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Comparative Analysis of Juvenile Criminal Liability: The Indonesian and Malaysian Approaches to Defence of Infancy

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Abstract:
The minimum age at which children can be held criminally liable is a central issue in juvenile criminal justice because it reflects how the law defines childhood, liability, and the state's obligations toward child offenders. This study examines how Indonesia and Malaysia design and apply the defence of infancy and how these choices influence the treatment of children in conflict with the law. The study aims to analyse the conceptual foundations, mechanisms, and practical consequences of the minimum age for establishing criminal liability in both jurisdictions. This study relies entirely on secondary data drawn from legislation, judicial decisions, academic literature, and official documents. Indonesian materials include the Juvenile Justice System Law of 2012 and several illustrative judgments, such as Decision Number 23/Pid.Sus-Anak/2025/PN Lbp, Decision Number 127/Pid.Sus/2012/PN.Bi, and Decision Number 1/Pid.Sus-Anak/2022/PN.Sbr. Malaysian sources include the Child Act of 2001, the Malaysian Penal Code, and case law such as Child v Public Prosecutor [2020] MLJU 13944. The findings show that Indonesia adopts a fixed statutory minimum age of twelve accompanied by diversion and restorative justice mechanisms, while Malaysia applies the doctrine of doli incapax, granting absolute immunity to children under ten and a rebuttable presumption for those aged ten to twelve, with greater reliance on institutional rehabilitation. These differences shape how liability is assessed and how children are processed, rehabilitated, and reintegrated into society. Based on these observations, the study suggests that Malaysia could benefit from expanding restorative practices, while Indonesia requires stronger and more consistent implementation of its existing restorative framework.

Keywords:
infancy; juvenile criminal liability; restorative justice.

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Introduction

Can an eleven-year-old child who steals be held criminally liable for the crime he has committed? This question seems simple, but the answer is probably not. It depends on where the child lives; different jurisdictions may apply different approaches, including Indonesia and Malaysia. In contemporary criminal law, the minimum age requirement for establishing juvenile criminal liability represents a complex interplay between the imperatives of child protection and the demands of criminal liability. It reflects a broader tension between notions of innocence and responsibility. Rather than merely reflecting this tension, the divergence between legal systems lies in how criminal capacity is determined, particularly whether liability is defined through a fixed statutory age threshold or through a presumption-based assessment of a child's capacity to understand wrongdoing.

While these conceptual differences highlight how each jurisdiction frames the boundaries of criminal liability, their practical relevance becomes clearer when examined alongside empirical patterns of how often children come into contact with the criminal justice system. Globally, UNICEF estimates that around 259,000 children were held in various forms of detention in 2024, showing that the issue of juvenile criminal liability has a significant real-world impact.[1] In Indonesia, court records 4,314 child offenders in 2022, 5,006 in 2023, and 4,823 in 2024;[2] while data from the relevant ministry shows that 449 children are under detention and 1,569 others are serving sentences.[3] In Malaysia, the Children Statistics published by the Department of Statistics Malaysia (DOSM) in 2025 report that 2,743 children were involved in crimes in 2023 and 2,627 in 2024,[4] indicating that the challenge is substantial in both jurisdictions. These numbers show that questions of capacity and culpability cannot be understood solely at the doctrinal level because they affect a large population of children who encounter the criminal justice system every year. They also demonstrate that different legal approaches have practical implications on how young offenders are identified, processed, and ultimately treated. Taken together, the empirical context reinforces the need to examine how each legal system constructs juvenile criminal liability and determines the extent to which children can be held liable for unlawful conduct.

Infancy is an affirmative defence that can be used to argue that a child cannot possess the requisite *mens rea* or guilty mind to be charged with the crime due to their age. In other words, the child offender has no capacity to comprehend the nature of his action. The defence of infancy developed as a result of a reluctance to penalise juveniles who are unable to form criminal intent as adults.[5] In many legal systems, this principle is rooted in the belief that children should not be treated with the same standards as adults regarding criminal liability, as they lack the emotional, psychological, and intellectual maturity necessary to fully comprehend the consequences of their behavior. The defense of infancy underscores that children and adolescents are in a period of growth and should be afforded the opportunity to reform and reintegrate into society, rather than be subjected to the same punitive measures as adults. However, the application of this defense varies across jurisdictions, with different age thresholds and requirements for proving immaturity, reflecting diverse views on when a child is capable of having criminal intent and when they should be held liable within the juvenile criminal justice system.

Different countries tackle this issue in distinct ways. In Indonesia, the Child Protection Law of 2002 (Amendment 2016) defines a child as an individual under 18, including those still unborn.[6] Additionally, the Juvenile Justice Law of 2012 stipulates that children in conflict with the law are those aged 12 to 18, who are suspected of committing a criminal act. On the other

[1] UNICEF, "Justice for Children," UNICEF Data, 2025, https://data.unicef.org/topic/child-protection/justice-for-children.
[2]Direktorat Jenderal Badan Peradilan Umum, "Infografis Anak Berhadapan Dengan Hukum," 2025, https://badilum.mahkamahagung.go.id/attachments/article/4857/Infografis Anak Berhadapan Dengan Hukum.pdf.
[3] Almira Afini, "Mengupas Esensi Diversi: Partisipasi Masyarakat Dalam Sistem Peradilan Pidana Anak," Kementerian Imigrasi dan Pemasyarakatan Republik Indonesia, 2025, https://www.kemenimipas.go.id/profil-2/logo-unit-eselon-1?catid=2&id=4055%3Amengupas-esensi-diversi-partisipasi-masyarakat-dalam-sistem-peradilan-pidana-anak&view=article&utm.
[4] Kementerian Ekonomi Jabatan Perangkaan Malaysia (DOSM), "Children Statistics Malaysia 2025," 2025.
[5] Wex Definitions Team, "Infancy," Cornell Law School, 2023.
[6] Evan Ferdiyan Rachmanto, "Legal Protection for Children as Victims of Violence," *Journal of Law and Legal Reform* 2, no. 4 (2021): 515–26, https://doi.org/10.15294/jllr.v2i4.48758.

hand, in Malaysia, the Child Act of 2001 defines a child as someone under 18.[7] However, in criminal matters, the age requirement for establishing criminal liability is determined by the Malaysian Penal Code. According to Section 82, no child under the age of 10 can be held criminally liable. For those aged between 10 and 12, Section 83 allows them to be held liable only if it can be shown that they possessed the maturity to understand the wrongfulness of their actions.

