

**NAVIGATING MALAYSIAN CIVIL LAW AND
MAQASID AL-SHARIAH IN THE BEST
INTERESTS OF MUSLIM CHILDREN BEYOND
CONTROL:
A CASE STUDY IN PENANG**

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by

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TABLE OF CONTENTS

Acknowledgement.....	ii
Table of Contents	iv
List of Tables.....	ix
List of Figures	x
List of Acronyms and Abbreviations	xi
Abstrak	xii
Abstract	xiiv

CHAPTER 1 – INTRODUCTION

1.1 Philosophies of Truth and Meaning in Human and Social Development	1
1.2 Belief, Faith and Consciousness in Human and Social Development.....	5
1.2.1 The Social Contract.....	10
1.2.2 Maqasid al-Shariah.....	11
1.3 Childhood in Islamic Jurisprudence	15
1.4 Childhood and the United Nations Convention on the Rights of the Child	18
1.5 Children’s Welfare and Protection in Malaysia.....	22
1.5.1 Department of Social Welfare (<i>Jabatan Kebajikan Masyarakat</i>).....	23
1.6 Beyond Control Children.....	26
1.6.1 Beyond Control Children in Penang	31
1.6.2 Pivot Points	33

1.7	Best Interest of the Child	34
1.8	Maqasid al-Shariah and Best Interest Decision Making.....	35
1.9	Statement of the Problem.....	39
1.10	Research Objectives.....	43
1.11	Research Questions.....	44
1.12	Significance of the Study.....	44
1.13	Key Definition of Terms.....	45
1.13.1	Child.....	45
1.13.2	Best Interest of the Child.....	46
1.13.3	Maqasid al-Shariah.....	46

CHAPTER 2 – LITERATURE REVIEW

2.1	Introduction.....	48
2.2	Islamic Human and Social Development	50
2.2.1	<i>Bayt al-Hikma</i> (House of Wisdom).....	51
2.2.2	From Philosophical Meaning to Theological Truths?.....	52
2.2.3	Caliphate to a Commonwealth of Islamic Nations and Communities	57
2.3	Three Agents of Colonialism: Explorers, Missionaries and Traders.....	62
2.3.1	Christian Righteousness in Colonialism	63
2.3.2	Terra Nullius and Indigenous Australians.....	66
2.4	Human Rights and Islamic Jurisprudence	69
2.5	Social Wrongs and Punishment	74
2.5.1	Collective or Individual Interests in Punishment?	77

2.6	Malaysian Child Laws Development	81
2.7	Theoretical Framework.....	86
2.8	Conceptual and Operational Framework	91
2.9	Conclusion	94

CHAPTER 3 – METHODOLOGY

3.1	Introduction.....	96
3.2	Research Design	98
3.3	Research Scope	107
3.4	Study Population.....	109
3.5	Study Samples	111
3.6	Data Collection	115
3.6.1	Interview Process	116
3.6.2	Interview Pattern	118
3.7	Research Tools.....	124
3.8	Data Analysis and Interpretation	126
3.9	Ethics	129
3.10	Limitations	134
3.11	Conclusion	135

CHAPTER 4 – PREVENTING ENTRY INTO THE SYSTEM

4.1	Introduction.....	137
4.2	Research’s Findings.....	138
4.2.1	Department of Social Welfare’s Quality Procedure Number 6.....	139
4.2.2	Pivotal Power of the Probation Officer	142
4.2.3	Applicant and Child Conflict	147
4.2.4	Beyond Control Children and the Court for Children Experience	151

4.2.5	Conflation of Criminal Allegations and Behavioural Events.....	160
4.2.6	Probation Officer’s Report.....	164
4.2.7	Presumption of Parents	168
4.3	Discussion.....	173
4.3.1	Early Intervention as a Prevention Strategy	175
4.3.2	Systemic Diversion of Beyond Control Children	182
4.4	Conclusion	187

CHAPTER 5 – PROMOTING RELEASE FROM CUSTODY AND SYSTEM

5.1	Introduction.....	190
5.2	Research’s Findings.....	191
5.2.1	Probation Home Detention.....	192
5.2.2	Approved School Detention.....	203
5.2.3	Board of Visitors and Release on License	211
5.2.4	Section 47 of the Child Act.....	214
5.2.5	Parent and Child Conflict.....	216
5.3	Discussion.....	219
5.3.1	A System Destined to Punish, Not Release.....	221
5.3.2	Punishment and Surveillance in Beyond Control Children’s Correction.....	227
5.4	Conclusion	236

CHAPTER 6 – CIVIL AND SHARIAH SYSTEMS OVERLAP

6.1	Introduction.....	239
6.2	Research’s Findings.....	240
6.2.1	Existing Civil and Shariah Overlaps for Beyond Control Children.....	241
6.2.2	Mediating Conflict and the Potential of Islam’s <i>Sulh</i>	244

6.3	Discussion.....	250
6.3.1	Religion and Faith in Secular Processes and Practices	252
6.3.2	Religion and Faith in Mediating Conflict	256
6.4	Conclusion	263

CHAPTER 7 – CONCLUSIONS AND RECOMMENDATIONS

7.1	Conclusions	265
7.2	Recommendations for Future Research.....	275
7.3	Recommendations for Policy Stakeholders	277

REFERENCES	280
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APPENDICES

LIST OF PUBLICATIONS

LIST OF TABLES

		Page
Table 1.1	List of Probation Homes (Asrama) and Approved Schools (Sekolah Tunas Bakti) in Malaysia, by State, 2015.....	29
Table 1.2	Children in Probation Hostels (Asrama Akhlak) by Gender and Ethnicity, Malaysia, 2011-15.....	29
Table 1.3	Children in Approved Schools (Sekolah Tunas Bakti) by Gender and Ethnicity, Malaysia, 2011-15.....	30
Table 1.4	Beyond Control Children in Penang, 2012-16.....	31
Table 1.5	Children in Probation Hostel (Asrama Paya Terubong), 2011-15.....	32
Table 1.6	Children in Approved School (Sekolah Tunas Bakti, Teluk Air Tawar), 2010-15.....	32
Table 3.1	List of Child Respondents' Ages and Interview Locations	113
Table 3.2	Unit 1 Respondents: Representative Malaysian Government Employees Who Operate the Beyond Control Child System in Penang.....	115
Table 3.3	Unit 2 Respondents: Beyond Control Children in Custody.....	115
Table 3.4	Unit 3 Respondents: Beyond Control Child's Case Review.	115
Table 3.5	Interview Frequency, Type and Translator usage.....	117
Table 3.6	Research Tools Overview	124
Table 3.7	Data Codes and Themes	128
Table 4.1	Counselling and Court Appearance Withdrawal Rates of Beyond Control Applications for Timur Laut DSWP and Court for Children 2013-2016	144
Table 4.2	Timur Laut Court for Children's Total Beyond Parental Control Applications, Withdrawals at 1 st or 2 nd Appearances and Top Five Most Common Parent/Guardian Behaviour Complaints 2012-16.....	158
Table 6.1	Penang Syariah Courts' <i>Sulh</i> Cases 2010-16.....	249

