

An Islamic Jurisprudential Evaluation of the Offence of Physical Sexual Assault in Act 792

Penilaian Fiqh terhadap Kesalahan Serangan Seksual Fizikal dalam Akta 792

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ABSTRACT

The increasing prevalence of physical sexual assault against children in Malaysia necessitates a comprehensive legal framework for more effective protection. The enactment of the Sexual Offences Against Children Act 2017 (Act 792) underscores Malaysia's commitment to addressing this issue. However, there is an urgent need to examine Islamic legal provisions to establish a more holistic approach. Despite its significance, fiqh discourse on this crime is relatively limited and requires deeper analysis. This study seeks to examine the provisions of Act 792 in relation to the fiqh perspective on the crime of physical sexual abuse against children. The study utilises content analysis centred on pertinent subjects related to physical interactions with children. The sources include classical fiqh texts from the four major Schools, Hanafi, Maliki, Shafi'i, and Hanbali, along with contemporary fiqh references. The research shows that Act 792 and fiqh both rely on physical contact and sexual intent as basic criteria for identifying offences. However, Act 792 provides a more thorough categorisation of these offences. In contrast, fiqh adopts a broader, more generalised approach. This study proposes the harmonisation of fiqh principles within Act 792 to enhance child protection through a more comprehensive legal framework. Such an integration would ensure a more robust and culturally relevant legal response to child sexual offences in Malaysia.

Keywords: Child sexual assault; Islamic jurisprudence; Sexual Offences Against Children Act 2017 (Act 792); comparative legal analysis; child protection

ABSTRAK

Peningkatan kes serangan seksual fizikal terhadap kanak-kanak di Malaysia menuntut satu kerangka perundangan yang menyeluruh bagi perlindungan yang lebih berkesan. Penggubalan Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (Akta 792) menzahirkan komitmen Malaysia dalam menangani isu ini. Namun begitu, masih terdapat keperluan untuk meneliti peruntukan undang-undang Islam bagi membentuk pendekatan yang lebih holistik. Walaupun penting, wacana fiqh mengenai jenayah ini masih agak terhad dan memerlukan analisis yang lebih mendalam. Kajian ini bertujuan meneliti peruntukan Akta 792 berhubung perspektif fiqh terhadap jenayah penderaan seksual fizikal terhadap kanak-kanak. Kajian ini menggunakan kaedah analisis kandungan yang memfokuskan kepada topik-topik berkaitan interaksi fizikal dengan kanak-kanak. Sumber kajian merangkumi teks-teks fiqh klasik daripada empat mazhab utama Hanafi, Maliki, Syafi'i, dan Hanbali serta rujukan fiqh kontemporari. Dapatan kajian menunjukkan bahawa walaupun Akta 792 dan fiqh berkongsi prinsip asas dalam mengenal pasti kesalahan melalui sentuhan fizikal dan niat seksual, Akta 792 menyediakan pengelasan kesalahan yang lebih terperinci. Sebaliknya, fiqh mengambil pendekatan yang lebih luas dan umum. Kajian ini mencadangkan penyelarasan prinsip-prinsip fiqh dalam Akta 792 bagi memperkukuh perlindungan kanak-kanak melalui kerangka perundangan yang lebih komprehensif. Integrasi sedemikian akan memastikan respons perundangan terhadap kesalahan seksual kanak-kanak di Malaysia menjadi lebih kukuh dan selaras dengan nilai budaya.

Kata kunci: Serangan seksual terhadap kanak-kanak; fiqh Islam; Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (Akta 792); analisis perundangan perbandingan; perlindungan kanak-kanak

INTRODUCTION

The Malaysian government has shown a strong commitment to addressing child sexual crimes since ratifying the Convention on the Rights of the Child (CRC) in 1995 (Choong 2021). To protect children from sexual crimes, the government has enacted the Sexual Offences Against Children Act 2017 (Act 792), representing an important step in effectively tackling this issue. Additionally, Act 792 protects children in multiple areas, especially in procedural and substantive laws tailored explicitly for them (Abdul Jumaat & Omoola 2023). This legislative initiative has emerged in response to public pressure prompted by a rise in the number of cases related to sexual offences against children.

Statistics on sexual offences against children under the age of 18, particularly physical sexual assault, have shown a significant increase over the years. From 2014 to 2016, the Royal Malaysia Police (PDRM) reported a total of 7,862 cases of sexual crimes against children under the age of 18 in Malaysia (Pauzi & Rahman 2021). This issue is particularly critical, as data indicates that nearly 60% of sexual crime victims in Malaysia are children. In 2020, out of 4,274 victims, 2,567 were children, while in 2021, out of 4,031 victims, 2,234 were children (Bernama 2022). Furthermore, statistics from 2023 indicate a significant rise in sexual offences against children in Malaysia, with an increase of 21.1%, from 1,147 cases in 2022 to 1,389 cases in 2023 (Bernama 2024). According to statistics from the Royal Malaysia Police (PDRM), there was a sharp increase of 26.5% in sexual crime cases involving children, from 1,239 cases in 2022 to 1,567 cases in 2023. Physical sexual assault accounted for the highest percentage, comprising 89.2% of all reported cases in 2023, increasing from 1,147 cases in 2022 to 1,389 cases in 2023 (Department of Statistics Malaysia 2024). It is worth noting that increases in official statistics involving a particular crime may reflect several complex positions. Firstly, they may represent real rises and falls in incidents. Secondly, they may be the outcome of greater confidence levels in reporting incidents, and thirdly, they may result from proactive policing of specific behaviour. Regardless of these interpretations, the issue of preventing sexual offences against children is a national and international priority.

