

THE RIGHTS OF THE CHILD WHO COMES INTO
CONFLICT WITH THE LAW: A LEGAL ANALYSIS

BY

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ABSTRACT

This research attempts to evaluate the laws in Malaysia regarding to the adequacy of laws towards the protection of child in the criminal litigation process. Children are vulnerable in nature that need special care, attention and protection as to be treated according to the law in line with the principle accorded in the United Nations Convention on the Right of Child 1989 (UNCRC). Article 3 of the Convention depicts that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative or authorities or legislative bodies, the best interests of the child shall be a primary consideration. Malaysia started its child protection and welfare when it ratified the Convention in 1995. With the acceding of the Convention, Malaysia has a duty to comply with the Articles of the Convention that it has acceded. This was the major step for the country, in particular the Government's attempts to comply with the Convention especially through the enactment of the Child Act in 2001 which came into force on 1 August 2002. This Act consolidated three former Acts, namely, the Juvenile Courts 1947, Women and Young Girls Protection Act 1973 and Child Protection Act 1991. In the preamble of Child Act 2001, it stated that children should be accorded special care and their welfare given paramount importance. This Act affords protection for children and tackles the problems of juvenile delinquency, child prostitutions and children out of control. It imposes severe punishments for child trafficking, abuse, molestation, neglect and abandonment and also mandates the formation of children's courts. This Child Act 2001 provides comprehensive trial procedure in respect to children. It is submitted that by conforming to both the letter and spirit of these provisions would be adequate in safeguarding the interests in court. However, other statutes namely the Criminal Procedure Code, The Security Offence (Special Measures) Act 2012, Dangerous Drugs (Special Preventive Measures) Act 1985, and the Prevention of Crime Act 1959 also applicable to children in the event of any lacuna in the Child Act 2001 in which this tarnished the principle of best interests of the child accorded in the Convention because the application of these statues to child is incompatible since the child offenders and the adults offenders are to be treated the same under these laws. This research is focusing on the shortcomings in existing approaches towards the child offenders and those of crime victims. Even though the child offenders are guilty of committing the offence, they still need the protection as the intention of Parliament is clear to treat a child differently form an adult by establishing the Court of Children and providing special procedures under the Child Act 2001. The reference of this study will be much on the statutes, case laws, text books, articles and also view from the experts. On another note, this research is concluded with recommendations and suggestions and law reforms where it deemed necessary to guarantee the rights of the child are protected and at the same time to move towards internationally recognised practices such as restorative justice and diversion particularly for children committing minor offence.

ملخص البحث

يحاول هذا البحث تقييم القوانين في ماليزيا فيما يتعلق بمدى كفايتها في حماية الطفل خلال عملية التقاضي الجنائي. نظرا لضعف الأطفال بطبيعتهم، فإنهم يحتاجون إلى عناية خاصة واهتمام وحماية كأن يتم معاملتهم وفقاً للقانون بما يتماشى مع المبدأ المنصوص عليه في اتفاقية الأمم المتحدة لحقوق الطفل الصادرة عام 1989م (UNCRC). تنص المادة الثالثة من الاتفاقية على أن تكون مصلحة الطفل هي الاعتبار الأساسي في جميع الإجراءات المتعلقة بالأطفال، سواء قامت بها مؤسسات الرعاية الاجتماعية العامة أو الخاصة أو المحاكم أو الهيئات الإدارية أو التشريعية. بدأت ماليزيا في حماية الأطفال والحفاظ على رفاههم بشكل قانوني عندما صادقت على الاتفاقية في عام 1995م، وبانضمامها توجب عليها الامتثال لمواد الاتفاقية التي صادقت عليها. وقد كانت هذه الخطوة الرئيسية للدولة نحو حماية الطفل، ولا سيما محاولات الحكومة الامتثال للاتفاقية من خلال سن قانون الطفل في عام 2001م، والذي دخل حيز التنفيذ في 1 أغسطس 2002م. وقد عزز هذا القانون ثلاثة قوانين سابقة، وهي: محاكم الأحداث 1947م، وقانون حماية النساء والفتيات 1973م، وقانون حماية الطفل 1991م. وقد نص قانون الطفولة الماليزي الصادر عام 2001م على أنه ينبغي منح الأطفال رعاية خاصة وأن يعطى رفاههم أهمية قصوى. ويوفر هذا القانون الحماية للأطفال ويعالج مشاكل جنوح الأحداث وإشراك الأطفال في أعمال البغاء وقضايا الأطفال الخارجين عن نطاق السيطرة. هذا القانون يفرض عقوبات قاسية على الاتجار بالأطفال وإساءة معاملتهم والتحرش الجنسي بهم والإهمال والتخلي عنهم، كما يفرض تشكيل محاكم للأطفال كما ينص هذا القانون على إجراءات شاملة لتنفيذ المحاكمات المتعلقة بالأطفال. وقد أجمع على أن الالتزام بهذه الأحكام نصاً وروحاً سيكون كافياً لحماية المصالح في المحكمة. وبالمقابل هناك قوانين أخرى مثل قانون الإجراءات الجنائية، وقانون الجرائم الأمنية (التدابير الخاصة) لعام 2012م، وقانون المخدرات الخطرة (التدابير الوقائية الخاصة) لعام 1985م، وقانون منع الجريمة لعام 1959م والتي يتم تطبيقها على الأطفال في حالة وجود أي ثغرة في قانون الطفولة الصادر عام 2001م، غير أن تطبيق هذه القوانين قد يتعارض مع مبدأ المصالح العليا للطفل حيث إن الأطفال المذنبين والجناة الكبار يعاملون بنفس المعاملة بموجب هذه القوانين.

