



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
بِوَسِيْلَتِي اِسْلَامٌ اِنْبَارٌ اِيْجِبًا مِلْدِيْنًا

THE ADEQUACY OF LAWS IN PROTECTING
CHILDREN'S VULNERABILITY AS A WITNESS IN
CRIMINAL TRIAL

BY

AHMAD RIZKI BIN ABDUL JALIL

A thesis submitted in fulfilment of the requirement for
the degree of Master of Comparative Laws

Ahmad Ibrahim Kuliyah of Laws
International Islamic University Malaysia

FEBRUARY 2010

ABSTRACT

This research attempts to evaluate the laws in Malaysia that afforded protection towards children's vulnerability as a witness in criminal trial. Children need special protection and to be treated fairly according the law when testifying in court whether in examination in chief or cross examination. Provisions of the child witness in Malaysia are discussed and scrutinized in order to identify weaknesses that are apparent. The research would emphasise certain Articles of the Convention on the Rights of the Child, which Malaysia has acceded in February 1995. With the acceding of the Convention on the Rights of the Child, Malaysia has a duty to comply with the Articles of the Convention on the Rights of the Child that it has acceded. Therefore, it is the objective of this research to analyze and scrutinize existing laws and efforts that have been made by the government to comply with the Articles of the Convention on the Rights of the Child. Article 12 and 13 of the 1989 United Nations Conventions on the Rights of the Child create obligations not only to hear a child witness but to free the child from any constraints or fear, anxiety or distress which might inhibit his evidence and to create the optimum circumstances in which a child as witness is free to give his or her account of events. When taking decisions concerning children's evidence, judges should be guided by these principles. In accordance with the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime, child witnesses should be supported throughout the court process to ensure that they feel safe, are heard in court and are able to give evidence effectively. Although the current legislation very briefly flirts with the notion that giving children more control brings its own rewards, there is little real acknowledgement that children should be fully involved in the procedural arrangements regarding the way they give evidence. The problem that the law has faced has, therefore, been how to bring the evidence of young children before the court in a form that is likely to result in conviction and how, at the same time, to protect the child from ill-effects of criminal procedures both outside and inside the courtroom. The court will also be concerned to ensure that a child giving evidence will be able to give as full, accurate and coherent an account of his or her experience as possible. The reference of this study will be much based on the Quran, the traditions of the Prophet, case laws, text books, articles and interviews with some judges and also views of experts. Finally, this research will propose suggestions and law reforms where it deemed necessary.

ملخص البحث

يحاول هذا البحث تقييم القوانين في ماليزيا والتي توفر الحماية للأطفال عرضة للتعدي بوصفهم شهودًا في المحاكم الجنائية أثناء المحاكمات القانونية، الاطفال يحتاجون إلى حماية خاصة، وإلى أن يعاملوا معاملة منصفة وفقًا للقانون عندما يُدلون بشهادتهم أمام المحكمة بغض النظر عما إذا كان عبر التحقيق الأساسي أو عبر التحري. وأحكام شهادة الطفل في ماليزيا سوف تناقش وتُدقق من أجل تحديد نقاط الضعف الواضحة. والبحث يدرس نصوص مواد معينة من اتفاقية حقوق الطفل التي انضمت إليها ماليزيا في شباط / فبراير 1995م، وبانضمام ماليزيا لاتفاقية حقوق الطفل؛ فواجب على ماليزيا الامتثال لنصوص مواد اتفاقية حقوق الطفل التي انضمت إليها. لذلك، فإن الهدف من هذا البحث هو لتحليل وتمحيص القوانين القائمة، والجهود التي بذلت من قبل الحكومة للامتثال لنصوص مواد اتفاقية حقوق الطفل. المادة 12 و 13 من اتفاقيات الأمم المتحدة عام 1989م بشأن حقوق الطفل التي تنشئ التزامات ليس فقط للاستماع إلى شهادة الطفل، ولكن لتحرير الطفل من أي قيود أو خوف، أو القلق، أو الضغوط التي قد تسكن له الأدلة، وتهئية الظروف المثلى التي يكون فيها الطفل شاهدًا وأن تمنح له الحرية في أن تعطي له أو لها حسب الوقائع. وعند اتخاذ القرارات المتعلقة بالأطفال والأدلة؛ ينبغي أن يكون القضاة مسترشدين بهذه المبادئ. وفقًا لمبادئ الأمم المتحدة التوجيهية بشأن العدالة في الأمور المتعلقة بالأطفال ضحايا الجرائم أو الشهود عليها، وينبغي أن تكون شهادة الأطفال مؤيدة خلال جميع مراحل عملية المحاكمة للتأكد من أنهم يشعرون بالأمان، وأن تكون مسموعة من قبل المحكمة ليكونوا قادرين على تقديم الأدلة على نحو فعال. على الرغم من أن التشريعات الحالية لفترة قصيرة جدًا تماشي مع الفكرة القائلة بأن إعطاء مزيد من السيطرة على الأطفال يجلب مكافآته الخاصة، هناك بعض اعتراف حقيقي بأن الأطفال يجب أن يشاركوا مشاركة كاملة في الترتيبات الإجرائية فيما يتعلق بطريقة تقديم الأدلة والمشكلة أن هذا القانون يتعرض لبيان كيفية تقديم الأدلة على الأطفال الصغار أمام المحكمة في شكل يمكن أن يكون من المرجح أن يؤدي إلى الإدانة، وفي الوقت نفسه كيفية حماية الطفل من الآثار السيئة للإجراءات الجنائية على حد سواء داخل وخارج قاعة المحكمة. والمحكمة أيضًا سوف تكون معنية بأن تضمن للطفل تقديم الأدلة كاملة ودقيقة ومتماسكة حسب خبرتها وإمكانيتها. وسوف تعتمد هذه الدراسة كثيرًا في مرجعياتها وتستند إلى القرآن الكريم، وأحاديث النبي (صلى الله عليه وسلم)، والحالات القضائية والكتب المدرسية، والمقالات والمقابلات الشخصية التي أجريت مع بعض القضاة، وكذلك آراء الخبراء. وأخيرًا؛

