law.

OBJECTIVE OF RESEARCH

To know the rights of person who has not attained age of majority under Islamic and Civil laws in Malaysia.

To identify the view from four schools of Islamic law; Hanafī, Hambali, shafi^ciy and Maliki.

To find out the provisions of al-Quran and as-Sunnah relating to *bulugh* and *tamyiz*.

To differentiate the obligations between *bulugh* and *tamyiz*.

To know the importance of age relating to property acquisition, requirement of leadership, validity of *‘ibadah* and also the admissibility of testimony in court.

To unveil the position of children under Criminal and Evidence laws in Malaysia.

To uncover the position of Civil law relating to age of majority.

RESEARCH METHODOLOGY

In completing this study, a couple of methodologies have been used to ensure that all information could be obtained in order to produce a perfect conclusion relating to this study.

The writer has chosen to use library research methodology because this research requires a lot of books, opinions from jurists and decisions of the court.

In this study, the writer has divided the methodologies into two main processes; collecting data and processing data.

The first process is a preliminary method used by the writer to collect all kind of materials from any library in Kuala Lumpur, such as the library of Academy of Islamic study in Universiti Malaya, the library in International Islamic University of Malaysia and the library of Islamic center.

In the second process, the writer would analyze the whole data and select only the related ones with this study. After all information have been acquired, the writer would conclude the data into a general point.

CHAPTER ONE
THE DEFINITION OF THE AGE OF MAJORITY (البلوغ)
AND TAMYIZ (تمييز)

Literally it means ‘reach or attain’, such as someone has reach something, it also means; reach something and stop, for example “a child has reach (age of majority) and he is no longer considered as a child i.e he has dreamt and begins to responsible to himself. Therefore the boy has attained the age of majority.
(Mukarrimul Ansari: 308)

In term of terminology’s usage, the word *bulugh* denotes “the development of human being from children stage into ahl-*Taklif* (a person who is liable under *Syari’ah* Law), or the strength that appear in the children’s body which take them out from childhood. (az-Zarqani: 290)

1.1 PUBERTY BY AGE

The *Syari’ah* has made *bulugh* as an indication to the mind perfection, because it is impossible to know the beginning of mind-perfection for a person except through this way. Puberty by age is applicable whenever the signs of *bulugh* are anonymous. The Islamic jurists of *fiqh* have disagreed regarding with the definite period that is presumed as *bulugh*.

As quoted from *Shafi’iyy* and *Hambali* school of laws stated that, the age of majority would only be considered at the age of fifteen based on Islamic Lunar Calendar for both male and female. This view was corroborated by Abu Yusuf, a *fiqh* jurist from *Hanafi* school of Law .The jurists of *Shafi’iyy* school of law has clarified the detail about the limit of the age, that *Ibn Umar* had said:

عرضت على النبي صلى الله عليه وسلم يوم احد، وأنا ابن أربع عشرة سنة فلم يجزني، ولم يرني بلغت، وعرضت عليه يوم الخندق وأنا ابن خمس عشرة سنة فاجازني، ورآني بلغت

“I had offered myself to Prophet Muhammad pbuh during the war of uhud, and I was 14 years old, He did not permit me (to engage in the war) and he did not consider me as matured. I had surrendered myself to Him during Khandak war and I was 15 years old boy. Then he permitted and considered me as matured” (Muhammad Bin Ismail, 1993: 38)

Imam *Shafi'yy* also stated that the Prophet (Peace Be Upon Him) had rejected 17 people among His companions (to involve in war) and they were 14 years old, because they did not reach the age of puberty, later on, they came to the Prophet by the time they were already 15 years old, and they were permitted. Among them are *Zaid bin Thabit*, *Rafi' bin Khadijah*, and *Ibn Umar*. (Mustafa al-Khin, 2000: 166)

On the other hand, from the view of *Maliki* school of law, that puberty or age of majority is completely 18 years old. However according to al- *Hitab* they are five views in the *Maliki* school of law regarding with puberty. In one narration said, that it is 18 years old, and others said 17 years old. From the view of the reviewers of a book namely '*Risalah*' it is 16 years old and others opined that it is 19 years old. As quoted from *Ibn Wahab's* view, it is 15 years old based on the previous *hadith*. (Muhammad Bin Ismail, 1993, 43)

Abu *Hanifah* in his view about the age of puberty for children is 18 years old and occasionally, 17 years old. This view is supported by al-*Kitab* in surah *al-Isra'* verse 34:

وَلَا تَقْرُبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ وَ أَوْفُوا بِالْعَهْدِ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا

“You shall not go near the property of an orphan, except with the good intention of improving it, until he attains his maturity. You shall fulfill your pledges; surely, you shall be held accountable for your pledges”
(Muhammad Farooq-I-Azam Malik, 1997: 394)

Ibn Abbas r.a stated that, the puberty is 18 years old and that is the minimum age of majority, which attention must be taken to it because they are matured children. While maturity for a girl is much more quicker than a boy. Thus, the age of majority for them is reduced (more younger). (Mustafa al-Khin, 2000, 168)