The age requirement for establishing criminal liability is a key concept in determining whether a child can be held legally liable for committing a crime. It represents a significant turning point in the state's obligation to maintain public order while simultaneously protecting children's rights and best interests. Children must be viewed differently from adults because they frequently lack the moral development and mental capacity to completely understand the consequences of their actions.[8] Because of this, the law provides a defence, known as the defence of infancy, which protects children from criminal liability based on the understanding that they may not yet comprehend the wrongful nature of their act. By comparing the approaches of Indonesia and Malaysia, the study seeks to understand the extent to which the variations in the defence of infancy doctrine affect the protection of children's rights and the administration of juvenile justice.

Malaysia is selected in this comparative study because it offers a legally meaningful contrast to Indonesia in defining the minimum age for establishing criminal liability. Both countries recognise the need for special protection for children, yet they rely on different conceptual foundations in determining criminal capacity. Indonesia applies a fixed statutory threshold that sets a clear minimum age for liability. Malaysia adopts the doctrine of *doli incapax* as the basis for determining whether a child can form criminal intent. Under this doctrine, Malaysia grants absolute immunity to children under ten and applies a rebuttable presumption of incapacity for those between ten and twelve.[9] These structural differences influence how each system evaluates a child's understanding of wrongdoing and how discretion is exercised in juvenile cases. For this reason, Malaysia is an appropriate method in analysing how the legal system shapes liability, protection, and rehabilitation for child offenders.

Studies on juvenile criminal liability have been conducted by various researchers. Kossay et al. concentrate on the implementation of diversion and restorative practices without examining how criminal responsibility for children is legally constructed. Their analysis remains focused on procedural outcomes and does not address the doctrinal basis that determines when a child may be held criminally liable.[10] The study by Taufiqurahman et al. compares juvenile criminal justice policies in Indonesia and Malaysia but does not discuss

[7] Nahid Ferdousi and Raihanah Abdullah, "Child Protection and Juvenile Justice: Legal Issues in Bangladesh and Malaysia," *Journal of Legal Studies* 15, no. II (2024): 529–57, https://doi.org/https://doi.org/10.32890/uumjls2024.15.2.6.
[8] Kevin Haines et al., "Children and Crime: In the Moment," *Youth Justice* 21, no. 3 (2021): 275–98, https://doi.org/10.1177/1473225420923762.
[9] Firly Ajurni and Novilia Wulan Sari, "Perbandingan Sistem Hukum Negara Indonesia Dan Malaysia Mengenai Perlindungan Anak," *Hukum Inovatif : Jurnal Ilmu Hukum Sosial Dan Humaniora* 1, no. 3 (2024): 347–59, https://doi.org/10.62383/humif.v1i3.433.
[10] Methodius Kossay, Nur Amannah Dalimunteh, and Abdul Romadon Sitompul, "The Effectiveness of Juvenile Diversion in Indonesia, Malaysia, and the Philippines: A Comparative Study of ASEAN Justice Systems," *Perkara : Jurnal Ilmu Hukum Dan Politik* 3, no. 2 (2025): 908–24, https://doi.org/10.51903/v2thtn98.

how each jurisdiction establishes the legal threshold for attributing liability to minors.[11] This leaves an essential element unaddressed regarding how criminal liability is grounded in statutory frameworks. Sharifah examines the evidentiary implications of section 113 of the Evidence Act but limits its discussion to sexual offense cases without connecting the presumption of incapacity to the broader structure of juvenile criminal liability.[12] It is clear that the three previous studies highlight policy and evidentiary issues, yet do not analyze the legal foundation that determines capacity across different age categories. This article fills that gap by comparing Indonesia's minimum age requirement with Malaysia's combination of absolute incapacity for children under ten and a rebuttable presumption for those aged ten to twelve.

The novelty of this article lies not merely in identifying structural differences, but in analysing the doctrinal implications of these differences for the construction of criminal capacity and the scope of child protection within each legal system. These distinct structures shape how criminal capacity is conceptualised, how discretion is exercised by legal actors, and how protective versus punitive objectives are balanced in juvenile justice. By focusing on these foundational differences, the article clarifies how criminal capacity is legally defined and how appropriate procedures are implemented in juvenile criminal cases. Indonesia's model emphasizes certainty by setting a single minimum age without further assessment. Malaysia's model introduces a presumption that allows courts to consider whether a child aged 10 to 12 can form intent. These contrasting approaches influence how each system structures protection and liability for child offenders. Through this doctrinal comparison, the article offers a meaningful contribution to addressing juvenile criminal liability issues that have not been addressed in the existing literature.

Method

This study examines how Indonesia and Malaysia formulate and implement the defence of infancy in their juvenile justice systems by relying entirely on secondary data. It adopts a doctrinal legal research approach within a comparative legal analysis framework. The study uses statutory materials, judicial decisions, academic writings, and official documents issued by state institutions responsible for child protection and juvenile justice. Indonesian data include the Juvenile Justice Law of 2012, relevant ministerial regulations, and several illustrative judgments, such as Decision Number 23/Pid.Sus-Anak/2025/PN Lbp, Decision Number 127/Pid.Sus/2012/PN.Bi and Decision Number 1/Pid.Sus-Anak/2022/PN.Sbr, which were selected for their relevance to the application of diversion and restorative justice. Malaysian sources include the Child Act of 2001, the Malaysian Penal Code, related guidelines, and judicial decisions such as Child v Public Prosecutor [2020] MLJU 13944, which demonstrate the operationalization of the doctrine of doli incapax and institutional rehabilitation.

[11] Farhan Taufiqurahman et al., "Juvenile Justice Criminal Law Policy Between Indonesia and Malaysia : A Comparison," *Ius Comparatum: Journal of Law Studies* 1, no. 2 (2025): 59–69, https://doi.org/10.35586/icjls.v1i2.
[12] Sharifah Nur et al., "Doli Incapax : The Relevancy of Section 113 of the Evidence Act 1950 Relating to Child Rape in Malaysia," *International Journal of Academic Research in Business & Social Science* 14, no. 10 (2024): 74–97, https://doi.org/10.6007/IJARBSS/v14-i10/22872.

