



A STUDY ON POLICIES AND LAWS AFFECTING
CHILDREN IN MALAYSIA: AN APPRAISAL OF
THE CHILDREN'S BEST INTERESTS

BY

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ABSTRACT

This study is designed to explore the interface between policy and law affecting children in Malaysia especially with reference to children's best interests. This study appraises the philosophical underpinning of certain policies and strategies that had been adopted by the Malaysian government since 1957 in dealing with children's best interests. In order to understand the relationship, qualitative method was applied. This was carried out by invoking historical approach and using secondary data. A series of government's reports, international legal instruments, statute and case laws were parts and parcel of the secondary data. Content analysis was also carried out in order to comprehend the issue on children's welfare that has been interpreted through judicial decisions. This study significantly proves that the existence of diverse statutes on children had prompted different understanding on child best interest principles. In terms of implementation, there is inadequate supervision from the government agencies in conducting the plans of action. This study shows that there are several factors that undermine the role of legislations and diminish the effectiveness of its implementation which include jurisdictional conflict of legal provisions and inadequacy of provisions which can penalize the non-compliance of court's orders. The interpretation of best interests of child in the Shariah courts also does not correspond with the objectives of *maqāsid al-Sharī'ah* from Islamic point of view. A major obstacle in enforcing the best interests principle in matters pertaining to children are linked to the monitoring system that has not been established properly due to overlapping jurisdiction between different agencies in implementing the similar policy. This study implies that any proposed policy must be based on empirical research evidence and robust since the current practice of formulating social policy and legal reforms was not driven by solid empirical research. This study shows that the nexus between policy and law which affect children's best interests is still poor as there is no comprehensive policy to protect the overall development of Malaysian children both for Muslim and non Muslim.

ملخص البحث

تهدف هذه الدراسة إلى استكشاف العلاقة بين السياسات والقوانين التي تؤثر على الأطفال في ماليزيا وبخاصة تلك التي تضع في اعتبارها مصالح الطفل الفضلى. وتُقيّم هذه الدراسة الأساس النظري لبعض السياسات والاستراتيجيات التي تم اعتمادها من قبل الحكومة الماليزية منذ عام ١٩٥٧ والتي تتعامل وتؤخذ في اعتبارها المصالح الفضلى للطفل. ومن أجل فهم تلك العلاقة، فقد تم اعتماد المنهج الكيفي الوصفي، وذلك من خلال استدعاء النهج التاريخي واستخدام البيانات الثانوية؛ حيث كانت سلسلة من التقارير الحكومية، والصكوك القانونية الدولية، والقوانين المنظمة، والقرارات القضائية جزءاً من البيانات الثانوية التي تم اعتمادها في هذه الدراسة. وتم أيضاً اللجوء إلى تحليل المحتوى لفهم مجالات رعاية الطفولة التي تم التنويه إليها وتبنيها في القرارات القضائية. وقد أثبتت هذه الدراسة وبشكل بارز أن وجود قوانين متعددة ومتنوعة تتعلق بالطفولة أدى إلى أفهام متعددة للمبادئ الأساسية التي تتعلق بمصلحة الطفل. ومن حيث التنفيذ العملي، يلاحظ أن الوكالات الحكومية كانت تفتقر في تطبيق وتنفيذ خطط العمل الموضوعية. كما وتبين هذه الدراسة أن هناك العديد من العوامل التي تعرقل دور التشريعات وتقلل من فعالية تنفيذها؛ ومن ذلك تنازع الولايات القضائية للأحكام القانونية وعدم كفاية المواد القانونية التي تعاقب على عدم الامتثال لأوامر المحكمة. حقيقة، الفهم بمصالح الطفل بمجال المحاكم الشرعية لا ينسجم ولا يتواءم مع المقاصد الشرعية المعتبرة في ضوء الفقه الإسلامي. وتتمثل العقبة الكبرى لتطبيق المصالح الفضلى بما يتعلق بالأطفال بنظام المراقبة والذي لم يتم تطبيقه بشكل صحيح بسبب تداخل الاختصاصات بين الوكالات المختلفة والتي تقوم بتنفيذ سياسات متماثلة. وتدل هذه الدراسة على أن كل سياسة مقترحة لا بد من أن تستند إلى نتائج البحوث الميدانية الفعالة، حيث أن الممارسات الحالية المتمثلة في صياغة السياسات الاجتماعية وتعديل القوانين لم تكن مدفوعة ببحوث ميدانية مُحكّمة. وتبين هذه الدراسة أن الرابط بين السياسات والقوانين التي تؤثر على مصالح الطفل الفضلى ما زالت ضعيفاً لعدم وجود سياسة متكاملة لحماية التنمية الشاملة للأطفال الماليزيين سواء بالنسبة للمسلمين أو غير مسلمين.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation 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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ABBREVIATIONS

