

# A LEGAL REVIEW ON GRAVE CRIMES FOR CHILDREN IN MALAYSIA

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**Abstract:** *This paper reviews the law on grave crimes involving children in Malaysia with a particular focus on the Child Act 2001 (Act 611). This study applies doctrinal legal research using descriptive approach. It discusses the increasing rate of serious offenses by minors, such as murder and drug trafficking, and the legal procedures in place to address these cases. The paper also traces the evolution of juvenile justice in Malaysia, highlighting key legislative amendments and international conventions that have influenced the country's approach. Furthermore, it addresses the challenges in sentencing, balancing societal protection and children's rights, and the roles of various stakeholders. The paper advocates for a holistic approach to juvenile delinquency, emphasizing the need for a system that prioritizes rehabilitation and reintegration over punishment. This study contributes to the ongoing discourse on juvenile justice in Malaysia and offers insights for policymakers, legal practitioners, and researchers in the field. This study is imperative since official figures indicate that in 2022, there were 3,013 instances of minors engaged in criminal activities, with a simultaneous uptick of 9.5 percent in sexual offenses involving children during the same period. Additionally, data reveals that 73.5 percent of children requiring care and protection belong to the bumiputera community, significantly surpassing other ethnic groups. In Malaysia, bumiputera includes Malays who are Muslims. This demographic of children is notably predisposed to serious criminal involvement.*

**Keywords:** *Grave crimes, Children, Child Act 2001, International Convention, Sentence*

## Introduction

The Children Statistics, Malaysia, 2023 figures indicate that in 2022, there were 3,013 instances of minors engaged in criminal activities, with a simultaneous uptick of 9.5 percent in sexual offenses involving children during the same period. 73.5 percent of children requiring care and protection are bumiputera, significantly surpassing other ethnic groups (The Malaymail, 2023). In Malaysia, bumiputera are predominantly Malays who are Muslims. As such, it means that this demographic of children is notably predisposed to serious criminal involvement.

Children who find themselves on the wrong side of the law will face consequences according to the law to adhere to the norms of society (Gemici, G. I., Abdurrachman, H., & Ramadhani, D. W. ,2024). It is imperative to note that the recent cases of juvenile offenses are not as light as most people would think. According to the Malaysian Crime Prevention Foundation, the most common crime committed by youths is shop theft. Most first impressions made regarding child offenses are minor offenses such as stealing or bullying. However, there are multiple instances whereby children are also involved in much more violent crimes such as murder, rape, and robbery.

In 2020, there was a 10.5% rise in the involvement of children in crime, totalling 5,342 cases, compared to the previous year's 4,833 instances. Additionally, the number of initial offenders surged by 15.7% to reach 4,916 cases (Department of Statistics Malaysia, 2021). Now this is a terrifying number, proving the severity of these crimes committed by child offenders. To further demonstrate the current status of these violent acts, such certain cases can be referred to.

The first notable case to highlight that occurred in Malaysia happened in November 2023. In this case, a video of a 13-year-old-boy, whose identity has remained anonymous, had threatened to stab an e-hailing driver with a knife whilst in the car as a passenger (Berita Harian, 2023). In the beginning of the video, the driver was incredibly agitated with the boy, as the boy seemed to upset him with his rude antics. The driver verbally expressed his discomfort and with that, the boy took out a knife and attempted to stab the driver. Luckily, the seatbelt that the driver was wearing had functioned as a protective shield and he managed to escape. The 13-year-old was suspected to be taken into custody on the 27th of November 2023. Many have disapproved the video and had urged authorities to sentence the youth for his actions.

On the same note, another case worth highlighting is the murder of an 11-year-old-boy that was committed by a 16-year-old teenager in Malaysia, on the 20th of March 2022. The deceased was reported to have been kicked, strangled and thrown around and that autopsy reports have shown the cause of death to be a blunt force trauma on the head (Bernama, 2022). The case was originally brought to the Magistrates Court however there were no advancements from the proceeding as murder cases are charged under the High Court. If the 16-year-old-boy has been proven guilty, he shall be sentenced according to Section 302 of the Penal Code which is, of death. In light of Section 97(1) of Act 611, a death penalty will not be pronounced to the offender since he was 16 years old at the time of the murder.