All materials were obtained through library study using publicly accessible court databases, legal repositories, government publications, and academic databases. Judicial decisions were selected based on their connection to the minimum age of criminal liability, the implementation of restorative or rehabilitative mechanisms, and the extent to which they reflect typical judicial reasoning and regional application trends in each jurisdiction. The collected data were analysed qualitatively by interpreting statutory provisions to examine conceptual foundations, analysing case law to elucidate operational mechanisms, and identifying patterns and potential inconsistencies between legal norms and judicial practice in the application of the defence of infancy. These analytical steps were structured to directly address the study's aims by linking statutory analysis to conceptual foundations, case-law analysis to procedural operation, and a synthesis of both to assess the practical consequences for children in conflict with the law. A comparative approach was used to analyse Indonesia's statutory minimum age system and Malaysia's presumption-based model, enabling an assessment of their conceptual foundations, procedural implications, and the practical consequences for children in conflict with the law.

Discussion

1. The Concept and Application of Criminal Liability Under Defense of Infancy in Indonesia and Malaysia

At what age can a child be considered mature enough to be held liable for the criminal act they committed? This question is not merely a matter of numbers, but is deeply rooted in the legal, social, and humanitarian values embraced by each country. Although Indonesia and Malaysia are both located in Southeast Asia and share similar legal histories, they provide different answers to this question. This divergence is not merely technical, but reflects fundamentally different philosophical choices in constructing criminal capacity and child protection. In Indonesian criminal law, the defence based on minority, commonly known as the defence of infancy, is recognized as an excuse under Article 40 of the National Code Penal of 2023. In case a person who has committed an act that corresponds to the formulation of the offence receives an exemption on the grounds that it is not appropriate for that person to be criticised, he should not be blamed, then the things that cause him to not deserve to be criticised are referred to as things that can forgive him, which is also shortened as an excuse.

The minimum age of criminal liability is a significant topic, since it determines when a person can be subjected to criminal punishment equivalent to that of an adult, in terms of consequences, nature, and severity. Indonesia adopts a strict age-based approach to juvenile criminal liability.[13] This fixed statutory threshold reflects a legislative preference for legal certainty and categorical protection rather than individualized judicial assessment of capacity. Under the provisions of Article 1, Paragraph 2 of the Juvenile Justice Law of 2012, it has been declared that any person between the ages of 12 and 18 who is either an alleged perpetrator of criminal conduct, a victim of criminal conduct, or a witness to criminal activity

[13] Reynald Ottenhof, "Criminal Resposibility of Minors In National and International Legal Order," *International Review of Penal Law* 75, no. 1 (2024), https://doi.org/10.3917/ridp.723.0669.

is considered to be a child in conflict with the law, or a child.[14] Children who commit or are suspected of committing crimes are also known as children in conflict with the law. They must be held liable to the law for their actions, which means they must participate in court proceedings, investigations, prosecutions, examinations, and many other legal procedures.[15]

In cases involving children as offenders, the evaluation of the criminal elements must still be guided by the provisions of substantive criminal law, such as the Indonesian Penal Code or other laws outside the Indonesian Penal Code that address specific offenses. However, in the context of juvenile criminal liability, the decisive issue is not the construction of the criminal elements themselves, but the legal justification for subjecting a child to criminal responsibility once those elements are met. This is because the Indonesian Code remains the primary reference for assessing whether the necessary elements of a criminal offense are met, considering both actus reus and mens rea. Actus reus, referring to the guilty act, relates to the objective or external component of the crime, whereas mens rea, or the guilty mind, focuses on the mental state of the individual who commits the unlawful act. Therefore, every crime consists of both a particular physical condition and a specific mental state that results in the act.[16] Therefore, even if the offender is a child, the process of proving the elements of the crime remains essentially unchanged. Evidence plays a crucial role in the court's examination of criminal procedural law. This is because there is a specific procedure for presenting evidence to establish the defendant's guilt or innocence during a trial.[17] The only difference is the legal procedure and the legal consequences that will be imposed after the criminal elements are declared fulfilled. Therefore, the examination of criminal offenses committed by children must still fulfil the formal and material requirements of proof as commonly applied to adults.

'Lex Specialis Derogat Legi Generali', which states that specific laws take precedence over general laws, is applied when enforcing the juvenile criminal justice system. For procedural aspects and the treatment of juvenile offenders, the main reference is the Juvenile Justice Law of 2012. Under the Juvenile Justice Law of 2012, law enforcement officials are required to treat children with the principles of protecting children's rights, restorative approaches, and paying attention to the best interests of the child.[18] This special procedural framework reinforces Indonesia's policy choice to prioritize uniform protection through age-based exclusion rather than discretionary assessments of criminal capacity. The legal process against children is not only intended to uphold justice, but also to prevent the negative impact of children's involvement in the juvenile criminal justice system.[19] Therefore, although the criminal elements are assessed under the Indonesian Penal Code, the implementation of the process must still be subject to special mechanisms as regulated in the Juvenile Justice Law of 2012.

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[14] Dwi; Mahfud Khairunnisa, "Criminal Juvenile Liabilities Under Indonesian Laws and the 1989 United Nations Convention on the Rights of the Child: An Analysis," *Student Journal of International* 03, no. 2 (2023): 108–19, https://doi.org/10.24815/sjil.v3i2.28079.

[15] Chamdani, Nobella Indradjaja, and Febrina Nurhandy, "Diversion As the Case Resolution for Children in Conflict With the Law Within the Perspective of Legal Psychology," *Awang Long Law Review* 6, no. 2 (2024): 478–82, https://doi.org/10.56301/awl.v6i2.1199.

[16] Alessandro Stasi, *General Principles of Thai Criminal Law*, *General Principles of Thai Criminal Law*, 2021, https://doi.org/10.1007/978-981-15-8708-5.

[17] Dita Mujiaka, "Juridical Overview of the Process of Proving Crimes Committed by Children According to Law Number 11 of 2012 Concerning the Juvenile Criminal Justice System (Case Study Decision Number: 9/Pid.Sus- Anak/2019/Pn.Slw)," *Journal of Law Science* 4, no. 2 (2022): 58–71, https://doi.org/10.35335/jls.v4i2.2229.