However, a significant gap remains in understanding the comparison of Act 792 from the perspective of *fiqh* (Islamic jurisprudence). While

existing scholarship on the Sexual Offences Against Children Act 2017 (Act 792) has predominantly focused on a secular legal perspective, this study aims to address an important gap by exploring the Act's provisions and its practical implementation in relation to Islamic jurisprudence (*fiqh*). This approach is necessary considering Malaysia's unique legal pluralism, where criminal, civil, and Syariah legal systems coexist alongside each other (Samuri & Khan). With a significant Muslim population and a well-established Syariah legal framework in place (Samuri, 2024), it is crucial to understand how Act 792 aligns with, or diverges from, Islamic legal principles, especially in matters concerning the protection of children. This research, therefore, contributes to a more holistic understanding of child protection laws in Malaysia by integrating both secular and Islamic legal viewpoints. (Abdul Wahab 2017; Abdul Jumaat & Omoola 2023; Pauzi & Rahman 2021). This gap also indicates that the comparative study of Act 792 from the *fiqh* perspective has not been thoroughly explored. In Arabic-speaking Middle Eastern literature, most discussions focus solely on child sexual crimes according to the laws of Middle Eastern countries, without engaging in debates from the perspective of *fiqh* (Shakir 2019; Al-'Ajami & Al-Mutayri 2016; 'Ali 2020). When addressing the Islamic viewpoint, the authors merely cite a few Qur'anic verses, lacking any scholarly or juristic discussion about that particular crime. Additionally, a comparative analysis of Act 792 and the *fiqh* perspective is still pending. From the *fiqh* perspective, some discussions may be relevant for comparison, such as rulings on kissing children (Al-Nawawi 1344H; al-Sarakhsi n.d.) and physical contact involving children (Al-Buhuti 2000; al-Mardawi 1955). In the context of comparative law, studying criminal law and *fiqh* is essential in generating ideas for future legal reforms in Act 792. This stems from the belief among the Muslim community that Islamic law is complete and applicable at all times and in all circumstances. Therefore, there is a need to discuss the offence of physical sexual assault against children under Act 792 based on *fiqh* perspectives.

Accordingly, this article aims to provide a comparative discussion between Act 792 and *fiqh* perspectives on the offence of physical sexual assault against children, drawing upon the views of scholars from classical *fiqh* texts. This study presents a unique approach seldom found in current academic literature. Most previous research has

concentrated solely on the statutory aspects of Act 792 or made broad references to Islamic law without thorough scholarly examination. In contrast, this article addresses that gap by offering a detailed fiqh analysis encompassing all four primary schools of Islamic jurisprudence. This article presents a literature review discussing the offence of physical sexual assault under Act 792, before explaining the research methodology, and an analysis of the study's findings.

THE OFFENCE OF PHYSICAL SEXUAL ASSAULT UNDER ACT 792

Child sexual abuse is a worldwide concern that has garnered significant attention from various stakeholders (Essabar et al. 2015). This issue is particularly concerning as sexual offences have profound physical and psychological effects on children (Solehati et al. 2021). For example, frequently reported effects include severe emotional disturbances, post-traumatic stress disorder (PTSD), mood disorders, and reduced cognitive functioning (Ali et al. 2024). Additionally, studies indicate that victims who endure sexual abuse involving penetration are at a heightened risk of experiencing long-term psychiatric issues. Chronic conditions such as schizophrenia and delusions have been linked to this type of abuse, severely impacting the mental well-being of survivors (Ali et al. 2024; Hailes et al. 2019). Given its detrimental effects on children, this global issue has received significant attention from the United Nations (UN), primarily through its recent efforts to tackle sexual abuse as part of the 2015 Sustainable Development Goals (Mathews & Collin-Vézina 2016).

In response to the UN's call to protect children, on 24 March 2017, the Malaysian Cabinet approved the proposal to introduce the Sexual Offences Against Children Bill 2017 to be tabled in Parliament. The first reading of the Bill took place on 28 March 2017, followed by the second and third readings on 4 April 2017. This development marked a significant milestone for the Malaysian government in its efforts to combat sexual crimes against children (Abd Aziz & Yazid 2021; Wahab & Nor 2018). Eventually, Act 792 came into force on 10 July 2017 (Pauzi & Rahman 2021). This initiative also reflects the government's commitment to addressing sexual crimes and upholding children's rights more broadly in the country (Wahab & Nor 2018).