يركز هذا البحث على أوجه القصور في الإجراءات الحالية تجاه الأطفال المذنبين وضحايا الجرائم، على الرغم من أن الأطفال المذنبين مذنبون بارتكاب الجريمة، فإنهم ما زالوا بحاجة إلى الحماية؛ لأن نية البرلمان واضحة في معاملة الطفل بشكل مختلف عن شخص بالغ من خلال إنشاء محكمة الأطفال وتوفير إجراءات خاصة بموجب قانون الطفل لعام 2001م. في هذه الدراسة تمت الإشارة إلى مجموعة من القوانين، والسوابق القضائية، والكتب المدرسية، والمقالات بالإضافة إلى آراء بعض الخبراء. وفي ختام البحث توصل الباحث إلى توصيات واقتراحات وإصلاحات قانونية تعتبر ضرورية لضمان حماية حقوق

الطفل، وفي الوقت نفسه أوصى باتخاذ إجراءات نحو ممارسات معترف بها دوليًا مثل العدالة الإصلاحية، خاصة بالنسبة للأطفال الذين يرتكبون جُنْحًا لا تصل إلى كونها جريمة.



APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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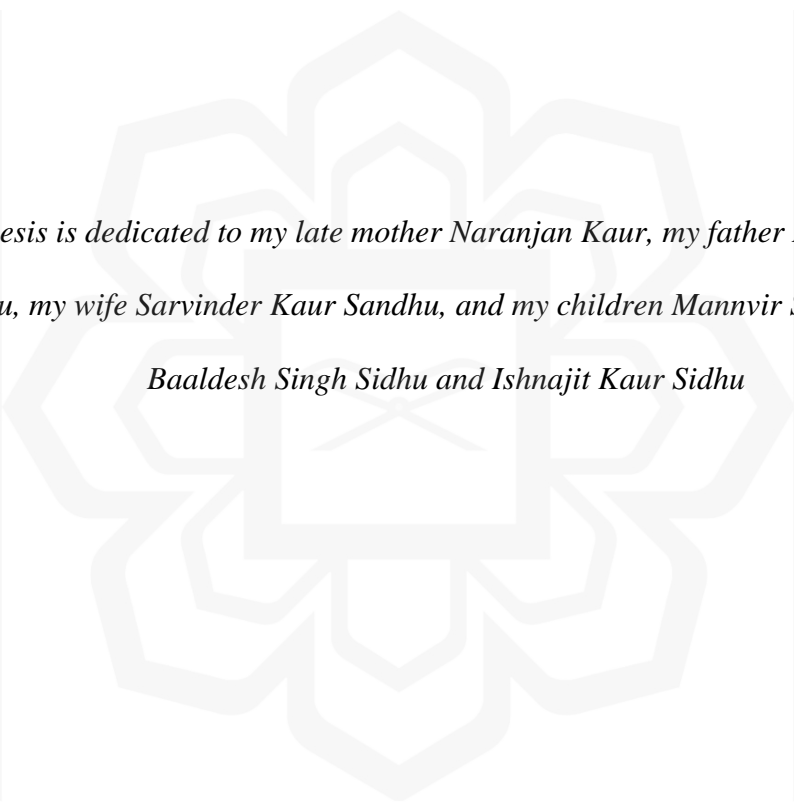
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This thesis is dedicated to my late mother Naranjan Kaur, my father Balwant Singh Sidhu, my wife Sarvinder Kaur Sandhu, and my children Mannvir Singh Sidhu, Baaldesh Singh Sidhu and Ishnajit Kaur Sidhu