[18] Kahar Muzakir, "Children's Rights to Justice and Restorative Diversion in Terms of Effectiveness," *Jurnal Ekonomi Akuntansi Manajemen Agribisnis* 1, no. 1 (2023): 33–40, https://doi.org/10.58222/jurekma.v1i1.144.

[19] Diding Rahmat, "Legal Protection Against Children of Criminal Offenses Through The Implementation of Diversion in Indonesia," *Lex Laguens: Jurnal Kajian Hukum Dan Keadilan* 2 (2024): 54–65, https://doi.org/10.08221/lexlaguens.v2i2.66.

In juvenile criminal cases, it is important for substantive criminal law and special procedural law to work together to ensure both justice and child protection are upheld. The assessment of whether a crime has been committed still relies on the Indonesian Penal Code or other relevant criminal regulations as the main basis for proving the offense. However, the way a child is treated during the legal process, including the legal measures applied, must follow the provisions of the Juvenile Justice Law of 2012. This approach ensures that while general criminal laws are used to evaluate the child's actions, special procedures are applied that consider the child's age and development. The separation between the function of criminal law and special procedures is crucial to maintaining a fair process without neglecting the child's rights. Therefore, implementing both aspects in harmony is key to enforcing the law while prioritizing the protection and rehabilitation of children in conflict with the law.

At a structural level, the Indonesian and Malaysian approaches reflect two different methods of constructing juvenile criminal capacity. In Indonesia, the question of capacity is determined legislatively through a fixed statutory age threshold, so that once the age requirement is met, criminal capacity is presumed without further individual assessment. As a result, judicial evaluation focuses on the fulfilment of offence elements and the application of special procedural safeguards, such as diversion and restorative justice, rather than on the child's capacity itself. In contrast, Malaysia places the assessment of capacity within the judicial domain for children in borderline age groups, requiring courts to examine the child's understanding and maturity through the doctrine of doli incapax. This comparison demonstrates that the key distinction between the two systems lies not merely in differing age limits, but in whether criminal capacity is predetermined by statute or assessed through judicial interpretation on a case-by-case basis.

Under Malaysian law defence of infancy originated from the legal maxim *Doli Incapax,* which treats a child as lacking the capacity to be held criminally liable. However, this presumption can be overturned if the prosecution proves that the child had what is known as *"mischievous discretion*", meaning the child knew that what they did was not merely naughty or mischievous, but seriously wrong. In contrast, Doli Capax refers to a child who has sufficient understanding of right and wrong at the time of the offence, thereby making criminal liability possible.[20] Rebutting Doli Incapax, therefore, requires the prosecution to prove that the child recognised the wrongful and serious nature of their conduct. This framework ensures that children are not prematurely subjected to criminal proceedings, while still allowing liability where genuine understanding and culpability are present.

For comparative insight, under Malaysian law, a child is defined as a person below the age of eighteen, as outlined in Section 2 of the Child Act of 2001. In line with the principles outlined in the Convention on the Rights of the Child, the Child Act emphasizes the term "children in conflict with the law" when referring to juveniles who are involved in the legal system as suspects or accused offenders.[21] Section 82 of the Malaysian Penal Code states that

[20] Kate Fitz-Gibbon and Wendy O'Brien, "A Child's Capacity to Commit Crime: Examining the Operation of Doli Incapax in Victoria (Australia)," *International Journal for Crime, Justice and Social Democracy* 8, no. 1 (2019): 18–33, https://doi.org/10.5204/ijcjsd.v8i1.1047.
[21] Norshamimi Mohd Mazlan and Aminuddin Mustaffa, "The Malaysian Juvenile Justice System: The Compelling Need to Implement Diversion in Handling The Issue of Juvenile Delinquency," *International Journal of Law, Policy and Social Review* 4, no. 1 (2022): 16–23.

no act committed by a child under the age of ten is considered an offense. This aligns with the legal principle of *Doli Incapax*, which holds that children below ten years old are presumed incapable of committing crimes.[22] This presumption is conclusive, meaning it cannot be contested or overturned, regardless of the situation. In essence, a child under the age of ten is fully exempt from criminal liability. To verify a child's age, official documents such as a birth certificate must be provided as evidence. This legal protection underscores that children of such a young age do not possess the maturity needed to comprehend the nature and implications of criminal actions. It ensures that young children are not unfairly subjected to the punitive measures of the criminal justice system.[23]

For better understanding, in the case of King Emperor v Baba Sein (1938), decided by the Rangoon High Court, a child under seven years old was accused of owning and operating a bus on a highway without having a proper permit for ferrying and plying the bus. In this case, the trial court had initially convicted the child, treating him as liable under the penal provisions. In this case, the judge emphasised that a child under the age of seven could not be held criminally responsible under any circumstances, even for violations of highway vehicle operation laws. An interpretive problem arose when the court of first instance attempted to pass sentence based on the child's position as the owner or operator of the bus. However, the High Court of Rangoon overturned the verdict, referring to Section 82 of the Penal Code, which establishes an irrebuttable presumption of legal incapacity. This shows that a child's legal capacity is not determined by their factual actions, but rather by an age threshold that is legally considered to lack the cognitive maturity to understand criminal offences.[24] This judgment reaffirmed the strict legal protection granted to very young children and clarified that criminal liability requires a minimum age threshold to ensure fairness and justice.

However, the law draws a different line for slightly older children. Section 83 of the Malaysian Penal Code deals with children who are above ten years old but under twelve. It states that nothing is an offence if the child has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion. This introduces a rebuttable presumption of incapacity, meaning that although the child may generally be presumed incapable, the presumption can be overturned under certain conditions. This presumption, known as the presumption of *Doli Incapax*, will be refuted only if the prosecution can provide sufficient evidence to establish beyond a reasonable doubt or convince the judge that the child understood that their conduct was gravely wrong.[25] If a child between the ages of ten and twelve is found to have sufficient maturity and understanding, he or she can be held criminally liable.[26] In contrast to Section 82, where the presumption is absolute, Section 83 places an obligation on the parties to prove whether or not the child had the requisite maturity. To raise the defence of infancy under Section 83, the defence must first prove the child's age by providing a valid birth certificate or equivalent legal document.

