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CHILD ABUSE ; PROTECTIONS

AFFORDED BY LAW

THIS DISSERTATION IS SUBMITTED TO FULFILL  
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Narizan Abdul Rahman

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## ABBREVIATIONS

A.C	Appeal Cases
A.I.R	All Indian Reports
All E.R.	All England Reports
A.L.J.	Allahabad Law Journal
C.A.	Court of Appeal
C.C.R.	Court Cases Reserved
C.J.	Chief Justice
C.L.R.	Culcutta Law Report
C.L.J.	Current Law Journal
Cr. App. Rep.	Criminal Appeal Report
Cr. L.J.	Criminal Law Journal
Cr. L.R.	Criminal Law Review
Exch.	Exchequer Report
E.R.	Equity Report
I.L.R.	Indian Law Report
J.H.	Jurnal Hukum
K.B.	King's Bench
L.L.J.	Lahore Law Journal
L.Q.R.	Law Quarterly Review
M.L.J.	Malayan Law Journal
M.L.R.	Malaya Law Review
M.L.N.	Malaysian Law News

NZLR

New Zealand Law Reports

Q.B

Queen's Bench

Q.B.D

Queen Bench Division

R

Regina

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## INTRODUCTION

Many different attitudes of children can be found. In the past young childrens were not considered people, perhaps on acknowledgement of high childhood mortality, which allowed an unwanted child to be disposed of without the parent being guilty of the crime or murder.

Some societies defined children as the property of the parent, to be done with as he willed, a view still sometimes expressed today : " What right have you to interfere in my family life?".<sup>1</sup>

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1. David N. Jones, *et. al.*, *Understanding Child Abuse*, Second Edition, (1987), 9.

Similarly, it was a common practice of Arabs during the 'Jahilliyah' period (pre-Islamic) to commit female infanticide. Female children used to be buried alive. The practice was condemned by Allah in The Holy Quran.<sup>2</sup> Islam came and abolished the practice and upgrade the status of woman.

Moreover for many centuries, it was considered necessary literally to beat good into children and punish them severely when they were naughty.<sup>3</sup> However it later led to the causes and consequences of all forms of maltreatment of young children in the family.<sup>4</sup>

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2. See The Holy Quran, Chapter 16, Ayat 58-59. The translation to ayat 58 is "When news is brought to one of them, of (the birth of) a female (child) his face darkens, he is filled with inward grief" Ayat 59 furthers states "With shame does he hide himself from his people, because of the bad news. Shall he retains it on (sufference and) contempt or bury it in dust. Ah what an evil (choice) they decide on?".

3. *Supra*, note 1 at 43.

4. Kevin Brown, Cliff Davies and Peter Stratton, *Early Prediction and Prevention of Child Abuse*, (1988), xi.

According to Christina Lyon, child abuse has become increasingly common in our society, provoking widespread public concern and highlighting a conflict between the recognition of parental rights and the rights of children to protection from harm or abuse.<sup>5</sup>

It is to be noted, despite the alarmed increase in child abuse cases, the protection afforded by law is still questionable. Recent cases have also revealed defects in the existing laws and a need for reform of child care laws.<sup>6</sup>

#### HISTORICAL PERSPECTIVES :

Child abuse has become a matter of intermittent public concern in the western world for over a hundred years.<sup>7</sup> The battered-child syndrome was first describe in 1868 by Ambrose Auguste Tardieu.<sup>8</sup> He had of necessity, to rely on autopsy find-

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5. Christina Lyon, Peter De Cruz, *Child Abuse* (1990),

6 *Ibid.*

7. S Augustine Paul, "*Child Abuse : The New Law*(1993), 3 CLJ lxxiii.

8 A Professor of Forensic Medicine and Dean of the Medical School, University of Paris.

ings. He described 32 children battered or burnt to death. The same year, Athol Johnson at the Hospital for sick children in London called attention to the frequency of repeated fractures in children. He attributed these to the condition of the bones, since rickets at that time was almost universal among London Children.<sup>9</sup>

In England, Mary Ellen was the first of a series of children whose tragic life led to public outcry, demands for action and changes in social policy.<sup>10</sup> The scandal occurred in 1874 when she was living in New York tenement with her adoptive parents. Neighbours were concerned that she was being ill-treated, and neglected. They contacted an organization providing voluntary help to immigrant.<sup>11</sup>

A visit was made to the flat and she was found in terrible state, neglected, beaten and cut with scissors. The parents refused to change their treatment for her and insisted that they could do as they wished.

There were laws against ill-treatment of animals but no similar laws to protect children.