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Sexual Offences against Children Act 2017
Syariah Court Evidence (Federal Territories) (Act 1007)
Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355)
Videotaping Children’s Evidence 1987

LIST OF ABBREVIATIONS

AC	Appeal Cases
AMR	All Malaysian Report
CLJ	Current Law Journal
CLR	Commonwealth Law Report
CPC	Criminal Procedure Code
CPC(A)A	Criminal Procedure Code (Amendment) Act 2010
CRC	Convention on The Right of Child
CRNZ	Criminal Report of New Zealand
CWC	Child Welfare Committee
DD(SPM)A	Dangerous Drugs (Special Preventive Measures) Act 1985
DDA	Dangerous Drugs Act 1952
DVA	Domestic Violence Act 1994
DVAA	Domestic Violence (Amendment) Act 2012
EA	Evidence Act 1950
ECW	Evidence of Child Witness Act 2007
EO	Emergency (Public Order and Prevention of Crime) Ordinance 1969
ESCAR	Essential (Security Cases) Regulations 1975
EWCA	England and Wales Court of Appeal
FGC	Family Group Conference
Ibid	(ibidem: in the same place)
ISA	Internal Security Act 1960
JCA	Juvenile Court Act 1947
JJ(C&PC) A	Juvenile Justice (Care and Protection of Children) Act 2000
LLR	Legal Legislative Regulatory
LNS	Legal Network Series
MLJ	Malayan Law Journal
NLJ	National Law Journal
NSWCCA	New South Wales Court of Criminal Appeal
NZLR	New Zealand Law Report
POCA	Prevention of Crime Act 1959
SOSMA	Security Offences (Special Measures) Act 2012
UNCRC	United Nation of the Convention of the Right of Child 1989
UNHCR	United Nation High Commission For Refugees
VIS	Victim Impact Statements
VOM	Victim Offender Mediation
VPS	Victim Personal Statement

CHAPTER ONE

INTRODUCTION

In this chapter, the researcher provides an overview of this research entitled the Rights of the Child and The Criminal Litigation Process in Malaysia: A Critical Analysis. The primary aim is to highlight the importance of ensuring child welfare and protection in criminal litigation. It is axiomatic that successful protective measures of children's rights increase the likelihood of children growing up physically and mentally healthy. This in turn allows them to develop personal attributes such as confidence and self-respect, making them less likely to abuse or exploit others. It is also to be noted that child protection is a special concern in situations of emergency and humanitarian crisis. Many of the defining features of emergencies – displacements, lack of humanitarian access, a culture of violence and weak governances creates an environment with serious child protection problems. While children in such circumstances continue to suffer violence, abuse and exploitation, the world will fail in its obligations to children; this could also affect its ability to meet its development aspirations and growth with future prospects.

1.1 BACKGROUND OF THE STUDY

There is an overwhelming concern about the plight of children all over the world. In fact, as early as 1919, the British social reformer, Eglantine Rebb founded the "Save the Children" charity, and thereafter, drafted series of proclamations relating to children's rights. These are collectively known as the Declarations of the Rights of Children. Rebb's idea on the rights of a child was adopted by the International Save the

Children Union, Geneva in 1923, and was subsequently endorsed by the precursor to the United Nations, the League of Nations in its General Assembly on 26th November 1924 and thereafter, the World Child Welfare Charter was born. The United Nations' General Assembly on 20th November 1959, passed the Declaration of the Rights of the Child and that day became the Universal Children's Day. In 1989, the Convention on the Rights of the Child was adopted by UN General Assembly. On 2nd September 1990, it became an international law. The Convention is a universally agreed set of non-negotiable basic standards that sets minimum entitlements and freedoms that should be enjoyed by a child.¹