[22] Sharifah Nur et al., "Doli Incapax," 81.
[23] Enys Delmage, "The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective," *Youth Justice* 13, no. 2 (2021): 102–10, https://doi.org/10.1177/1473225413492053.
[24] Vinay Singh Moriya and Preeti Chaudhary, "Defence of Infancy and Status of Juvinile," Manupatra Articles, 2022.
[25] David Hamer and Thomas Crofts, "The Logic and Value of the Presumption Incapacity Defence)," *Oxford Journal of Legal Studies* 43, no. 3 (2023): 546–73, https://doi.org/10.1093/ojls/gqad010.
[26] Aaron H.L. Wong, "Can Lowering the Minimum Age of Criminal Responsibility Be Justified? A Critical Review of China's Recent Amendment," *Howard Journal of Crime and Justice* 63, no. 1 (2024): 3–21, https://doi.org/10.1111/hojo.12543.

Secondly, it must be demonstrated that the child had not attained sufficient maturity of understanding at the time of committing the act. Maturity, in this context, refers to a child's ability to comprehend the wrongfulness and the potential consequences of their conduct.

This structure allows the law to balance two important principles, i.e., protecting children from the harshness of criminal proceedings and ensuring that those capable of understanding their misconduct are held liable. The rebuttable presumption of Doli Incapax is based on an apparent view of reality, which holds that, below a certain age, virtually all children lack capacity. Factors most frequently considered include a juvenile's cognitive development, socio-moral reasoning, and their ability (or inability) to comprehend the criminal consequences of their actions. The child's capacity to regulate emotion and behaviour was also influenced by their lack of awareness of the illegality of certain acts, underlying mental health conditions, and behaviour.[27] Therefore, a juvenile aged between ten and twelve who wishes to invoke the defence of infancy must meet two main elements. First, proof of age, and second, proof of insufficient maturity from criminal understanding. Failure to establish either element may result in the juvenile being deemed to possess juvenile criminal liability.

In conclusion, Malaysian law takes a thoughtful and structured approach to handling juvenile offenders by clearly distinguishing levels of criminal liability based on a child's age and mental maturity. Children under the age of ten are completely exempt from criminal liability, recognizing their limited understanding and capacity to be held liable for criminal behavior. For those aged between ten and twelve, the law allows for a more cautious assessment, requiring proof that the child had the capacity to understand the nature and consequences of their actions before any legal responsibility can be imposed. This system reflects a deliberate effort to protect children from the harshness of the criminal justice system while still upholding accountability when appropriate. Compared with these models, these models expose a clear normative trade-off. Indonesia's fixed age approach prioritizes predictability and uniform protection by limiting judicial discretion at the liability stage, while Malaysia's presumption-based framework offers flexibility and contextual assessment but introduces the risk of inconsistent outcomes across cases.

2. Implications of the Defence of Infancy Differences between Indonesia and Malaysia in Juvenile Case Handling

The defence of infancy significantly shapes how legal systems view and handle juvenile criminal liability. The fundamental understanding that children have lower moral and cognitive capacities than adults serves as the foundation for special treatment in criminal law in both Indonesia and Malaysia. However, the way this shared premise is translated into legal rules and institutional practices differs substantially between the two jurisdictions. The age requirements, legal presumptions, and practical applications of this argument, however, differ significantly between the two nations. These variations affect a child's subsequent treatment

[27] Susan Baidawi et al., "Children Aged 10 to 13 in the Justice System: Characteristics, Alleged Offending and Legal Outcomes," in *Criminology Research Grant*, 2024, https://doi.org/10.52922/crg77185.

within the legal system in addition to determining whether they may be found criminally guilty. These differences do not merely determine criminal responsibility in abstract terms, but directly shape how children are processed, protected, or sanctioned within the justice system. Legal outcomes are significantly impacted by how childhood, culpability, and the state's role in rehabilitation and correction are conceptualized. The rights, safeguards, and developmental requirements of juvenile offenders are thus more broadly affected when one examines the comparative frameworks of Indonesia and Malaysia.

Under the Juvenile Justice Law of 2012, Indonesia, as a signatory to the Convention on the Rights of the Child, which outlines the principle of legal protection for children, is required to offer special protection to children involved in legal conflicts. As a result, the approach to handling crimes committed by children is grounded in restorative principles, as outlined in Article 5 of the Juvenile Justice Law of 2012, which emphasizes that the Juvenile Criminal Justice System should prioritize Restorative Justice.[28] There are various perspectives and methodologies concerning the interpretation of restorative justice. There are differing perspectives on restorative justice; some regard it as an activity, while others interpret it as an idea, philosophy, or conceptual framework concerning crime and justice. Furthermore, restorative justice presents challenges in definition because it encompasses diverse practices across multiple phases of the criminal process. There are two predominant perspectives concerning the definition of restorative justice. The initial definition focuses on the process, highlighting a "purist" perspective, whereas the subsequent definition emphasizes the outcome, representing a "maximalist" viewpoint.[29]

Restorative Justice represents a paradigm shift in the criminal justice system, emphasizing justice for both victims and offenders and advocating alternative punishment, including community service and other rehabilitative measures. Bagir Manan stated that the essence of Restorative Justice encompasses principles such as fostering collaborative engagement among perpetrators, victims, and community groups to address incidents or criminal acts. It positions these parties as "Stakeholders" who collectively seek equitable and fair solutions for all involved (win-win solutions).[30] Restorative Justice serves as an umbrella concept encompassing various programs that examine criminal acts through a restorative lens. The primary aim of Restorative Justice is to address and repair the harm caused by crimes, involve victims in the process, hold perpetrators liable, and mitigate the likelihood of future offenses. The mediation process inherent in Restorative Justice does not consistently lead to compensation. Instead, it encompasses any resolution that both the victim and the perpetrator mutually accept.[31]

The criminal case of a child with Number 23/Pid.Sus-Anak/2025/PN Lbp, which was classified as a fraud case, has been successfully resolved through the diversion mechanism. Diversion is a special process in juvenile justice that aims to keep children out of the formal