فإنّ هذا البحث قد طرح الاقتراحات والتوصيات لتعديل وإصلاح القانون حيث رأيت ذلك
ضروريًا.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

.....
Mohammad Ismail bin Mohd. Yunus
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.

.....
Abdul Rani bin Kamarudin
Examiner

This thesis was submitted to the Department of Public Law and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Khairil Azmin Mokhtar
Head, Department of Public Law

This thesis was submitted to the Ahmad Ibrahim Kulliyah of Laws and is accepted as a fulfilment of the requirement for the degree of Master of Comparative Laws.

.....
Mohd. Akram Shair Mohamed
Dean, Ahmad Ibrahim Kulliyah of Laws

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.

Ahmad Rizki bin Abdul Jalil

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

**DECLARATION OF COPYRIGHT AND AFFIRMATION
OF FAIR USE OF UNPUBLISHED RESEARCH**

Copyright © 2010 by Ahmad Rizki bin Abdul Jalil. All rights reserved.

**THE ADEQUACY OF LAWS IN PROTECTING CHILDREN'S
VULNERABILITY AS A WITNESS IN CRIMINAL TRIAL**

No part of this unpublished research may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without prior written permission of the copyright holder except as provided below.

1. Any material contained in or derived from this unpublished research may only be used by others in their writing with due acknowledgement.
2. IIUM or its library will have the right to make and transmit copies (print or electronic) for institutional and academic purposes.
3. The IIUM will have the right to make, store in a retrieval system and supply copies of this unpublished research if requested by other universities and research libraries.

Affirmed by Ahmad Rizki bin Abdul Jalil

.....
Signature

.....
Date

To my beloved parents, to my dear wife and son and to all judicial and
legal officers with high esteem, honour and affection

ACKNOWLEDGMENTS

First and foremost, praise to Allah, the Most Compassionate and Most Merciful for conferring upon me the strength and health to complete this research. Alhamdulillah, after going through many stresses, hurdles and pains, finally my dream to see this writing becomes a manuscript has become a reality.

This work will not be possible without the assistance of many. I would like to take this opportunity to express my sincere and humble gratitude and thankfulness to Prof. Dr. Mohd. Akram Shair Mohamed, Dean, Kulliyah of Laws, Assoc. Prof. Dr. Naemah Amin, Deputy Dean (Postgraduate Study) and Asst. Prof. Dr. Khairil Azmin Mokhtar, Head of Department (Public Law). My gratitude also goes to Asst. Prof. Dr. Hj. Mohamad Ismail bin Hj. Mohd Yunus, my supervisor, for his most valuable supervisions, guidances, assistances and advices while working on this research, despite his tight schedules and commitments. My special thanks also goes to examiners, Assoc. Prof. Dr. Abdul Rani bin Kamarudin and Dr. Farah Nini binti Dusuki, for all the times, efforts, opinions, comments and corrections that they have contributed on this work are very appreciated and acknowledged.