LIST OF FIGURES

	Page
Figure 1.1 Stratified Hierarchy of Maqasid al-Shariah	12
Figure 1.2 Children in Probation Hostels (Asrama Akhlak), Malaysia 2003-15... 25	25
Figure 1.3 Children in Approved Schools (Sekolah Tunas Bakti), Malaysia 2003-15	26
Figure 1.4 Beyond Control Children, Malaysia 2009-15.....	27
Figure 2.1 Map of Africa, post 1884-85 Berlin Conference	63
Figure 2.2 Chronology of Child Related Malaysian Law	85
Figure 2.3 Maqasid al-Shariah and Hudud Allah Compared	87
Figure 2.4 Conceptual Framework Diagram.....	93
Figure 3.1 Case Study Design of Research	99
Figure 4.1 Stages and Strategies Adopted, Before a Formal Beyond Parental Control Application to the Court for Children.	142
Figure 4.2 Beyond Control Child Respondent’s Circumstances and Application Triggers	148
Figure 4.3 DSWP and Court Respondents’ Reflections on Beyond Control Children in the Application Process.	171
Figure 4.4 DSWP Respondents’ Reflections on Beyond Control Children from Custodial Sites.....	172
Figure 4.5 Bronfenbrenner’s Bio-Ecology of Human and Social Development .	176
Figure 4.6 Beyond Control Children’s Systemic Diversion in Practice	182
Figure 5.1 Goals and Methods of the Probation Home.....	193
Figure 5.2 Daily Routine for Residents of the Probation Home	195
Figure 5.3 Children in the Probation Home “Lock-Up”	196
Figure 5.4 “Roll Call” before Zuhr (Midday) Prayers at the Probation Home	197
Figure 5.5 Daily Routine for Students at the Approved School.....	206

LIST OF ACRONYMS AND ABBREVIATIONS

AH	After Hegira (Anno Hegirae)
CE	Common Era
CRCI	Covenant on the Rights of the Child in Islam
DSW	Department of Social Welfare
DSWKL	Department of Social Welfare Kuala Lumpur
DSWP	Department of Social Welfare Penang
HREC	USM Human Research Ethics Committee
IPHRC	Independent Permanent Human Rights Commission
ISDEV	USM Centre for Islamic Development Management Studies
JAKIM	Jabatan Kemajuan Islam Malaysia
NGO	Non-government organisation
OIC	Organisation of Islamic Cooperation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Child Education Fund
USM	University Sains Malaysia

**MENGAJAI UNDANG-UNDANG SIVIL MALAYSIA DAN MAQASID AL-SYARIAH DEMI KEPENTINGAN KANAK-KANAK DI LUAR KAWALAN:
SATU KAJIAN KES DI PULAU PINANG.**

ABSTRAK

Di bawah undang-undang Malaysia, kanak-kanak luar kawalan merupakan satu fenomena yang unik kerana mereka tidak melakukan jenayah tetapi mereka telah melanggar norma-norma kehidupan bermasyarakat antara ibu bapa dan anak-anak dalam budaya Malaysia. Permasalahan ini menarik minat kerajaan Malaysia untuk menangani isu tersebut mengikut undang-undang berpandukan prinsip dan praktis kehakiman Latin Kristian pada awal abad ke-19 kerana kesan undang-undang kolonial Inggeris. Tradisi Judeo-Kristian mempunyai persamaan dengan falsafah Maqasid al-Shariah dan undang-undang Islam, namun begitu terdapat beberapa perbezaan asas untuk menangani konflik dalam kekeluargaan. Undang-undang Islam dan tradisi sivil menekankan aspek perdamaian dan konsep keharmonian dalam kalangan keluarga dan komuniti, melampaui hal-hal berkaitan pelanggaran norma. Namun begitu, pendekatan Malaysia dilihat tidak selaras dengan piawaian antarabangsa, apabila seorang kanak-kanak diberikan hak penjagaan atau berada di bawah pengawasan negara selama tiga tahun jika tidak mematuhi ibu bapa mereka. Penyelidikan ini bertujuan meneroka tindakan yang dilakukan untuk mencegah atau membebaskan kanak-kanak ini daripada terjebak dalam sistem yang sedia ada selaras dengan komitmen Malaysia terhadap ekspektasi Pertubuhan Bangsa-Bangsa Bersatu. Pada masa yang sama, penyelidikan ini turut meninjau potensi untuk mempertimbangkan falsafah keadilan dan rekonsiliasi Islam dalam respons sekular yang ditingkatkan kepada keluarga Islam dalam krisis. Dengan menggunakan kaedah kajian kes, kajian

ini memilih 28 orang responden, termasuk lapan orang kanak-kanak luar kawalan. Kesannya, hukuman yang diterima oleh anak telah merenggangkan hubungan antara ibu bapa dengan anak daripada proses membaik pulih hubungan. Penyelidikan memfokuskan kepada kegagalan sistem keadilan, kepatuhan sistem dan kawalan kehakiman terhadap kanak-kanak dan keluarganya. Di Malaysia, pengamal tugas diberikan kuasa autoriti moral untuk menjatuhkan hukuman kepada kanak-kanak dan ibu bapa yang gagal memenuhi peraturan yang ditetapkan. Kaedah *sulh* dalam *Maqasid al-Shariah* dan undang-undang Islam merupakan contoh terbaik yang boleh diguna pakai dalam sistem keadilan sosial antarabangsa bagi menangani masalah kanak-kanak yang tidak mematuhi undang-undang. Pada awal abad ke-21, Malaysia telah mempraktikkan kaedah *sulh* di Mahkamah Syariah. Kajian semula respon negara diperlukan untuk mendorong ekspektasi moden dari intervensi awal dan pengalihan dari sistem peradilan formal ke tradisi rekonsiliasi adat, dengan itu menghalang pengawasan dan penginstitutionian yang tidak perlu bagi kanak-kanak.

**NAVIGATING MALAYSIAN CIVIL LAW AND MAQASID AL-SHARIAH IN THE
BEST INTERESTS OF MUSLIM CHILDREN BEYOND CONTROL:
A CASE STUDY IN PENANG**

