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## **Should A Child Be Allowed To Give Evidence? The Position of Child Evidence Under Civil And Islamic Laws In Malaysia**

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## ABSTRACT

*Currently, more children fall victim to crime and go to court to give evidence. The key issues include the acceptability of children as witnesses, the weight to be given to their evidence and whether or not there should be special procedures to ease the stress of giving evidence in court. The main objective of this article is to discuss the position of child evidence under civil and Islamic laws in Malaysia. This article will focus on the provisions of laws relating to evidence given by a child witness and the procedures applicable in Malaysia. This study will ascertain whether or not the current laws are adequate to protect the rights of child as witness in trial based on analysis and evaluation to every aspect which is relevant to this topic. The issue of whether or not a child should be allowed to give evidence in court will also be clarified.*

**Keywords:** *child evidence, child witness, corroboration, unsworn evidence, Islamic laws*

## 1.0 Introduction

By and large, children are often called to give evidence in court. They may be required to give evidence as victims of serious crimes or as by-stander witnesses to crimes and other legally significant events which they are not otherwise involved.<sup>1</sup>

Therefore, the primary concern is to determine the position of child evidence under civil and Islamic laws in Malaysia. Even though Western jurists always consider the punishments under Islamic criminal law as harsh punishments and may contravene their concept of human rights, those punishments especially from the category of *hudud* crimes will not be executed unless the cases are successfully proven in court.

Child witnesses who give evidence in court are often negatively affected by their experiences with the court proceedings. One of the greatest fears that some child witnesses have about testifying in court is of seeing the perpetrator of their abuse again.<sup>2</sup> For some children, there may be a fear that the accused may physically harm them and for others, there may be a psychological distress by seeing him again.<sup>3</sup>

Testifying in court can also be stressful for any witness, particularly for child victims of crimes. Several features of trial proceedings such as facing the accused or describing the details of the alleged crime in courtroom may make children reluctant to testify as witnesses as well as may decrease the accuracy of their testimony.<sup>4</sup> Hence, children need special protection and fair treatment according to the law as they are the vulnerable type of witness. Basing on this, it would have been pertinent to ascertain the adequacy of laws in protecting children's right to give evidence under civil and Islamic laws in Malaysia. As such, it is also paramount to identify the effective mechanisms in order to protect the child witness from ill-effects of criminal procedures both inside and outside the courtroom.<sup>5</sup>

One of the major factors contributing to children's anxiety at court appears to be fear of the unknown. Child witnesses do not know what would happen in the courtroom and they also

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<sup>1</sup> J.R. Spencer & Rhona H. Flin, *The Evidence of Children: The Law and the Psychology*. 2<sup>nd</sup> edn (Blackstone Press: London, 1990) 1.

<sup>2</sup> Nicholas James. *Child Witness, Law and Practice*. (Columbia University Press: New York, 1990) 14.

<sup>3</sup> Saywitz Kent. *The Credibility of Child Witnesses*. (Academic Press: London, 1989) 100.

<sup>4</sup> James Wigmore. *Evidence in Trials at Common Law*. (Academic Press: Edinburgh, 1997) 123.

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

do not always understand their own role in the proceedings.<sup>6</sup> Moreover, two children who are of the same age may be different in their competency to give evidence because of their dissimilarity in capability to understand the questions put to them.<sup>7</sup>

Thus, the dilemma now is how to reconcile the images of children as vulnerable, unformed and dependent creatures in need of protection with the necessity of extracting reliable information from child witnesses in order to convict an offender or to protect the children from further abuse.<sup>8</sup> Indirectly, such situations might lead to another issue of whether or not a child should be allowed to give evidence in court. In this article, the justifications for that particular issue will be primarily based on the perspective of international laws by referring to the United Nations Convention on the Rights of the Child (1989) as well as United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime.

## **2.0 The Position of Child Evidence Under Civil Laws In Malaysia**

### **2.1 Definition of A Child**

Article 1 of the United Nations Convention on the Rights of the Child (1989) defines children as all human being under the age of eighteen unless the relevant national laws recognise an earlier age of majority.

In Malaysia, the definition of a child is governed under the relevant legislations in accordance with their respective purposes. Notwithstanding the various legislations, Malaysia's legislations with regard to the definition of a child under civil law are mostly consistent with Article 1 of the United Nations Convention on the Rights of the Child (1989) with the exception of Section 2 of the Adoption Act 1952 which defines a child as a person below twenty one years of age and includes a female under that age who has been divorced. Another exception is under Section 3(2)(c) of the Inheritance (Family Provision) Act 1971 whereby an infant son of non-Muslim has been defined as a person below twenty one years of age.

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<sup>6</sup> Johnson Murray. *Preparing Child Witnesses For Court*. (The Scottish Office Central Research: Edinburgh, 2001) 77.

<sup>7</sup> Abdul Muin Abdul Rahman. *Witnesses in Islamic Law of Evidence*. (Pelanduk Publication: Selangor, 1999) 56.

<sup>8</sup> Goodman, G.S. & Helgeson, V.(1985). Child Sexual Assault: Children's Memory and The Law.40. *University of Miami Law Review*.181.

## 2.2 Principles In Relation To Children's Evidence Under The Evidence Act 1950

### 2.2.1 Competency of Child Witness

Section 118 of the Evidence Act 1950 provides that all persons are competent to testify unless they are, in the opinion of the court, unable to understand the questions put to them or unable to give rational answers to those questions owing to tender years, extreme old age, disease of mind or body, or any other such cause. The explanation to the section provides that a mentally disordered person or a lunatic is a competent witness if he is capable of understanding the questions put to him and giving rational answers.