The Convention on the Rights of the Child advances international standards on children's rights in a number of ways. It elaborates and legally binds many of the rights of children laid out in previous instruments. It contains a lot of new provisions relating to children, for example, with regard to the child's rights, and the principle that in all decisions concerning the child, the child's best interests must come first. It also created, for the first time, an international body responsible for overseeing respect for the rights of the child, the Committee on the Rights of the Child. Recognition of the child's right to protection is not limited to the Convention on the Rights of the Child. There are a number of other instruments, both those of the United Nations and those of other international bodies, which also lay out these rights. These instruments include:

1. The African Charter on the Rights and Welfare of the Child of the Organization for African Unity (now African Union) of 1990;

¹ "History of Child Rights." UNICEF, www.unicef.org/child-rights-convention/history-child-rights (accessed 12th December, 2020).

2. The Geneva Conventions on International Humanitarian Law (1949) and their Additional Protocols (1977);
3. International Labour Convention No. 138 (1973), which states that, in general, persons under the age of 18 may not be employed in jobs that are dangerous to their health or development, and International Labour Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour;
4. The Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention on Transnational Organized Crime.

One aspect that is often left out in discussing the rights of a child is the impact of the legislation on the child itself. In Malaysia, there are various legislations that have determinative impacts on the child. The following are some of the laws that have a direct bearing on the child: -

1. Child Act 2001 [Act 611]

The objective of this act is to give protection and assistance in relation to children without regard to distinction of any kind, such as race, colour, sex, language, religion, social origin or physical, mental or emotional disabilities or any other status.

2. Adoption Act 1952 [Act 257]

The objective of this Act is to safeguard the interest of the adopted child and to provide them with the same rights and status as the natural child of the adoptive parents would have in terms of rights of inheritance. However, the provisions of this Act not apply to any person who professes the religion of Islam and the child is a Muslim according to the law.

3. Anti-Trafficking in Persons Act 2007 [Act 670]

This Act was enacted to convict and to punish those who traffics children for the purpose of exploitation.

4. Births and Deaths Registration Act 1957 [Act 299]

The registration of every birth in the country becomes mandatory by virtue of this Act. Thus, this Act provides the child with the right to a name and an official document.

5. Age of Majority Act 1971[Act 21]

This Act consolidate the law relating to the age of majorities.

6. Care Centres Act 1993 [Act 506]

This Act provides for the registration, control and inspection of day and residential care centres. This Act controls the number of children in a day care centre based on the space and specified ratio between care givers and children.

7. Childcare Centres Act 1984 [Act 308]

The provision of this Act ensures quality childcare for children below the age of four years at childcare centres. The Act requires these centres to register with the Department of Social Welfare where the department will monitor the operation of the childcare centres and its compliance to this Act.

8. Children and Young Persons (Employment) Act 1966 (Revised 1988) [Act 350]

The aim of this Act is to protect a child from economic exploitation, including child labour. This Act regulates the kind of employment, number of days and hours of work for child and young persons. This Act also enables a child to sue his or her employer as well as protects them from claims by the employer.

9. Domestic Violence Act 1994 [Act 521]

The purpose of this Act is to control the crime of violence amongst the family and maintain the well-being of the family. It also protects the child against any form of abuse committed within the household.

10. Sexual Offences Against Children Act 2017 [Act 792]

This Act provides for certain sexual offences against children and their punishment in addition to other sexual offences against children and their punishment in other written laws.

11. Education Act 1996 [Act 550]

Through this Act, primary education was made compulsory for children. Parents are obliged to enrol their child upon attaining the age of six years in primary school and the duration for compulsory education is set as six years.

12. Guardianship of Infants Act 1961 [Act 351]

Rights and duties of parents in relation to their children are provided in this Act. The Act also provides for equality of parental right in the upbringing of infants and in the administration of property belonging or held in trust of the infant.

13. Islamic Family Law (Federal Territory) Act 1984 (“IFLA”) [Act 303]

A Muslim’s child’s rights are found in IFLA. Under this Act, parents are obliged to maintain their child until they attain the age of 18 or until they complete higher education or further training.