ABSTRACT

Beyond control children are a unique phenomenon under Malaysian law, they have not committed a crime, rather they have trespassed on the normative expectations of propriety between parent and child in Malaysian culture. The state has declared its interest in this relational breakdown and its response remains rooted in Latin Christian judicial principles and practices that sailed out with British colonial law, early in the 19th century CE. Maqasid al-Shariah and Islamic justice philosophies share many similarities with Judeo-Christian traditions, however there are some fundamental differences when it comes to addressing conflicting families. Islamic legal and civil traditions promote reconciliation and mediation to restore harmony in families and communities, rather than elevating a social wrong against an individual which results in retributive punishment and expectations of atonement against the wrong doer. Malaysia's treatment of beyond control children is incongruent with international standards or expectations, when a child can be held in custody or remain under state surveillance for up to three years for disobeying their parents. The research objectives were to explore what was being done to prevent children's entry into the existing social welfare system or to extract them from it, considering Malaysia's commitments to the United Nations' expectations of preventing unnecessary institutionalisation. Furthermore, to establish whether there was potential in considering Islamic justice and reconciliation philosophies in the secularly framed responses to Muslim families in crises. Utilising a case study methodology, twenty-eight respondents, which

included eight beyond control children reveal a process that is destined to punish and add distance in the fractured parent and child relationship, rather than repair it. The research highlights systemic failures in expectations of fairness, system compliance and judicial protection for children and their families. System duty bearers adopted a moral authority to deliver retributive pain and punishment to children and families who had failed to meet Malaysian social expectations. Maqasid al-Shariah and Islamic justice practices, such as the ancient *sulh* (amicable settlement) process are examples that meet the aspirations of modern international justice system responses to children in conflict with the law. Malaysia is perfectly situated to take the lessons learnt in the Malaysian Syariah Courts following their inclusion of the *sulh* practice early in the 21st century. Reimagining the state's response is needed to one that promotes modern expectations of early intervention and diversion from formal justice systems into customary reconciliatory traditions, thereby preventing unnecessary surveillance and institutionalisation of children.

CHAPTER 1 – INTRODUCTION

1.1 Philosophies of Truth and Meaning in Human and Social Development

How humankind has developed and advanced is one of the big philosophical questions that remains without a definitive answer because of the premise towards a universal understanding and acceptance of truth and meaning, particularly around the philosophies of theology and the metaphysical in rational thought. These cognitive states of being are value and morally laden concepts that have, and continue to provide fertile ground for oppression, benefit and conflict. They provide an intellectual governance framework to individuals and institutions which transforms rationality and logic into seemingly obvious conclusions that manifest in empires, nations, cultures, systems and individual's decision-making. Truth and meaning remain contested and will always be, because of their very nature to be historically and epistemologically rooted (Evans & Evans, 2008 & Ragab, 2014).

Fundamental to the understanding of human and social development is to acknowledge the analytical importance of the continual reflection and critique of human existence. Aristotelian logic and deductive reasoning in philosophies of thought remain as relevant today, as they were to the ancient Greeks (Russell, 1935 & Smith, 2016). What this foundational critiquing process brought to humankind is the framework to inquire on perceptions of truth, meaning and rationality. Inevitably, this leads to reflecting upon and a continual shift in human's beliefs, interpretations and ways of being. The fluidity of the space to critique and reflect remains a significant, often bloody, contested concept, particularly when it comes to the various spiritual or mythological beliefs and governance systems of humans and their

societies. For example, for over 1000 years, the critical reflection of why humans need to believe in, or pay homage to spiritual or mythological beings, or the purpose of it, largely during the ‘ancient societies’ and the ‘Age of Reason’, was replaced with a dominance of religious servitude and acquiescence during the Renaissance (Gottlieb, 2016). Bertrand Russell (1872–1970 CE), the British analytic philosopher, mathematician and historian, believed it is through the continual oscillation between rational and irrational thought and behaviour; “Rationalism and anti-rationalism have existed side by side since the beginning of Greek civilisation, and each, when it has seemed likely to become completely dominant, has always led, by reaction, to a new outburst of the opposite.” (Russell, 1935, pg. 68).

Along with the centrality of Aristotelian logic and rational thought was the rise of scientific reasoning which challenged human and social structures in the faith of believing in a higher or omnipresent power. Within Judeo-Christian philosophical traditions, the French scientist, mathematician and philosopher, Rene Descartes’ (1596–1650 CE) ‘dualism’ is regarded as seminal because it brought together theology and the science of physics to describe human existence. Primary in Descartes’ theories of a ‘mind and body split’ was the innateness of the mind’s knowledge, in other words, humans are born with a soul and a reverence to God, and the body is purely a physical organism that supports the mind (Gottlieb, 2016). Descartes based and articulated his dualism theory on scientific reason, largely in his belief that the soul, which innately shapes the mind and emotions, is a product of the pineal gland, a small organ in the middle of the brain (Lokhorst, 2016). The use of science to propose an understanding of human belief systems was significant; it naturally leads to debates on ‘nature versus nurture’ in human and social

development. It also provides fertile space for critical reflection, adaptation and the rise of the rational and irrational in its application or dismissal.

In contrast to Descartes' belief in the innateness of the human psyche was the theory put forward by Scottish born philosopher, David Hume (1711–1776 CE). Hume argued for 'naturalism' in human understanding; humans are part of the continuum of nature and there is no radical difference between us except for our lived experiences (Gottlieb, 2016). Hume focused on causal relationships and how these shape humans' thoughts, actions and systems. Within this framework of critical reflection, the assumptions of religious doctrine, scientific inductive reasoning and rationalist's 'proofs' were challenged and brought into question under Hume's central tenet that passion and perceived experiences, rather than reason, governs human behaviour and morality (Gottlieb, 2016; Morris & Brown, 2017). Hume's trust in human's lived experiences to define their moral truths, rather than institutions and doctrine, cannot be understated and remains prevalent to this day, with his philosophy being popular among both atheists and scientists (Gottlieb, 2016). His moral philosophy is attributed to having influenced Adam Smith (1723–1790 CE), a foundational philosopher on the political economy model, Charles Darwin's (1809–1882 CE) theories on evolution, and Immanuel Kant (1724–1804 CE) who extended and sharpened Hume's theories with the assertion that reason is the source of morality (Morris & Brown, 2017; Nassar, 2016).

A key component of any philosopher's reflections and their potential to have impact and provide meaning is the intellectual space they can occupy and the interests of those who control the space. A historical view of human and social

development reveals the significance of religious doctrinal commitment, trade, education, military supremacy, scientific advancement and social cohesion to advance empires or repel invaders (Ragab, 2014; Evans & Evans, 2008; Abdalla, 2016; Rahman, Street & Tahiri, 2008). It also reveals a darker side of human existence, such as slavery, racism, colonialism, oppression, subjugation of spiritual belief systems and a dominance of intellectual reasoning, often to justify overriding perceptions of truth and meaning.

A contemporary example of dominance in intellectual reasoning and narratives that shape worldviews and subsequent engagements is the treatment of Islamic philosophy's and societies' contribution to human and social development. The Western narrative that Islamic science only contributed to scientific meaning between periods of classical Greek thought and the Renaissance in western Europe remains a prevalent discourse. Furthermore, it was a religious version of scientific knowledge, and a specific cultural product, rather than a universal project (Evans & Evans, 2008, p.95). From this revisionist narrative of history, the premise is that post-Renaissance European thinking kept advancing and is value neutral, while the Muslim world remained stagnant and a non-contributor to knowledge, somehow acting as a critical observer on the sidelines, stuck in the past. Understandably, this narrative is contested and has been subject to realignment from scholars in both Islamic and non-Islamic circles (Ragab, 2014; Evans & Evans, 2008; Rahman, et. al., 2008; Abdalla, 2016; Al Sharrah, 2003; Sabra, 1996). Edward Said's *Orientalism* (1978) reflects on the Western discourse towards the East, arguing how Western historical and constructed narratives primarily create and maintain an Eastern 'other' who are not seen as equals but more as curiosities and objects of usefulness to

maintain power in all its forms. Power is the objective, not a meaningful engagement based on egalitarianism. However, history has also shown that empires and systems of thought and governance have risen and fallen because truth and meaning, rational and the irrational, are in a continual state of evolution and contestation.