As far as child evidence is concerned, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence nor knowledge which will render a child as a competent witness. The intellectual capacity of a child to understand questions and to give rational answers is the sole test of his testimonial competency and not any particular age.<sup>9</sup> It depends upon the good sense and discretion of the judge.<sup>10</sup>

It is paramount to make a cross-reference to Section 90(9)(b) of the Child Act 2001 whereby it allows the child to give sworn evidence or make any statement when making his defence. Section 133A of the Evidence Act 1950 states that where a child of tender years who is called as a witness does not in the opinion of the court understand the nature of an oath, he may give unsworn evidence if the court is satisfied that he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. In other words, if the court forms a view that the child does not have competency to give sworn evidence or does not understand the nature of an oath, his evidence may still be accepted by producing unsworn evidence within the ambit of Section 133A of the Evidence Act 1950 provided that he possesses sufficient intelligence and understands the duty of speaking the truth in order to justify the admissibility of his evidence. Even though the Evidence Act 1950 does not specify the meaning of 'sufficient intelligence', but the authors of this article opine that such term may refer

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<sup>9</sup>*Santosh Roy v State of W.B.* [1992] Cr LJ 2493 (Cal)

<sup>10</sup>*State of M.P. v Deoki Nandan* [1987] Cr LJ 1016

to an understanding of the obligation to speak the truth, having a sufficient memory to retain an independence recollection of the past event's occurrence and having the capacity to communicate memories of the event in response to questions at trial.

However until now, there has been neither a specific method of questioning nor proposed types of questions required to be used in the inquiry duly ever set forth by the law. Questions presently posed by the courts normally evolve around the child's background, his ability to understand the nature of oath and the effect of his sworn and unsworn evidence. It should be borne in mind that any failure to conduct the inquiry or preliminary examination does not merely amount to irregularity but is also fatal to the evidence and the whole proceedings.<sup>11</sup>Hence, it is a duty of a court or judge to determine the proper level of competence of a child before trial proceedings.

### **2.3 Rule of Corroboration On The Unsworn Evidence Of A Child**

The classical definition of corroboration was delivered by Lord Reading CJ in the case of *R v Baskerville*.<sup>12</sup> He said,

*We hold that evidence in corroboration must be an independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, i.e. which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.*

The above definition of corroboration has been adopted in the Malaysian case of *Attan b. Abdul Ghani v PP*<sup>13</sup> whereby Sharma J has summarised the corroboration rules as follows:

1. There must be some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably sure to act upon it.
2. The evidence must come from independent sources.
3. It must implicate the accused in the material particular. It confirms that the accused committed the crime.

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<sup>11</sup>*Tajudin bin Salleh v Public Prosecutor* [2008] 2 CLJ 745

<sup>12</sup> [1916] 2 KB 658

<sup>13</sup> [1970] 2 MLJ 143

Augustine Paul JC (as he then was) in the case of *Aziz bin Muhamad Din v Public Prosecutor*<sup>14</sup> stated that corroboration is not a technical term. It simply means ‘confirmation’. Thus, the essence of corroborative evidence is where one creditworthy witness confirms what another creditworthy witness has said.<sup>15</sup>

Section 133A of the Evidence Act 1950 states that where the evidence of a child is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated. It must be noted that this section applies only to unsworn evidence of a child. In the case of *Public Prosecutor v Mohd Noor bin Abdullah*,<sup>16</sup> the High Court held that the unsworn evidence of any child of tender years has to be corroborated by some other material particulars in support implicating an accused before he can be convicted. Abdul Malik Ishak J in the case of *Sidek bin Ludan v Public Prosecutor*<sup>17</sup> viewed that in the case of a sworn child witness, the old rule of prudence applies which is the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence. However in the case of an unsworn child witness, Section 133A of the Act applies. Nevertheless in the case of *Tham Kai Yau & Ors v Public Prosecutor*,<sup>18</sup> the Federal Court considered that a formal warning on the issue of corroboration need not be issued to the jury if they were advised to pay particular attention to or to scrutinise the evidence of young children with special care and explains the tendencies of such children to invent and distort.

The basis of the rule on the need of corroborative evidence is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and the fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.<sup>19</sup>

In another case of *Public Prosecutor v Mohammad Terang bin Amit*,<sup>20</sup> the respondent was discharged and acquitted by the Magistrate court from three charges of using criminal force to

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<sup>14</sup> [1996] 5 MLJ 473, at pg. 484-485.

<sup>15</sup> *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144

<sup>16</sup> [1992] 1 CLJ 702

<sup>17</sup> [1995] 3 MLJ 178

<sup>18</sup> [1977] 1 MLJ 174

<sup>19</sup> *Chao Chong & Ors v Public Prosecutor* [1960] MLJ 238

<sup>20</sup> [1999] 5 CLJ 156



outrage the modesty of three girls. The Public Prosecutor then appealed to the High Court based on three grounds, namely:

1. The magistrate had erred in holding that there was no corroboration in respect of the evidence of the three girls.
2. The magistrate had erred in holding that the three medical reports of the three girls were not admissible.
3. The magistrate had erred in law in holding that allegations against the accused was either totally or substantially untrue by virtue of the fact that the complaints were not lodged at the first reasonable opportunity.

The magistrate had rejected the evidence submitted by the parents of the three girls and also the evidence of the teacher of the school where the girls were studying. On appeal, the High Court highlighted amongst others on the manner of corroboration of unsworn evidence after taking into account that all the girl victims did not testify under oath. In observing on the period of time taken by the girls to notify the adults upon occurrence of incidents, the court referred to Section 157 of the Evidence Act 1950 which provides that a witness' testimony may be corroborated by any former statement made by such witness if it is relating to the same fact at or about the time when the fact took place or before any legal authority competent to investigate the fact. The court viewed that the expression of "at or about the time when the fact took place" is not to be limited in terms of hours or days. It is limited by the terms of "first reasonable opportunity" or "as speedily as could reasonably be expected".