1.2 THE MINIMUM AGE OF MAJORITY

The minimum age of puberty for a boy by the point of *Maliki* and *Shafi'iyy* school of law is when they attained nine years old on lunar calendar. In other view from *Shafi'iyy*, school of law and as narrated by *Nawawi* in *Syarhul Muhazzab*; after nine and a half years passed. (al-Buhuti, 1982: 435)

Whereas, the view from *Hanafi* school of law is totally different. They said that the minimum age of puberty for a boy is twelve years old. While, *Hambali* school of law viewed that it is ten years old. Therefore, if a *wali* claims that his child is already puberty with a dream, the claim is accepted if the child is ten years old.

The minimum age of Puberty for a girl is nine years old on lunar calendar. This view is taken from *Hanafi*, the most accurate view in *Shafi'iyy* and *Hambali* school of laws. The justification pertaining to the matter is relied on the *Hadith Rasulullah* (Peace Be Upon Him) :

إذا بلغت الجازية تسع سنين فهي امرأة

“When a young girl has reach the age of nine, she is already a woman”

This *hadith* concerns with a woman .In a view made by *Shafi'iyy*'s jurists said that it is nine and a half years old for a girl to be a woman, and others said it is nine years old because it is the least age for girl to be in menstruation period. (as-Suyuti, 1975 : 244)

1.3 PUBERTY AS A CONDITION IN ISLAMIC LAW

All jurists of *fiqh Islami* have agreed that the Law-Maker (Allah) has imposed responsibilities and prohibitions to the people who is already *mukallaf* (muslim, attain the age of majority and sound mind) and all of the obligations require puberty in advance before it comes into effect. These have been proved by a number of Quranic verses.

1. In *surah an-Nur*: 59 Allah stated.

وَإِذَا بَلَغَ الْأَطْفَالُ مِنْكُمُ الْحُلُمَ فَلْيَسْتَأْذِنُوا كَمَا اسْتَأْذَنَ الَّذِينَ مِنْ قَبْلِهِمْ...

“And when your children reach the age of puberty, let them ask your permission as their elders do.....” (Muhammad Farooq-I-Azam Malik, 1997: 478)

This verse connotes the responsibility for a person who has attained the age of majority to ask permission.

2. In *surah an-Nisa*': 6

وَابْتَلُوا الْيَتَامَى حَتَّى إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ.....

“Observe the orphans through testing their abilities until they reach the age of marriage, then if you find them capable of sound judgment, hand over to them their property.....” (Muhammad Farooq-I-Azam Malik, 1997: 187)

The age of marriage or puberty becomes the indicator to the obligation of transferring the acquisition of property that belong to the orphan by the trustee.

Hadiths relating with the age of puberty also has proved it :

3. The Prophet (Peace Be Upon Him) speak to *Muaz* while he was posting to *Yaman*:

خذ من كل حالم ديناراً أو عدله معفياً

“collect from each of dreamers one dinar or.....”

The phrase ‘dreamer’ in this *hadith* comes from Arabic words (حالم) refer to people who has reach puberty. Therefore, Paying *jizyah* i.e tribute, become an obligation to people who has reach puberty.

4. During *Quraizah* day (the betrayal of Jews clan against *Muslim* in *Madinah*), the betrayal should face death penalty If they have reach puberty (الإنبات) .

The puberty or *al-Inbat* becomes the sign to the permissibility of death penalty upon the betrayal of the country.

5. The prophet (Peace Be Upon Him) said that:

لا يقبل الله صلاة حائض إلا بخمار

“Allah swt does not accept a prayer of a person within her menstrual period accept with veil”

Menstruation becomes the barrier for women to perform prayer.

6. The prophet (Peace Be Upon Him) stated that:

غسل يوم الجمعة واجب على كل محتلم

Hadith: “the bath on Friday is an obligation for all dreamers”

7. The Hadith from the Prophet (Peace Be Upon Him) :

رفع القلم عن ثلاثة : عن الصغير حتى يكبر...

"The *Qalam* (sins) will be uplifted from three groups: a minor until it reach puberty..."

All these verses and *hadiths* regarding with the signs of puberty showed that the Law-Maker (Allah) prescribed puberty as a condition to the *at-Taklif* and the obligation of the general commandments. Therefore, one is considered as *baligh* by any other signs of puberty, only then he / she is regarded as a perfect man and woman, or *mukallaf* if they are in sound mind.