Based on the above discussion, it can be derived that a child offender is capable of committing serious offenses that can impose threat to the public. The public authority should not take child offenses for granted as it could escalate to more dangerous and violate behaviours thus terrifying the citizens. While juvenile offenses in the 1950s to 1970s primarily consisted of minor mischievous acts often stemming from poverty, there has been a concerning escalation

in recent years, with some youths now engaging in serious crimes like drug trafficking and violent offenses (Randawar et al., 2022).

## Background

The background of this research is regarding the uprising issue of children committing a serious criminal offense, which is also referred as 'grave crime.' Child law, particularly as it pertains to grave crimes committed by minors, is a subject of paramount importance within the realm of legal scholarship and policy discourse in Malaysia. The conviction and treatment of juvenile offenders in cases involving serious criminal acts has long been a topic of concern and debate, both nationally and internationally. In the past years, Malaysia has made significant strides in reforming its legal framework and practices concerning juvenile justice, rebalancing between society protection and the rights of the children. The contention meant that act 611 serves the purpose of consolidating and amending the laws relating to the care, protection, and rehabilitation of children and to provide for matters connected therewith and incidental thereto.

The legal landscape governing child law for grave crimes in Malaysia has evolved in response to international human rights conventions, domestic legal reforms, and changing societal attitudes. This research endeavours seeks to undertake a comprehensive and multi-dimensional review of the child law system in Malaysia as it relates to grave crimes committed by minors. It aims to examine the intricate web of legal provisions, judicial decisions, and policy developments that shape the treatment of juvenile offenders within the Malaysian legal system. It will delve into the nuanced challenges faced by the Malaysian legal system in addressing grave crimes committed by children and the evolving approaches designed to address these challenges. A conclusion will be drawn out to provide recommendations and a summary of the elements of this research to provide an overall view on the matter of grave crimes among children concerning child law in Malaysia.

According to the interpretation in Section 2 of the Child Act 2001 (Act 611), grave crime includes:

- (a) The offences of murder, culpable homicide not amounting to murder or attempted murder;
- (b) All offences under the Firearms (Increased Penalties) Act 1971 [Act 37];
- (c) All offences under the Internal Security Act 1960 [Act 82] punishable with imprisonment for life or with death;
- (d) All offences under the Dangerous Drugs Act 1952 [Act 234] punishable with imprisonment for more than five years or with death; and
- (e) All offences under the Kidnapping Act 1961 [Act 365];

## Evolution Of Child Law On Grave Crimes In Malaysia

The punishment for grave crimes committed by children had initially started from the Juvenile Act. The ratification of the United Nations Convention on the Rights of the Child (UNCRC) in 1995 has significantly influenced child-related policies and legislative reforms in Malaysia. The ratification of UNCRC led to the introduction of Act 611, which aimed to uphold the best interests of children following the UNCRC. However, it was noted that there were loopholes and weaknesses in the implementation of the act, which required further improvement. Despite the absence of a clear stipulation of children's rights in the Malaysian Constitution, the formulation of various social policies and laws in Malaysia was considered more advanced than in other Muslim states (Rojanah Kahar & Najibah Mat Zin, 2011). The ratification of UNCRC also led to the introduction of the National Child Policy and National Child Protection Policy

in 2009, which aimed to bring positive changes to the welfare and protection of Malaysian children.

