

Status Offences Against Children in Malaysia: A Necessary Evil or Unfairly Discriminatory?

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Abstract

In Malaysia, juvenile delinquency is a severe problem. Enacting status offences is one of the legislative remedies to the situation. Status offences refer to the acts that are not criminal *per se* but become offences because the perpetrators are children. Status offences are covered by a number of legal provisions in Malaysia. This paper aims to look into Malaysia's status offences, the rationale behind them, and whether they violate the equality clause under Article 8(1) of the Federal Constitution. This study applied doctrinal legal research methodology that focused on the legal principles in the statutes and legal institutions. This study conducted doctrinal analysis of case law, legal provisions, legal texts, and databases. This study found that the *parens patriae* concept explains status offences in public policy. Furthermore, the judicial interpretation of Article 8(1) allows for a distinction to be made between children and adults. The major findings of this research is that in Malaysia, there are wide arrays of laws that can be considered as status offences targeting children. This essay finds that status offences are still relevant but that diversion and rehabilitation should precede harsh penalties when dealing with child offenders. This research suggests that future research focuses on status offences from the perspective of children's right to life and liberty.

Keywords: Status Offences, Children, Juvenile Justice, Equality, Discrimination

Introduction

Juvenile delinquency is widely perceived as an increasing problem in Malaysia (Tai et al., 2019). The "red flag" level of adolescent involvement in violent crimes such as substance misuse, violence and bullying, murder, rape, and armed robbery has been reached (Ahmad Badayai et al., 2016). Passing status offences on minors is one method of dealing with juvenile criminality. A status offence is one in which a person's criminal responsibility is based solely on their status, capacity, or physical situation, obviating the need to establish an act or legal

omission to get a conviction (Howard, 1963). In the context of children, status offences refer to illegal behaviour committed solely because the perpetrators are minors (Siegel & Welsh, 2007). It is not a crime if an adult commits the act (Roberson, 2010). Truancy, disobedience of parents, running away from home, curfew breaches, and alcohol possession are all considered status offences in various jurisdictions (Steinhart, 1996).

The legislative move in enacting status offences against children is premised on the justification that the State should intervene in the life of any youngster who exhibits "evidence of not growing into an honest, good, and hardworking citizen" (Newland, 1980). This is based on the idea of *parens patriae*, which empowers the government to protect, care for, and manage its citizens, particularly the most vulnerable, such as the mentally ill and children (Nong & Yusoff, 2017). When parents fail to care for, protect, and control their children, the doctrine serves as a legal and moral foundation for the government to act as guardians and intervene in the family institution (Pisciotta, 1982). The State views status offences as a means of social control and surveillance to prevent youngsters from being exposed to crimes, moral risk, and social evils (Naffine, 1989). Through the law, the government gives support and complements the responsibility of the parents to care for the children (Nong & Yusoff, 2017).

Methodology

This study applied doctrinal legal research that focused on the legal principles in the statutes and legal institutions through reasoning power (Kharel, 2018). Statutory provisions in the Federal Constitution, parliamentary Acts, and subsidiary legislation such as regulations were reviewed. In addition to that, this study also examined the *ratio decidendi* from judicial decisions. The full case reports were obtained from online databases such as Current Law Journal (CLJ) and Lexis Nexis. Besides, secondary materials such as journal articles, textbooks, conference papers, newspaper reports, and web pages were also referred to. This study analysed the legal principles of status offences, the theories behind such law, and the application of the law in the Malaysian legal system. This study highlights the interplay of the legal doctrine on status offences and the legal practice of its application in Malaysia.

Establishing the Liability & Defence of Infancy

Several statutes in Malaysia resemble status offences. They are aimed at children because there is no equivalent law for adults who have reached the age of majority as defined by section 2 of the Age of Majority Act 1971. Furthermore, minors under the age of 10 are exempt from criminal liability under section 82 of the Penal Code. In *Marsh v Loader (1863) 143 ER 555*, for example, the defendant apprehended a youngster, one or two months shy of seven years old, taking a piece of wood from his property and taking him into prison. The Magistrate released the boy since he was under the age of responsibility. The child could not commit a felony. As a result, it is essential to remember that status offences must be read together with the provision of s 82 of the Penal Code. Children under the age of ten are entirely relieved from criminal responsibility.