Science and religion remain joined in the same purpose of knowledge-building for the betterment of humankind. What Evans and Evans (2008) call a “warfare narrative” is the conflict between religious and scientific scholars over competing truths on worldviews and human existence (pg.88). They believe it is unhelpful to talk in competing narratives because each discipline can cohabit and contribute understanding and meaning (Evans & Evans, 2008). Primarily, truth conflicts over creationism and the end of life remain, but these are accommodated and not exclusionary to a mutual respect of each other’s role in human and social development because no one has been able to provide absolute proof either way (Evans & Evans, 2008). These conceptions remain in the contested space of logical reasoning and/or theological revelations to provide meaning and truths in worldviews and governance of societies.

1.2 Belief, Faith and Consciousness in Human and Social Development

The power of faith and belief in the human psyche, and the social structures and systems of governance that spring from them, is critical in the advancement of humankind. Any inquiry into systems of belief and how they manifest soon starts to reveal terms such as hope, values, culture, morality, social order, normative, identities, nations and communities. While these are largely positive, there is also the language of exclusion and ‘othering’ with problematic terms such as savages, uncivilised man, lower religions, assimilation and uneducated (De Vattel, 1844; Coe,

1904; Ellwood, 1913&1918; MacLennan, 1922; Mitchell, 2007; Pettit, 2015; Commonwealth of Australia, 1997). Critical examination of the links between individual and a collective consciousness and morality leads into deconstructing what role religion or belief systems play and how their meaning is defined in human existence and societal expectations of inclusion or exclusion. Critical reflection is fundamental to human development, but what could be considered useful is the philosophical framework of inquiry adopted, thereby influencing perceptions, promoting self-reflection and resulting in the most appropriate engagement and decision-making. A sociological perspective is rooted in phenomenological assumptions of competing truths in social order doctrines of belief (Csordas, 2004; Evans & Evans, 2008; Sherkat & Ellison, 1999; Coe, 1904; Ellwood 1913 & 1918; Mitchell, 2007). These conflicting truth narratives can quickly transfer into a discourse of superiority for one belief system over another and inflated convictions, or a rise of the irrational over the rational. An anthropological view could provide more clarity, or meaning, because it is founded in cultural relativism, which is localised and custom centric, rather than universal, essential and enduring (Evans & Evans, 2008, pg.96). An anthropologist's view is to understand how belief systems create meaning and are transported across cultural boundaries and geographies, rather than determining their validity to exist.

Modern and post-modern social theorists have given considerable thought to the reason for religion, and its role and function in society, resulting in various theoretical positions. Functionalists, such as Emile Durkheim (1858–1917 CE), the French philosopher and sociologist, and Talcott Parsons (1902–1979 CE), the American sociologist, were generally positive, seeing religion as providing social

cohesion, bringing order and stability, along with a collective conscience, but failed to acknowledge how it can divide society through exclusion and conflict (Van Krieken, et. al, 2006). Karl Marx (1818–1883 CE), the German Philosopher, saw religion as a tool of oppression that reinforces class distinctions and exploitation of the proletariat (Van Krieken, et. al, 2006). Critical realists, who challenge empiricist and idealist philosophies, argue that our understanding of ‘what is real’ needs to accommodate things apart from our own experiences and knowledge bases (Bhaskar, 2008 & De Souza, 2014). Although a broad feminist critique is that religion is inherently patriarchal, this has been created by the men of religion, not the religion (Van Krieken, et. al, 2006). Human rights theories, shaped by the principles of positivist universalism, secularism and a rule of law see religion as a factor in realising the individual’s inalienable human rights (Reynaert, Bouverne-De Bie & Vandervelde, 2009; Kaime, 2010; An-Na’im, 2000).

While these positional snap-shots are useful to define, and delineate differences of theoretical opinion, they stop short at understanding *the faith* of believing in a greater purpose or a consciousness of the spiritual self. Consciousness is fundamental to human existence and has been defined as a qualitatively subjective experience that is socially constructed, fluid and individually developed on our personal interpretation of the world, which manifests primarily in our morality (Searle, 2007 & Dennett, 2011). In terms of faith, a consciousness of faith is a separate state of being from the rituals and mythology of theological scripts or the application of social patterns; it relates to an individual’s inner conviction and commitment towards their spiritual constructions of truth and meaning (Ellwood, 1913 & 1918). Consciousness guides interpretation and constructs meaning and belief, within

whatever system of thought and governance an individual exists and remains a continual work in progress because human existence is constantly evolving and being reinterpreted.

The development of belief and consciousness are fundamental to understanding human and social development, particularly when viewed through the various faith paradigms that provide some means of understanding how humankind has advanced, constructed meaning, established values and imposed boundaries of social inclusion or exclusion. What Ellwood (1918) calls “the commonly accepted seven stages of religious evolution” (p.342) provide definable systems of belief that are linked with human development, namely: *pre-animism* (spiritual energy in objects); *animism* (supernatural power that animates the universe); *totemism* (spiritual connection and identity of individuals or kin groups through animal or plant totems); *ancestor worship* (deceased family members can influence the present and future); *polytheism* (worship of multiple gods and deities); *henotheism* (patron god for family, tribe or group); and *monotheism* (belief there is only one God). They also provide clarity on what is considered ‘sacred’ and ‘divine’ to create social order and meaning where they are adopted (MacLennan, 1922). When Charles A. Ellwood (1873–1946 CE), the American sociologist, uses the phrase “religious evolution” (1918, p. 342), it can subtly lead the reader towards a perception that the natural conclusion, at the seventh stage, is monotheistic belief and this is the correct order of how humankind has developed from primitive beings into an enlightened state of consciousness of a single God. However, this position is problematic when considering the significant contributions to human development from the believers of Taoism, Hinduism,

Buddhism and those whose spirits live in totems, such as Australian indigenous First Nations communities.

MacLennan (1922), in his work *Religion and Anthropology*, brings a perspective of how various religions, such as Hinduism, Christianity, Judaism and Buddhism have used belief systems (animism, polytheism, monotheism, etc.) to reinforce the centrality of what is ‘sacred’ and ‘divine’ in their construction of meaning, and how this is more of a human tendency towards interpretations and application to create and maintain social order. In support of this argument, MacLennan links societal evolution from kinship groups into nations, where the focus of the group went from family and tribal allegiances to patriotism, “through this the individual emerges as a ‘subject’ of rights and duties in himself” (p.606), plus has obligations to the state (p.606). Loyalty to the sovereign or state and the various methods of authoritative control that manifest through institutions, law and custom is expected. In this process, religion, or systems of belief, transform and are characterized by the national identity of sovereigns and states, rather than individuals’ relationship with their religion (p.606). This interpretation of religion’s role in human and social development goes beyond a consciousness of thought towards a higher power. It develops into a system of rules and shared cultural moralities that are implicitly or explicitly defined and obligated by the collective, thereby regulating inclusion or exclusion. This resonates with the arguments around the manipulation and use of theology and mythology to meet social or political objectives, rather than the interests of the individual’s consciousness in faith (Auda, 2007 & 2008).