In Malaysia, the sentencing of child offenders is governed by Act 611, the Criminal Procedure Code, and the Penal Code. The Court for Children, established under Act 611, has jurisdiction to hear, determine, or dispose of any charges brought against a child. The legal provisions regarding the age of the child, probation report, previous convictions, and the type of offense committed are paramount considerations in determining the appropriate sentence for child offenders. The sentencing competence of the Court for Children includes options such as fines, compensation, probation orders, approved school or Henry Gurney school orders, and imprisonment for children aged fourteen and above. Judicial discretion is exercised in sentencing, guided by general considerations such as the age of the offenders, the gravity of the offense, probation reports, and previous convictions (Randawar et al., 2022). Additionally, the Court must balance the aims of sentencing for deterrence and rehabilitation of child offenders. The absence of a formal guideline in sentencing leads courts to refer to previous cases to understand sentencing trends and policy.

Under Section 82 of the Penal Code, children below 10 years old are exempt from criminal liability. In Section 83 of the Penal Code, children aged 10-12 years can be held criminally liable. Still, there is a defence available if they need more maturity to understand the nature and consequences of their conduct. In contrast, children above 12 can be fully liable for their crimes. Section 2 of Act 611 defines a 'child' as a person under 18 years old in criminal proceedings. The Act outlines special procedures for the arrest, bail, trial, and sentencing of child offenders in Part X and this takes precedence over normal adult criminal procedures (Anita Abdul Rahim, Tengku Noor Azira Tengku Zainudin, Rajamanickham, 2015). The Act prohibits imposing the death penalty on children. For offenses that may lead to the death penalty, children must be ordered to imprisonment at the pleasure of the Yang di-Pertuan Agong for offenses committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan or the Ruler if the offense was committed in the state according to Section 97 of The Act. However, under Section 83(1) of The Act, for serious crimes like murder, rape, etc., children may be tried in regular adult criminal court and if a child commits a crime together with an adult, the trial is held in the regular adult criminal court.

### **Sentence and Punishment of Child Offenders**

According to Anita Abdul Rahim, Tengku Noor Azira Tengku Zainudin, & Rajamanickham (2015), arrest and detention are the first stages for charging a child with a crime in Malaysia. Under Section 84(1) of Act 611, if a child is arrested for an alleged offense, they must be brought before the Court for Children within 24 hours. Section 84(3) states that the court can release the child on bail/bond pending the hearing of charges unless it involves a grave crime like murder or is necessary in the child's best interests (Nadzriah Ahmad, 2011).

The second stage is the charges and court process, in which the police will investigate to gather evidence against the child. If there is sufficient evidence, the child will be formally charged in the Court for Children. The charges are read out at the first mentioned court, and the child is asked to plead guilty or claim trial. If pleading not guilty the court will hear prosecution witnesses and the child's defence during the trial. Special procedures are followed as per Part X of Act 611, such as explaining charges simply, allowing parents/guardians to assist the child, and questioning the child if unrepresented.

The final stage is sentencing, in which if the child is found guilty of the charges after trial, the Court of Children can impose various sentencing orders on the child as per Section 91 of The Act, such as admonition, bond, probation, being sent to an approved school such as Henry Gurney School (for children above the age of 14 under Section 74 of The Act), whipping (for male only), or imprisonment (for those 14 years old and above).

### **Whipping**

In light of the preceding conversation, it's evident that there exist documentation detailing instances where child offenders, upon committing severe offenses, have been subjected to whipping as a form of punishment. In the case of *PP v Velory Ak Libong* [2005] 1 MLJU 407 and *PP v William Ayau* [2005] 4 MLJ 328, the punishment of a child offender who committed rape was imposed the sentence of whipping. This is in place of Article 91(g) of Act 611 which authorizes the Court for Children to “order the child, if a male, to be whipped with not more than ten strokes of a light cane”. Article 92 of the Act provides restrictions and guidelines for the whipping process of a child offender. The child must be examined by a medical examiner to ensure that he is in a fit state to undergo the punishment. The whipping must be done using a light cane and with an average force. If the medical examiner finds the child to be unfit to finish the remainder of the whipping, it must be stopped immediately (Cooray, M., Jamaluddin, S. Z., & Tahir, Z., 2020). Article 288 of the Criminal Procedure Code (CPC) provides for whipping of a juvenile offender as a way of school disciplinary method, and this usually occurs in cases that are punishable by fine or imprisonment under article 293 of the CPC.