S 83 of the Penal Code stipulates that an act of a child above the age of ten but under the age of twelve is not an offence if he has not attained the maturity to understand his Act's nature and consequences. The Penal Code framers chose twelve years of age, two years younger than the English presumption of infancy, due to the "precocity of the children in the East". The emphasis of s 83 is whether the child has sufficient maturity and understanding to

appreciate his Act's outcome as good or evil. That forms the basis of a guilty mind (*mens rea*) based on the maxim '*quia malitia supplet aetatem*', which means malice makes up for age. The rebuttable presumption requires the child to prove that at the time of the commission of the offence, he lacks sufficient maturity of understanding of the nature and consequences of his action.

In the Indian case of *Ulla Mahapatra v King (1950) Cut 293*, an eleven-year-old boy was charged with murder. From the evidence, it was proven that he charged toward the victim with a knife, saying that he would cut him to bits and eventually did cut him. The Court held that his conduct led to one inference that he intended to hurt the victim, and he knew that a cut inflicted by a knife would effectuate his intention. In another Indian case of *Abdul Sattar v Crown 1949 50 Cri LJ 336*, the boys below twelve years old broke into several shops and committed theft. The Court held that the Act of breaking the locks and taking only valuable items indicated that the accused had sufficient maturity and understanding of their conduct. In *Re Marimuthu*, a ten-year-old girl working as a servant took a silver button belonging to her master and gave it to her mother. The accused was acquitted, and the Court observed that under s 83, a child between 7 and 12 years of age could not be found guilty of an offence unless it is proven that the child had attained sufficient maturity of understanding to judge the nature and consequences of the acts done.

By the implication of ss 82 and 83 of the Penal Code, children above the age of 12 but below 18 can be fully criminally responsible. In such cases, courts often consider the seriousness of the offences committed. For instance, in *PP v Mohd Turmizzy [2007] 6 MLJ 642*, Ipoh High Court held that since drug trafficking is a grave crime that affects public health and safety, it does not warrant the Court's mercy. The Court cited the Lordship KN Segara J's observation in *PP v Low Kian Boon [2006] 6 MLJ 254*, where it was held that since serious crimes among youths seem to be on the rise, it would send a wrong signal to children and the public at large if the Court were to treat them with "kid gloves." Similarly, in *Veerian a/l T. Latchmanen v PP [2001] MLJU 499*, the High Court of Taiping observed that most crimes committed by juvenile offenders in the 1950s to 1970s were most crimes committed by juvenile offenders were petty offences out of mischief or poverty. However, juvenile crimes have worsened, and some young persons were involved in drug trafficking and crimes of violence. The Court observed that the "authorities should not fall into this trap or hoodwinked. The Court must show its abhorrence, and this could only be shown by reflecting on the sentence imposed by the Court." The Court affirmed the custodial sentence against the accused, who was found guilty of robbery and causing hurt.

Statutes Reflecting Status Offences in Malaysia

The following are statutory provisions that reflect the existence of status offences against children in Malaysia.

(a) Children Beyond Control

Despite the lack of an explicit stipulation that "children beyond control" is a status violation in Malaysia, section 46 of the Child Act 2001 mimics one. Minors who are out of control face the same treatment as children who commit crimes, including temporary incarceration and suspension of personal liberty for up to three years (UNICEF, 2013). While naughty behaviours

are not illegal in and of themselves, indiscipline and disobedience toward parents might be viewed as "out of control" behaviour.

The Child Act of 2001 does not define "beyond control" behaviours. S 46(1) states that if the parent or guardian is unable to exercise proper control and care over the child, they may make a written request to the Court for Children so that the child will be sent to the institutional placement. Those who are "naughty, ungovernable, disobedient, delinquent, deviant, or children involved in social problems" may fall into this category (Syed Nong & Mohd Yusoff, 2019). In *Superintendent of Pulau Jerejak v Wong Cheng Ho* [1980] 1 MLJ 154, the Federal Court observed that depending on the circumstances of each case, it is up to the Executive to determine whether the child is in need of care or protection, has fallen into bad company, is exposed to moral danger, or is beyond control.