At this stage, the court looked into the details of the facts to determine as to whether or not the notification given by the three girl victims had fulfilled the requirements of Section 157 of the Evidence Act 1950. The court held that there was an undue delay by the girl victims to inform their parents of the alleged incidents and as such, the requirements under Section 157 was not being fulfilled since the notification was not attempted upon the "first reasonable opportunity" or "as speedily as could reasonably be expected". Due to such delay, the court then precluded the testimony of the parents from corroborating the earlier unsworn evidence of all the victims. Nevertheless, the court allowed the evidence given by the teacher to corroborate the unsworn evidence since it was clear from the facts that the complaints lodged by the girls to the teacher were made "as speedily as could reasonably be expected" under such circumstances.

However, the evidence of one unsworn evidence witness cannot corroborate the evidence of another unsworn evidence witness. Therefore if there are two or more giving unsworn evidence to the same effect, still there can be no conviction unless there is some other evidence corroborating their evidence.<sup>21</sup>

In a word, it is possible to summarise that under Section 133A of the Evidence Act 1950, a child is eligible to give evidence in court but his or her unsworn evidence on its own is insufficient to convict the accused in the particular case. It seems to suggest that the court cannot convict the accused person based on the uncorroborated evidence of an unsworn child witness.

As a matter of law, someone may argue that child evidence is relatively of less evidentiary value if it is unsworn evidence and therefore it must be corroborated. However, an *obiter dictum* in the case of *Yusaini bin Mat Adam v PP*<sup>22</sup> provides that since Section 38 (evidence of child of tender years) of the English Children and Young Persons Act 1933 has been repealed, it should be considered whether the same should be done with Section 133A of the Evidence Act 1950, bearing in mind the experience of other Commonwealth countries on the matter of children's evidence in our court and also that in our judicial system, jury trials have been abolished. In addition, the rules relating to corroboration need a relook and the necessity for the examination procedures of child witness to be child-friendly need to be taken into account. Section 55 (2) of the Youth Justice and Criminal Evidence Act 1999 (Act of United Kingdom) provides that the witness may not be sworn for the purpose of giving evidence unless he has attained the age of 14 and he has sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath. Further, Section 56(3) of the Act states that a deposition of unsworn evidence given by a person to whom the subsection applies may be taken for the purposes of criminal proceedings as if that evidence had been given on oath. Therefore under the common law, the unsworn evidence of a child shall be accepted as sworn evidence in a court proceeding without the requirement of corroboration.

Hence, the authors intend to suggest that the legal requirement of corroboration on the unsworn evidence of a child under Section 133A of the Malaysian Evidence Act 1950 ought to be amended and some new subsections have to be inserted in order to assure the rights of child as

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<sup>21</sup>*Director of Public Prosecutions v Hester* [1972] 3 ALL ER 1056 at 1059.

<sup>22</sup> [1999] 3 MLJ 582

a witness while safeguarding the rights of an accused person in the legal proceedings. For instance, the amendment may be made by clearly specifying the types or nature of evidence which can be produced in order to corroborate the unsworn evidence of a child. The amendment to the corroborative requirement does not mean that all child witnesses should be believed by all judges. It only means that the law leaves open the possibility that there could be a conviction where the evidence of a child convinces the judge by proving beyond reasonable doubt of the accused person's guilt.

#### **2.4 The Protection of Child Witness From Inappropriate Cross-Examination**

Given that one of the purposes of cross-examination is to cast doubt on the credibility of an opposing witness, the experience of being cross-examined is likely to be difficult for certain witnesses. Child witnesses who depending on their age, may have a significantly lower level of linguistic development and emotional maturity than adult witnesses. They are often particularly vulnerable to the adversarial nature of cross-examination.<sup>23</sup> Studies which have been conducted in Scotland and the United States also revealed that cross-examinations contained a significantly higher proportion of vocabulary which a child witness did not understand.<sup>24</sup>

During cross-examination, a cross-examiner will normally focus on the inconsistency in a matter of minor detail.<sup>25</sup> Children may be more susceptible than adults to this form of questioning. Although studies show that even quite young children can remember for a long time about directly experienced events which are important to them, but their memory may become less consistent over time for less personally relevant or indirectly experienced events.<sup>26</sup> By confusing a child witness about the peripheral details, it may be easier to suggest in cross-examination that the child's accounts of events are inaccurate.<sup>27</sup>

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<sup>23</sup> Brennan, M. & Brennan Roslin E. *Strange Language: Child Victims Under Cross Examination*. 3<sup>rd</sup> edn. (Riverina Murray Institute of Higher Education: New South Wales, 1988) 71.

<sup>24</sup> Walker, A.G. *Questioning Young Children in Court: A Linguistic Case Study*. (Law and Human Behaviour, 1993) 67.

<sup>25</sup> McGough, Lucy S. *Child Witnesses: Fragile Voices in The American Legal System*. (Yale University Press, 1994) 226.

<sup>26</sup> Fivush, R. & Shukat, J. Content, consistency and coherence in young children's recall. In. M.S. Zaragoza, J.R. Graham, G.C.N. Hall, R. Hirschman & Y.S. Benporath (Eds.). *Memory and testimony in the child witness*. (Sage Publications: Thousand Oaks, CA, 1995) 5-23 at 20.

<sup>27</sup> See J.R. Spencer, above n.1 at 273.

As a result of inappropriate cross-examination, a child's evidence may be distorted and the child may wrongly be perceived as an unreliable and untruthful witness. The fact that certain kinds of questions can be used by a cross-examiner to cast doubt on the reliability of evidence given by a child witness may have a number of consequences. There may be an adverse impact on child's emotional state and a child who has been abused may feel that he or she has been re-victimised by the court's proceeding.

Section 137(2) of the Evidence Act 1950 deals with the meaning of cross-examination whereby it refers to the examination of a witness by the adverse party. In addition, Section 138(2) of the Act provides that cross-examination must relate to relevant facts though it need not be confined to the facts to which the witness testified on his examination-in-chief. In order to clarify the main objective of cross-examination, it is paramount to refer to the case of *Public Prosecutor v Wong Yee Sen & Ors*<sup>28</sup> whereby the court held that the aim of cross-examination is to assist in the administration of justice by revealing the truth to the court. The function of cross-examination is to eliminate or reduce the danger that a false conclusion will be reached.