### **Imprisonment**

A case of murder committed by a child can be illustrated in the case of *PP v Yusry* [2021] 1 LNS 2223, also known as the ‘Tahfiz arson’ case. The defendants were convicted by the High Court for the offense of murder of 23 people by fire at Maahad Tahfiz Centre at Jalan Keramat Hujung, Kampung Datuk Keramat, Wangsa Maju. The defendants were charged under Section 302 of the Penal Code for murder, read together with Section 34, which provides for the mandatory death penalty upon conviction. However, Section 97(1) of the Children's Act 2001 provides that offenders under the age of 18 cannot be subjected to the death penalty, which can be replaced with a prison sentence as long as the Yang di-Pertuan Agong approves, by Section 97(2) of the same Act. Similarly, In the case of *Malik Yatam lwn Pengarah Penjara Kajang* [2021] 1 LNS 1420, in which the defendant was found guilty under Section 302 of the Penal Code and the Sultan of Selangor ordered him to be detained in Kajang Prison following Section 97(2) of Act 611. Imprisonment was usually given for cases that involved grave crimes since the severity of the crime is considered to be high and may impose unwanted threats towards the public. This is shown in the case of *PP v Turmizy* [2007] 6 MLJ 642, whereby the defendant was convicted of the crime of drug trafficking. The court held that drug trafficking is a grave crime that affects public health and safety and that it does not grant the Court’s mercy.

### **Probation**

The probation punishment may be ordered when a child commits any grave crime among other serious offenses (Andrews, P. L., 2018). Section 90 of Act 611 provides that the Court for Children must review a probation report before choosing how to handle a child. A probation officer has the responsibility to interview the child offender, prepare a probation report, and draw recommendations to help the court in giving the sentence (Randawar, D. K., Ikhsan, M. I., & Monil, F., 2022). In Malaysia, the probation report covers the respondent's background, familial information, and conduct. The probation does not only serve as a punishment, but as a rehabilitative process for the child offenders. Before issuing the probation order, the Court is



required, under Section 98 of the Child Act 2001, to clarify to the child in a manner appropriate to their age, level of maturity, and comprehension, of the implications of the order and the consequences of failing to adhere to it.

### **Henry Gurney School and Approved School**

The most common or 'demanded' form of punishment for juvenile offenders would be the order to be sent to Henry Gurney School (Mohd Al-Adib Samuri et al., 2012). It is notable to mention that Henry Gurney School (for boys) is different from the approved school in the context of punishment for child offenders. Noor, N. A. M., & Ahmad, N. A. (2021) stated that Henry Gurney School operates under the supervision of the Director General of Prisons and is authorized by the Minister to educate, train, and detain individuals assigned to it. Meanwhile, Section 2 of Act 611 defines an "approved school" as a school established or designated under section 65, which also encompasses a centre. Additionally, the minister has the authority to establish or designate approved schools to educate, train, and detain children such as Sekolah Tunas Bakti for girls.

From the above discussion, it can be derived that the sentencing of a child offender is carried out according to the law in Malaysia. Serious offenses such as murder and rape established under the Penal Code are categorized as state offenses and must be tried under the high court and conducted in a manner that is the same as an adult offender. However, the sentence of the death penalty cannot be imposed on a child as they are protected by Section 97(1) of the Act 611. Nonetheless, either a child or an adult will face sanctions for the crimes they have committed.

### **Theory of Sentencing Child Offenders**

Courts typically assess the gravity of the offenses committed, often discerning between serious crimes and minor infractions when deciding the suitable judgment for juvenile offenders. In cases of lesser severity, courts tend to issue more lenient sentences for juvenile offenders (Fornes, I., 2022). In contrast, grave crimes, which can be regarded as serious offenses, can be a mitigating factor for the court to pass a more deterrent punishment. Numerous debates have occurred when discussing the theories behind the sentencing process of child offenders. Pan, Y. (2023) stated that child offenders apply the theory of special treatment that is constructed more dynamic to serve as an alternative to the current justice system and following the needs of the society. The rationale behind the theory of special treatment is. due to several factors, namely children are generally indecisive (Suwinda, S., Ikhsana, L., Sulistyowati, N. S., & Arifin, R., 2022), they possess a different mental and physical capacity than adults and their crime is a projection of their immaturity and infancy (Randawar et al., 2022).