1.2.1 The Social Contract

Also underpinning MacLennan's reflections are the principles of *social contract theory*; the move from a state of nature, meaning without government, into civil society, which is based on a reciprocity of interest, obligations and liberty between citizens and the model of governance adopted and accepted by the collective (Gottlieb, 2016; Lloyd & Sreedhar, 2014). Thomas Hobbes (1588–1679 CE), the British moral and political philosopher, is famous for his pioneering work on social contract theory, with the often-quoted adage, that life in the natural world, meaning without sovereignty and government, would be “nasty, brutish and short” (Gottlieb, 2016). Hobbes believed that when man comes out of the natural world and into a collective, there needs to be a common understanding and agreement of what is good and virtuous, and this is represented in the authority of the sovereign power; for Hobbes, this meant monarchy and their absolute legal authority (Lloyd & Sreedhar, 2014). In his 1651CE seminal publication, *Leviathan: the matter, forme and power of a common-wealth ecclesiasticall and civill*, Hobbes wrote about the “lawes [sic] of nature” which were established on a rational understanding of what is best and good for the world. Hobbes believed that man in nature is at war with himself and, once brought into civil society, which is based on fairness, protection and progress, man naturally advances for the betterment of himself and society (Lloyd & Sreedhar, 2014). Critiques of Hobbes' natural law and his social contract theories have highlighted the problematic assumptions of a universal expectation from society, particularly from a class perspective, and the benevolence of a sovereign monarch, that contrast with history or lived experiences (Russell, 1961, pg. 540-41). Unsurprisingly, monarchs appreciated this theory, but Hobbes also faced considerable resistance from religious authorities of the era, who challenged his faith

in God's order, even labelling him an atheist (Russell, 1961, pg. 532-33). Although Hobbes' theory was of its time, the fundamentals of social contract theory, in terms of a reciprocity of interest, social justice and civil obligation to be part of a community or nation remains, either consciously or sub-consciously, in the human psyche. Often contested within the scope of contemporary Western liberal democratic narratives and interpretations is Hobbes' overarching principle of the rights and obligations between citizens and those who are chosen to govern to be equal partners in the social good and to be virtuous to realise a harmonious society. It also gives some insights into the philosophies of truth and meaning that were circulating in 'civilised Europe' and their expectations as European colonisation extended and firmed its grip on 'new worlds' into the 18th century CE.

1.2.2 Maqasid al-Shariah

With a considerable resurgence of interest in the late 20th century, maqasid al-Shariah (objective or meaning of Shariah) has been, and continues to be, within the critical intellectual space of Islamic scholars, academics and jurists (Kamali, 2012). Maqasid al-Shariah represents the unequivocal, clearly defined, Islamic social contract for the *ummah* (Islamic community) across the world, particularly when the five pillars of Islam form its foundation. To establish and agree on what the meaning and objective of Shariah is, and then to transfer this into sovereign law that regulates social values, moral expectations and governance of societies, is a significant challenge that has been considered for centuries. Eminent Islamic scholars between the fifth and eighth Islamic centuries defined al-Shariah's meaning and purpose, with the final stratified iteration being attributed to Abu Ishaq al-Shatibi (d. 1388 CE) (Auda, 2008; Kamali, 1999, chapter 20, 2008 & 2012; Alwani, 2014).

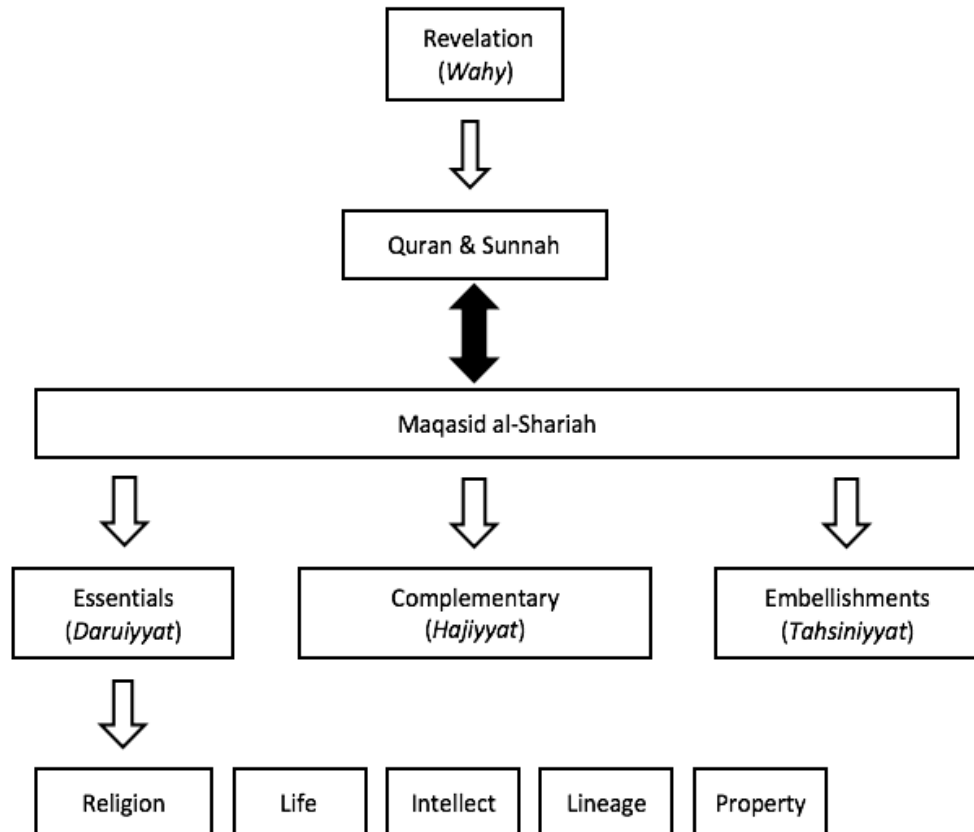


Figure 1.1: Stratified Hierarchy of Maqasid al-Shariah
(Adapted from Auda, 2007 & 2008)

The intention of the Islamic scholars, including al-Shatibi, was to give an overarching philosophical imagining to what Islamic society would be under al-Shariah, along with a set of tangible objectives for Islamic *ulema* (sacred law and theology scholars) and jurists to achieve while addressing social issues using the Islamic juristic deductive process of *usul al-fiqh* (Kamali, 1999 & 2012). In basic terms, the maqasid al-Shariah doctrine answers the essential questions that law addresses, namely, what type of society do we want and what effect does this law have in achieving it? Based on his examination of the Quran and ancient literature, including al-Shatibi's reflections, Kamali (1999, page 396) believes the overarching philosophy of maqasid al-Shariah is an Islamic society built with justice (*qist*),

compassion (*rahmah*) and education of the individual (*tahdhib al-fard*), primarily to achieve the virtue of God's consciousness (*taqwa*).