Ibn Munzir stated that, the Islamic inheritance law is an obligatory only for people who is sound mind and has attained the age of puberty, through consensus of jurists. (al-Buhuti, 1982: 443)

Ibn Hajar also stated that all jurists unanimously agreed that all *muslims* who has attained the age of puberty is subject to the obligation of *ibadah*, *hudud*, and other Islamic laws. (Ibn Hajar al-Asqalani: 277)

1.4 THE REQUIREMENT FOR *BULUGH* IN ISLAMIC LAW

1. In Term of obligatory condition (شروط الواجب)

Puberty is required for the liability of *faraidh*, compulsions, and prohibitions as well as the obligation for *solat*, fasting, pilgrimage, except for *zakat*. In conjunction with the matter, the guardian of the children should abstain them from any prohibited deeds and ensure they perform their prayer in order to accustom themselves with such commandment. Prophet Muhammad (Peace Be Upon Him) said that:

مُرُوا أَبْنَاءَكُمْ بِالصَّلَاةِ لِسَبْعِ، وَاضْرِبُوهُمْ عَلَيْهَا الْعَشْرَ، وَفَرَّقُوا بَيْنَهُمْ فِي الْمَضَاجِعِ

“Command your children to perform prayer when they reach seven, and punish them when they reach ten (if they fail to perform prayer), and separate between them (male and female) in bed”

However, no *Qisas* and *Hudud* punishments could be imposed on them e.g stealing, *qazaf*, but it is better to nurture them with good value of Islam. (Syamsuddin Muhammad Bin Abi al-Abbas Ahmad Bin Hamzah, 1967: 421)

2. The Validity in Performing Particular Obligations Regarding with Puberty.

Puberty is a requirement for validity in term of the perfection of eligibility in every aspect of human life for instance, the eligibility of leadership, judiciary, the obligation upon oneself in giving testimony, relating to financial matters e.g gift, loan, *wakaf*, *kaffarah*, and also related to divorce as well as *nazar*.

1.5 THE COMMENCEMENT OF OBLIGATION DURING PUBERTY

The obligation to perform all aspect of *Ibadah* in Islamic law begins, when children have already showed any sign of puberty as previously stated or through dreaming. The following are the examples of *Ibadah* for children who have just attained the age of majority.

1. In a case of *Taharah* (purification) in repeating *tayammum* (ablution via clean dust).

According to *Shafi'iy* and *Hambali* school of law, when children take *tayammum* while they are not in the age of majority. Later on, they become puberty before annulling the *tayammum*, they are required to repeat the *tayammum* if they wants to perform *solat fardhu*. The reason behind such ruling is, the first *tayammum* they took was considered as for *solat sunat* and for children who have yet attained the age of puberty, all *solat* are *mubah* for them to perform including *solat fardhu*. However, for children who have attained the age of puberty, the *tayammum* is an obligatory to perform either *solat sunat* or *fardhu*, during the shortage of water. On the other hand,

wudhu' (ablution) and obligatory bath are not subject to this ruling. Hence, it is not necessary for children to take them for a second time after they become puberty. The reason for this matter is *wudhu'* and obligatory bath cleanse the body from *hadath*, and *tayammum* is only *mubah* (permissible) as it acts as substitute for both of them (ablution and obligatory bath), during *dharurat*. This view also comes from the prominent opinion in *Maliki* school of law that *tayammum* is *mubah* and could not cleanse the *hadath* off the body (accept during *dharurat*). Whereas, from the opinion of *Hanafi* school of law, and other view by the jurists in *Maliki* school of law, that *tayammum* itself cleanses the *hadath* at the time no water could be found . Therefore in their view, the children who have taken *tayammum* need not to repeat it soon after they become puberty. (an-Nawawi, 1980: 221)

1.6 AGE OF DISCERNMENT (*TAMYIZ*)

The *Fiqh* Jurists have defined the word *mumaiyyiz* or *tamyiz* as the age that indicates the end of children stage for a human being; knowing to differ between good and bad for themselves, as well as to know how to distinguish between good and bad when they have already mixed. (Qaladji, 2000: 32)

In Arabic language, the word *tamyiz* is regarded as a noun and *mumaiyyiz* is also a noun but, it refers to the doer of certain action. Therefore, *mumaiyyiz* is a person who has reached the age of *tamyiz*.

1.7 THE *AHKAM* (RULINGS) RELATING WITH *TAMYIZ*

Most of the jurists of Islamic Jurisprudence; *Hanafi*, *Maliki*, *Hambali* and some of the jurists of *Shaf'iyy* school of law have agreed that the Islamic belief among the *Mumaiyyiz* is valid and although they are only *mumaiyyiz* (capability to differ between good and bad) it does not affect their belief toward the law of Allah, or it is up to their parent. This matter has been supported by *hadith* that the beloved prophet (Peace Be Upon Him) has called Ali *Karramallah hu wajhah* for Islam and by that time he was still a boy. After he had embraced Islam he was the first boy who became a *muslim*, the Prophet (Peace Be Upon Him) said that:

"كل مولود يولد على الفطرة..."

"All babies are born according to their nature"

(Extracted from the narration of Abu Hurairah by Imam Bukhari)

This is because the religion of Islam means a sincere submission to Allah such as prayer, fasting, and pilgrimage, and the pronouncement made by a child is also a part of submission (*Ibadah*).