There are no analogous provisions in other Malaysian laws that govern unpredictable or unmanageable adults. Parents' options for dealing with adult children who have a violent tendency are restricted to filing a police report if a crime is committed or suspected. If an adult commits simple disobedience, verbal disagreement, or leaves the house without permission, the matters are not usually reported to the police. The only recourse is to lodge a report for a missing person should the adult child leave the house and cannot be contacted by the family.

(b) Tobacco and Alcohol Consumption Prohibition

In addition to the Child Act of 2001, some other laws in Malaysia might be considered status offences. For example, reg. 8 of the Control of Tobacco Product Regulations 2004 prohibits the sale of tobacco products to minors. Besides, reg. 13(1) states that a child who smokes, chews, buys, or has any tobacco product in his possession, whether for his consumption or not, commits an offence and is subject to a fine of not more than RM1,000 if convicted. Because of the health concerns linked with tobacco consumption and its addictive nature, especially among adolescents, this status crime on smoking prohibition has been established. Furthermore, data indicating cigarette smoking is a potential factor associated with substance dependence supports the tobacco ban on minors (Weinberger et al., 2017).

On 27 July 2022, the Health Minister tabled the Anti-Tobacco Bill before the Parliament which aimed to prohibit those who were born after 1 January 2007 from purchasing and possessing cigarettes, including electronic cigarettes (vape) (Adam, 2022). The penalty for the breach is fine up to RM5,000. Those who sell or provide cigarettes or vapes to those born after 1 January 2007 are subject to a fine not exceeding RM20,000, or imprisonment up to one year, or both. For a second or subsequent offence, the maximum fine is RM30,000, or jail up to two years, or both (Adam, 2022).

Regulation 361(4) of the Food Regulations 1985 forbids the sale of alcoholic beverages to anybody under 21. The legal drinking age was eighteen before December 2017. (Aziz, 2016). Underage drinking, like smoking, has many negative health consequences. Those who begin drinking before the age of fifteen are five times more likely to suffer from alcohol-related health problems later in life (Mohd Arshad et al., 2015). Underage drinking is also linked to car accidents, the leading cause of death among teenagers, suicide, violence, academic issues, and sexual offences (Harding et al., 2016).

(c) Driving Restrictions

A person under the age of sixteen is not permitted to operate a motor vehicle on the road, according to section 39(1) of the Road Transport Act 1987. S 39(2) further specifies that no individual under the age of seventeen may operate a motor vehicle on the road other than a motorcycle or an invalid carriage. Tractors, public service vehicles, and heavy machinery require a driver to be at least 21 years old to operate (3). Under section 39(5) of the Act, non-compliance with the foregoing provisions is punishable by a fine of not more than RM2,000 or a period of imprisonment of not more than six months or both. The prohibition on minor driving stems from the fact that driving is a complicated endeavour that necessitates psychomotor, cognitive, and perceptual abilities and the higher danger of accidents among young beginning (Williams & Ferguson, 2002).

In Penang, for example, three children pleaded guilty to a summons of RM400 each for dangerously riding their bicycles in violation of regulation 42(3) of the Road Traffic Rules 1959. (Alias, 2018). A traffic summons was issued against a ten-year-old boy in Jitra, Kedah, for riding a motorcycle under 18, having an expired road tax, having no insurance coverage, and without wearing a helmet. Under section 39(5) of the Road Transport Act 1987, his parents were prosecuted (Azimi, 2020). Moreover, after a video of a 10-year-old girl riding a motorcycle went viral on social media, she was issued three summons for riding a motorcycle without a licence, not wearing a helmet, and not having side mirrors in Kuala Lumpur (Bahaudin, 2021).