The scope and regulatory parameters of Act 792 are seen as more comprehensive compared to existing laws under the Penal Code. This structured and systematic framework not only facilitates the interpretation and implementation of the law but also strengthens the legal structure in efforts to protect children from various forms of sexual exploitation and abuse (Wahab & Nor 2018). Additionally, Act 792 details the punishments that may be imposed on offenders, including individuals in positions of trust, such as parents, guardians, teachers, or those responsible for the care of children. The Act 792 also establishes procedures concerning the acceptance of child witnesses in sexual offence cases to ensure the protection of their rights. Furthermore, its provisions mandate that any person with information regarding child sexual offences must report the incident immediately (Abd Aziz & Yazid 2021).

Act 792 covers three main categories of sexual offences involving children. First, offences related to child sexual abuse materials (child pornography), as outlined in Part II of Act 792, encompass the production, distribution, and possession of such materials. Second, child sexual grooming offences, stipulated in Part III of the Act, address the act of persuading or influencing a child for sexual purposes through various means, including online platforms. Third, sexual assault offences, detailed in Part IV of the Act, include both physical and non-physical sexual acts against children.

The offence of physical sexual assault against children is provided for under Section 14 of Act 792, as follows:

Any person who, for a sexual purpose

1. touches any part of a child's body;
2. causes a child to touch any part of that person's body or the body of another person;
3. causes a child to touch any part of their own body; or
4. commits any other act involving physical contact with a child, excluding sexual intercourse,
5. commits an offence and shall, upon conviction, be liable to imprisonment for a term not exceeding twenty years and may also be subject to whipping.

Although this law has only recently been introduced, Malaysian courts have tried numerous cases and imposed sentences on offenders under its provision. For instance, there have been several cases involving individuals

who work with children, such as teachers or school vehicle drivers, who betrayed their trust by committing sexual offences against students. For example, in the case of *Ahmad Nazrol Fahmi Mustafa v. PP* [2023] CLJU 1900, the appellant, who was also the driver of the victim's school van, was convicted by the Putrajaya Sessions Court of the offence of physical sexual assault on a girl aged 6 years and 10 months under section 14(b) and section 16(1) of Act 792 for instructing the victim to hold his genitals and masturbate while he was driving the school van. Additionally, in the case of *PP v. Tengku Mohammad Khaireel Tengku Wahab* [2024] CLJU 291, the defendant, who was responsible for looking after children at a school, was charged with two counts of physical sexual assault on a boy aged 11 years and 7 months, committed in the school warden's room. In each case, the accused exploited their position of trust to commit sexual assaults against children under their care. All decided cases demonstrate the courts' concern regarding sexual offences against children, especially when involving betrayal of trust by individuals who should protect them. The courts consistently emphasise public interest and consider aggravating factors such as relationships of trust, victim age, and long-term trauma effects in determining sentences. Court decisions also show a clear stance in accepting children's testimony as competent under Section 17 of Act 792, including children with special needs.

METHODOLOGY

This article discusses sexual offences against children based on both classical and contemporary fiqh texts and compares them with the offence of physical sexual assault against children as stipulated under Section 14 of Act 792. Data collection was conducted through document analysis. The primary sources consist of classical and contemporary fiqh texts from the four major Schools of Islamic jurisprudence: Hanafi, Maliki, Shafi'i, and Hanbali. A keyword-based search strategy was applied,

focusing on child-related topics such as touching, physical contact, kissing, private parts, *amrad* (a beardless adolescent boy, often regarded in classical Islamic texts as potentially sexually provocative), and acts that invalidate ablution for prayer.

The search for relevant fiqh texts was also conducted using the Islamic Digital Library known as *Maktabah Shamela* (<https://shamela.ws/>), which served as a key reference source for systematically accessing classical Islamic works. Each relevant text was examined under specific chapters related to the discussion of physical sexual assault against children. The data obtained was then systematically organised according to the offence categories under Section 14 of Act 792, to allow for a structured comparison between criminal law and fiqh.

In addition, the legal provisions in Act 792 were analysed using established legal sources such as Lexis Malaysia and the Malaysian Current Law Journal (CLJ). This study also examined recent court cases related to offences under Section 14 of Act 792, namely physical sexual abuse against children, to support the findings and understand how the law is applied in actual judicial contexts. Several key published cases involving physical sexual contact with children were analysed to identify points of similarity, difference, and comparison with the fiqh perspective.

The research was carried out in three phases. First, a legal analysis was conducted to identify the elements of the offence under Section 14 of Act 792. Next, the fiqh texts were studied to examine scholarly views on issues related to physical sexual assault, including debates on physical interactions with minors. Finally, a comparative content analysis was carried out between the two legal systems. This analysis focused on several key aspects, particularly the elements of the crime, such as the forms of physical conduct, the offender's intention, and the types of punishments imposed. The findings from fiqh texts were categorised in accordance with the offence categories outlined in Section 14 of Act 792 on physical sexual abuse, thereby facilitating the comparison between fiqh perspectives and the provisions of Act 792.