Sections 148 to 152 of the Act are generally intended to protect a witness from being improperly cross-examined. Section 148 provides that a court shall decide whether or not a witness shall be compelled to answer a question if it is not relevant to the suit or proceeding. The court also may if it thinks fit, warn the witness that he is not obliged to answer it.

In the case of *Wan Othman bin Datuk Wan Yusof v Kewangan Utama (M) Bhd*,<sup>29</sup> it was held that evidence, even if scandalous, is admissible if relevant.

In addition to this legislative power to restrict inappropriate cross-examination, courts also have an inherent power which would enable them to control the way in which witnesses are cross-examined. The exercise of the court's inherent jurisdiction has been described as 'part of the power of the court to carry out the very role required of it by law and that is to administer justice'.<sup>30</sup>

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<sup>28</sup> [1990] 1 MLJ 187, 189 (HC)

<sup>29</sup> [1993] 2 CLJ 572

<sup>30</sup> The Honourable Mr Justice P de Jersey. (1985). "The Inherent Jurisdiction of the Supreme Court". 15 Queensland Law Society Journal 325, at 330.

Section 152 of the Evidence Act 1950 deals with the questions that are intended to insult or annoy and gives further protection to witnesses beside those provided by Section 151 of the Act. Under this section, the court has a duty to forbid two kinds of questions, namely:

1. questions which are insulting or annoying; and
2. questions, though proper by themselves, are needlessly offensive in form.

In the case of *R v Chhoa Mui Sai*,<sup>31</sup> Terrell Ag CJ said that in order to avoid prolix cross-examination, the court should forbid any question which appears to be intended to insult or annoy and which is needlessly offensive in form.

As far as evidence of children is concerned, the statutory provisions could be expected to include certain rules which ensuring that a child witness is not intimidated by excessively aggressive cross-examination.

However, it seems that the existing statutory provisions particularly under Section 151 and Section 152 of the Evidence Act 1950 are not specifically deal with the rules pertaining to the inappropriate cross-examination of a child witness. Both sections are narrowly framed to prevent improper kinds of question during cross-examination. The provisions do not provide any specific rule which enable the court to disallow a question, whereby after taking into consideration of the child witness' age or level of maturity and experience, is misleading and confusing rather than offensive or insulting. The court also should take into account any particular factors such as cultural differences, language difficulties or level of education of a child witness which may affect his ability to comprehend and respond to the questions during the cross-examination.

As such, the authors propose that a wider provision should be inserted in the Evidence Act 1950 by giving specific duty to the court to disallow, during a cross-examination of a child witness, a question which having regard to the child's age, level of understanding and education, is confusing, misleading, intimidating or being phrased in inappropriate language.

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<sup>31</sup> [1937] MLJ 236

### 3.0 The Position of Child Evidence under Islamic Laws in Malaysia

#### 3.1 Definition of A Child in Islam

In Islam, the Holy Quran uses various Arabic terms for children such as ‘*dhuriyya*’, ‘*ghulam*’, ‘*ibn*’, ‘*walad*’, ‘*walid*’, ‘*mawlud*’, ‘*tifl*’ and ‘*saghir*’ but according to Avner Giladi, the context seldom makes it clear whether it is exclusively referring to immature children or simply offspring.<sup>32</sup> Nevertheless, Islamic law defines a child as a person who has not attained the age of majority or ‘*baligh*’.<sup>33</sup> Thus, the determination of the majority age of a person in Islamic law depends on the attainment of puberty. This is based on the *hadith* of the Prophet Muhammad SAW which reads to the effect, “the penalty is lifted in three instances: in the case of a child (minor) until he attains puberty, in the case of a sleeping person until he wakes up and in the case of a lunatic until he recovers”.<sup>34</sup>

Generally under the Syariah law, puberty is normally attained by menstruation for a female or the capability to ejaculate sperm for a male. In the absence of these signs, puberty of a person will be determined according to his or her age. Muslim scholars however have different views in determining the appropriate age of puberty. According to Shafi’i and Hanbali, the age of puberty for both male and female is fifteen years old. Therefore if someone reaches the age of fifteen, he or she is already an adult.<sup>35</sup> However according to Maliki, the age of puberty for both male and female is eighteen years old whereas according to Hanafi, the age of puberty for male is eighteen years old and for female is seventeen years old.<sup>36</sup> In Malaysia, *Mazhab Syafie* is the main source of the authority in the administration of Islamic religion.<sup>37</sup> Nonetheless, the Mufti may follow the accepted views of the *Mazhab Hanafi*, *Maliki* or *Hanbali* if the Mufti considers

<sup>32</sup> Wikipedia. (2012). *Islam and Children*. [http://en.wikipedia.org/wiki/Islam\\_and\\_children](http://en.wikipedia.org/wiki/Islam_and_children) [Retrieved on 28 October 2012]

<sup>33</sup> Section 3(1) of the Syariah Court Evidence (Federal Territories) Act 1997 defines ‘*baligh*’ as having attained the age of puberty in accordance with *Hukum Syarak*.

<sup>34</sup> Bukhari. *Sahih al-Bukhari*. Trans. M.M. Khan. 6<sup>th</sup> edn. (Maktabat Al Riyadh Al Hadeethah: Riyadh, 1984) 119.

<sup>35</sup> Zaydan, Abdul Karim. *al-Madkhal li al-Dirasat al-Shari’ah al-Islamiyyah*. (Muasasah al-Risalah: Amman, 1990) 264.

<sup>36</sup> Al-Marghinani. *The Hedaya: Commentary on the Islamic Laws*. Trans. C. Hamilton. (Kitab Bhavan: New Delhi, 1982) 222.