(d) Employment Law Restraints

In terms of labour law, the Children and Young Persons Employment Act of 1966 governs the employment of children in Malaysia. A "child" is defined as "any person who has not completed his fifteenth year of age" under s 1A(1) of the Act, while a "young person" is defined as "any person who, not being a child, has not reached his eighteenth year of age." S 2 forbids children and young people from doing any harmful labour or working in any occupation other than light labour, school training, or apprenticeship. S 2(3) allows young people to work as a domestic servant, office, shop (including hotels, bars, restaurants, and stalls), go-down, factory, workshop, store, boarding house, theatre, cinema, club or association, and industry suitable to their capacity while under the supervision of their parents or guardians.

Female minors are given further protection under this clause, as they are not permitted to work in hotels, bars, restaurants, boarding homes, or clubs unless they are under the administration or control of their parent or guardian. A violation of the Act is punishable by imprisonment for a term of not more than three years, a fine of not more than RM10,000, or both. Children's employment is prohibited to eliminate child labour and exploitation and allow them to focus on their education (Mahmood et al., 2016).

(e) Participation in a Peaceful Assembly

Individuals under the age of twenty-one years old are prohibited from organising peaceful meetings under section 4(1)(d) of the Peaceful Assembly Act 2012. Children are likewise forbidden from participation in assemblies, save for those mentioned in the Second Schedule, according to paragraph (e) of the same section. Only religious assemblies, funeral processions, assemblies related to customs, and assemblies authorised by the Minister are permitted for children. A 'child' is defined as a person under fifteen in Section 3 of the Act.

The prohibition is warranted because children, particularly those of a young age, are frequently taken to assemblies by their parents without their consent or awareness of the nature of the gatherings (Daly, 2013). Furthermore, there is a chance that the gathering would devolve into violence, endangering the children's health and safety (Daly, 2013). The possibility of adults manipulating youngsters to join the assembly in order to achieve their own interests is also a source of concern (Daly, 2013).

(f) Restriction on Underage Marriage

In terms of child marriage, the marriageable age for non-Muslims is 18 years old for both males and females, according to section 10 of the Law Reform (Marriage and Divorce) Act 1976. However, a female who has reached the age of 16 may marry after obtaining permission from the Chief Minister under section 21(2) of the same Act. Under this subsection, an application for a licence shall be in Form E in Schedule 1 to the Law Reform (Marriage and Divorce) Rules 1982. On the other hand, for Muslims, generally, the State Syariah Enactments include a similar rule that no marriage may be solemnised if the man is under the age of 18 or the woman is under the age of 16 unless the Syariah Judge provides his written consent in "certain situations". For example, s 8 of the Islamic Family Law (Federal Territory) Act 1984 and s 8 of Sabah Islamic Family Law Enactment 2004 contain the minimum marriageable age. The Syariah Enactments do not outright prohibit child marriage as there are procedures to marry under the prescribed age, provided it is permitted by the Syariah Courts (Thuraisingama & Abdul Hadi, 2021).

Because the phrase "certain situations" was not specified, the Court's judgement and discretion must be used to interpret it. Before making a judgement, a judge usually analyses the child's best interests, physical characteristics, and environmental background, as well as medical and counselling reports. In *Kamariah bt Ahmad v Nur Asmira bte Abdullah* [2015] 3 SHLR 21, the girl aged 15 and two months applied from the Syariah Court of Melaka to solemnise an underage marriage. The Court allowed the application as it was satisfied that the reason given by the parties was that the girl and her boyfriend often go out together, so the marriage is necessary to prevent humiliation to the families.

However, based on health hazards such as premature pregnancy, depression, sexually transmitted illnesses, and maternal mortality, there have been calls to prohibit child marriage (Nour, 2009). In addition, child marriage exposes victims to physical and mental assaults and poverty (Parsons et al., 2015). Besides health consequences, child marriage often affects girls' access to education. Due to the chores at home and their duties to care for their families, girls who were involved in child marriage often dropped out of school (Mahato, 2016).

(g) Prohibition on Purchase of Poisons and Controlled Medicine

Regarding poison, s 17(1) of the Poisons Act 1952 prohibits selling and supplying poisons and controlled medicine to persons under 18. It is an offence under s 17(2) and subjects to a general penalty under s 32(2) of the Act, which provides a fine not exceeding RM3,000 or imprisonment for a term not exceeding one year or both upon conviction. The primary reason for such restriction is to prevent poisoning among children, which can be unintentional due to their exploratory nature and immaturity (Ahmed et al., 2015). The limitation also purports to avoid drug abuse and adverse health impacts on children (Hasan & Muhammad, 2017).