RESULTS AND FINDINGS: SEXUAL ASSAULT OFFENCES ACCORDING TO FIQH LITERATURE

The research revealed several key themes in the content analysis of fiqh literature. These themes include “Touching Any Part of the Body with Sexual Intent,” “Children’s Private Parts,” “Physical Interaction with an ‘Amrad’” and “Kissing Children.” In this study, the term “children” refers to individuals who have not yet reached puberty, as defined in Islamic law. Puberty in this context is primarily based on sexual and reproductive maturity rather than intellectual development. According to all major Islamic jurists, boys are considered to have reached puberty upon the ejaculation of semen, while girls reach puberty upon the onset of menstruation. In the absence of these physical signs, jurists from the Shafii and Hanbali Schools generally consider the age of 15 as the threshold, while the Hanafi and Maliki Schools may extend this age to between 17 and 18. Although many fiqh texts focus on men’s perspective, especially regarding temptation and modesty, it is also important to recognise that preventing temptation and condemning sexual abuse are responsibilities that apply to both men and women. Islamic law stresses the importance of protecting all children, regardless of gender.

TOUCHING ANY PART OF THE BODY WITH SEXUAL INTENT

Islamic scholars hold the view that physical interaction with male and female children is forbidden if done with sexual desire. However, such interaction is permissible if done without sexual desire, as presented by scholars of the Hanafi School (Al-Balkhiy 1310H; Al-Sarakhsi n.d.), Shafi’i (Al-Bujairimi 1995) and Hanbali (Al-Buhuti 2000; Al-Mardawi 1955). Scholars who opine that physical interaction with children is permissible explain that there are two essential conditions for it to ensure the children’s welfare is preserved. The first condition is that the child and the physical interaction do not provoke sexual desire and arousal. This means the act of touching must be done without any lust. The second condition is the lack of immoral actions, like touching private areas, which may result in adverse consequences, such as sexual intimacy (Al-Balkhiy 1310H; Al-Sarakhsi n.d.).

This group also emphasises that the body of young children is not considered as *awrah* (parts

of body requiring covering) if the touch does not contain any sexual stimulation and carnal desire (Al-Sarakhsi n.d.). In fact, according to al-Mardawi (1955), an adult is permitted to interact physically, for example, by placing children, whether male or female, on their laps for playful interaction, kissing and so forth, as long as it does not include sexual desire and arousal. At the same time, adults are also allowed to shake hands with children of the opposite gender if there is no *fitnah* (temptation) and lustful feelings towards them (Al-Bujairimi 1995). Additionally, this group argues that the Prophet’s son Ibrahim, when he passed away as an infant, was bathed by women without any clothing covering his body (Al-Buhuti 1438H).

Some scholars specify age limits concerning physical interaction with children. For instance, the Hanbali School categorises children under seven as non-*mumayyiz* (those who have not achieved discernment), meaning that touching their body is not prohibited. Once a child turns seven, they are deemed *mumayyiz*, and if they also demonstrate desire (*shahwah*), the ruling shifts. Specifically, the Hanbali School regards a nine-year-old girl as equivalent to a *mumayyiz* child with *shahwah*. Thus, from this perspective, the ability to touch children hinges not just on age, but also on whether the child has reached discernment and exhibits signs of desire (Al-Mardawi 1955). Furthermore, the Maliki School is seen to be stricter regarding the issue of physical interaction with children. Maliki scholars have divided and differentiated the ruling of touching and holding children based on male and female gender, and have discussed this issue in relation to the bathing of children’s corpses. If male children are less than eight years old, then physical interaction is permitted. As for female children, men are not allowed to physically interact with them, except during the nursing age, which is before the child reaches three years old (Al-Azhari n.d.; Al-Nafrawi 1995; Zarruq 2006).

Maliki scholars exhibit a more cautious and rigid stance on physical interactions between adult men and young female children, in contrast to interactions with male children. This approach is taken due to concerns about potential sexual arousal that might arise from physical touch to female children’s bodies. They believe that girls aged six or seven can incite desire and arousal. Therefore, Maliki scholars restrict physical interactions to adult men with children under three years old, arguing that at this developmental stage, children

cannot elicit any arousal or sexual attraction in men (Al-‘Adawi 1994; Al-Nafrawi 1995). This view is also considered a precautionary measure against potential *fitnah* (temptation) that could occur, as, in their view, the feminine nature itself can evoke desire in anyone (Al-Azhari n.d.).

However, if a child is approaching puberty (according to Shafie and Hanbali schools, puberty is defined when a child reaches the age of 15), this action is still prohibited. The reasoning behind this perspective is that the ruling for children nearing puberty is similar to that for those who are already in puberty (Al-Haytami 1983). This prohibition is also based on a perspective that children at this stage could already possess desire, irrespective of being capable of arousing sexual stimulation in those who look at them (Al-Kharashi 1317H).