The selected view in *Shafi'iyy* school of law stated that the pronouncement of Islam made willingly by *Mumaiyyiz* children is invalid because they are not *mukallaf* as the *hadith* explained:

رفع القلم عن ثلاثة عن النائم حتى يستيقظ و عن الصبي حتى يحتلم وعن المجنون حتى يفيق.

"The disposal of sin onto three types of people; a sleeping person until he awakes, a child until he dreams, an unsound mind person until he recovers"

In other narration:

وعن الصبي حتى يبلغ

"....and a child until he attain the age of puberty".

(Extracted by Imam Abu Daud)

This is because the utterance of two declarations to embrace Islam verbally for them would not be accepted. If it is made through writing its application is similar to contract and such contract is null and void because children are not eligible to enter into contract. This view also derived from Imam *Zufuri*, a jurist from *Hanafi* school of law. (Ibn Qudamah, 1984: 424)

In the third opinion among the jurists in *Shafi'iyy* school of law, that the utterance of Islam by *Mumaiyyiz* children is externally valid but not internally. If they attain puberty and still remain in his word, only then they are assumed as *muslim* from the

day onwards. Nevertheless, if they declare their renunciation from Islam, verily their early utterance is futile. (an-Nawawi, 1980: 230)

In the case of renunciation from Islam or apostasy by *mumaiyyiz* children, most of the Jurists said that it would be taken into account and the punishment of *Hudud* could not be imposed until they reach puberty, but not if they repent themselves and return to Islam, otherwise he would face capital punishment.

However, the renowned view in *Shafi'iy* school of law stated that, it would not be taken into account by referring to *hadith* (رفع القلم عن ثلاث) and the phrase in the *hadith* quoted that (عن الصبي حتى يبلغ). Therefore, Imam Ahmad has concluded from the *hadith* that, the pronouncement of Islam made by *Mumaiyyiz* children is valid but his renunciation from Islam is rejected, because Islam drives mankind into virtue and apostasy drives human being into mass destruction, hence such renunciation is invalid. (an-Nawawi, 1991: 429)

1.8 IBADAH BY MUMAIYYIZ

Children who have reached the age of discernment is not *mukallaf*; responsible to himself under Islamic Law, thus it is not compulsory for them to perform prayer, fasting, pilgrimage and other form of *Ibadah* but if they do it is valid. In this matter, their parent or guardian must ask them to perform prayer (*solat*) when they reach seven years old and when they have already ten, and punish them if they disobey. The Prophet (Peace Be Upon Him) said :

مرؤا أولادكم بالصلاة.....

“Order ye children to perform *solat* (prayer).....”

(Extracted by Imam Abu Daud)

1.9 MUMAIYYIZ CHILDREN WHO BECOMES IMAM IN SOLAT

(Leading a group of people to perform prayer)

As extracted from Hanafi, Maliki, Hambali school of laws and al-Auza'i opined that, it is not valid for *Mumaiyyiz* children to lead people who have reach the age of puberty in *solat fardhu* (Obligatory Prayer) because to become Imam or leader in *solat* relating to the perfection, and children is not kind of perfect person due to the possibility of annulment to the conditions of prayer.

The Jurists of Shafi'iyy school of law, Hasan Basri, Ishak and Ibnu Munzir viewed that, the leadership (*Imam*) in *solah* by *Mumaiyyiz* children among the people of puberty is valid, this is based on the general understanding from the *hadith*:

يَوْمَ الْقَوْمِ أَقْرَأَهُمْ لِكِتَابِ اللَّهِ

“Lead the people to read The Book of Allah (*al-Quran*)”

(Extracted from the Narration of Abi Mas'ud al-Badri by Imam Muslim)

In supporting to this *hadith*, it was narrated that some companions of the Prophet (Peace Be Upon Him) had lead their people (in *solah*) before they reach the age of puberty-seven years old- and it was also narrated that *Amru bin Salamah* had lead his people during the life of the Prophet (Peace Be Upon Him) and he was six or seven years old by that time.

(Extracted by Imam Bukhari)

Yet, regarding with the leadership (Imam) in *solat sunat* (recommendable prayer) by *Mumaiyyiz* children, most of the Jurists of Islamic Jurisprudence totally agreed that it is valid for them to lead the *solah*, because *solat sunat* is much lighter than *fardhu* (obligatory). In contrast, the recommendable prayer lead by *Mumaiyyiz* children is not valid as stated by the selected view of Hanafi school of law. The Prominent view of *Maliki* school of law is similar to the ruling of leadership by *Mumaiyyiz* children in *solat fardhu*. However, *Hanafi* and *Shafi'iyy* school of laws in their most accurate view stated that, the obligation of *solat jenazah* (prayer for the corpse) is abolished

right after it has been performed even by *Mumaiyyiz* children, as well as the obligation of paying *salam* (respect) and call for prayer as opined by Hanafi school of law and others who agreed with the obligatory of paying *salam* and answering. (an-Nawawi, 1980: 213)

1.10 TESTIMONY (شهادة) OF MUMAIYYIZ

The Jurists of Islamic Jurisprudence; *Hanafi*, *Hambali* and *Shafi'iy* school of laws are in the same view that, testimony made by *Mumaiyyiz* children who are yet to reach puberty is inadmissible as *al-Quran ul-Karim* stated in surah *al-Baqarah*: 282:

...وَأَسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ...