<sup>37</sup> Section 39(1) of the Administration of Islamic Law (Federal Territories) Act 1993 states that the Mufti shall ordinarily follow the accepted views (*qaul muktamad*) of the *Mazhab Syafie* in issuing any fatwa.

that following the accepted views of *Mazhab Syafie* will lead to a situation which is repugnant to public interest.<sup>38</sup>

### **3.2 The Evidence of A Child in Islamic Law**

Generally, a child lacks the competency to give evidence in Islam. This is in contrast with the common law position where the general rule states that infancy does not render a witness incompetent.<sup>39</sup>

Muslim jurists put certain limitations on competency of children in giving evidence because they feel that a child lacks understanding and discerning power which is inherent in persons of tender years, thus preventing them from understanding the nature of certain events. Nevertheless, there are certain exceptions to the general rule. The evidence of a child may be accepted in certain cases to preserve and protect the rights and interest of people. The legal maxim states that, "Hardship begets facility".<sup>40</sup> This maxim can be elaborated to mean that a strict adherence to the rule of law can cause difficulty and hardship to the people in certain circumstances. Therefore, it is necessary to lighten the burden of the people and to disregard the general rules in certain exceptional circumstances in order to avoid any injury or injustice from its application.

#### **3.2.1 Competency of Child Witness and The Admissibility of Children's Evidence**

At this point, it is pertinent to analyse several verses of the Holy Quran, the views of Muslim jurists and the statutory provisions regarding the admissibility of children's evidence in Islamic law which is applicable in Malaysia. The issue here is whether or not the testimony of a child can be accepted in court.

First and foremost, the authorities from the Holy Quran will be now examined in order to determine the competency of child witness in Islam. In the case of Prophet Isa A.S, a testimony was made by him when he was only an infant. As a result, such testimony has helped to clear his

<sup>38</sup>The Administration of Islamic Law (Federal Territories) Act 1993, s. 39(2).

<sup>39</sup>Curzon, L.B. *Law of Evidence*. 2<sup>nd</sup> edn. (Pitman: London, 1986) 15.

<sup>40</sup>Al-Sayyid Sabiq. *Fiqh al-Sunnah*. 8<sup>th</sup> edn. (Darul Fadhilah, 1986) 55.

mother which is Maryam from the accusation of adultery. In relation to this event, it has been illustrated by Allah SWT in Surah Maryam, verse 27.

*Then she brought him (the baby) to her people, carrying him. They said, "O Maryam! Indeed you have brought a thing Fariyya (an unheard mighty thing)".*<sup>41</sup>

The above verses of Al-Quran signify that the people were surprised when they saw Maryam was carrying a baby in her arms. When a woman is seen carrying a newborn baby, it is on assumption that she is married. Otherwise, it will be held that she had committed adultery. It was only when they heard the newborn baby (the Prophet Isa A.S.) speaks, they believed the truth. Indirectly, it shows the admissibility of child's evidence in Islamic Law even though at the end of the day, people somehow will argue that the Prophet Isa A.S was a child who has been given a special ability to speak while he still a baby during that time, unlike other normal babies.

As far as children's evidence is concerned, the Muslim jurists however did not concur on its admissibility. The Muslim jurists are unanimous in their opinion that before someone's testimony can be accepted, one of the conditions for the admissibility of evidence in Islamic law is the attainment of puberty or *baligh*.<sup>42</sup>

However, the Syariah Court Evidence (Federal Territories) Act 1997 adopts a middle view. Section 83(1) of the Act provides that all Muslims shall be competent to give *syahadah* or *bayyinah* as witnesses provided that they are 'aqil, baligh, 'adil, have a good memory and are not prejudiced. Section 83(4) of the Act further provides that a person who is not *baligh* or a person who is of unsound mind is competent to give *bayyinah* but not competent to give *syahadah*. Nevertheless, the explanation to this subsection stipulates that the *syahadah* of a child in those cases can be accepted as long as there is no enmity between them.<sup>43</sup>

From the above analysis, it shows that under certain exceptions, a child is able to give evidence in Islamic law by fulfilling several requirements as have been laid down by the Muslim jurists. In Malaysian law of evidence, the main consideration in accepting the evidence of a child

<sup>41</sup> Surah Maryam, verse 27. Muhammad Taqiuddin al-Hilali & Muhammad Muhsin Khan. *op.cit.*, at 558.

<sup>42</sup> Ibn Rushd, Muhammad bin Ahmad bin Rushd, Al-Qurtubi. *Bidayah Al-Mujtahid Wa Nihayah Al-Muqtasid*. (Maktabah Al-Kuliyyah al-Azhar: Egypt, 1969) 499.

<sup>43</sup> The explanation to Section 83(4) of the Syariah Court Evidence (Federal Territories) Act 1997 provides that, "The bayyinah of a minor in the case of an injury caused by some minors upon others is admissible provided that there is no misunderstanding between them and they were present at the scene of the incident.



is the capacity to understand the questions put to them and the intellectual capacity of the child rather specifying any particular age. In comparison with Islamic law of evidence, the normal indication of adulthood which is the attainment of puberty; will be a requirement for a child to be able to give testimony. Therefore it is hoped that by careful acceptance of a child's evidence, justice may be served and the pursuit of the truth may be enhanced.

### 3.3 Rule of Corroboration on The Evidence of A Child – Position Under Islamic Law In Malaysia

Under the Syariah Court Evidence (Federal Territories) Act 1997, there is no specific requirement of corroboration on the evidence of a child. In contrast under the Evidence Act 1950, Section 133A specifically mentions that where the unsworn evidence of a child is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated.