PROHIBITION ON TOUCHING CHILDREN’S PRIVATE PARTS

In the context of touching children’s private parts, scholars explain that touching children’s body parts, including their private parts, is permissible if such touching is without sexual desire (Al-‘Asqalani 1989; Al-‘Ayni 2008). This is based on the view of some scholars, such as al-Sarakhsi (n.d.), who explain that the body of children who have not reached the age of having arousal and do not provoke desire in someone is not considered as *awrah* (parts of body requiring covering). Such touching does not raise concerns about potential *fitnah* or matters leading to moral corruption. Furthermore, based on customary practice and Islamic law, children are not held responsible for tackling such issues as the obligation to fully cover their *awrah* or prohibitions against touching them. This only applies when they have reached the age of developing desire or arousal (al-Sighnaqi 1435H).

The view presented by al-Sarakhsi appears to align with the opinion held by the Hanbali School, where both agree that touching children’s private parts is permitted as long as such touching does not motivated by or to induce sexual arousal. However, Hanbali scholars have specified that this permission is limited to children under the age of seven. If the child’s age exceeds seven, touching their private parts is forbidden (Al-Buhuti 2000; Al-Hajjawi n.d.). As noted by al-Uthaimin (1422H), children under the age of seven are considered to have parts of their body that are not classified as *awrah*, such as hands and other exposed areas. Consequently, it is permissible to look at and touch these areas

on children since their *awrah* does not adhere to the same guidelines that apply to those who have reached puberty.

However, the Shafi’i School has a different view from scholars of other Schools. They believe that touching children’s private parts, whether male or female, is forbidden. Nevertheless, this School provides flexibility and leniency by allowing touching in certain essential situations related to children’s welfare and well-being. For example, a mother can look at and touch her child’s private parts during the nursing period and in the context of care due to necessity and need (Al-Haytami 1983; Al-Ramli 1984). This touching is limited only to mothers or guardians, whether male or female, who are not *mahram* (unmarriageable kin in Islamic law), to touch children’s private parts during the nursing period, estimated until two years or less for nursing and care only. This permission includes managing children’s hygiene and treating wounds experienced. However, it must be emphasised that the permissibility to touch children’s private parts is only allowed when there is a truly urgent need. For example, cleaning private parts from impurities, treating wounds using oil, or performing other tasks requiring touch for care (Al-Dimyati 1997).

PHYSICAL INTERACTION WITH AN ‘AMRAD’

Scholars view that the term *amrad* refers to an adolescent male who has not grown a beard (Al-Tha’labi 2015; Al-Zuhaili n.d.) and has not reached the usual age for beard growth (Al-Bujairimi 1995). The term *amrad* also includes individuals who provoke sexual desire. Al-Bujairimi defines *amrad* as including children who can evoke sexual feelings in those who look at them due to their physical appearance (Al-Bujairimi 1995). Therefore, most scholars, such as Ibn Taimiyyah (1987), Ibn Qayyim (2019), and al-Ghazali (n.d.), refer to such children in Arabic as *sabiy al-amrad*, which denotes a beardless and attractive adolescent boy. Thus, scholars opine that touching an *amrad* with sexual desire through any type of touch, such as handshaking and the like, is forbidden and not permitted (Al-Nawawi 2004; Ibn Taimiyyah 2004).

In the Shafi’i School, this issue is discussed through clear principles built upon scholars’ *ijtihad* (independent reasoning). The prohibition of touching an *amrad* is agreed upon based on the principle: “Everything that is forbidden to be seen is forbidden to be touched” (Al-Nawawi

2004). This principle provides a strong foundation for determining the ruling on an *amrad* because merely looking at them is considered forbidden in the Shafi'i School (Al-Nawawi 1994; Al-Shirbini 1994). Therefore, touching an *amrad* is considered more serious and important to avoid, as it involves direct physical contact deemed more significant than merely looking at the physical appearance or body of an *amrad* (Al-Buhuti 2000; Al-Nawawi 2004).

Additionally, some scholars categorically prohibit the act of touching an *amrad*, drawing comparisons between touching an *amrad* and touching women. For instance, Ibn Taimiyyah (2004) states that finding pleasure in touching an *amrad* is considered more sinful than finding pleasure in touching an *ajnabi* (unrelated) woman. This viewpoint highlights how jurists have provided serious thought to acts involving an *amrad*, which reflects the historical prohibition of homosexuality in Muslim societies. (Al-Dibyan 2005; Ibn Taimiyyah 2004).