14. Law Reform (Marriage and Divorce) Act 1976 [Act 164]

This act provides for the rights of the child to be maintained by the parents and the custody of the child in the event of a divorce.

15. Married Women and Children (Maintenance) Act 1950 [Act 263]

This Act ensure that the father, who neglects or refuses to maintain his child, to make monthly allowance in proportion to his means.

16. Penal Code [Act 574]

Provisions of Act 574 under Chapter XVI relating to offences affecting the human body apply equally to children. Section 314-318 specifically provide for offences relating to causing miscarriages and to unborn child. Section 317 in particular makes it an offence for the exposure and abandonment of child under 10 years by parents or guardian.

17. Registration of Adoption Act 1952 [Act 253]

This Act provides for the registration of adoption upon an application made by the adoptive parents of a child under the age of 18 years.

18. Peaceful Assembly Act 2012 [Act 736]

The recently introduced Peaceful Assembly Act 2012 denies a child under the age of 15 years the right of peaceful assembly. The Act also denies the right of a person under the age of 21 years of age from organising a peaceful assembly.

19. Prevention of Crime Act 1959 [Act 297]

This statute allows for detention of child without trial.

20. Security Offences (Special Measures) Act 2012 [Act 747]

An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters.

1.2 STATEMENT OF PROBLEM

The interplay between the rights of a child and the workings of the legislations brings into focus the need to study whether certain aspects of the legislation and law are consistent with the need to protecting the rights of a child. It is discovered that the protection for a child is not after all good enough as there are laws that do not discriminate between an adult offender and a child offender. Reference may be made to

the international instrument and standards. The pertinent question that begs for an answer is to what extent then is the protection sufficient according to the international standard? It is thus pertinent to look at the relevant laws closely and tightly in order to get a grasp the whole situation and the state of affairs.

At present, as adverted to earlier there are various legislations and laws that have a direct and indirect impact on a child. As regards to a children being an offender, the central point of the legislation appears to be targeted at adult offenders, and thus making child offender “unwanted”. Another area of confusing is the categorization of age of criminal liabilities in multiple legislations. In relation to this, there is uncertainties as to when a child can be tried as an adult offender.

With reference to the child being tried as a child, certain positive developments have taken place with the introduction of the Child Act which contains provisions pertaining to constitution of the courts and the manners of reception of evidence and truth.

As regards to the child taking the role of a witness, it must be stated that the laws relating to child’s evidence remains greatly unsettled.

These aspects will be studied in depth with the specific focus on the nexus between the child and the law in the criminal litigation process. It will examine the following aspects/research questions: -

- a) Chapter 2: Children and the trial processes;

The researcher will discuss on the trial process for children at the Courts for Children and whether the current criminal litigation process provide sufficient protection to children as offenders.

b) Chapter 3: Child victims and welfare of child abuse victims;

The researcher will discuss the welfare of child abuse victims and the responsibilities of the public to prevent child abuse further. Further, the researcher will provide a very detailed analysis of the current laws and legislations on child victims and how wide scope of Victim Impact Statements (hereinafter referred as “**VIS**”).

c) Chapter 4: Children as witnesses;

The researcher will discuss when children are being called as child witnesses in courts and the different statements provided by children in court,

d) Chapter 5: Security Offences (Special Measures) Act 2012 and the children.

The researcher will give a detailed analysis on the provisions of Security Offences (Special Measures) Act 2012 (hereinafter referred as “**SOSMA**”) and its strict approach towards the accused, and further relate it to child offenders charged under SOSMA. Further, an analysis of the compatibleness of SOSMA with the objective of the Child Act and United Nation of the Convention of the Right of Child 1989 (hereinafter referred as “**UNCRC**”)

e) Chapter 6: Sentencing of the child;

The researcher will provide a detailed analysis on child sentencing and further discuss on child offenders. This chapter will focus on the institutional treatment of juveniles in Malaysia, whether the trainings and treatment of child offenders in approved schools or Henry Gurney schools is in accordance with Article 37 and 40 of the UNCRC which sets out protection for every child deprived of liberty. The issue of remand on the detention of child offenders at pre-trial will also be discussed.

f) Chapter 7: The preventive laws and measures for Malaysian children;