[28] Itok Dwi Kurniawan, "The Implementation of Restorative Justice for Children Who Commit Crimes from the Perspective of National Law and the Qanun Jināyat" 11, no. 2 (2024): 2477–0280, https://doi.org/10.24952/multidisipliner.v11i2.13360.
[29] Faiz Rahman, "Contextualizing Restorative Justice Through Diversion Mechanism: A Study of Indonesia'S Juvenile Justice System," *Indonesia Law Review* 9, no. 3 (2020): 241–58, https://doi.org/10.15742/ilrev.v9n3.584.
[30] Francisco Lundu Hesekhel Pasaribu et al., "Keadilan Restoratif Pada Tingkat Penyidikan Bagi Pecandu Narkotika Dan Korban Penyalahguna Narkotika," *Court Review: Jurnal Penelitian Hukum* 4, no. 1 (2024): 9–15, https://doi.org/10.69957/cr.v4i03.1509.
[31] Rahul Ardian Fikri, "The Implementation of Restorative Justice for the Criminal Action of Accident against Child Based On Regulation of the State Police of the Republic Of Indonesia Number 8 Year 2021," *Legal Brief* 11, no. 1 (2021): 306–13.

criminal justice system and resolve their cases through non-judicial means, such as restorative justice. This approach aligns with the principles set forth in Juvenile Justice Law of 2012, which emphasizes protection, rehabilitation, and the child's best interests over punishment. The case involved a minor alleged to have committed fraud, a serious offense that still falls within the scope of offenses eligible for diversion under the applicable legal framework. The public prosecutor, together with the investigator and the parties involved, including the child, their parents, the victim, and social workers, held a deliberation to consider whether the case could be settled outside the court system. After thorough discussions facilitated by a diversion judge, the parties reached a consensus that pursuing formal legal proceedings would not necessarily serve the child's best interest or fully satisfy the victim's needs.

Additional cases demonstrate that the restorative justice approach has also been applied in more sensitive or complex situations involving children as both perpetrators and victims. In the Court Decision No. 127/Pid.Sus/2012/PN.Bi. The court acknowledged that the child offender had been legally proven to have violated Article 81(2) of the Child Protection Law, yet still affirmed the outcome of a diversion process grounded in restorative justice principles. The judges concluded that returning the child to parental care for structured guidance was more appropriate than imposing a criminal sentence, reflecting the system's emphasis on rehabilitation over punitive responses.[32] A different illustration appears in the Court Decision No. 1/Pid.Sus-Anak/2022/PN.Sbr, where children are involved in an assault that tragically resulted in the death of the victim. In this case, the court adopted a balanced approach that integrated retributive and restorative considerations by involving the family, community, and child protection institutions in the rehabilitation process. The judgment highlighted the importance of contextualizing the child's conduct within broader social and psychological factors, placing the child not merely as an object of punishment but as a subject of protection. These examples show how Indonesian courts increasingly apply restorative reasoning even in cases involving serious moral and social harm.[33]

The criminal case of a child with Number 23/Pid.Sus-Anak/2025/PN Lbp, which was classified as a fraud case, has been successfully resolved through the diversion mechanism. Diversion is a special process in juvenile justice that aims to keep children out of the formal criminal justice system and resolve their cases through non-judicial means, such as restorative justice. This approach aligns with the principles set forth in Juvenile Justice Law of 2012, which emphasizes protection, rehabilitation, and the child's best interests over punishment. The case involved a minor alleged to have committed fraud, a serious offense thatstill falls within the scope of offenses eligible for diversion under the applicable legal framework. The public prosecutor, together with the investigator and the parties involved, including the child, their parents, the victim, and social workers, held a deliberation to consider whether the case could be settled outside the court system. After thorough discussions facilitated by a diversion

[32] Nadia Nurhalija, Mohammad Ekaputra, and Wessy Trisna, "Analisis Yuridis Sanksi Pidana Anak Yang Melakukan Tindak Pidana Pengeroyokan Yang Mengakibatkan Kematian (Studi Putusan: 1/Pid.Sus-Anak/2022/PN.Sbr Dan Studi Putusan: 4/Pid.Sus-Anak/2024/PN.Bjm)," *Unes Journal of Swara Justisia* 9, no. 2 (2025): 279–87, https://doi.org/10.31933/vvac6r50.
[33] Bukhari Yasin, H. M Yasir, and Alfian Yulianto, "Penerapan Restorative Justice Dalam Perkara Persetubuhan Terhadap Anak Yang Berakhir Dengan Perkawinan," *Legal Standing Jurnal Ilmu Hukum* 8, no. 1 (2024): 2580–3883, https://doi.org/10.24269/ls.v8i3a.10811.

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While Indonesia embeds restorative justice within its juvenile justice framework as a primary response to juvenile offending, Malaysia adopts a structurally different approach to juvenile criminal liability. In numerous countries, restorative justice has been implemented. Despite this, the idea is still fairly new in Malaysia.[34] The laws governing juvenile criminal justice in Malaysia have yet to incorporate restorative justice as a formal method for addressing criminal offenses committed by children. It is recommended that the juvenile justice system in Malaysia adopt restorative justice practices to facilitate the resolution of offenses involving juvenile offenders and victims. In Malaysia, when a child is suspected of committing a crime, the police will initiate an investigation, and the child may face formal charges. The child will then be brought before the Court of Children, where he will be asked whether he wishes to plead guilty or request a trial. If the child pleads guilty, he will be subjected to the corresponding punishment. However, should the child request a trial, the procedures outlined in the Child Act of 2001 will be followed. This highlights that in the Malaysian child justice system, the offender is given the choice to either plead guilty or request a trial, offering a level of flexibility in the legal process.[35]

However, this procedural pathway does not apply uniformly to all children. Unlike Indonesia, which emphasizes reintegration through diversionary and restorative mechanisms, Malaysian criminal law draws a clear jurisdictional boundary for children below the age of ten that excludes them entirely from the criminal process. For children below the age of ten, Malaysian criminal law draws a clear jurisdictional boundary that effectively excludes them from the criminal process altogether. Pursuant to Section 82 of the Malaysian Penal Code, no