In addition, it must be noted that in Islamic law, the degree of proof and evidence are not the same for every case since it will depend on the categories of crimes, namely *hudud*,<sup>44</sup> *qisas*<sup>45</sup> and *ta'zir*.<sup>46</sup> For *hudud* offences, an accused shall not be convicted unless there is strong evidence to justify the conviction i.e. evidence which establishes the case beyond any doubt or *syubhah* as *hudud* convictions are set aside on the existence of *syubhah*. Therefore, the Muslim jurists are unanimously agreed that the burden of proving *hudud* offences is higher compared to other types of crimes.<sup>47</sup>

Section 86 of the Syariah Court Evidence (Federal Territories) Act 1997 provides a rule regarding the number of witnesses:

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<sup>44</sup>*Hudud* consists of several offences under Islamic criminal law whereby their punishments are fixed and have been prescribed in the Holy Quran and the Sunnah. The offences are theft, adultery, false accusation of adultery (*qadhif*), intoxication, apostasy, armed robbery and rebellion. See Safwat, Safia M. (1982). *Offences and Penalties in Islamic Law. Islamic Quarterly*. vol. 26, at 175.

<sup>45</sup>*Qisas* are crimes relating to personal injury which includes murder. See El Awa, Mohamed Selim. *Punishment in Islamic Law: A Comparative Study*. American Trust Publications: Indianapolis, 1982) 69-90.

<sup>46</sup>*Ta'zir* offences are called arbitrary crimes which entails discretionary punishment. These include crimes which are not described as *hudud* and *qisas*. Their punishments are left to the discretion of the court. Ibid, at 96-119.

<sup>47</sup>Mahmud Saedon A. Othman. *An Introduction to Islamic Law of Evidence*. Trans. Raden Ahmad Shauki R. Hisam. 1<sup>st</sup> edn. (Hizbi Sdn. Bhd: Shah Alam, 1996) 17-19.

- (1) A claim by a person who is known to be rich that he has become a pauper is not sufficient to prove his claim unless it is corroborated by the evidence of three male witnesses.
- (2) In the case of sighting of the new moon, the evidence of one male person who is ‘*adil*’ shall be sufficient to prove such fact.
- (3) The evidence of one male person shall constitute sufficient proof in the following circumstances:
  - (a) evidence of a teacher in a case involving school children;
  - (b) evidence of an expert in the valuation of damaged goods;
  - (c) evidence as to the acceptance and rejection of witnesses;
  - (d) notification of dismissal of a representative;
  - (e) evidence as to the defects in any goods for sale.
- (4) Evidence of a female person is sufficient to prove any fact which is usually seen within the knowledge of a female person.
- (5) Except as otherwise provided in this section, evidence shall be given by two male witnesses or by one male and two female witnesses.

Based on the above provisions, it did not state any explicit requirement for corroboration on the evidence of a child. Unless the evidence of a child falls within subsections (2), (3) or (4), however it seems that the availability of only one child witness to give evidence in Syariah court may not be sufficient since subsection (5) of Section 86 clearly provides that evidence shall be given by two male witnesses or by one male and two female witnesses.

Whilst the Malaysian civil law clearly requires corroboration for children’s evidence, Islamic law laid down various conditions to strengthen the evidence of children which includes consistency of the witnesses, elimination of any possibility of being taught by others and capability to understand the testimony. Islamic law also gives a lot of weight to the need for accuracy and truthfulness in the evidence given by a witness in order to ensure that justice is being upheld.

In the case of *Mst. Rani v The State* (Pakistan’s case)<sup>48</sup>, it was decided that mere pregnancy is not sufficient to convict a woman for adultery especially where she claims the

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<sup>48</sup> PLD 1996, Karachi 316.

pregnancy to have been caused due to rape. Therefore if an unmarried girl who is pregnant and below 18 years old has been charged with the offence of adultery at the Syariah Court, the existence of pregnancy is only a presumption that she has committed adultery. Such form of evidence is not strong as it is still subject to the right of the accused in defending it.

Under Islamic law, there are many types of circumstantial evidence that could be used in order to corroborate the evidence of pregnancy in adultery cases such as the accused's behaviour, the appearance of the accused, the presence of semen on the vaginal swabs of a woman and the existence of contraceptive methods such as spermicides pills in the possession of an unmarried woman.<sup>49</sup>

### **3.4 The Protection of Child Witness From Inappropriate Cross-Examination in Syariah Court**

Sections 101 to 105 of the Syariah Court Evidence (Federal Territories) Act 1997 are generally intended to protect a witness from being improperly cross-examined. As far as the protection of witness from inappropriate cross-examination is concerned, those provisions are also similar with Sections 148 until 152 of the Evidence Act 1950. For instance, Section 101 of the Syariah Court Evidence (Federal Territories) Act 1997 which is similar to Section 148 of the Evidence Act 1950 provides that a court shall decide whether or not a witness shall be compelled to answer a question if it is not relevant to the suit or proceeding. The court also may if it thinks fit, warn the witness that he is not obliged to answer it.

Another important provision is Section 104 of the Syariah Court Evidence (Federal Territories) Act 1997 whereby it stipulates that the court may forbid any indecent or scandalous questions or inquiries even when they may have some bearing on the issues for determination by the court. However, the court cannot forbid the questions or inquiries if they relate to facts in

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<sup>49</sup>Zakiah Bt. Samori. *Qarimah (Circumstantial Evidence) In Adultery (Zina) Case: Analysis on Four Madhab & Provision in Malaysia and Pakistan*. Pkukmweb.ukm.my/elaw/images/stories/zakiah.pdf [Retrieved on 30 December 2013].

issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.<sup>50</sup>

Section 105 of the Syariah Court Evidence (Federal Territories) Act 1997<sup>51</sup> deals with the questions that are intended to insult or annoy whereby the court has a duty to forbid two kinds of questions, namely:

1. questions which are insulting or annoying; and
2. questions, though proper by themselves, are needlessly offensive in form.

However, the existing statutory provisions particularly under Section 104 and Section 105 of the Syariah Court Evidence (Federal Territories) Act 1997 are also not specifically dealt with the protection from inappropriate cross-examination for a child witness.

Hence, the authors propose that a specific provision should be inserted in the Syariah Court Evidence (Federal Territories) Act 1997 by giving precise duty to the court to disallow, during a cross-examination of a child witness, a question which having regard to the child's age, level of understanding and education, is confusing, misleading, intimidating or being phrased in inappropriate language since a child witness possesses different level of intellectual capacity compared with an adult witness.