“... Let two witnesses from among you bear witness to all such documents...”
(Muhammad Farooq-I-Azam Malik 1980: 156)

The word ‘*rijāl* or Men’ in this Quranic verse has nothing to do with *Mumaiyyiz* children who are not in the age puberty.

Apart from that, from the view of *Hanafi* school of law affirms that testimony made by them is admissible if they reach the age of puberty. However, there is an exception in the case of injury as viewed by *Maliki* school of law. Imam Ahmad stated that, testimony made by *Mumaiyyiz* children regarding with such situation i.e injury, is admissible if they give their testimony before leaving the situation where the people was injured. The third opinion by Imam Ahmad regarding with the admissibility of testimony of *Mumaiyyiz* children in any cases except in *Hudud* and *Qisas* with a condition that they have attained the age of puberty at ten years old. Some of the *Salafin* (a group of *sunni* who uphold the literal meaning of Quranic verses) e.g *Imam Ali*, *Shuraih*, *Hassan*, and *Nakhaié* viewed that the testimony relating to other cases except *Hudud* and *Qisas* is admissible, but only apply among themselves (*Mumaiyyiz* children). (Ibn Qudamah, 1984: 424)

1.11 THE EXPENSES OF *MUMAIYYIZ* AND THE GIFT BY THEM

Everything that is purely beneficial for the children who have reach the age of discernment (*mumaiyyiz*) as well as to spend it for their own interest is valid even though without the consent of their guardian. However, if such spending to the property or wealth would give a big effect to them, the permission from their parent or guardian should be acquired in advance.

1.12 THE LIMITATIONS BETWEEN *MUMAIYYIZ* AND WOMEN

The Jurists of Islamic Law have totally agreed that the *Mumaiyyiz* children who have not reach the age of puberty are not allowed to see and watch women who is stranger -not from their family (*ajnabiyyah*). Nevertheless, the dissension among the Jurists only occur in viewing the permissibility to see on other parts of the body except what are between naval and knee. The *Maliki* and *Shafī'īyy* school of laws come up with the view that *rahiq* i.e the *Mumaiyyiz* children who are almost to become puberty are assumed as have reach the puberty. So, they have to cover their sight and prohibiting themselves from looking the *ajnabiah* women. On the other hand, *Shafī'īyy* and *Hambali* school of laws have come to the agreement that *Mumaiyyiz* children are not deprived from seeing parts of *ajnabiah* women's body except what are between naval and knee. In the view of *Hanafī* school of law stated that the *Mumaiyyiz* children is allowed to see *ajnabiah* and all parts of the body except between naval and knee without the engagement of desire/lust. This is also the final view in *Shafī'īyy* school of law. The Jurists of Islamic Law in other narration stated that the *Mumaiyyiz* children are allowed to see the *mahrāmī*.e those who could not be married by them, but only to the parts of the body that normally being exposed e.g neck, head (hair), palms, feet etc. Imam Ahmad has been asked regarding with the matter; "when should the women cover their head from the child ?" he answered, "when they have reach 10". (Abi al-Abbas, 1967: 455)

1.13 THE RIGHT OF *MUMAIYYIZ* CHILDREN TO CHOOSE IN THE CASE OF GUARDIANSHIP

The Jurists from *Shaf'iyy* and *Hambali* school of laws opined that if the children are already seven years old they are completely eligible to choose either to stay with their mother or father, however they (father and mother) still subject to the conditions for guardianship. If the conditions are not fulfilled by one of the parties, the right of guardianship will go to another party. The Prophet (Peace Be Upon Him) said:

خير غلاما بين أبيه و أمه

"The children choose between his father and mother"

(Extracted from the Narration of Abu Hurairah by Ibnu Hajar)

On the other hand, the Jurists in the *Shaf'iyy* school of law see the obligations to the law (*hukm*) are relating to the age of discernment without relying it to certain age for particular children. This only applies if the children by that time normally reach *mumaiyyiz* by the age of seven. However, if the children reach the age of discernment before or after the age of seven, they are subject to the compulsions and prohibitions in Islamic Law. In contrast, no space is given for children to choose, in *Hanafî* and *Maliki* school of laws but in *Hambali* school of law, the same rule is applied only to female children. (Ibn Qudamah, 1984: 456/3)

1.14 THE IMPOSITION OF *TAKLIF* (تكليف) BETWEEN *MUMAIYYIZ* AND PUBERTY

Most of the Jurists adhered to the view that the imposition of *taklif* upon human being begin when they have reach puberty, not *mumaiyyiz*. *Mumaiyyiz* children are not compulsory to perform any kind of obligations and no penalty or punishment would be imposed on them if they fail to obey to such compulsion or violating any prohibitions. The Prophet (Peace Be Upon Him) said:

رفع القلام عن ثلاثة عن النائم حتى يستيقظ وعن الصبي حتى يحتلم وعن المجنون حتى

يفيق.