AA	Adoption Act 1952
All ER	All England Report
AMR	All Malaysia Reports
Anor	Another
AP	Appeal Cases
Art	Article
CA	Child Act 2001
Cap	Chapter
CEDAW	Convention on the Elimination of all Forms of Discriminations against Women 1979
Ch	Chancery
CLJ	Current Law Journal
CPA	Child Protection Act 1991
CRPD	Conventions on the Rights of Person with Disabilities 2006
D.R	Dewan Rakyat
DSW	Department of Social Welfare Malaysia
ECECR	European Conventions on the Exercise of Children's Rights 1966
ECHR	European Convention on Human Rights 1950
edit	Editor
edn	Edition
F.M.S	Federated Malay States
Fam LR	Family Law Report
GD	Geneva Declaration 1924
GIA	Guardianship of Infants Act 1961
ICCPR	International Covenant on Civil and Political Rights 1966
IFLA	Islamic Family Law (Federal Territory) Act 1984
IKIM	Institute Kefahaman Islam Malaysia
JCA	Juvenile Courts Act 1947
JH	Jurnal Hukum
Ky.	Kysye Law Report
Ky.Ecc	Kysye Ecclesiastical Report
LJ	Lord Justice
LRA	Law Reform (Marriage and Divorce) Act 1976
MAC	Minimum Age Convention 1973
MLJ	Malayan Law Journal
NPA	National Plan of Action for Child Survival, Protection and Development
NRD	National Registration Department
OIC	Organization of Islamic Conference
Ors	Others
RAA	Registrations of Adoption Act 1952
Sdn Bhd	Sendirian Berhad
ss	Sections
SSLR	Straits Settlements Law Reports

UDHR	United Nation Declaration of Human Rights 1948
UFMS	Unfederated Malay States
UK	United Kingdom
UNCRC	United Convention on the Rights of the Child
UNDRC	United Nation Declaration of the Rights of the Child 1959
Vol.	Volume
WFCLC	Worst Forms of Child Labour Conventions 1999
WGPA	Women and Girls Protection Act 1973

TRANSLITERATION

Table of system of transliteration of Arabic words and name used by the International Islamic University Malaysia

ء	'	خ	kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	ه	H
ت	T	ذ	dh	ض	ḍ	ق	Q	و	W
ث	Th	ر	r	ط	ṭ	ك	K	ي	Y
ج	J	ز	z	ظ	ẓ	ل	L		
ح	h	س	s	ع	‘	م	M		

Short Vowels	
َ	a
ِ	i
ُ	u

Long Vowels	
ا + َ	ā
ي + ِ	ī
و + ُ	ū

CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

In Malaysia, the legal status of children both for the Muslim¹ and Non Muslim² are established in statutory forms. However, to ensure that the laws related to children are properly implemented and enforced, the government has to formulate policies. Thus, it has been observed that for the past 50 years, some of the Malaysian policies though not directly formulated to children, nevertheless had addressed children's best interests, in its plans and programs.

In order to strengthen the plan of action as planned under the core development policies, various social policies also had been formulated by government in order to protect the overall development of family and children wellbeing. It is noted that although Malaysia does not have any specific child-focused policy, nonetheless a "National Plan of Action for Child Survival, Protection and Development" (hereinafter referred to as the First NPA) was a blueprint for the national development and formulation of policies, strategies and programs for children from 1990 up the year 2000.³ Currently, Malaysia is implementing the second Plan of Action covering

¹ Islamic Family Law (Federal Territories) Act 1984 and other State Islamic Family Law Enactments in Malaysia.