In *Muhammad Afiq bin Rosnizam v Public Prosecutor [2015] MLJU 811*, the High Court, in reaffirming the decision of the Court for Children that ordered a child offender to be sent to Henry Gurney School, Melaka, observed that drug offence is a grave crime. It is necessary to remove the child from society as he was a repeat offender and the parents also failed to exercise proper control over him. There is also a high relapse tendency due to his association with persons with bad character. The Court also highlighted that drugs had been declared the number one menace to the country and continue to be to date.

(h) Film Censorship and Ban from Entertainment Outlets

The Film Censorship Board divides films into three categories, as defined by the Film Censorship Guidelines 1993 (as updated in 2010). To begin with, the 'U' classification permits viewing by people of all ages. Second, the 'P13' rating denotes that viewers under 13 must be supervised by a parent or guardian while watching. The film contains scenes that have aspects of terror, scare, negative acts, and tension components, but not in excess, an elusive storyline, and elements that can disrupt a child's emotions. On the other hand, the '18' classification indicates that the films are intended for audiences aged 18 and up. The film features elements of horror, gore, and violence that are not excessive, an adult scene that is not overbearing, and social, sensitive political, and religious themes that necessitate a high degree of comprehension (Islam & Rahman, 2019). The purposes of censorship and rating system are to censor or ban films that violate Malaysian society's religious, cultural, and moral standards (Mahmud et al., 2009) and give parents guided discretion on viewing decisions suitable for their family (Islam & Rahman, 2019).

The restriction on entering entertainment outlets such as nightclubs falls under the jurisdiction of local authorities. S 2 of the Entertainment (Federal Territory of Kuala Lumpur) Act 1992 defines "entertainment" to include:

- a. plays, operas, pantomimes, variety acts, performances of music, singing, dancing, gymnastics, martial art
- b. demonstrations, acrobatics and legerdemain, beauty contests, tableaux, demonstrations, displays and parades, in which living persons take part
- c. displays of fireworks, set pieces, commemorative decorations and representations of real or mythical creatures
- d. circuses and exhibitions of animals
- e. exhibitions of models, reading matter, pictures, photographs or of statuary or other forms of representation of human or animal figures
- f. exhibitions of cinematograph films, video movies and puppet-shows
- g. reproductions or transmissions otherwise than in association with a cinematograph film, by any means whatsoever other than telephony or radio telephony, of any music, song or speech
- h. machines and devices by the manipulation of which chances are given of obtaining prizes in money or kind
- i. pin-table and video games
- j. sporting contests of any kind between any number of persons or animals, organised competitions at games of skill or chance
- k. trade fairs consisting of the exhibition, advertisement or sale of the products of industries or of materials
- l. any combination of any of the above forms of entertainment; or

m. any other entertainment which the Minister may, from time to time by order in the Gazette, declare
in any place to which members of the public are admitted with or without payment of money or other consideration.

Under rule 29(1) of the Entertainment (Federal Territory of Kuala Lumpur) Rules 1993, the mayor may set the minimum age of customers entering adult entertainment outlets. In Kuala Lumpur, the current minimum age is 21. Under rule 29(2), no one under the minimum age is allowed to enter the outlet. Rule 29(3) obligates the entertainment license holder to put up a notice banning the entry of a person under the minimum age. The restriction was made on the basis that clubbing is often associated with negative connotations, such as drug and alcohol consumption (Mazierska & Rigg, 2021) and immoral activities, including prostitution (Darley, 2009) and nightlife violence (Schnitzer et al., 2009).

Article 8 of the Federal Constitution and Issue of Discrimination

Article 8(1) of the Federal Constitution (FC) guarantees equality before the law and equal protection under the law for all people. Furthermore, Article 8(2) states that no law may discriminate against citizens solely based on religion, race, descent, or place of birth unless the Constitution expressly authorises it. Because the above-mentioned status offences exclusively apply to children, the question of whether those laws violate the equality principle arises. Critics argue that status offences are discriminatory towards children and should be abolished as they fail to respect children's rights and do not reflect the best interests and welfare of the children. Critics also submit that status offences increased the number of children detained in police custody for minor offences such as truancy, running away from home, or being 'beyond parental control' (Child Rights Information Network, 2010).