#### **4.0 Issue: Whether or Not A Child Should Be Allowed To Give Evidence**

Legally speaking, a child may be allowed to give evidence in certain cases under both civil laws and Islamic laws which are applicable in Malaysia provided that all the requirements for the admissibility of such evidence have been fulfilled before the court.

But practically speaking, testifying in court can be stressful for any witness, particularly for child victims of physical or sexual abuse. A feature of traditional trial proceedings such as facing the accused in the courtroom may make children reluctant to give evidence or testify about such abuse and may decrease the accuracy of their testimony.<sup>52</sup> Besides that, child victims

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<sup>50</sup> Similar provision with Section 151 of the Evidence Act 1950.

<sup>51</sup> Similar provision with Section 152 of the Evidence Act 1950.

<sup>52</sup> Wigmore, James H. *Evidence in Trials at Common Law*. (Academic Press: Edinburgh, 1997) 123.

are different people from child offenders. While the latter are seen in most jurisdictions as quite competent to be examined in court, the former are considered highly vulnerable and therefore in need more protection from the improper examination which may affect the accuracy of their testimony.<sup>53</sup> Thus, the issue now is whether a child should be allowed to give evidence, after knowing that several dilemmas may take place when a child is giving evidence in court. The justifications for this issue will be based on the perspective of international law by referring to the United Nations Convention on the Rights of the Child (1989) as well as United Nations Guidelines on Justice Matters Involving Child Victims and Witnesses of Crime.

The United Nations Convention on the Rights of the Child 1989 (UNCRC) is an international treaty that establishes human right standards for children. Through the Convention, national governments demonstrate their commitment to ensure children's rights in their country.<sup>54</sup> Malaysia acceded to the UNCRC on 17 February 1995<sup>55</sup> and initially ratified the Convention with twelve reservations, which express a government's disagreement with certain provisions in the treaty while still approving the treaty as a whole. Since 1995, Malaysia has withdrawn some of its reservations.<sup>56</sup> However, Malaysia still has five reservations in place. These are to Article 2 on non-discrimination, Article 7 on name and nationality, Article 14 on freedom of thought, conscience and religion, Article 28(1)(a) on free and compulsory education at primary level and Article 37 on torture and deprivation of liberty.<sup>57</sup>

It is important to take into consideration that the best interests of the child shall be a primary consideration in all actions concerning children.<sup>58</sup> In the context of court proceedings,

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<sup>53</sup> Ceci, Stephen & Maggie Bruck. *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*. (American Psychological Association: Washington DC, 1995) 86.

<sup>54</sup> Voice of the Children. 2011. Convention on the Rights of the Child: What's Happening in Malaysia. <http://voc.org.my/blog/blog/2011/12/23/convention-on-the-rights-of-the-child-whats-happening-in-malaysia/> [Retrieved on 5 Mac 2014]

<sup>55</sup> Attorney General's Chambers. 2011. Human Rights. [http://www.agc.gov.my/index.php?option=com\\_content&view=article&id=408&Itemid=334&lang=en](http://www.agc.gov.my/index.php?option=com_content&view=article&id=408&Itemid=334&lang=en) [Retrieved on 6 June 2012]

<sup>56</sup> Voice of the Children. *op.cit.*

<sup>57</sup> Lim Chee Wee. 2010. *Press Release: Time to remove all reservations and sign the Optional Protocols*. [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_time\\_to\\_remove\\_all\\_reservations\\_and\\_sign\\_the\\_optional\\_protocols.html](http://www.malaysianbar.org.my/press_statements/press_release_time_to_remove_all_reservations_and_sign_the_optional_protocols.html) [Retrieved on 13 July 2014]

<sup>58</sup> The United Nations Convention on the Rights of the Child 1989, Article 3(1).

high standard of evidence collection should be maintained in order to ensure fair and equitable outcomes of the justice process.<sup>59</sup>

In accordance with Article 12(2) of the UNCRC, the starting point for evidence given in court by a child is that the child shall be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child.<sup>60</sup> However, this right is not absolute. Article 12(2) of the Convention envisages that this right to be exercised ‘in a manner consistent with the procedural rules of national law’. Such procedural laws exist in national law in order to ensure that the court is able to trust any testimony given by a child in judicial proceeding. Two legal hurdles typically exist. According to the legal system in question, either one or both may be applied by the court. The first is regarding the question of the admissibility of a child’s evidence and the second is the question of the reliability of a child’s evidence. The former question relates to whether the court is able to take any evidence given by a child into account at all in determination of the case whereas the latter question of reliability relates to the weight that the court should subsequently attach to the evidence given by a child.<sup>61</sup> In deciding upon the admissibility and reliability of a child’s evidence, the court may not do so merely upon the basis of the child’s age alone.<sup>62</sup> This restriction is set out in Paragraph 18 of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime which provides, “...his or her (child) testimony should not be presumed invalid or untrustworthy by reason of the child’s age alone...”. Hence, age should not be a barrier to a child’s right to fully participate in the justice process.<sup>63</sup>

Nonetheless, the court can pose several questions in order to determine whether the child’s age and maturity allow the giving of intelligible and credible evidence. The court may, for example, take such factors into consideration when examining evidence given by a child in the context of the case as a whole. If compelling reasons exist, it may also carry out certain tests in order to establish the extent to which a child is able to give valid testimony. Such tests may

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<sup>59</sup> Myers, John E.B. *A Decade of International Reform to Accommodate Child Witnesses*. (Sage Publications: New York, 1996) 266.

<sup>60</sup> McEwan, J. (1988) *Child Evidence: More Proposals For Reform*. *Criminal Law Review*. 813-822, at. 813.

<sup>61</sup> *Ibid*, at 814.

<sup>62</sup> Detrick, S.A. *Commentary on the United Nations Convention on the Rights of the Child*. (Kluwer Law International: The Hague, 1999) 67.