I must also extend my special thanks to my beloved parents, En. Abdul Jalil bin Mohamed and Pn. Saodah bte Kassim and my dear wife Siti Zakiah bte Abd. Ghani for their constant encouragement, love and support. In fact, I am very grateful to be part of your life and your inspirations have been so much to me. Especially to my beloved wife, thanks for your great companionship, patience, sacrifice and understanding in my struggle to complete this work. Despite your busy works as a teacher and a housewife, you could still spend your times in helping me to type and proof read this research. Indeed, every tear and laugh that you have shared with me during day and night of these difficult years have meant a lot to me.

My special thanks are also due to my family members, friends and every one who have encouraged and assisted me in the preparation of this research. I wish to thank all staff of the Postgraduate Unit of the Ahmad Ibrahim Kulliyah of Laws and Centre for Postgraduate for their help and cooperation. Finally, all mistakes are mines and may Allah bless us.

TABLE OF CONTENTS

Abstract	ii
Abstract (Arabic)	iii
Approval Page.....	v
Declaration Page	vi
Copyright Page.....	vii
Dedication	viii
Acknowledgements	ix
Table of contents	x
List of Cases.....	xiii
Table of Statutes	xiv
List of Abbreviations.....	xv
CHAPTER ONE: INTRODUCTION	1
Introduction	1
Objective of the Study	1
Statement of Problem	1
Hypothesis	3
Literature Review	4
Scope and Limitation of the Study	11
Methodology.....	11
Contents	12
CHAPTER TWO: DEFINITIONS, NATURE AND SCOPE.....	14
Definition of Child.....	14
Definition of Child in Islamic Law	15
Concept of Rushd.....	17
Definition of Right.....	19
Nature and Scope: The Rights of Children as a Witness in Criminal Trial	20
CHAPTER THREE: THE RIGHTS OF CHILD WITNESS IN CRIMINAL TRIAL UNDER INTERNATIONAL LAW	24
Introduction	24
Children’s rights Under International Laws	24
United Nations Convention on the Rights of the Child	24
Four Sets of Rights in the CRC.....	26
The Right to Survival	26
Right to Development.....	26
Right to Protection.....	27
Right to Participation.....	28
CRC and Malaysia	29
United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime	30
i. Best Interest of the Child.....	31

ii. The Right to be Treated with Dignity and Compassion.....	32
iii. The Right to be Informed.....	33
iv. The Right to Effective Assistant	33
v. The Right to Privacy.....	34
vi. The Right to be protected from Hardship during the Justice Process.....	35
vii. The Right to Support Person	36
viii. Admissibility and Reliability of a Child’s Evidence.....	38
ix. Protection from Inappropriate Cross Examination of Child Witnesses	42
x. Protective Measures to Protect the Privacy and Well being of a Child Witness	44
Conclusion	48
CHAPTER FOUR: THE RIGHTS OF CHILD WITNESS ACCORDING TO THE VIEWS OF EXPERTS	49
Introduction	49
The Views of Experts	49
Conclusion.....	62
CHAPTER FIVE: THE RIGHTS OF CHILD WITNESS IN CRIMINAL TRIAL UNDER ISLAMIC LAW.....	65
Introduction	65
Children’s Rights under Islamic Law.....	65
The Position of Child Witness in Islamic Law of Evidence	68
Meaning of Evidence.....	68
Conditions of Witness in Islamic Law of Evidence	69
Definition of Minor in Islamic Law of Evidence	70
The Acceptance of Testimony of a Minor.....	70
The Position of Child Witness in Syariah Court of Malaysia	78
Conclusion	80
CHAPTER SIX: THE RIGHTS OF CHILD WITNESS IN CRIMINAL TRIAL UNDER MALAYSIAN LAWS: AN EVALUATION AND ANALYSIS	82
Introduction	82
The Evidence Act 1950: Principles and Scopes in Relating to Child Witness	83
(i) Competency of Child Witness.....	83
(ii) Definition of Child Tender Years.....	86
(iii) The Meaning of Understand the Nature of Oath.....	87
(iv) Manner of Ascertaining the Capacity of a Child Witness.....	88
(v) Corroboration	89
An Analysis to the Adequacy of Laws in the Evidence Act 1950 to Protect The Rights of Child as a Witness in Criminal Trial.....	91
Protection from Inappropriate Cross-examination of Child Witness	95
Existing Powers of the Court to Restrict Inappropriate Cross- examination	98
The Application of the Evidence of Child Witness Act 2007 in Criminal	