“The disposal of sin onto three types of people; a sleeping person until he awakes, a child until he dreams, an unsound mind person until he recovers”

Most of the Jurists in *Hanafi* school of law unanimously agreed, if a child renouncing religion of Islam and he is sound mind, such renouncing is valid just like his previous proclamation of Islam. The sound mind possessed by the child depicts his discernment, that is seven years old and it is said that for those who is sound mind, Islam become the salvation for them in earth and hereafter and such person is able to separate between virtueness and viciousness. (Ibn Qudamah, 1984: 399)

1.15 CONCLUSION

Under Islamic Law, the term *bulugh* is defined as certain level of age that would make someone liable or bear responsibility to himself relating to the compulsions or prohibitions prescribed in al-*Quran*, as-*Sunnah*, and determined by Jurists through consensus and analogy (*qias*).

However, there are disagreements among Jurists in fixing the exact age of puberty (puberty). *Shafi'iyy*, *Hambali* school of laws, and *Abu Yusuf* viewed that, the age of puberty for male and female is 15 years old.

In *Maliki* school of law, there are many views stating about the age of puberty. Some Jurists said it is 18 years old, others said it is 17 years old, some other Jurists said it is 16 years old and the rest said it is 19 years old. While *Hanafi* school of law and Ibnu 'Abbas viewed that the age of puberty is 18 years old, but a girl attains puberty a little bit faster than a boy. In this case, the writer think that 18 years old is much suitable for today's situation due to the development of children's mind in modern world are changing and different from the children in old days. After all, most of children nowadays rarely face any difficulties and hardships in their life because everything has been provided for them like government school, school bus,

textbooks, computer, and Internet. Most of the Jurists also agreed that 18 years old is the exact age to reach puberty.

The minimum age of *bulugh* is also different and contradicted from one scholar to another. *Maliki* school of law viewed it is nine years old on lunar calendar. The Jurists in *Shafi'iyy* school of law stated that, the minimum age of puberty is nine and a half years old. The view from *Hanafi* school of law said that it is 12 years old.

The disagreement among the Jurists continue in viewing the minimum age of puberty for girl. The view from *Hanafi*, *Shafi'iyy* and *Hambali* school of laws stated the age is nine years old. In other view from *Shafi'iyy* school of law opined that it is nine and a half and other said it is nine years old.

The writer prefer to choose nine years old as a minimum age of puberty for a boy and girl, as most of the Jurists said that it is nine years old.

There are two essential elements that need to be pointed out relating to puberty or *bulugh*. First, it becomes a requirement to be bound under Islamic law and second, it determines the validity of certain obligations.

Age of discernment or *Tamyiz* could be concluded as a certain level of age for children to have a capability to know and understand the consequences of any actions they take whether it is good or bad for them. Therefore, Islam has not fixed certain age to be *mumaiyyiz* but as long as they have the stated characteristic, they are assumed as a *mumaiyyiz*.

Most of the Jurists agreed that the Islamic belief in *mumaiyyiz* is valid as well as the renunciation from Islam by them. The only school that opposed the view is *Shafi'iyy* school of law. Meanwhile, Imam Ahmad viewed that Islamic belief uttered by children is valid but their renunciation from Islam is not accepted. In this situation, the first view takes precedent among others.

In the case of becoming Imam in a prayer, the Jurists have given different views relating to the matter based on the explicit meaning of Quranic verse and other possible matters that would invalidate the prayer. At this point, the writer concludes that a person who has reach puberty normally is better than *mumayyiz*. So, let them lead the solat except in a case when the group consists of *mumayyiz* children.

Mumaiyyiz children could give their testimony in court not as a witness but to support other testimony made by adult witnesses. However, most of the Jurists like *Hanafi*, *Hambali* and *Shafi'iy* stated that their testimony is inadmissible, meaning that it would not be assumed as evidence unless the capable witness who has fulfilled all conditions to be a witness, has given the same testimony. If the case only involves *mumaiyyiz* children, then their testimony is admissible.

In term of accepting a gift from *mumaiyyiz* or a gift given by *mumaiyyiz*, it is valid to them to accept any beneficial things and to spend anything from their possession except such gift would harm them or they are yet capable to manage their own property.

The *mumaiyyiz* children also have to confine their sight from seeing certain parts of women body, which is between naval and knee, whether they are *mahram* or not to the children. Despite the different views were given by the Jurists, this is the similarity that could be learnt among the views regarding with '*aurah*'.

In term of guardianship, children would only have a right to choose either to stay with mother or father after their parent divorced is when they have already reach the age of discernment or *mumaiyyiz*.