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9. Dennis Howitt, *Child Abuse Errors*, (1992), 29

10. *Supra* note 7.

11. Note that Mary Ellen was a British immigrant.

So it was decided to bring the matter before the court on the ground that Mary Ellen was a member of the animal kingdom for this purpose.<sup>12</sup> The case was found proved and she was granted protection.

There was the public outcry against the sufferings of Mary Ellen and the fact that there was a law against cruelty to animals but none against cruelty to children.<sup>13</sup>

The scandal resulted in the formation of the New York Society for the Prevention of Cruelty to Children which was the inspiration for the founding in Britain of the National Society for the Prevention of Cruelty to Children or NSPCC.<sup>14</sup>

#### History of Legislation in England :

There were obvious cases of cruelty. After campaigns by the NSPCC and others, Parliament passed the Prevention of Cruelty Act 1889, which among other provisions, gave powers to magistrates to issue a warrant to permit the entering of a home if there was suspicion of ill-treatment, to the police to arrest those suspected of ill-

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12. David N. Jones, *op.cit.*, at 43.

13. S. Augustine Paul, *op.cit.*, at lxxiii.

14. *Supra*, note 12.

treatment and to courts to remove such children from their parents.<sup>15</sup>

The Children Act 1908, codified, consolidated and extended previous legislation and for the first time established Juvenile Courts. The Children and Young Persons Act 1932, raised the age limit for protection proceeding to 17 and introduced other provisions.

These two Acts were consolidated in the Children and Young Persons Act 1933 and extended in 1938 by the introduction of statutory supervision in the family home. The Infanticide Act 1938 acknowledged that some mothers injure and occasionally kill newborn babies whilst suffering from the mental illness associated with child-birth. This saved such women from the gallows.<sup>16</sup>

As the result of "the Battered-child Syndrome" (paper presented by Dr C Henry Kempe, a member of the American Academy of Paediatrics), the NSPCC Battered Child Research Team was subsequently established in 1968. They published numerous papers, aiming to disseminate and arouse professional interest.<sup>17</sup>

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<sup>15</sup> *Id.*, at 46

<sup>16</sup> *Ibid.*

<sup>17</sup> David N. Jones, *op. cit.*, at 46.

**Malaysian position :**

Child abuse in Malaysia happened in the society irrespective of race and religion. The abusers are, in fact close to the children including parents, guardians, relatives, teacher and others.<sup>18</sup> The reasons that led to child abuse are not easy to detect because they are hidden in the abusers themselves. Nevertheless, there are certain factors related.

In Malaysia, child abuse cases happened after the World War II. This was based on the passing of the Children and Young Persons Act in 1946 which came into force a year later. The passing of the Juvenile Court Act 1947 also marked the history.

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18. C.H. Liew, "The adequacy of Laws in the Lawasia Region Relating to Domestic Violence - a Malaysian Point of View", paperwork presented in the 10th. Law Asia Conference, 29th June to 4th July, 1987, Kuala Lumpur, 2.



STATISTICS ( BRIEF ) :

In England, child abuse and neglect is one of the common causes of death to young children in Britain today, and up to four children die at the hands of their parents and relatives every week. Many children are growing up physically and emotionally scared for life.

Overall, in 1989, 21,200 girls and 19,500 boys were considered to require protection from maltreatment. The National Society for the Prevention of Cruelty (NSPCC) claim that their figures for reported physical and sexual abuse are increasing and the Department of Health admits to a 1% increase in the number of registration from 1988 to 1989.<sup>19</sup>

NSPCC figures also show that over three-quarters of the physical abuse most likely to cause death or handicap occurs to children aged less than five, with 70% of head injuries occurring to infant less than one year. The sexual abusers of most (over 80%) children whose abuse is declared either family members or acquaint-

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19. Abu Bakar Munir, "Child Abuse And The Law of Evidence", (1992), 1 MLJ lxxv.

ances of the abused children.<sup>20</sup>

In Malaysia, between the year 1985 and 1990, the Suspected Children Abused and Neglected (SCAN) group has identified 485 child abuse cases among which 388 cases involved physical abuse and the rest sexual abuse. In more than 50% of the physical abuse cases, the abuser are parents.<sup>21</sup>

#### OBJECTIVES:

In Malaysia, in particular, child abuses cases are increasing. It is in fact, a shocking experience to witness the Malaysians who are well known for their gentleness and softheartedness, committing such a crime. Indeed, it is still fresh in our memory the critical condition of Bala-sundram, a two year old boy who died under the most painful and harrowing circumstances. Also unforgettable, the case of two siblings, Noor Dina Mariana and Noor Dina Ariyany. They had been seriously abused by the guardians, while the mother was working abroad.