[34] Azlinda Azman and Mohd Taufik bin Mohammad, "Crime Victims Support System and Restorative Justice: Possible Implementation in Malaysia," *Journal of Arts and Humanities* 1, no. 2 (2012): 18–26, https://doi.org/https://doi.org/10.18533/journal.v1i2.115.
[35] Norjihan Ab Aziz et al., "Restorative Justice in The Child Justice System: Implementation in Other Jurisdictions," *Malaysian Journal of Social Sciences and Humanities (MJSSH)* 7, no. 6 (2022): e001561, https://doi.org/10.47405/mjssh.v7i6.1561.

act committed by a child under ten years of age constitutes a criminal offence, as such children are conclusively presumed incapable of understanding the nature and consequences of their actions. In practice, this means that criminal proceedings against the child cannot be initiated, regardless of the seriousness or visibility of the conduct. This application of doli incapax was illustrated in a reported incident in Langkawi, where a six-year-old child drove a vehicle and caused a traffic accident but was deemed entirely exempt from criminal liability. Legal authorities confirmed that the investigation of the child served only a procedural purpose and could not result in prosecution, while potential legal responsibility was instead redirected toward the adults responsible for the child under the Child Act of 2001. This demonstrates that, unlike Indonesia's diversion-based restorative framework, Malaysia's approach to children below ten prioritizes exclusion from criminal adjudication rather than reintegration through rehabilitative or restorative mechanisms within the justice process.[36]

Notably, the interaction between Sections 82 and 83 of the Penal Code has concrete implications for how children are drawn into criminal proceedings. While children under ten are categorically excluded from criminal liability, children aged ten to twelve may be held criminally responsible following a judicial evaluation of their maturity. In practice, courts assess this maturity by examining the child's conduct, the surrounding circumstances, and the child's demonstrated awareness of wrongdoing. In Ulla Mahapatra v The King, the court relied on medical evidence and surrounding circumstances, including the deliberate use of a weapon, the force and distance of the fatal blow, and the appellant's threatening statement, "I will cut you to bits," to conclude that the child possessed sufficient maturity to understand the gravity and consequences of his actions. This case demonstrates how judicial evaluation of conduct, intention, and surrounding facts operates to rebut the presumption of incapacity under a presumption-based model of juvenile criminal liability. As a result, children in the same age group may experience different legal outcomes depending on how their actions are evaluated, exposing some to full criminal liability while others remain protected.[37] This case demonstrates how judicial reasoning operates to rebut the presumption of incapacity under a presumption-based model of juvenile criminal liability, resulting in differentiated outcomes for children within the same age group.

Restorative justice in Indonesia is applied with statutory limitations, where diversion is not permitted for offences carrying a maximum penalty of more than seven years or for repeated offences. In this context, criminal penalties for children are treated as a last resort (*Ultimum Remedium*), reinforcing the idea that punitive measures should only be used when no other appropriate options are available. The child's age plays a significant role in determining the suitability and urgency of diversion, with younger children receiving greater consideration for non-judicial resolution. This approach reflects a legal system that values restorative measures and the child's developmental needs, even in handling more serious

[36] V Anbalagan, "Child below 10 Not Criminally Liable, Says Lawyer," freemalaysiatoday.com, 2022.
[37] Muhammad Izwan Ikhsan et al., "Parental Liability Law in Malaysia for Children ' s Misconduct : A Legal Overview," *International Journal of Religion* 3538, no. 4 (2024): 179–92, https://doi.org/10.61707/d2d7e789.

cases.[38] It highlights the state's obligation to prioritise rehabilitation over retribution in juvenile proceedings.

Furthermore, in addition to the diversion mechanism, children in conflict with the law may be sentenced to imprisonment at the Juvenile Correctional Facility *(Lembaga Pembinaan Khusus Anak – LPKA)* if their behavior and circumstances pose a threat to the community, as outlined in Article 81 of the Juvenile Justice Law of 2012. The maximum prison sentence for a child is limited to half of the maximum sentence an adult could receive for the same offense. Regarding the implementation of child rehabilitation, under the applicable laws and regulations, children who are incarcerated will be placed in the *LPKA*. The *LPKA* is required to provide education, vocational training, rehabilitation, and other rights as mandated by law.[39] Meanwhile, if the child does not go through a prison sentence but the child is detained, the child is placed in the the Juvenile Detentional Facility *(Lembaga Penempatan Anak Sementara - LPAS)* as stipulated in Article 84 of Juvenile Justice Law of 2012. However, if the child is detained at the *LPAS*, the child still has the right to receive coaching, guidance, supervision, accompaniment, education, and tutoring.[40]

Part IX of the Child Act of 2001 of Malaysia governs the procedures and protections afforded to children alleged to have committed criminal offences. This part of the legislation reflects a clear departure from the punitive approach traditionally applied to adult offenders, emphasizing rehabilitation, reintegration, and the child's best interests as paramount considerations. To implement this rehabilitative philosophy, several specialized institutions have been established. Pursuant to Chapter 4 of the Child Act of 2001, children found guilty of criminal offences may be sent to Approved Schools. Section 67 provides that a Court for Children may order the placement of a child in an Approved School upon conviction for any offence. Approved Schools are rehabilitative institutions that offer a combination of academic education, moral and religious instruction, vocational skills training, and behavioural management programs to facilitate the child's reformation .[41] However, statutory limitations apply to the placement of young children. Section 66 of the Act expressly stipulates that, "A Court for Children shall not make an order requiring a child under the age of ten years to be sent to an Approved School." This provision recognizes the developmental vulnerabilities of very young children and seeks to protect them from the potentially adverse effects of institutionalization at an early age.