Trial: An Analysis to the Right of Child Witness	100
Free from Fear, Anxiety and Distress	105
Identification Issues	111
Right to Effective Assistant	113
The Right of Protection from Hardship during the Justice Process...	116
Right to Privacy	119
The Hearsay Evidence of Child Witness	120
(i) Categorical Exceptions to the Hearsay Rule	121
(ii) Admissibility versus Weight	122
(iii) Hearsay and children	122
(iv) Voir Dire	123
(v) Khan Decision.....	123
(vi) The Two- Pronged Test	124
(vii) Necessity	124
(viii) Reliability	125
Evaluation of the Rights of Child Witness in Criminal Trial:	
The Available Facilities in Courts	126
The Effectiveness of Implementation on Rights of Child Witness in Criminal Trial	127
Conclusion	132
CHAPTER SEVEN: PROPOSALS AND CONCLUSION.....	134
Introduction	134
The Area of Inadequate Laws.....	134
Proposals.....	136
BIBLIOGRAPHY	140
APPENDIX A	145
APPENDIX B	146
APPENDIX C	147
APPENDIX D.....	148
APPENDIX E	149
APPENDIX F.....	150

LIST OF CASES

DPP v M [1998] QB 913
Eastern Health Board v M.K unreported Supreme Court
Southern Health Board v C.H [1996] 1 i.r 219
Tham Kai Yau & Anor. v. PP [1977] 1 MLJ 174
Chao Chong & Anor v. PP[1960] MLJ 238
Lee Mian v. PP[1934] MLJ 124
Liew Wah Ming v. PP[1963] MLJ 82
R v. Baskerville[1916] 2 KB 658
Attan b. Abdul Ghani v PP[1970] 2 MLJ 143
Mohd Yusof Rahmat v PP [2009] 2 CLJ 673
R. V. Levogiannis[1993] 4 S.C.R. 475
Lim Ah Oh & Anor v. R [1950] MLJ 269 CA
R v M.B [1998] 42 o.r (3d) 1 C.A
R v Mohan [1994] 2 S.C.R. 9
R v McIntosh [1997] 35 O.R. (3d) 97 at 97 (C.A)
Cleveland v State Ind. Ct. APP. 1986
Subramaniam v PP [1956] 1 WLR 965
R. v. Khan[1990] 2 S.C.R. 531
R v L.S [1990] o.j. No. 877
Yusaini bin Mat Adam v PP [1999] 3 MLJ 584
PP v. Mohammad Terang bin Amit [1999] 1 MLJ 154, 158
Director of Public Prosecutions v. Hester [1972] 3 All ER 1056
Teo Thin Chon v. PP [1957] MLJ 184
Kabiraj Tudu v. State of Assam [1994] Cri. LJ 432

LIST OF STATUTES

Evidence Act 1950
Evidence of Child Witness Act 2007
Evidence of Child Witness Bill 2007
Child Act 2001
Age of Majority Act 1971
Children and Young Persons (Employment) Act 1966
Penal Code [Act 374]
Shari'ah Criminal Procedure (Federal Territory) Act 1997 [Act 560]
Shari'ah Court Evidence (Federal Territories) Act 1997
Islamic Family Law Act (Federal Territory) 1984
Federal Constitution
Oaths and Affirmation Act 1949
Evidence Ordinance (Extension) 1971 (PU (A) 261/71)
English Children and Young Person Act 1933
Criminal Procedure Code (Amendment) Act 2004
Criminal Procedure Code (Revised 1999)
Official Secrets Act 1972
Administration of Islamic Law (Federal Territories) Act 1993
Qanun e Shahadat Order 1984

LIST OF ABBREVIATIONS

CRC	Convention on the Rights of the Child
CLJ	Current Law Journal
MLJ	Malayan Law Journal
NGO	Non Governmental Organization
O.I.C	Organization of the Islamic Conference
SUHAKAM	Suruhanjaya Hak Asasi Manusia

CHAPTER ONE

1. INTRODUCTION

The subject of this research is the adequacy of laws in protecting children's vulnerabilities as a witness in criminal trial. This research is to present an analysis and comparative study from the perspective of Islamic Law, International law and Malaysian laws.