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20. *Ibid.*

21. *Id.* at lxvi.

Therefore, this topic is chosen with certain objectives in mind. Firstly, highlighting the factors leading to the child abuse cases and the effects. Secondly, analysing the protection afforded by the existing provisions and to examine any lacunae and the possible improvements. Thirdly, offering a comparative approach in overcoming the problem, especially from Islamic point of view. Finally, to create awareness in the public, the importance of protection to children as a future generation.

**SCOPE :**

As the topic suggests a wide, vast discussion, it is submitted that all categories of abuse will be dealt with including physical, sexual, emotional abuse and neglect cases.

The focus of the discussion would be the legal protection available in child abuse cases in Malaysia. The relevant provision in various law relating to the protection of children would be highlighted. Consequently, certain aspects of law would be examined to check whether there is any lacunae in law and the weaknesses in the imple-

mentation of law. Thus, certain recommendations to redress the problem would be highlighted. It will also be dealt with comparative approach with regard to the legal protection afforded by law in England and Islamic law.

The introductory section would be dealing with the background of the study, historical perspective in England and Malaysia, brief statistics of cases in England and Malaysia and the objectives and scope of the discussion.

The first chapter would be dealt with the definition of child, child abuse and the categories of child abuse. Also the statutory provisions in Malaysia and England in general. It will also deals briefly with the provision in Islamic Law, in particular the provision relating to *hadhanah* (custody), maintenance, inheritance and others.

The second chapter would concentrate on the position of child abuse in Malaysia, the leading factors and statistics, the study of statutory provision, the implementation of law, in particular the law relating to the protection of children in Malaysia and England. It is also deal with the adequacy of legal protection in child abuse cases and the law relating to the evidence of children.

The subsequent chapter will be concentrating on Islamic perspective in this issue. They include the Quranic provisions and hadiths of the Prophet and Islamic viewpoint in overcoming the problem. And also the detailed provision in Islamic Enactment regarding this matter.

The final chapter will be dealt with various approaches adopted to overcome the problem and comparisons in general. It also deals with certain recommendations and conclusions.

## CHAPTER I

### DEFINITIONS :

#### CHILD : Under Various Laws.

The United Nations Convention on the Rights of the Child defines a child as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.<sup>1</sup>

There is a problem in defining a child in Malaysia. This is because the term 'child' appears in various provisions. The term child is described in the case of a transferred child, a female under the age of fourteen years and in other

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1. United Nations Convention on the Rights of the Child, Part 1, Article 1.

cases, a person under the age of fourteen years.<sup>2</sup>

Section 82 of the Penal Code provides that a child but below the age of ten cannot commit crime. Section 83 further provides that, a child over the age of ten below the age of twelve must have understanding of the nature and consequences of his conduct on that occasion before he can be charged with the offence.<sup>3</sup>

The Criminal Procedure Code states that 'a youthful offender includes any child above the age of ten but below the age of 16 who has been convicted of an offence'.<sup>4</sup>

The Juvenile Court Act 1947 defines a child as a person under the age of fourteen and young person as a person who has attained the age of fourteen years and is under the age of seventeen.<sup>5</sup>

Section 2(1) of the Child Protection Act defines a child as a person under the age

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2 . The Children and Young Persons Act, 1947, section 2(1)

3 . The Penal Code, section 83

4 . The Criminal Procedures Code, Cap 6.

5 . The Juvenile Court: Act, 1947, s 2(1).

eighteen years.<sup>6</sup>

### CHILD ABUSE :

Having defined the 'child' in various definitions, it is vital to define 'child abuse'. Child abuse has been defined in many ways.<sup>7</sup>

According to David Gil,

'Any act of commission or omission by individuals, institutions or society as a whole, and any conditions resulting from such acts or inaction, which deprives children or equal rights or liberties, and / or interfere with their optimal development, constitute by definition abusive or neglectful acts or conditions'.

The term 'child abuse' is a political concept

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6 . The Child Protection Act 1991, section 2(1). In England, for the purpose of the Children and Young Persons Act 1933, section 107, a child is a person under the age of 14 years. Under the Children Act 1975, section 107 (1) and Adoption Act 1976, section 72(1), a child is a person under the age of 18 years. (Roger Bird, Osborn's Concise Law Dictionary (1993), 72

7 . Christina Lyon, Peter De Cruz, *Child Abuse* (1990), 15