² Law Reform (Marriage and Divorce) Act 1976 and related legislations which are applicable to non Muslim children such as Adoption Act 1952 and Legitimacy Act 1961.

³ Statement by H.E Dato' Hajah Siti Zaharah Sulaiman, Minister of National Unity and Social Development during the 27th Special Session of the United Nations General Assembly on Children at the United Nation, New York, Friday, 10 May 2002, <<http://www.un.org/ga/children/malaysia.html>> viewed on 2 January 2006; Kammerman, S.B., *Early Childhood Care and Education and other family policies and programs in South East Asia*, UNESCO, 2002 at 11.

the years 2001 – 2010 which focuses more on the issue of development and participation of children in anticipation of impending globalization.⁴

Malaysian policies related to children are scattered and are largely incorporated into the social policies such as the National Social Policy⁵ and National Policy on Women.⁶ Among the established objectives under those policies are that all efforts shall be directed towards fostering physical, social, emotional and mental development of children. Thereby, children's rights and welfare or the best interest became the focal point in promoting children's interest in Malaysia. Thus the ratification of Convention of the Rights of the Child shows government's commitment in upholding children's best interest.⁷

Finally, after 12 years of ratification of UNCRC the government took positive move in formulating the first child-focused policy⁸ known as the National Child Policy which is recently launched⁹ with the principles objective that children must be given full recognition as a trust to the State government. The formulation of comprehensive child-focused policy is vital to ensure that the implementation and enforcement of law related to children in Malaysia is effective. Therefore, the focus of this chapter is on the brief overview of the background of the study and some

⁴ As noted by Amy Bala & Maniam Sinnasamy, *Child Participation: the Malaysian Experience*, 2006, at 5, <http://www.crin.org/docs/GDD_2006_UNICEF_Malaysia1.doc> viewed on 2nd July 2008; Badaruddin, M., (2002). *Planning for Children and the city*, Paper presented for Child and City Conference, Aman Jordan, December 11-13, <<http://www.araburban.org/chidcity/Papers/English/Badarudin.pdf>> viewed on 2nd August 2006.

⁵ *National Social Policy*, Ministry of National Unity and Family Development, 2003.

⁶ The National Policy on Women was formulated in 1989 and under the administration of Ministry of Women, Family and Community Development. It seeks to eradicate poverty and integrate women in all aspects. See *Women Development Plan of Action*, HAWA, Ministry of Unity and Community Development, 1997 at 16.

⁷ Abu Bakar Munir, "The Convention on the Rights of the Child: What did we sign?," Proceedings of the Seminar Understanding the Convention on the Rights of the Child, 1996 at 9-14.

⁸ Workshop on Child National Policy, Ministry of Women, Family and Community Development, Hotel Crown Princess, Petaling Jaya, 1-4th April 2007.

⁹ The Prime Minister recently launched two important policies namely National Child Policy and National Child Protection Policy on 15th September 2009. The National Child Policy is beyond the scope of discussion of this research.

descriptions of the changes in the social structure of children in Malaysia are also included. This explanation leads to the identification of the problem statement, research questions and objectives of the study.

1.1 BACKGROUND OF THE STUDY

Children have been considered as a valuable asset for the nation. Therefore, regardless of different cultural background, race and faith, Malaysian children had received the ultimate attention from the government. However, the present day situation in Malaysia reveals that families are experiencing significant changes due to the impact of globalization, economic development, demographics, social and cultural change. The changes have brought about some positive results such as improved health, reduced income poverty and enhanced education and reduced gender inequities.¹⁰ Equally, the family structure have changed relationships between families and society, especially with regard to the education, socialization and care of young children; and inequities remain and have even increased between urban and rural communities.¹¹ Families in Malaysia are increasingly diverse, whereby the extended families are declining and nuclear families are rising in numbers.¹² Thus children who are living in the family system are subject to these changes.

Although the legal status of Malaysian children for both Muslim and non Muslims are protected through statutory forms and other policies, it seems that the

¹⁰ Anjli Doshi, G., "Ke Arah Pengukuhan Masyarakat Sejahtera: Cabaran dan strategi pengukuhan institusi kekeluargaan," *Konvensyen Kebangsaan, Agenda pembangunan Sosial ke arah Pembangunan Masyarakat Sejahtera dan Saksama*, 2006, 1-2 Jun, Kuala Lumpur.