Although unrelated to children, several times, Malaysian courts have heard cases involving claimed violations of the equality clause. In *Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333*, the Federal Court remarked that the test to assess whether legislation approved by Parliament is arbitrary or not is that the law must be upheld as long as it does not result in unfair discrimination. Another essential component of the equality clause is that, as maintained in *Dato' Yong Teck Lee v PP [1993]*, Article 8 does not require that all people be treated the same; only those in the same class shall be treated the same. The Court in *PP v Khong Teng Khen [1976] 2 MLJ 166* highlighted the legal reality that the law may classify people into children, juveniles, and adults and provide different criteria for determining their criminal liability or the mode of trying or punishing them if found guilty. Classification may also present in terms of different rights and liabilities associated with each class. The law may also classify offences into different categories and provide that some offences be triable in a Magistrate Court, Sessions Court or High Court.

In *Meor Atiqulrahman Ishak & Ors v Fatimah Sili & Ors [2000] 1 MLJ 393*, the Federal Court responded on the issue of equality between children and adults. In this case, the appellants, students of one Sekolah Kebangsaan Serting Hilir (FELDA), were expelled from said primary school for refusing to comply with reg. 3 of the *Peraturan Sekolah Kebangsaan Serting (FELDA) 1997* (Serting Primary School's Regulations 1997). The appellants had worn turbans as part of their school uniform to school, which was prohibited under the Regulations 1997. According to Syariah law, the appellants were not of age of majority as they were not yet *baligh* (coming

of age). The Federal Court observed that even with regard to mandatory practices (*wajib*), the *Syariah* treats adults and children differently, like any law, for that matter. The Court answered negatively on the issue of violation of the equality clause as the appellants are not allowed to wear the turban as part of the school uniform during school hours only. They are not prevented from wearing the turban at other times. However, if they join a sport or curricular activities, they need to comply with the prescribed clothing regulations. Besides, there is no restriction for the children to join *pondok* school (religious school) where the wearing of the turban was not prohibited, unlike in government schools.

In practice, when the idea of non-discrimination is discussed, it is in terms of equality among children, not between children and adults. As a result, the idea can be interpreted as stating that all children must be treated equally, but not necessarily that children and adults must be treated equally (Shier, 2012). The Court will decide whether the categorisation is justified rationally and comprehensively (Faruqi, 2019). The Court of Appeal established unfair discrimination standards in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241*. To be actionable, the offended party must demonstrate to the Court that the discrimination was accompanied by severity, harshness, unfairness, and bias favouring one person over another.

Conclusion

To summarise, status offences against children are still significant in Malaysia since the law aims to safeguard children's interests and welfare from misbehaviour, danger, and vices. Status offences reflect the government's responsibility under *parens patriae* doctrine to support parents and guardians in caring for children. According to the classification doctrine used to interpret Article 8 of the Federal Constitution, in answering whether status offences are discriminatory towards children, it is submitted that they do not violate the Constitution. Law may classify and differentiate between adults and minors for valid justification, such as to protect the children's life, welfare, and safety and discipline them, among other things. This study submits that status offences are still relevant as they serve the public interest function of preventing children from engaging in inappropriate, immoral, and dangerous activities.

However, a more child-friendly approach is required when it comes to status offences. Instead of processing status offenders via the traditional juvenile justice system in the Courts for Children, a diversion system should be established to refer them to restorative and rehabilitative programmes. This study argues that arresting the children and detaining them for committing status offences is not a suitable practice. While status offences are still crucial in protecting children, dealing with juvenile offenders must focus on restoring the children to become better citizens, with punitive measures used only as a last resort. Diversion programmes that focus on educating, counselling, and reintegrating the children into society should be utilised to keep out the children who have committed status offences from the formal criminal justice system. Institutional detention should only be invoked as the last resort where the nature of the crime committed is grave and warrants punitive treatment.

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