Abu Ishaq al-Shatibi defined and prioritised Islamic values, drawn from the Quran and Sunnah, that consider *maslahah* (public interest) through focusing on essentials (*daruiyyat*), complementary (*hajiyyat*) and embellishments (*tahsiniyyat*) (Auda, 2007 & 2008; Kamali, 1999, chapter 13 & 2008). The most important are the 'essential' values, namely the preservation of religion, life, intellect, lineage and property, because Shatibi believed these are the fabric that bind the Muslim *ummah* and without them society becomes unbalanced and dysfunctional (Auda, 2008; Qadir & Sultan, 2013; Kamali, 1999; Ibn Khaldun, 1958). The complementary maqasid (*hajiyyat*) are not as specific as the essential, but principally relate to granting concessions to reduce hardship (Kamali, 2016b). An example is removing the obligation of fasting for the sick or the traveller during Ramadan. The embellishment maqasid (*tahsiniyyat*) are limitless in definition and largely focus on behavioural expectations of Muslims (Kamali, 2016b). An example is cleanliness, which brings beauty to the individual and when applied to community settings, comfort and peaceful surroundings. The complementary and embellishment maqasid are supporting expectations drawn from the Quran and Sunnah that, when combined with the essential maqasid, serve as a holistic Islamic way of being, which realises the Lawgiver's message (Kamali, 2016a & 2016b).

Shatibi encouraged the application of maqasid al-Shariah to interpret and give meaning to the divine commands and prohibitions of the Lawgiver because this critically reflective process will better reveal the intent (Shabiti, cited Kamali, 1999,

p 403). Moreover, the values defined are about a society that is built on inclusion, justice and compassion rather than a rigid and forced compliance to Shariah through fear or coercion (Ibrahim, 2014; Kamali, 1999, chapter 20)

In contemporary Islamic academic publications, *maqasid al-Shariah* is being seen, and called upon, to bring Islamic jurisprudence into the 21st century CE to address modern dilemmas such as human development, bioethics, domestic violence, child custody and child sexual abuse (Auda, 2007 & 2008; Kamali, 2008; Ali, 2014; Saifuddeen, Rahman, Isa and Baharuddin, 2013; Husni, Nasohah and Kashim, 2015). There are concentrated attempts to not only apply this framework to 21st century concerns but also to further elaborate and introduce modern language to the Shabiti framework (Abdul Rauf, 2015, pg. 27). This is intended to make it more accessible and move it towards being linguistically inclusive of universal basic values, more specific in meaning and for it to be based on the Quran rather than Islamic heritage and medieval period interpretations and determinations which still resonate (Auda, 2008). Contesting some of these views are Islamic scholars who believe the existing *maqasid al-Shariah* articulation is inherently flexible and has the capacity to accommodate the modern world and any change of language would impact established meanings (Ibrahim, 2014 & Kamali, 2008).

The maintenance of *maqasid al-Shariah*'s truth and meaning, while advancing the Islamic *ummah*'s broad interests in fairness, compassion and not causing hardship in the 21st century, underpins the promotion of *maqasid al-Shariah* in current Islamic philosophy. Language usage and interpretation is only one element of the *usul al-fiqh* process. Meaning and objectives require equal consideration because

without a full comprehension of maqasid al-Shariah, a well-considered, inclusive decision is not possible and individual interest and opinion can take precedent, leading to literal interpretations and problems in social harmony, potentially bringing hardship (Kamali, 1999, chapter 20, 2008 & 2012; Auda 2007 & 2008). The process of constructing and interpreting Shariah law and the subsequent application of rulings, is one of the primary concerns for modern Islamic scholars who believe there is need for discussion and consideration of how maqasid al-Shariah can provide an exclusively Islamic answer to modern concerns that represents what was intended by the Lawgiver (Auda, 2008; Kamali 1999, 2008 & 2012, Saifuddeen, Rahman & Baharuddin, 2013; Ibrahim, 2014).

1.3 Childhood in Islamic Jurisprudence

Islamic law and teachings have a clear path set for children and childhood which is defined by stages and obligations towards being both connected and guided by Allah through the teachings of the Quran, and obligations to their parents and the Muslim *ummah* (Al-Krenawi & Graham, 2000; Olowu, 2008; Rajabi-Ardeshiri, 2009). Parents also have obligations to their children and will be questioned on Judgement Day regarding their treatment; they are rewarded, if they raise a pious and caring child (Stacey, 2010 & Olowu, 2008). Throughout the Quran, there are references to the importance of children and their treatment from the womb to maturity. Shariah law places importance not only on physical wellbeing but also on the importance of family and community relations, education, seeking knowledge and spiritual guidance (Olowu, 2008; Habashi, 2015).

The Quran and the teachings of the Prophet Mohammad preceded the 20th century's CE United Nations Convention of the Rights of the Child (UNCRC) by centuries (Van Bueren, cited in Hashemi, 2007). Children's importance and vulnerabilities were acknowledged and addressed well before the UNCRC, through guidance from the Quran and Sunnah. The treatment and development of children remains a central hub of the Islamic way of life, with a concentration and clear articulation of how children should be treated and their role and obligations within Muslim society (Hashemi, 2007 & Olowu, 2008). Under guidance of the Quran, Muslim children are exposed to and taught their religious duties from an early age, with equal reinforcement of their obligations to community duties (*fard kifayat*), broadly defined as consistently 'doing good' and avoiding 'evil' personally or in/with others (Olowu, 2008). A comprehensive review of Quranic teachings and Shariah law and their guidance on contemporary discourses towards child's rights and childhood was carried out by UNICEF and Al-Azhar University in Cairo, Egypt (2005 and 2016). From this work, importance is placed on the interconnectedness of Islamic rules, law and guidance that form a 'childhood jurisprudence' which is squarely aimed at bringing children into adulthood with a clear understanding of Allah, the Quran and their role and responsibilities to these, plus to themselves, their parents, their extended family, their community and Islamic society in general. Moreover, through the principle of reciprocity, parents, kinship groups and communities have responsibilities to raising and guiding children (UNICEF & Al-Azhar University, 2005; Olowu, 2008, Rajabi-Ardeshiri, 2009).

Obligations and rights under Shariah law are clearly defined for children and the broader Muslim *ummah*. They are based on both the ability to receive rights and

to bear moral and legal responsibilities to them (Olowu, 2008; Abolaji, et. al., 2014), through the concept of ‘*dhimma*’, defined under Islamic law as “a quality by which a person becomes fit for what he (or she) is entitled as well as what he (or she) is subject to” (Abdallah, 1978, cited in Olowu, 2008). Obligations and rights are morally trusted to humans based on their capacity to equally comprehend their entitlements, along with their obligations to them (Olowu, 2008). Explicitly for children, al-Shariah gives further guidance on these issues through legally defining four stages of childhood capacity development to obtain rights and obligations (*ahliyyat wujud*) (Olowu, 2008; Abolaji, et. al., 2014).