From this research, the writer intends to discover whether the present laws are adequate or not to protect the rights of child as witness in criminal trial based on analysis and evaluation to every aspects and factual data relating to this topic.

2. OBJECTIVE OF THE STUDY

The research aims to discuss and to analyse the adequacy of laws in protecting children's vulnerabilities as a witness in criminal trial. It consists of several chapters covering the rights and children's vulnerabilities particularly as a witness in criminal trial. It will also discuss the recommendations and suggestions in solving the current issues relating to the adequacy of laws in order to protect the rights of a child and to reduce his vulnerabilities as witness in criminal trial under Islamic law, International law and Malaysian laws.

3. STATEMENT OF PROBLEM

Specifically, this research focuses on the problem of adequacy of laws on children's rights as a witness in criminal trial. In court of law, children are often called to give evidence in court. More often or not, they give evidence as victims of serious crimes.

It is important that special provisions in the laws apply to the treatment of children who appear as witnesses in criminal trial.¹

The children's rights as a witness to a crime are derived under International laws, Islamic laws and other studies. Whether these rights are available under Malaysian laws and if so, how effective are their implementations. How the laws protect the rights of child witness in our criminal justice system?

The current climate in the area of child sexual abuse and the criminal justice system is one of increasing consternation at the inadequacies and difficulties of this system for child witness. This issue of vulnerability, exacerbated by the experience of sexual abuse, puts child witness at a distinct disadvantage when faced with the criminal justice system. There is a little doubt that child witness of sexual abuse are vulnerable to further harm through exposure to the criminal justice system.²

Child witnesses who give evidence in court are often negatively affected by their experiences with the court process. One of the greatest fears that some child witnesses have about testifying in court is of seeing the perpetrator of their abuse again.³ For some children, especially during child tender years, there may be a fear that he may physically harm them, and for others there may be a psychological distress at seeing him again.⁴ The problem that the law has faced has, therefore, been how to bring the evidence of young children before the court in a form that is likely to result in conviction and how, at the same time, to protect the child from ill-effects of criminal procedures both outside and inside the courtroom.⁵

¹ Nancy Walker, *Children as Witnesses in Court*, (California: Sage Publication, 1991), 21.

² Loftus Johnson, *Eyewitness Testimony*, (Cambridge: Harvard University Press, 1979), 55.

³ Nicholas James, *Child Witness, Law and Practice*, (New York: Columbia University Press, 1990), 14.

⁴ Saywitz Kent, *The Credibility of Child Witnesses*, (London: Academic Press, 1989), 100.

⁵ Simon Wood, *The Preparation of Child Witnesses*, (Lincoln: Central Research Unit, 1999) 45.

Courtrooms are deliberately designed to be non user-friendly places in order to ensure a suitable degree of respect for the seriousness of the proceedings. Whatever affects the formality and design of most courtrooms tends to intimidate innocent witnesses, particularly child victims.⁶

In accordance with the United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime, child witnesses should be supported throughout the court process to ensure that they feel safe, are heard in court and are able to give evidence effectively.

Articles 12 and 13 of the 1989 United Nations Convention on the Rights of the Child create obligations not only to hear a child witness but to free the child from any constraints or fear, anxiety or distress which might inhibit his evidence and to create the optimum circumstances in which a child as witness is freed to give his or her account of events.⁷

This research is to identify, evaluate, analyse and discover issues relating to the adequacy of laws on children's rights as a witness in criminal trial under Islamic law, international law, Malaysian laws and decided cases, the available practices and the available facilities.

4. HYPOTHESIS

The present laws relating to protection of children's right as a witness in criminal trial Malaysia are inadequate and are need of attention. In order to protect the rights of children as a witness, it is important to have special provision in the Civil Law and Islamic Law for the treatment of children who appear as witnesses. The children need

⁶ Goodman, *The Child Witness*, (New York: Springer, 1988), 97.

⁷Cleland, *Children's Rights in Scotland*, Sweet &Maxwell, 1993.

special protection and fair treatment according to the law as they are the vulnerable type.

Testifying in court can be stressful for any witness, particularly for child victims of physical or sexual abuse. Several features of traditional trial proceedings, such as facing the accused or describing the details of the alleged crime in open court, may make children reluctant to testify about their abuse and may decrease the accuracy of their testimony.⁸ The writer suggests that certain law of evidence and criminal procedure applicable to the testimony of children are in need of reform.