One of the primary reasons for the prohibition of physical interaction with an *amrad* in Islamic law is their potential to become a source of *fitnah* (temptation) for men. This concern arises from the recognition that some individuals may be tested by Allah SWT with same-sex attractions, specifically towards an *amrad*, leading them to experience stronger or comparable desires for such youths than for women. This inclination, if left unchecked, may result in transgressions of religious and moral boundaries (Al-'Uthaymīn, n.d.). At the same time, scholars have employed *qiyas* (analogical reasoning) to draw a distinction between an *amrad* and women, while simultaneously acknowledging their similarities in terms of physical attractiveness. Both are considered capable of inciting *fitnah* (temptation) by provoking sexual desire and arousal, thereby posing a moral and spiritual risk to the Muslim community (Al-Bujayrimī, 1995; Al-Haytamī, 1987). To safeguard individuals from harm, Islamic law establishes clear boundaries based on the principle of *sadd al-dhara'i* (blocking the means), designed to prevent any avenues that may lead to damage or corruption (Rashid Mat et al. 2021). This underscores the significant influence of Islam's framework in moulding Muslim society (Yakubu & Abdul Aziz, 2024). Within this framework, some scholars also forbid the act of touching *amrad*.

Scholars have differed on whether touching an *amrad* invalidates ablution (*wudu'*) which aligns it potentially to other actions which break the purified

status necessary for worship. The first view states that touching an *amrad* with desire invalidates ablution. The first opinion is held by the Maliki School (Al-Hattab 1992; al-Mawwaq 1994), one view in the Shafi'i School (Al-Mawardi 1999) and one view in the Hanbali School (Al-Mardawi 1955; Ibn Taimiyyah 1987) explaining that touching an *amrad* with sexual desire invalidates ablution. The second opinion, upheld by the Shāfi'ī and Ḥanbalī schools, states that touching an *amrad* does not invalidate *wudu'*, regardless of sexual desire (Al-Nawawi 1344H). The Ḥanafī school shares this view but adds a condition: *wudu'* is only nullified if there is excessive physical contact (*mubāsharah fāḥishah*), such as undressed hugging or direct contact between private parts (Al-Balkhiy 1310H).

KISSING CHILDREN

Scholars view that kissing children, whether one's own children, nephews and nieces, adopted children, or other children, regardless of gender, is permitted in Islam and even encouraged, as it reflects affection and tenderness towards them (Al-Mulaqqin 2008; Al-Fayumi 2018; Al-Nawawi 1344H). However, as explained by scholars, there are primary conditions for kissing children. Permissible kissing of children must be based on pure intentions, such as showing feelings of love, compassion, mercy, and gentleness that should be shown by adults towards children without being accompanied by carnal desire and lust (Al-Nawawi 1344H; Ibn Battal 2003). Kissing children has no specific restrictions and is permitted on any part of their body as a sign of affection (Al-Mulaqqin 2008). However, some scholars have expressly excluded kissing children on the private parts of their bodies (Al-'Asqalani 1379H).

At the same time, the act of kissing children is also believed to be one of the *sunnah* practices in Islam (Al-Nawawi 1344H). This is because there are many authentic and well-known hadiths regarding the practice of kissing children, both male and female children (Al-Munziri 2018). Therefore, scholars who permit kissing children argue that adults must emulate Prophet Muhammad SAW in showing affection to children (Al-Mulaqqin 2008). For example, there are various narrated hadiths explaining that such acts were performed by the Prophet towards children, including his children and grandchildren, including companions such as Abu Bakr, who also kissed 'Aishah during childhood. Simultaneously, Malik also agreed with this act

when asked about the issue of kissing children as long as it was done out of affection (Al-Mulaqqin 2008).

However, kissing children with sexual intention or desire is forbidden based on scholarly consensus, regardless of whether the child is one's biological child, adopted child, or other children (Al-Munziri 2018; Al-Nawawi 1344H; Ibn Battal 2003). The exception for kissing with desire is only permitted in legitimate relationships, such as with one's married partner (Al-Nawawi 1344H). Therefore, al-Qarafi (n.d.) explains that some scholars have taken precautionary measures by avoiding kissing young children's mouths due to their concern about feelings of desire and pleasure that might arise from such kissing. Instead, they only permit kissing children on their neck and head.

RESULTS AND DISCUSSION

The scope of Act 792 regarding physical sexual assault is seen as more specific and structured compared to the general nature of fiqh discussions. Section 14 Act 792 defines in detail and systematically regarding physical sexual assault offences, such as any person who, for sexual purposes, touches any part of a child's body; causes a child to touch any part of that person's body or any part of another person's body; causes a child to touch any part of the child's own body; or commits any other act involving physical contact with a child without sexual intercourse. This approach shows that Act 792 appropriately emphasises child protection by classifying certain acts as crimes (Wahab & Nor 2018). This matter simultaneously reflects Act 792's effort to encompass every aspect or form of behaviour involving physical sexual assault so that it can be classified and convicted as a sexual crime. Meanwhile, in fiqh discussions, there is no specific term like "physical sexual assault" as in criminal law. However, scholars' discussions focus more on general prohibitions and prevention against acts of a sexual nature, such as kissing children (Al-Nawawi 1344H; al-Sarakhsi n.d.), touching children's private parts (Al-'Asqalani 1989; Al-'Ayni 2008), touching children's body parts (Al-Buhuti 2000; Al-Mardawi 1955) and touching an *amrad* (Al-Nawawi 2004; Ibn Taimiyyah 2004), which are ruled as absolutely forbidden acts if done with sexual desire. However, both legal systems are seen as complementary