As a whole, the different between *bulugh* (puberty) and *tamyiz* (discernment) could be seen in term of age and the perfection of children's mind. *Mumaiyyiz* is considered as the beginning to the mind's perfection. Therefore some compulsions and obligations have been imposed to them and some others are only commendable for them to practice and it just started at the age of seven.

Whenever children have reach the age of 18 as stated by the Jurists of *Hanafi* school of law, they are considered as *bulugh* or puberty. That means the perfection of their mind could not be denied and at this stage, the children are bound not only to the obligations as a true *muslim* but also to the prohibitions of Islamic law.

CHAPTER TWO

AGE OF MAJORITY IN CIVIL LAW

2.1 DEFINITION OF THE AGE OF MAJORITY

The paradigm of civil law regarding the age of majority is quite different compared to Islamic Law, because the enforcement of the age in civil law depend on various laws; Criminal Law, Law of Evidence, Family law, Law of Contract etc. Generally, the age of majority refers to a person who has attained 18 years old. According to section two of The Age of Majority Act 1971 (Act21) the age of majority is determined by the following provision:

“Subject to the provisions of section 4, the minority of all males and females shall cease and determined within Malaysia at the age of eighteen years and every such male and female attaining that age shall be the age of majority”.

Although it is clear that the age of majority in Malaysia is 18 years old generally, but section 4 of the act clarified that;

Nothing in this Act shall affect –

- a) The capacity of any person to act in the following matters, namely, marriage, divorce, dower and adoption,*
- b) The religion and religious rites and usages of any class of persons within Malaysia,*
- c) Any provision in any other written law contained fixing the age of majority for the purpose of that written law.*

Let us now refer to The Child Protection Act 1991 Section two of the act interprets the word ‘child’ as *a person under the age of eighteen years old*. Section 11 of Contract Act 1950 said that *a person is competent to enter into a contract if he has*

attained the age of 18 years old. As a conclusion there is no doubt that the age of majority in Malaysia is 18 years old according to civil law.

2.2 THE CAPABILITY OF COMMITTING CRIME IN CRIMINAL LAW

In this chapter, we are going to discuss about the age of majority in relation to Criminal Law. Since the people who is under 18 years old is regarded as children, the law sees them of incapable of entering into contract or making a will but there are no boundary for their capability of committing crimes. For the purpose of Criminal Law, the children are divided into three different categories –

- a) Children under ten years old
- b) Children above nine years old but less then 14 years old
- c) Children above 14 years old

2.3 CHILDREN UNDER TEN YEARS OLD

The first category regarding with children who are exempted from any liability of crime in any condition. According to *Common Law*, a child is exempted from any criminal liability until he or she reach seven years old. (Law Reform Act, 1969)

For the time being, the liability of children begin on their 10th birthday , The stated maxim is known as a conclusive presumption in which the children are said '*doli incapax*' ; incapable of doing any criminal act, in other words, a child under that category could not form the necessary intention to commit a crime. Although, there is an obvious evidence showed that the children have *mens rea*; intention to commit crime and *actus reus*; an act of crime, they still could not be convicted if during the occurrence crime the children have not attained the age of ten. Such assumption make the person enticing them to the crime would be assumed as the prime criminal not as a second party. (Smith and Hogan, 1996)

2.4 CHILDREN ABOVE NINE YEARS OLD BUT LESS THAN FOURTEEN YEARS OLD

Children who age are not less than 10 years but below 14 years old are exempted from the crime liability unless the prosecution would be able to prove that, they not only cause *actus reus* along with *mens rea*, but also have committed the crime with 'mischievous discretion'.

Such conditions required the evidence that proved the children are able to differentiate between good and bad by the time they commit it. In *Gorrie* case, the presiding justice has told the jurists that they must have satisfied that –

“that during the crime was committed, the boy should not only has already known that the crime was wrong but it was severely wrong”.(R.v Gorrie (1919) 83 JP 136)

The term has been used in a case of *J M v Runeckless* when the court decided that it is not necessary to provide an evidence, which the child had the knowledge relating to the action morally wrong to them, but to prove that such action had come to the knowledge of him that it was severely wrong. In other words, such action is more serious than he thought.

Therefore, in order to convince the presiding judge, that the child has committed crime, the prosecution counsel must try to prove the intention to commit the crime, the action of the crime and also the child's level of knowledge relating to its consequences.

The question arises here on how to prove whether or not the child know the severity of the crime he committed.

In the similar case, *J M versus Runeckless*, the court held that there were many evidence contained in the action did by the child; smashing with milk bottle and stabbing with the shattered bottle. After the incident, the child ran and hide from the police along with the writing statement made by her.