5. LITERATURE REVIEW

This topic has been chosen as a research, based on the writer's observation to the previous research studies, reviews of literature and theoretical articles in evidence relating to the rights of children as a witness in criminal trial. Most of the previous research studies discussed on evidence of child witness and the rights of child witness in criminal trial separately.

Further, the writer finds that, although the research study and academic writing on evidence relating to the rights of children is increasing but there is no specific research in analytical and comparative study discussing the laws to protect the rights of children as a witness in International laws, Malaysian Laws and Islamic Laws.

Basing on this, there is a need for an analytical and comparative study on the adequacy of laws to protect the rights of children as a witness in criminal trial with a view to find out the similarities and the differences between both systems of laws.

The writer refers to the relevant text books such as Children's Rights and the Developing Law by Jane Fortin. Practitioners and policy makers are more concerned

⁸ James Wigmore, *Evidence in Trials at Common Law*, (Edinburgh: Academic Press, 1997), 123.

with what rights children have or should have, than whether they have rights at all. There appears to be a worldwide acceptance that children have right to be protected. The United Nations Convention on the Rights of the Child, the latest of the list of international documents recognising children's rights, contains a list of forty rights.

Children become very nervous and fearful when appearing as a witness in a criminal trial. Although giving evidence can be traumatic, there are no special rules protecting them from being required to do so; like any adult, a child witness is compellable. It is now widely recognised that children's fear over appearing in court is alleviated by being familiarised with the courts and with what will be required of them.

Considerable efforts have been made to develop age related leaflets, witness information packs; pre-trial visits and the services of court liaison officers, all of which may help them overcome some of their apprehension during their wait for the trial. Schemes have been established to protect children in this respect. They may be able to give evidence behind screens, or in an adjacent room relayed to the court by a television link. Although it is not clear, whether screens reduce a child witness's fear of the defendant. Research indicates that allowing children to give evidence through the television link does appear to reduce their stress.⁹

The writer also refers to law book such as *Child Law* by Geoffrey Shannon, which states that a child already scarred by the subject matter of the proceedings may be further traumatised by the process of testifying in court in relation to such matters. In addition to preventing trauma, there is also concern of a more judicial nature. The criminal court will also be concerned to ensure that a child giving evidence will be able to give as full, accurate and coherent account of his or her experiences as

⁹Bull, R., *The Effect of Child Witness Research on Legislation in Great Britain*, (London: Home Office), 88.

possible. The testimony of a child is obviously of particular importance in the context of cases involving child sexual abuse. Because of the nature of the offence, and the secluded context in which it usually occurs, there may be no other evidence to corroborate that of the child. Thus, the need to facilitate child witnesses becomes especially important. Children often have to give evidence about confusing and embarrassing events in open court. The credibility of even the most honest child can be weakened by a skilful cross-examination. Aggressive questioning and the use of intimidating or embarrassing language can cause confusion and highlight childish inconsistencies that further will undermine the coherence and credibility of a child's testimony. Particularly in the context of child sexual abuse cases a child lacks the vocabulary necessary to describe specifically a particular experience.

The Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child. Malaysia ratified the Convention on the Rights of the Child (CRC) on 17 February 1995. On 25 January 2007, the Committee on the Rights of the Child (the Committee) examined Malaysia's First Periodic Report.

The Committee on the Rights of the Child reviewed the initial report of Malaysia on how our country is implementing the provisions of the Convention on the Rights of the Child. The writer discovers that, in discussing the rights of child witness it would have been pertinent to evaluate and examine this report, befitting its official status.

The writer also examines the Report on Round Table Discussion on Convention on the Rights of the Child by SUHAKAM. This document provides blueprints for further discussion on this research. The objective of this round table

discussion was to provide an avenue for broad-based forum to discuss challenges relating to the rights of children and to chart the way forward. Other objectives were to discuss ways to further the implementation of the CRC and to review whether the provisions of the CRC are contained in the Child Act 2001 and other domestic laws and to recommend to the Government of Malaysia the withdrawal of reservations to the CRC.¹⁰

The writer finds that, there is no definition in the Evidence Act in respect of who is a child. For examples, in Malaysia the laws relating to children are scattered in a number of statutes. Even the definition of a “child” differs from one statute to another. In fact the word “minor”, “infant”, “young person”, “juvenile”, “girl” and “child” have been used or referred to by all these statutes interchangeably. This create confusion and at times, overlapping of jurisdiction. Malaysia has reserved Article 1 of the United Nations Convention on the Rights of the Child on the definition of the word “child”. This is very important Article in the Convention and it is submitted that it is time that Malaysia withdraws this reservations¹¹. All statutes relating to children must use the word “child” and define the word as a person below the age of 18 years. This means that as far as children are concerned, the definition of “child” is in accordance with the United Nations Convention on the Rights of the Child¹².