when requiring the presence of touch or physical contact with children to establish an offence. The care and protection of children align with *maqasid al-Shariah* (the higher objective of Islamic law), which emphasises prioritising the child's best interests in every circumstance (Abdol Malek et al. 2024). This approach is rooted in the belief that the wellbeing (*maslahah*) of all individuals, including children, must be safeguarded to uphold the five essential elements: religion, life, intellect, lineage, and property (Jamaludin et al. 2022; Eldersevi & Haron, 2020; Ahmad et al. 2024; Hamsin et al. 2023). Nevertheless, there are similarities between Act 792 and Islamic law, particularly regarding the existence of sexual elements in physical contact. Act 792 specifies that physical sexual assault offences must be executed "for sexual purposes," according to the definition outlined in Section 14. This indicates that incidents of physical sexual assault must involve a sexual intention or purpose directed at children. For instance, in *Mohd Rasul Mat Lasi v. PP* [2021] CLJU 1737, the appellant, a school bus driver, was charged under Section 14(a) of Act 792 and sentenced to 7 years' imprisonment along with 2 years of rehabilitative counselling during detention. On 24 April 2018, the victim (aged 14) and her sibling (11) boarded the bus driven by the appellant to school. Both victims were students with Down's syndrome. After dropping off other students, the appellant took the victim to a restaurant, where he committed indecent acts against the victim by kissing and groping her body for sexual purposes. In this context, the presence of sexual intent is the key factor in determining whether an act constitutes a crime under criminal law. This principle is consistent with Islamic legal thought, which also considers sexual desire a crucial element in assessing whether physical interactions with children are forbidden and classified as sexual offences. According to Saqr (2011), sexual desire in Islamic law refers to a desire that seeks pleasure and satisfaction. Therefore, in this discussion, the term specifically refers to sexual attraction or lust directed toward children. For example, Islamic scholars have clarified that touching a child, whether male or female, is prohibited if it is done with sexual intent. However, such contact is permitted if there is no sexual motive. This position is upheld by scholars from the Hanafi School (Al-Balkhiy, 1310H; Al-Sarakhsi, n.d.), the Shafi'i School (Al-Bujairimi, 1995), and the Hanbali School (Al-Buhuti, 2000; Al-Mardawi, 1955). Therefore, under Islamic law,

actions such as touching or kissing a child are only considered sexual crimes if they are carried out with sexual intention. Without such intent, these actions are not classified as sexual offences, even if physical contact is involved. However, in practice, proving the presence of sexual intention can be highly challenging, particularly in criminal courts where evidence on intention must meet strict legal standards.

Act 792 is seen to evaluate sexual assault criminal offences based on physical acts as a whole, compared to the offender's intention, as in Islamic law. For example, in *PP v. Jamaluddin Mohd Ghani* [2024] SMCU 92, the offender was charged under Section 14(a) of the Sexual Offences Against Children Act 2017 for committing physical sexual assault against a 12-year-old child by rubbing the victim's buttocks and private parts. Similarly, in *Ahmad Nazrol Fahmi Mustafa v. PP* [2023] CLJU 1900, the appellant (the victim's school van driver) was charged under Section 14(b) of Act 792, read together with Section 16(1), for committing a physical sexual assault against a female child aged 6 years and 10 months by making the victim touch the appellant's genitals. Conversely, Islamic law also considers the offender's intention and physical contact, but prioritises the offender's intention in determining the criminality of an act. In scholars' view, sexual intention becomes an essential element that distinguishes between acts considered forbidden or permissible. For example, touching children's private parts without sexual desire is considered acceptable in specific contexts by some scholars as long as the child is at the stage of non-*mumayyiz* (below 7 years old) or near puberty, because *awrah* rules do not apply to their body (Al-Sarakhsi n.d.). However, if such touching is done with sexual intention, it becomes forbidden and is categorised as a sexual crime. Most secular jurisdictions hold a similar stance. Evidence of sexual abuse must be presented, which can often be challenging to obtain due to the nature of the abusive behaviour.