"All these action, are sufficient to convict the child in the court due to her ability to know the consequences of the crime. The younger the children is, the more stronger evidence is required." (J.M v Runeckless (1984) 79 Cr App Rep 225, DC)

Although children may be prosecuted for criminal offences but it may not amount to adult criminal in term of proceeding and the punishment , therefore the children under 14 years old would face custody proceeding replacing the criminal proceeding for adult. By virtue of The Children and Young Person Act 1969, Section 13, the proceeding may be instituted in Juvenile Court by any local authority, constable, and any party appointed by inland ministry. The court must be satisfied and ensure that the children really need the care and control, which they would not get it except as granted by the court.

If children are convicted with an offence, he would be sent to rehabilitation school for certain years as ordered by the judge. Nevertheless, there is an exception for this matter if they allegedly involved in homicide cases, the criminal proceeding must be put forward just like the adult and criminal liability is applied in this matter upon them. This means, the *mens rea*, and the *actus reus*, must be proved and the application of standard of proof must also be carried out like the usual criminal proceeding.

There is another exception, particularly, for children under 14 which they could not be convicted in rape cases of, any sexual offences, sodomy, or any kind of attack with the intention to commit sodomy. All of these matters are based on the maxim; *doli incapax*. On the other hand, if they apparently commit such crime, they still could be convicted on erotic attack or abetting others in doing so which they are incapable to do it alone. (Smith and Hogan, 1996)

2.5 THE CHILDREN ABOVE FOURTEEN YEARS OLD

Children whose age are above 14 years old are assumed as obliged to any actions as if they have already reach 40 years old. Meaning that, the prosecution counsel only has to prove the existence of *mens rea* in their action, similar with the criminal cases

involving an adult. In modern law, the children still deserve the distinct hospitality compared to the adult if they have been convicted with crime. (Smith and Hogan, 1996)

2.6 LAW OF EVIDENCE

In Malaysia the statute that governs the law of evidence is known as 'Evidence Act 1950 (Act 56), this act does not state certain age of people who is competent or incompetent to testify in court whether in criminal or civil cases. In *Section 118 of Evidence Act 1950* vested that;

"all person shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".

It could be concluded that the only condition which would qualify any person to become competent to give testimony in court is their ability to 'understand the question and ability to give rational answers to those question'. Therefore, as long as they could understand and answer the question, they are considered competent person regardless of the age, be convicted and sanity.

2.7 EVIDENCE OF CHILD OF TENDER YEARS

The position of children in giving evidence in court is explained in *section 133A of Evidence Act 1950*;

"Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath but otherwise taken and reduced into writing in accordance with section

269 of the criminal procedure code of the Federated Malay states shall be deemed to be a deposition within the meaning of that section.

Provided that, where evidence admitted by virtue of this section is given 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 implicating him". (Evidence Act 1950)

To sum up, the evidence made by children of tender years are admissible if in the opinion of the court, fulfill the requirements as written in the Act; they possess sufficient intelligence to justify the reception of the evidence, understands the duty of speaking the truth and reduced it into writing. This is called unsworn evidence.

2.8 CONCLUSION

For conclusion, the age of majority in civil law is 18 years old based on the Age of Majority Act 1971, Child Protection Act 1991 and Contract Act 1950.

In criminal law, children have been classified into three groups; children under ten years old, children above nine years old but less than 14 years old, and children above 14 years old.

Children who are under ten years old have no criminal liability, as civil law does not see them of having any ability to commit crime. This presumption is based on a maxim under civil law called 'doli incapax'.

Children who are above nine years old but less than 14 years old have the same privilege with the children under ten years old except three main evidence could be proven; mens rea or intention to commit crime, actus reus or act of crime, and mischievous discretion or the general knowledge relating to the severity of crime and its consequences.

If the court accepted and convinced that the facts and arguments adduced by the prosecution counsel had reach to the 'prima facie' level, the children would be convicted and sentenced accordingly.

The mischievous discretion of children could be proven through their action during the event of the crime. For example, running away from the location of the event, hiding from police and giving false statement. All of these matters only apply to criminal cases with an exception to rape cases because *doli incapax* applies to them in these cases.

In respect of procedure, children at this age who allegedly commit a crime would be brought to juvenile court. The court would use custody proceeding for them to find out whether they are guilty or not. If the children were found guilty they would be sent to rehabilitation school for a period of time except in homicide cases.

Children who have reach the age of 14 and above, the criminal liability is applied to them as if they have reach the age of majority.

Although the age of majority in civil law is 18 years old, but the criminal law does not prescribed such age to be liable under criminal offence because children also involve in criminal offences. So, in order to teach them a lesson, to prevent crime from being out of control and to instill awareness among children that crime is severely wrong, the criminal law has divided them into three categories according to the level of development of their mind.

The law of evidence in Malaysia is governed by Evidence Act 1950. The condition to be a competent witness in civil court is to have an ability to understand the question and to give a rational answer to the question put to them. For children, there are two conditions to testify in court. First, if the children do not understand the meaning of oath but have an adequate intelligence to explain what they have witnessed in court and understand the duty of speaking the truth, they may testify without taking an oath and their evidence are admissible after their words have been reduced into writing.