During the first stage, from conception to birth, the foetus has ‘incomplete receptive capacity’ (*ahliyyat wujud nakisa*) and no obligations but has rights to inheritance and what is determined under Shariah law for the offspring of the parents (Olowu, 2008; Abolaji, et al., 2014). The second stage is from birth until the ‘age of understanding’ (*tamyiz*), approximately seven years of age, where the child obtains the reasoning capacity to know right from wrong and ‘complete receptive capacity’ (*ahliyyat al-wujud kamila*) and “receives or claims all obligations due to him, such as inheritance, maintenance, etc.” (Olowu, 2008 & Abolaji, et. al., 2014).

The third stage is from the age of understanding until maturity (*baligh*) where the child has ‘incomplete active legal capacity’ (*ahliyyat ada nakisa*) and is increasingly given and takes more responsibilities which have legal ramifications, with the presence of a guardian or adult to support and to ratify the actions is necessary (Abolaji, et. al., 2014). The fourth stage is from maturity until death, where the child becomes an adult and acquires ‘complete active capacity’ (*ahliyyat*

ada kamila), complete rights and obligations under Shariah law (Hashemi, 2007; Olowu, 2008; Abolaji, et. al., 2014). This juristic and moral framework has significance in the construction of who is a child, childhood and when a person gains maturity to act on their own behalf and to be held fully accountable to their actions within communities.

1.4 Childhood and the United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (UNCRC) is one of the leading global obligations for nation states and has been signed or ratified, either partially or fully, by all 197 United Nations member states (United Nations Human Rights Commission, 2016). Importantly, this includes nations with Muslim majority or minority populations. While there has been widespread acceptance of the principle acknowledging children need special consideration, there have been many reservations from these and other nations around particular sections of the UNCRC, including those relating to children's rights towards religion, the age of adulthood (18 years) and how they participate (Hashemi, 2007; United Nations Treaty Collection, 2016).

Malaysia ratified the UNCRC in 1995 initially with 12 reservations, now reduced to five (Nini Dusuki, 2015a, chapter 3). There are remaining friction points on how Malaysian cultural and social norms challenge the UNCRC's perceptions on children's punishments, education, freedom of religion, age of reaching adulthood, birth registration and discrimination (Malaysia, Ministry of Women, Family and Community Development, 2010; Child Rights International Network, 2010; Child Rights Coalition Malaysia, 2012; Nini Dusuki, 2015a). These points and Malaysia's

compliance with UNCRC expectations are monitored by the United Nations Committee on the Rights of the Child, whose remit is to keep account of the status and progress of the Malaysian Government towards meeting its obligations under the UNCRC agreement through official reports and governmental appearances before the committee in Geneva, Switzerland.

There have been reservations and criticisms of the sociologically rooted UNCRC regarding the universalist western-centric construction of childhood it articulates and promotes, and how it fails to fully interpret and accommodate the social, cultural and historical constructions of children and childhood in non-Western states and indigenous communities (Morrow, 2011; Fler, et. al., 2008, Reynaert, et al., 2009; Olowu, 2008; Rajabi-Ardeshiri, 2009; Nieuwenhuys, 1998). A clear example of these reservations comes from the Organisation for Islamic Cooperation's (OIC) Covenant on the Rights of the Child in Islam (CRCI) (2005a). The CRCI was drafted by OIC members and has been signed by the 57-member states, including Malaysia (Organisation for Islamic Cooperation, 2016). It is designed as a clear declaration of Islamic values towards what constitutes an Islamic childhood and the role and function of Muslim children, parents, the *ummah* and Islamic nations. The CRCI acknowledges the UNCRC and they share similar, overarching themes to enable a healthy child and childhood. However, there are fundamental differences regarding a child's freedom of religion, adoption, the parent and child relationship, the role of the state and 18 years of age being the marker of adulthood. The CRCI firmly centres Islamic jurisprudence as the best interest of Muslim children, rather than a universal interpretation and construction of a child's rights (Organisation of Islamic Cooperation, 2005a).

An extensive discourse analysis of international UNCRC literature was undertaken on the 20th anniversary of the 1989 UNCRC (Reynaert, et al., 2009). Three primary themes pervade and present in academic literature over the period, namely: “autonomy and participation” are the new norm for children in practice and policy; “children’s rights versus parental rights”, meaning the incursion of judicial and social expectation on parents towards their children; and finally, the “global children’s rights industry” and their technically positivist presentation of child rights in policy and practice that can be inconsiderate of alternative points of view and other possibilities (Reynaert, et. al., 2009, page 518). Reynaert and colleagues (2009, page 529) propose that the child’s rights discourse, reflected in documents such as the UNCRC, is part of a wider construction of children and childhood that commenced in the 19th century CE, where a process of ‘educationalization’ has taken place. Children’s lives and development have been institutionalised and decontextualized and brought into a global normative space of rights and production that is primarily focused on an expectation of what they will, or should, become, rather than on what is really happening for them in the present (Reynaert, et al., 2009 & Morrow, 2011).

An accompanying factor of the UNCRC discourse, as highlighted by Reynaert and colleagues (2009) has been the rise of child-focused organisations both within the United Nations system and non-government sectors, acting both globally and locally. These organisations bring a uniformity of principle and often the same in actions and expectations, sometimes leading to misinterpretations of intentions and, at worst, conflict in host communities (O’Leary & Squire, 2012; Squire & Hope,

2014). Concurrent with the evolution of human and child rights discourses has been a rise in academic and social policy interest in children. Until the middle of the 20th century CE, children had primarily been regarded as pending adults under tutelage who would be heard and acknowledged upon reaching adulthood, either in their early 20s or upon becoming economically active and visible through entering the workforce (Reynaert, et al., 2009 & Morrow, 2011). What this means for the state is pressure at the global, national and local levels by organisations and individuals with human rights expectations and voices that are easily heard and buoyed with modern communications methods.

The location of Allah, the Quran and the principles of Islamic child development is a friction point within the child rights discourse under the UNCRC, which advocates for children to be seen beyond these types of frameworks and more as participatory individual agents of their own destiny (Morrow, 2011; Fler, Hedegaard & Tudge, 2008; Reynaert, et. al., 2009). Children and their protection are matters for state involvement, where individual rights holders keep duty bearers accountable to achieve their inalienable rights. The state, with all its legal enforcement capacities, is brought into the family dynamic, thereby constructing obligations within the parent and child relationships (Morrow, 2011 & Fler, et. al., 2008). UNCRC advocates see this in a positive light because, largely imagined through Western universalist, secular and legal lenses, it not only better protects children, it also ensures them agency in how their lives are shaped and which direction they take (Reynart, et al., 2009). Thereby, moving children from being receptors of adult knowledge and custom, to being acknowledged as citizens and

identified as contributing and constructing their own cultural space and understanding (Morrow, 2011 & Fler, et. al., 2008).