Furthermore, there are distinctions regarding offender responsibility for sexual offences between Act 792 and Islamic law. Offenders under Act 792 are considered broader, covering both individuals under 18 and adults. For example, in *PP v. Muhammad Badrul Azan Bin Ishak* [2022] MLJU 1394, the magistrate court ordered a juvenile offender aged 17 who committed an offence under Section 14(a) Act 792 by holding a female child's buttocks with sexual intent to be sent to Henry Gurney School for

three years as stipulated under s.91(l)(f) of the Child Act 2001. Therefore, based on Act 792, children can be subject to legal action if found guilty of criminal offences by the court. On the other hand, under Islamic law, individuals are only held responsible for offences if they are deemed legally accountable under Shariah. This means those who have reached puberty and have a sound mental capacity are the ones to whom Islamic legal obligations pertain, as supported by scholarly consensus (Ibn Al-Munzir 2004). Children who have not reached puberty and who commit offences such as physical sexual assault are not held responsible under Islamic law. This is due to their lack of legal accountability under Islamic law, meaning they are not subject to religious obligations regarding what is halal (permissible) and haram (forbidden) (Al-'Amrani 2022). Therefore, most literature in fiqh discourse related to physical sexual assault focuses more on the context between adults and children, where the offender is an adult.

Next, regarding punishment, there are differences in the approach between the two legal provisions. Act 792 is regarded as stringent, particularly in terms of the harsh penalties that must be enforced against offenders (Abdul Wahab 2017). Section 14 of Act 792 provides that "shall be punished with imprisonment for a term not exceeding twenty years and may also be liable to whipping" for those who commit physical sexual assault offences. This provision shows that Malaysian criminal law takes a harsh approach towards sexual crimes against children, intending to provide justice to victims and also to punish and deter offenders. In Islamic law, sexual crimes against children are usually punished under the category of *ta'zir*, which means discretionary punishment decided by a judge. For example, kissing a male adolescent with sexual intent can fall under this category (Zaydan 2001). *Ta'zir* is used for sinful acts that do not have a fixed punishment or a required religious penalty (Al-Hajjawi n.d.; Ibn Abi 'Umar 1983). It is meant to educate and correct the offender's behaviour. Judges or rulers have the authority to choose the type and level of punishment they think is suitable for each case ('Audah n.d.). The punishments can include warnings, public scolding, fines, prison, whipping, or even banishment. Judges may also combine different punishments or reduce the severity depending on their judgment, which makes *ta'zir* a flexible approach for dealing with such offences (Al-Bujairimi 1995). In terms of similarities, punishments in both systems share the same goal,

which is to ensure justice for child victims and provide appropriate punishment and deterrence to offenders. However, the main difference lies in the scope and form of punishment for offenders found guilty of physical sexually assault on children. Act 792 provides lengthy minimum prison sentences, including an option of corporal punishment. Whilst Islamic law can also provide for punitive sentencing, since some of the action could fall within the category of ta'zir, there is greater flexibility in sentencing and reparation.

CONCLUSION

In conclusion, it is undeniable that both legal systems share a common goal in protecting children. Act 792 represents a progressive initiative introduced by the Malaysian government to address sexual crimes against children by outlining the offence of physical sexual assault against children in a detailed and structured manner. From the Islamic jurisprudence perspective, discussions on the offence of physical sexual assault against children are also emphasised, although the approach is generally broader. This article discusses that fiqh mainly addresses lustful intentions and physical abuse involving children and adults, which corresponds with Act 792 that also mandates sexual intent for conviction. However, it is worth noting that in the most serious cases of abuse, the question of sexual desire may not arise at all, as the harm is clearly established through various forms of evidence such as medical findings, police interviews, or psychiatric evaluations. The greater challenge lies in cases involving more ambiguous behaviour, where proving sexual intention becomes considerably more difficult.

Furthermore, there is a need for more extensive comparative studies between Act 792 and fiqh to enable a comprehensive legal reform. While enacting Act 792 marks a crucial advancement, it still holds potential for better integration with fiqh perspectives, which would aid in the overarching aim of merging criminal law with Sharia law in Malaysia. Future studies ought to expand this comparative analysis by examining additional aspects of Act 792 through the lens of Islamic jurisprudence, specifically regarding issues like child abuse materials, grooming, and non-physical sexual abuse. This exploration is vital as it can enhance the ongoing discourse by incorporating Islamic viewpoints.

Moreover, it is essential to recognise that Islamic law acknowledges the principle of adhering to the law of the land—ta'āqud al-muslimīn bi-shurūṭihim (Muslims must follow the terms they agree to)—as long as it aligns with Islamic principles. This principle reinforces the enforcement of laws like Act 792, which seek to protect the public and promote justice, mirroring the primary objective of Islamic law. Nonetheless, interpreting traditional Islamic texts in the context of modern times poses challenges. What was once accepted by scholars must now be contextualised within today's legal frameworks and societal values. In Malaysia, the legal landscape is influenced by individuals from diverse religious and cultural backgrounds, including Muslims and non-Muslims. Despite these variances, there exists a collective commitment to safeguarding children and other vulnerable groups from harm. Hence, future studies should further investigate how Islamic law and national law can collaborate more effectively in pursuit of this significant objective.

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AUTHORS' CONTRIBUTIONS

All authors contributed to the conceptualisation, methodology, and analysis. M.F. prepared the first draft, while M.A.S., and M.Q. handled the restructuring, review and editing. All authors have read and approved the final version of the manuscript.

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