¹¹ Rozumah B, Siti Nor., Yaacob, Abdullah Al Hadi and Rojanah, K. *The Impact of Changing Family Structures on Children's Lives*, IRPA Report, UPM: Faculty of Human Ecology, 1999.

¹² Rumaya Juhari and Siti Nor Yaacob, "Perubahan dan Cabaran Keluarga", in *Isu Keluarga Kontemporari*, edited by Rumaya, J and Siti Nor Yaacob (Kuala Lumpur: In Reach Edition, 2007), at 1-10.

implementation of laws are quite ineffective.¹³ Cases and issues on children are still alarming although these diverse laws on children had gone through various amendments and improvements. Issues and problems on child abuse,¹⁴ neglect,¹⁵ abandoned¹⁶, children of divorce¹⁷ and juvenile delinquency¹⁸ are some of areas that have been identified as the most vulnerable events suffered by children.

It is apparent that various policies which directly or indirectly focused on children's welfare or best interest have been formulated since independence. Nonetheless, the affirmative action started only in 1994¹⁹ after the World Children Summit. Ironically, the other core development policies have been utilized to promote the children's best interests. Accordingly, other social policies served as a foundation for upholding the welfare of Malaysian children.

The formulation of core development policies and social policies²⁰ at the national level has been further extended at the international level through the treaties

¹³ Available from <http://www.malaysianbar.org.my/malaysian_law_confrence_organizingcommittee_dated_January_2008> viewed on 12th Mac 2008.

¹⁴ Khoo, K.B., Ch'ing, G.S., Muhd Khairi, O., Jessni, J., Kamid, M., Zaidah, M.A. and Raja Liza, R.A., Penderaan Fizikal Kanak-kanak Pada 1993: Satu Kajian Kes Kanak-kanak di Hospital Kuala Lumpur, vol 2(2); 1995, *Jurnal Kesihatan Masyarakat*; Mariani Mansur, "Personaliti dan Resiliensi Kanak-kanak Teraniaya, Serta Hubungannya dengan Faktor2 Ciri Peribadi dan Kontekstual: Kajian Kes di Pusat Perlindungan Kanak-kanak di Wilayah Persekutuan Kuala Lumpur dan Selangor," (Ph.D. thesis, National University of Malaysia, 2005).

¹⁵ Jal Zabdi Yusof and Sridevi Thambapillay, Neglecting Child Neglect: Selected Legal Issues Encountered in Malaysia, paper presented at the ALIN International Law Conference, Bangkok, 5-6 December 2007.

¹⁶ Azizah Mohd, "Law of Foundling (*Laqīṭ*): The Islamic legal principles and the law in Malaysia," (Ph.D. thesis, International Islamic University Malaysia, 2004).

¹⁷ Rozumah, B, Rumaya.J and Rojanah, K, "Predictors of the Wellbeing of children from non traditional families', (1), *Human Ecology Research Bulletin*, 2001 at 16-22; See also Rozumah, B, Siti Nor Yaacob, Abdullah Al Hadi, Rojanah, K. *The Impact of Changing Family Structures on Children's Lives*, IRPA Report, UPM: Faculty of Human Ecology, 1999.

¹⁸ Norbani Mohamed Nazri, "Welfare: The Key to juvenile justice in Malaysia", Proceeding for 4th ASLI Conference, 2007 at 198-206; see also Nasimah Husin, "Juvenile Delinquency in Malaysia: Legal Provisions and Prospect for Reforms", <<http://www.childjustice.org/hussin2005.pdf>> viewed on 2nd January 2008; Norbani Mohamed Nazri, Child Offender: Policies and the Emergency Rules, paper presented for 5th Asian Law Institute Conference, Singapore 22-23 May 2008.

¹⁹ First NPA was drafted in 1995 as noted by Hamidon Ali, Promotion and Protections of Rights of Children, for 3rd Committee of the 60th Session of the UNGA New York, 17th October 2005, available at <<http://www.un.int/malaysia/GA/60thGA/6033.PDF>> viewed on 20 December 2007.

²⁰ See for further details in Chapter 3 of this thesis.