The abovementioned special treatment is called rehabilitation theory. This theory lies on the basis to impose lighter sentences, and it caters the best interest of the child. Sentences that reflect the principles of rehabilitation theory encompass psychiatric therapy, counselling, vocational training, improved education, drug rehabilitation programs, and other scientifically-based methods aimed at decreasing reoffending rates (Prianto, D., 2021, October). The theory serves multiple purposes for the juvenile justice system, to name a few; a child offender may become a law-abiding citizen at one point (Kiswanto, B. B. A., & Mashdurohatun, A., 2021), it serves as an initiative to better the quality of life of a child offender as well as rehabilitate juvenile offenders that will indirectly protect the society from increasing crime rates.

According to a study conducted by Nur Najlaa Syairah (2021), restorative justice, as applied within the framework of rehabilitation theory, plays a crucial role in fostering a sense of accountability among juvenile offenders. This contention is supported by Nadzriah Ahmad (2011) that restorative justice makes the offender directly accountable and responsible for their action followed by the community. Despite the above-mentioned objectives of the underlying rehabilitation theory in the juvenile justice system, this form of sentencing implementation has been a subject of argument in common society, especially on grounds of the contrasting theory, deterrence theory.

The theory of deterrence relies on the idea of imposing harsher punishments to offenders based on the severity of the crime. This theory influenced society to enact the child law that obviously defeats the best interests of the child and more relies on the public's interest. This means that juvenile offenders are sentenced to heavy punishments based on deterrence theory. Malaysia is a country that is more likely to choose the theory of deterrence rather than the theory of rehabilitation (Mohd. Al Adib Samuri, 2012). Evidently, Act 611 provide room for capital punishments for offenders under the age of 18 such as imprisonment and whipping which is under the deterrence theory. The implementation to these punishments that are based on deterrence theory has also been a subject of criticism from several embodiments such as the Committee on the Rights of the Child.

These two theories are highly contrasting to each other. In a study conducted by Nurliyana Shahira Baharli et al. (2021) discussed a comprehensive literature review on these two theories. Ward (2010) defined "punishment" as a psychological technique designed to eliminate any inappropriate behaviours or enforcement by authorities to a person convicted of any offense by having five main elements namely authorized, intentional, reprobative, retributive and harmful. In comparison, As stated by Muyobela and Strydom (2017), the term "rehab" succinctly encapsulates the process of facilitating an individual's readjustment to societal norms or restoring them to a prior state. This suggests that the primary objectives of the rehabilitation theory are to rehabilitate juvenile offenders and facilitate their successful reintegration into society.

In the existence of both theories being implemented in juvenile justice systems, many researchers conclude that the rehabilitation theory is more effective to be applied in the child law. The rehabilitation theory has demonstrated a heightened emphasis on the educational, social integration, and psychological rehabilitation aspects pertaining to juvenile offenders (Mohd. Al Adib Samuri, 2013). Adibah Bahori et al. (2017) also supports this theory that imprisonment is a punitive method of sentencing for a child offender and rehabilitation form of punishment is more appropriate to be practiced over juvenile offenders (Nurliyana Shahira Baharli et al., 2021).