Children are generally viewed as developmentally immature and without the capacity to make independent choices that reflect their own best interests argue that the age at which autonomous rights are firsts given to minors might rightfully be

¹⁰ Report on Roundtable Discussion on Convention on the Rights of the Child by SUHAKAM, 1995.

¹¹ On the 28th December 1994, the Prime Minister of Malaysia signed the Instrument of Accession o the Convention on the Rights of the Child with 12 reservations, namely Articles 1, 2, 7, 13, 14, 15, 22, 28, 37, 40 paragraph 3 and 4, 44 and 45.

¹² See Noor Aziah Mohd Awal, *Child Act 2001 How Far Does it Conform to the UNCRC?* (UM Press) 2002 p.207

lower than the age at argument is supported by research on children's decision-making competence in legal context¹³.

Researchers have generally concluded that experience with the juvenile justice system does not improve children's understanding of their rights. Several suggestions have been made that might improve the situation for children.

In general, studies of children's concepts of their rights have shown that by the end of grade school, children have considerable knowledge of the legal process and an understanding of key legal vocabulary.

However, understanding may develop at slightly different ages based on the difficulty of the legal concept, and knowledge of the process precedes understanding of vocabulary (Melton & Limber, 1992). However, Melton and Limber suggest that children from disadvantaged backgrounds may be especially vulnerable to the legal system, because they are not convinced that they really have rights and thus will not assert them.

The last several decades have witnessed the initiation of empirically based assumptions about children's understanding of and capacity to exercise their rights, especially within the arena of juvenile justice.

Although recent years have seen the extension of certain rights to minors, children's cognitive and emotional developmental maturity may impact their ability to understand the legal system and assert their rights. According to Melton, "if children are to participate more fully in self-determination as individuals, then increased awareness of children's comprehension of their rights (both 'natural' and 'legal') is necessary in order to facilitate legal education and to establish reasonable limits on the exercise of these rights". Research on children's understanding of law and their rights

¹³ Melton, *Children's Competence to Consent* (New York): Plenum 1983), 79.

has focused on two areas; children's conceptualizations of rights and the legal system and children's ability to invoke or protect their rights.

Testifying in court can be stressful for any witness, particularly for child victims of physical or sexual abuse¹⁴. Several features of traditional trial proceedings, such as facing the accused or describing the details of the alleged crime in open court, may make children reluctant to testify about their abuse and may decrease the accuracy of their testimony.¹⁵

Researchers in several studies have examined the frequency with which children testify using various evidentiary and procedural innovations in the United States. Researchers in one of the earliest studies surveyed Alabama judges and prosecutors regarding their use of accommodations in domestic child abuse cases¹⁶.

Various evidentiary and procedural innovations have been introduced over the past decade to help enable victims to testify in child proceedings. At the federal level in United States for example, the Victims of Child Abuse Act of 1990 amended the Federal Rules of Criminal Procedures, extending special accommodations to children such as allowing the presence of a support person during the child's testimony and closing the courtroom to the public.¹⁷

For determining maturity to give sworn or unsworn evidence in court, it may not be practical to prescribe a cut-off age to determine who can take the oath and who cannot. Some children would attain a level of precocity sufficient for the witness oath to administer before they reach their teens whereas others may take a much longer period to reach similar understanding and awareness of the solemnity of oath. In

¹⁴ Goodman, *Children as Witnesses*, (New York: Springer, 1988), 99.

¹⁵ Sawitz, *Journal of Consulting and Children*, (Washington: Crowood Press, 1991), 87.

¹⁶ Sigler, *Judicial and Prosecutorial in the Trial of Domestic Abuse Cases*, (New York: Guildford Press, 1990), 56.

¹⁷ Whitcomb, *When the Victim is a Child* (Washington, DC US Department of Justice) 1992, 53.