In addition to Approved Schools, Malaysia has established Henry Gurney Schools as another form of rehabilitative institution. According to Section 75 of the Child Act of 2001, a child who is found guilty of an offence punishable by imprisonment may be ordered to be detained in a Henry Gurney School. These schools function as correctional facilities.[42]

[38] Adelia Oktaviani, Satrio Fajar Romadhon, and Muhammad Rusli Arafat, "Comparison of Juvenile Justice Systems in Indonesia and South Korea," *Tirtayasa Journal of International Law* 2, no. 1 (2023): 1, https://doi.org/10.51825/tjil.v2i1.17774.
[39] Emanuel Lukas Sanga Ruing, "Pemenuhan Hak Rekreasional Terhadap Narapidana Anak Di Lembaga Pembinaan Khusus Anak (LPKA) Kelas I Medan," *Jurnal Komunikasi Hukum (JKH)* No.2, no. 11 (2022): 746–58, https://doi.org/10.23887/jkh.v8i2.48291.
[40] Farah Fadhilah and Muhammad Ya'kub Aiyub Kadir, "Right to Education of Children in Conflict with The Law at Lembaga Pembinaan Khusus Anak (LPKA) Class II Jakarta, Indonesia," *Student Journal of International Law* 1, no. 2 (2021): 87–99, https://doi.org/10.24815/sjil.v1i2.19275.
[41] Anita Abdul Rahim et al., "School Students Committing Crime: The Position under the Malaysian Criminal Law," *GlobalIlluminators* 1 (2022): 542–49.
[42] Mualimin Mochammad Sahid et al., "Hak Terhadap Pendidikan Bagi Pesalah Kanak-Kanak: Kajian Di Sekolah Henry Gurney, Melaka," *Malaysian Journal of Syariah and Law* 12, no. 3 (2024): 609–19, https://doi.org/10.33102/mjsl.vol12no3.447.

Nevertheless, the legislation imposes age restrictions concerning the placement of children in Henry Gurney Schools. Section 74 provides that, "A Court for Children shall not make an order requiring a child under the age of fourteen years to be sent to a Henry Gurney School".[43] This provision ensures that younger children, deemed less suitable for placement in a correctional environment, are instead diverted to more developmentally appropriate rehabilitative pathways. For instance, in Child v. Public Prosecutor [2020] MLJU 13944, the child was sentenced to a Henry Gurney School order for the offense of receiving stolen property, which is a violation of section 411 of the Malaysian Penal Code. This institution is well-known for the fact that it only accepts student applicants who have been convicted of heinous offenses, such as drug abuse, murder, or burglary. In addition to this, they are infamous for engaging in violent behaviours that are tough to rehabilitate. It is for this reason that the findings of this study suggest that sending the child who committed the crime to the Henry Gurney School would be an inappropriate response to the intensity and seriousness of the act.[44]

Indonesia's juvenile justice system, as outlined in the Juvenile Justice Law of 2012, emphasizes restorative justice, aligning with international standards such as the Convention on the Rights of the Child. The system focuses on protecting, rehabilitating, and reintegrating child offenders, recognizing their distinct cognitive and moral development compared to adults. The law prioritizes diversion as a key mechanism for cases involving minor offenses, encouraging dialogue among stakeholders, including children, parents, victims, law enforcement, and social workers, to reach a consensus that benefits the child. Punitive measures are a last resort, with imprisonment used only in facilities like the *LPKA*, focusing on education and rehabilitation. Children in detention receive guidance and support to ensure their rights are protected. Indonesia's approach reflects a shift from retributive justice to a child-centered model that emphasizes development and societal reintegration.

Malaysia's juvenile justice system, governed by the Child Act of 2001, formally emphasizes rehabilitation but still reflects elements of a conventional punitive approach through its reliance on formal criminal adjudication. In the absence of institutionalized restorative justice mechanisms, cases involving children are predominantly processed through the Court for Children rather than resolved through non-judicial or participatory alternatives.[45] If convicted, they may be sentenced to institutional care such as Approved Schools or Henry Gurney Schools. These institutions focus on education and vocational training, but there are concerns about their punitive nature, particularly in cases involving minor offenses. The absence of diversion limits Malaysia's ability to resolve cases in ways that involve victims and promote reintegration. Additionally, the principle of Doli Incapax (the presumption that children below a certain age are incapable of forming criminal intent) is not always effectively applied, which could prevent the unjust prosecution of juvenile offenders.

[43] Nafal Nabil Ridwansyah and Beniharmoni Harefa, "Criminal Justice System for Children Perpetrators of Murder Between Indonesia and Malaysia," *RechtIdee* 15, no. 1 (2024): 37–48, https://doi.org/10.21107/ri.v19i2.
[44] Nadzriah Ahmad et al., "The Fundamental Rights of Children Deprived of Liberty in Detention Centres in Malaysia During the Covid-19 Pandemic: A Qualitative Study," *UUM Journal of Legal Studies* 14, no. 1 (2023): 237–67, https://doi.org/10.32890/uumjls2023.14.1.10.
[45] Daleleer Kaur Randawar et al., "Prevention over Punishment : Restoring Hope through Malaysian Child Act 2001," *International Journal of Research and Innovation in Social Science (IJRISS)* IX, no. 2454 (2025): 857–67, https://doi.org/10.47772/IJRISS.

Despite its rehabilitative elements, the system could benefit from incorporating restorative justice principles to better meet the needs of juvenile offenders and support their reform.

Conclusion

The comparative analysis of the minimum age of criminal liability in Indonesia and Malaysia highlights a central tension between legal certainty and flexibility in assessing juvenile criminal capacity. Indonesia relies on a fixed statutory age threshold that offers a clear and predictable standard for criminal liability, supported by procedural safeguards such as diversion and restorative justice. This model prioritizes child protection by shifting the focus from punishment to rehabilitation within a structured legal framework. Malaysia, on the other hand, applies the doctrine of doli incapax, which allows courts to assess a child's maturity on a case-by-case basis. While this approach provides flexibility, it also places a significant evidentiary burden on judicial assessment and increases the risk of inconsistent outcomes for children within the same age group. These different legal constructions affect not only how liability is determined, but also how children are treated throughout the criminal process. Indonesia limits judicial discretion in determining liability and instead embeds protective measures within procedural mechanisms. In contrast, Malaysia places judicial discretion directly at the core of liability assessment, particularly for children aged ten to twelve. As a result, children in similar circumstances may face markedly different legal consequences depending on how the court evaluates their capacity.

Although both systems are designed to protect children, the analysis shows that effective juvenile justice depends not only on doctrinal design but also on consistent institutional practice. Based on the comparative findings, Malaysia could strengthen its juvenile justice framework by introducing structured pre-trial diversion mechanisms inspired by Indonesia's restorative approach, especially for non-serious offences. At the same time, Indonesia should focus on improving consistency by establishing clearer national guidelines and providing judicial training to ensure uniform application of restorative justice across regions. Strengthening these aspects would help ensure that the legal frameworks in both countries operate more effectively in practice and genuinely serve the best interests of children in conflict with the law.

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