### **Challenges On Sentencing Child Offenders**

Malaysia's juvenile justice system aims to balance the theory of sentencing between deterrence theory and rehabilitation theory. However, numerous criticisms arise of the imposition of capital sentences on children, especially regarding Malaysia's ratification of the Convention of Rights of the Child in 1995. Malaysia expressly makes reservations to articles 1, 2, 7, 13, 14, 15,[...], 28,[paragraph 1(a)] 37, [...] of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia (Child Rights International Network, 2010). The Committee on the Rights of the Child urges immediate abolishment of all forms of cruel,

inhuman, or degrading punishments, including caning and other forms of corporal punishment imposed on persons having committed a crime when under the age of 18. It was further argued that the committee is deeply concerned with the provisions of Act 611 that caning is still a lawful penal sanction provided by the Child Act and it is used as a disciplinary measure in penal institutions.

This action clearly indicates the initiative of the Committee to abolish sentencing that is based on the deterrence theory and embrace sentencing that lies on the rehabilitation theory. Nonetheless, Malaysia does not explicitly allocate Article 40 for the utilization of restorative justice, grounded in rehabilitation theory, within its juvenile justice system administration (Nadzriah Ahmad, 2011). Furthermore, the judiciary in Malaysia is more likely to use the deterrence theory rather than rehabilitation theory (Samuri & Awal, 2009). The courts, as seen in *PP v Boon* (2006) 6 MLJ 254 and other cases, are taking a tough stance on serious crimes committed by juveniles like drug trafficking and violence. They argue that leniency sends the wrong message and that stricter sentences are needed to deter such behavior, reflecting a shift from minor offenses in the past (Randawar et al., 2022).

This contention is further supported by a judgment made by Justice Sharma in the case of *Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214:

“I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaningless, ornamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of the punishment. The considerations of public interest have also to be borne in mind. In certain types of offences, a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.”

From the above judgment made by Justice Sharma, it seems to favour the idea that the theory of prevention is outdated following the introduction of Act 611, which aligns with the newer theory of rehabilitation. Despite the presence of this new act, courts still rely on Justice Sharma's judicial reasoning in subsequent cases. Act 611 explicitly emphasizes prioritizing the best interests of the child, which is a fundamental principle protected by the theory of rehabilitation. If the sentence is for the child's best interest, then it will follow the rehabilitation theory. If the sentence is for the public's interest, then the deterrence theory will prevail. As supported by Pan, Y. (2023), the judges in Malaysia are more in favour of the public interest hence lies the justification for the sentencing based on deterrence theory.

Another issue of sentencing child offenders is the fact that the law is so flexible that it does not ensure consistency in decision-making of the punishment towards the offender. Randawar et al. (2022) argued that there is no golden formulated in passing a sentence to a child offender. The court possesses a discretionary authority to select appropriate sentencing options carefully and conscientiously. Several factors such as age of the child, previous conviction and severity of the crime will influence in determining the proper sentence to be passed. However, in the absence of guidelines on passing sentences to juvenile offenders, it will inevitably cause inconsistencies when judges pass sentences. Despite the juvenile justice system in Malaysia has



been implemented for decades, there is still no guidelines or golden rule in adjudicating sentence for child offenders.

### Conclusion and Recommendations

In conclusion, the issue of child offenders committing grave crimes in Malaysia has become a significant concern, necessitating a comprehensive review of the legal framework governing juvenile justice. Despite strides in legal reform, challenges persist in balancing deterrence and rehabilitation theories in sentencing child offenders. While Act 611 prioritizes the best interests of the child, courts often lean towards deterrence-based sentencing, citing public interest and the need for deterrence. This has led to criticisms, especially regarding the imposition of capital punishment and caning on child offenders. Furthermore, the absence of clear sentencing guidelines has resulted in inconsistencies in decision-making among judges. To address these challenges, it is imperative for Malaysia to align its juvenile justice system more closely with the principles of rehabilitation theory, emphasizing holistic rehabilitation programs over punitive measures. Additionally, there is a need for the establishment of clear sentencing guidelines to ensure consistency and fairness in the adjudication of child offender cases. Embracing restorative justice practices within the framework of rehabilitation theory can foster a sense of accountability among juvenile offenders while facilitating their successful reintegration into society. Ultimately, prioritizing the best interests of the child in sentencing decisions is crucial for promoting the rehabilitation and well-being of juvenile offenders in Malaysia.

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