1.5 Children's Welfare and Protection in Malaysia

The 1957 Malaysian Federal Constitution (Malaysia, 2010) declares Islam as the religion of the Federation, along with freedom to practice other religions (article 3(1), plus the ability of religions to manage their own affairs and establish institutions to do so (article 11(3)). These are legislatively controlled at the state level, under Federal authority (Malaysia, 2010). The result for Muslim Malaysians is regulation by two legal systems, namely the 'civil' which deals with general law and order issues that are common and applicable to the entire population, and Syariah Courts, whose remit and authority is to the regulation of Muslims' personal and community matters.

The concurrence of the 'civil' and the 'Syariah' regulatory systems has been problematic for many years and is criticised as a colonial hangover that minimised Islamic jurisprudence within Malaysia's governance (Kamali, 2007 & Karmaruddin, 2012). It is the realisation of 19th century CE secular European ideals that separate public interests from private lives, primarily through judicially monitored itemised statutes and the displacement of religious institutions from government (Mian, 2016 & Kamali, 2007). This separation of the public and private is incongruent with Islamic jurisprudence and governance, leading to Islamic scholars calling for better efforts to reconcile civil and Syariah law expectations in Malaysia (Kamali, 2007; Kamaruddin, 2012; Tun Abdul Hamid Mohamad, as cited by Abdul Rauf, 2015). Conversely, and specifically for families and children, UNCRC advocates, such as

United Nations International Child Education Fund (UNICEF) and child-focused non-government organisations (NGOs), believe an increased strengthening of the secular Malaysian Child Act (Malaysia, 2001 & 2015) is required to remove anomalies between the concurrent systems and to increase preventative intervention by the state in the family unit to achieve compliance with the UNCRC (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013; Child Rights Coalition Malaysia, 2012; Child Rights International Network, 2010).

1.5.1 Department of Social Welfare (*Jabatan Kebajikan Masyarakat*)

Vulnerable Malaysian children's welfare and protection is monitored and regulated by the various states via the Department of Social Welfare (*Jabatan Kebajikan Masyarakat Negeri*), under central Federal control and direction (*Jabatan Kebajikan Masyarakat*) (DSWKL). The primary legislative mechanism that affords power to the social welfare departments and determines accountable processes to be applied to children, is the Child Act (Malaysia, 2001 & 2015). The development and passing of this act saw three child-focused Malaysian laws consolidated into one (Nini Dusuki, 2015b, chapter 2), and for the resulting Child Act (Malaysia, 2001 & 2015) to be in line with the principles and expectations of the UNCRC (United Nations, 1989; Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013; United Nations Treaty Collection, 2016).

The Child Act (2001 & 2015) applies to all Malaysian children and holds authority over Malaysian Syariah Courts when it comes to 'civil law' matters but not Shariah law offences, as determined by the Malaysia Syariah Criminal Offences Acts and the various state Syariah Criminal Offences Enactments. These are dealt with by

the Syariah Courts, under State regulation and Federal Constitutional authority (Malaysia, 2006c; Malaysia, State of Penang, 1996; Rahim and Yusof, 2014). Syariah Courts are only empowered to deal with Muslim ‘family’ and *ummah* matters, such as marriage, divorce, child custody, allegations of sexual relations or proximity outside marriage, public morality and zakat compliance. The courts are linked to Islamic affairs departments, such as the Malaysian Islamic Development Department (*Jabatan Kemajuan Islam Malaysia*) (JAKIM) that hold responsibilities to regulate authoritative committees, religious enforcement officers and Mosques. JAKIM’s Religious Enforcement Officers investigate complaints against Syariah Law, which is regulated by the Syariah Court system. JAKIM’s organisational structure mirrors the Department of Social Welfare, through having a central body located in Kuala Lumpur and representation at the individual state level.

Child protection is a dedicated discipline of a child welfare system and focuses on the protection of children from all forms of violence, abuse and exploitation. Current formal responses bring the state into the family unit with clear identification of a victim, legal powers and consequences for the child and their parent or guardian. The Malaysian Child Act (Malaysia, 2001 & 2015) empowers ‘protectors’ and the court for children to act in the best interest of a child’s safety and development. This includes, at the extreme end of the spectrum, removing children from parental or guardian control and for the child to be placed in state care (Malaysia, 2001 & 2015). Once in state care, and if there is no hope of returning the child to their parent or guardian, the state has an obligation to the child to find solutions that best develop the child into a responsible adult. Options include placing children in foster families, adoption, government run hostels, schools and centres that focus on their

development (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a; Child Rights Coalition Malaysia, 2012; Malaysia, 2001 & 2015).

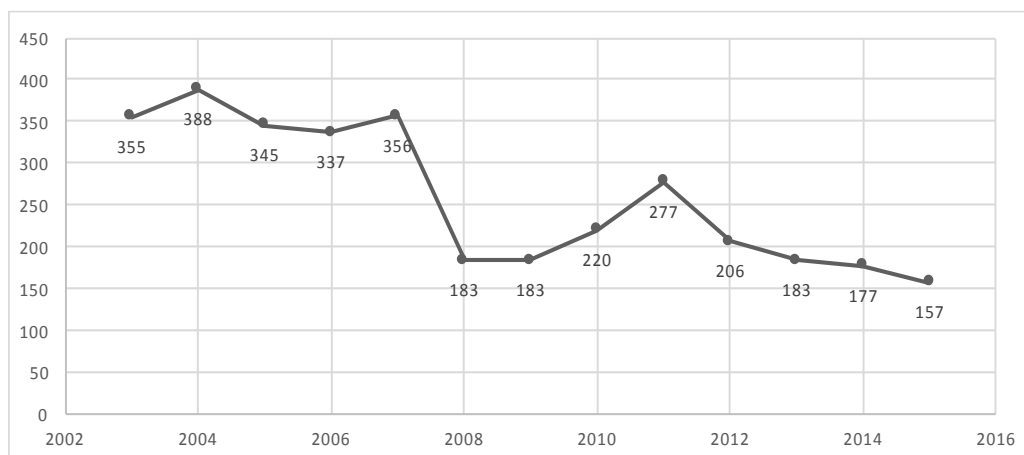


Figure 1.2: Children in Probation Hostels (Asrama Akhlak), Malaysia 2003-15.

(Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013a & Malaysia, Department of Social Welfare Statistics Report: 2009, 2010a, 2011, 2012a, 2013a, 2014 & 2015a)

Concerns have been noted about the capacity of state social welfare departments to best respond to children in need of protection. Of primary concern is how these children are unnecessarily criminalised through their removal from family and community connections and kept in institutions, where concerns are being raised about the quality of their development (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a; Child Rights Coalition Malaysia, 2012). The Department of Social Welfare assesses vulnerable children they identify or are referred to them and they make recommendations to the court for children in the relevant state. The court for children can use protection orders or civil law custodial penalties to place children in state run institutions (Malaysia, Ministry of Women, Family and Community Development and UNICEF, 2013 & 2013a; Child Rights Coalition Malaysia, 2012; Malaysia, 2001).