<sup>63</sup> Davies, M. *Asking the Law Question*. (Law Book Company: Sydney, 1994) 78.

seek to establish the competency of a child witness, such as whether the child is able to understand questions and whether he or she understands the importance of telling the truth.<sup>64</sup>

In relation to child witnesses, international standards suggest that testimony given by a child should not be declared inadmissible lightly.<sup>65</sup> Paragraph 18 of the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, for instance, is based on the presumption that ‘every child should be treated as a capable witness which subject to examination’. In other words, a child is to be deemed as a capable witness and his or her evidence is admissible unless proven otherwise by means of examination in court.

The right of children to be heard cannot longer be sidelined especially in the light of our obligations under the United Nations Convention on the Rights of the Child 1989. This Convention makes it clear that in matters concerning the future safety and welfare of a child of sufficient age and maturity, the child in question has a right to get his or her views and concerns noted by the court.<sup>66</sup>

In the case where a child has been abused, there will probably be only two eyewitnesses who are the offender and the child himself.<sup>67</sup> By itself, the evidence from the child victim is inevitable mainly because the machinery of justice has to apply it in order to deal with such abuse case. Exclusion of children’s evidence may mean that an offender will not be prosecuted because there is little or no other evidence which can be led against the accused.<sup>68</sup> Children also occasionally perpetrate even the serious offences. If prosecuted, a child defendant, like an adult, may elect to give evidence in defence. In the nature of things, children are often witnesses to crimes committed by other children. Hence, this is a separate area where children’s evidence is a matter of practical importance.<sup>69</sup>

The competency of a child witness to give reliable evidence should not be underestimated. Recent studies have found that there is no psychological evidence that children

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<sup>64</sup> Brannon, C.L. (1994) *The Trauma of Testifying in Court for Child Victims of Sexual Assault v The Accused’s Rights to Confrontation*. Law & Psychology Review. 439-460, at. 447.

<sup>65</sup> Ibid.

<sup>66</sup> Geoffrey Shannon. *Child Law*. (Round Hall: Dublin, 1995) 236.

<sup>67</sup> Whitcomb, D. *When The victim Is A Child*. 2<sup>nd</sup> edn. (National Institute of Justice: Washington, D.C, 1992) 103.

<sup>68</sup> Judy Cashmore & Kay Bussey. (1996) *Judicial Perceptions of Child Witness Competence*. 20 Law & Human Behavior, 313-334, at. 328.

<sup>69</sup> Kevin Smith & Steve Tilney. *Vulnerable and Child Witnesses*. (Oxford University Press: Pennsylvania State University, 2007) 143.

are more likely to lie than adults. Certainly, the research on children's belief about court proceedings implies that children may be more cautious about lying in the witness box than adult witnesses.<sup>70</sup> Jones and Krugman (1986) reported about an episode of a three-year-old child who was abducted from the front yard of a neighbour's home. Three days later, she was found in the cesspit of a deserted mountain outhouse while crying, bruised and suffering from exposure. Fourteen days after her abduction, the police showed her a photo line-up of twelve people which included the suspect. The girl accurately and quickly identified the suspect as her abductor.<sup>71</sup> It seems that children's ability to recount events can be very accurate, particularly if free recall and simple direct questions are used. By using these techniques, the accuracy of recall of children six years of age and over is probably as good as that of adults, with some children under six also being quite accurate.

It is unfair for child witnesses to be totally prohibited from giving evidence in court for all cases without clearly proving whether or not he or she is a competent witness to testify at the first instance. Even under Islamic laws, there are several exceptions to the general rule of children's evidence whereby a child may give evidence in certain cases as has been previously discussed. Indirectly, it proves that the evidence of children should not be declared inadmissible lightly. Since a child witness should be treated as capable witness unless proven otherwise and the evidence of children is paramount to be examined in some cases, therefore in our humble opinion, a child should be allowed to give evidence under civil laws as well as Islamic laws provided that all the requirements for the admissibility of such evidence have been fulfilled before the court. Even if a child accused is capable to fulfill all the requirements for the admissibility of such evidence under both civil and Islamic laws, thus the child accused also should be allowed to give evidence in court.

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<sup>70</sup>See J.R. Spencer, above n.1 at 270.

<sup>71</sup>Jones, D.P.H. & Krugman, R.D. (1986) "*Can A Three-year-old Child Bear Witness To Her Sexual Assault and Attempted Murder?*". Child Abuse and Neglect. Vol. 10. at 253-258.



## 5.0 Conclusion

To put it laconically, the civil and Syariah courts in Malaysia may accept the evidence of children provided that all the requirements for the admissibility of such evidence have been satisfied under both systems of law. The Islamic law draws a definite line of distinction between children and adults which is remained unchanged after a lapse of more than fourteen hundred years. Based on the views of Muslim jurists, it recognises the evidence of children in certain circumstances in order to avoid hardship. Therefore, it is a duty of a fair judge to be guided by the legal principles when assessing the reliability and credibility of a given testimony.

However to some extent, the Malaysian procedural laws particularly in relation to the manner of giving evidence by child witness are still inadequate in certain aspects. Several weaknesses have been highlighted in the current legislations which need to be reviewed by the Parliament based on the proposed suggestions where it deemed necessary. Comprehensive laws will ensure peace and harmony for a country whereby justice will serve protection of individual rights and society's rights as a whole.

Essentially, the rights of children to be heard and to free the child from any constraints or fear, anxiety or distress have been dealt above but the more important aspect is the implementation of such rights accordingly. Despite the reality that there is little doubt on the competency of children to testify in court, it is unjust for judges to prevent children from giving evidence in all cases. In some cases, children can even provide useful information and give observations about matters of fact such as whether they were beaten by their parents, whether they were molested by the accused and so on. That information could be important in helping the court to determine some legal issues in trial. Hence, children should be allowed to give evidence in court if they are competent witnesses and able to give reliable as well as credible account of events which they have experienced or observed.

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