



# CHILD PORNOGRAPHY: A COMPARATIVE ANALYSIS OF SHARI'AH, MALAYSIAN AND ENGLISH LAW

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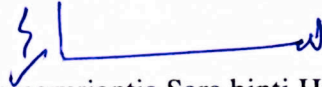
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## AUTHOR DECLARATION

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I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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## ABSTRAK

Pornografi Kanak-kanak adalah satu isu yang timbul yang menuntut kepada penyelesaian yang segera dan selaras. Asalnya pendekatan perundangan bagi kanak-kanak itu sendiri adalah tidak mencukupi untuk memelihara kepentingan mereka. Kajian ini bertujuan untuk mengemukakan analisis perbandingan undang-undang berkaitan pornografi kanak-kanak berdasarkan perspektif *Shari'ah*, perundangan Malaysia dan undang-undang Inggeris. Kajian ini menggunakan method penyelidikan kajian perpustakaan. Untuk memperoleh data, teknik kajian yang telah digunakan ialah pencarian maklumat dan penyelidikan di perpustakaan-perpustakaan terpilih dan internet. Hasil kajian menunjukkan peruntukan sedia ada tidak secara mutlaknya memperundangkan tentang pornografi kanak-kanak bagi perundangan Malaysia dan undang-undang Inggeris. Ini menunjukkan perlunya kepada beberapa perubahan dan penambahan undang-undang dalam membantu mengatasi kelompongan undang-undang yang sedia ada.

## ABSTRACT

Child pornography is emerging issues that require urgent and coordinated solution. Given the nature of children, the legalistic approach alone is not sufficient to protect their interest. This research project is library-based research attempting to make comparative analysis of child pornography in pursuant to Shari'ah, Malaysian law and English law. As such, the principles and practice of those legal systems have been examined. It concludes that the present laws in Malaysia and English law is not absolute to accommodate child pornography issues. Hence, the laws need to be amended and revised to protect the dignity of the children.

## ملخص البحث

كان فونوغرافي الأطفال هي قضية التي ظهرت واحتاجت إلى الحلول السريعة والمتناسقة. وفي الأصل أن مبدأ القوانين المعمولة حالياً غير كافية لحماية مصالح الأطفال. ولذلك حاولت الباحثة في هذا البحث تقديم تحليل المقارنة بين القوانين التي تتعلق بفونوغرافي الأطفال من نظرة الشريعة والقانون الماليزي والقانون الإنجليزي. ويعد هذا البحث دراسة مكتبية. وللحصول على المعلومات قد استعملت الباحثة على طرق استقرائي وجمع المعلومات في المكتبات المختارة ومن إنترنت. ونتيجة البحث تشير إلى أن القوانين المعمولة غير المكتملة في تقنين القوانين تتعلق بفونوغرافي الأطفال بين القانون الماليزي والقانون الإنجليزي. فذلك يدل على احتياج إلى التغيرات والإضافات في القوانين لمساعدة في إملاء الفراغ في القوانين المعمولة حالي.

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## GLOSSARY

<i>Diyat</i>	Fine
<i>Fiqh</i>	Substantive Law
<i>Habs</i>	Imprisonment
<i>Hadd</i>	Fixed Punishment
<i>Hukm</i>	Legal Text
<i>Inter alia</i>	among others
<i>Khas</i>	Specific
<i>Jinayat</i>	Islamic Criminal law
<i>Mumayyiz</i>	Fully attain the age of seven
<i>Niat</i>	Intention
<i>Qazf</i>	False Imprecation
<i>Qisas</i>	Retributive Punishment
<i>Qur'an</i>	Holly Book of Islam
<i>Ta'zir</i>	Discretionary Punishment
<i>Umum</i>	General
<i>Shari'ah</i>	Islamic law
<i>Sunnah</i>	Practice of Prophet s.a.w
<i>Zina</i>	Sexual Intercourse Out of Wedlock

## TRANSLITERATION

### 1. Alphabet

<u>Arabic</u>	<u>Latin</u>	<u>Example</u>	<u>Transliteration</u>
ء	'	النساء	An-Nisā'
ب	B	بدري	Badri
ت	T	تفكّر	Tafakkur
ث	Th	مباحث	Mabāhith
ج	J	جيلاني	Jālānī
ح	Ḥ	حديد	Hadīd
خ	Kh	خليل	Khalīl
د	D	داعي	Dā'i
ذ	Dz	ذكر	Dzikh
ر	R	رابطة	Rābiṭah
ز	Z	زكّير	Zakīr
س	S	سيد	Said
ش	Sy	شيخ	Syeikh
ص	Ṣ	صبر	Sabr
ض	Ḍ	ضعيف	Dai'f
ط	Ṭ	الطور	At-Tur
ظ	Ẓ	عظيم	'Aẓīm
ع	'	عمّان	'Ammān
غ	Gh	غافر	Ghāfir
ف	F	فتح الله	Fethullah
ق	Q	القسطون	Al-Qāsītūn
ك	K	كثير	Kathīr
ل	L	لم	Lam
م	M	مسلم	Muslim
ن	N	نطفة	Nutfah
و	W	وجودية	Wujūdiah
هـ	H	هريرة	Hurayrah

ي	Y	يوسف	Yūsuf
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## 2. Short Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
-----	A	أمر	Amr
-----	I	عاصم	‘Aṣim
-----	U	صبر	Sabr

## 3. Long Vowel

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
ا	Ā	مذاكرة	Muzākarah
و	Ū	المتقون	Al-Muttaqūn
ي	Ī	عالمين	‘Ālamīn

## 4. Diphthong

<u>Arabic Vocal</u>	<u>Latin Vocal</u>	<u>Example</u>	<u>Transliteration</u>
و	Ww	متورة	Munawwarah
ي	Yy	تيمية	Taimiyyah
ي	Iyy	البخاري	Al-Bukhāriyy

## 5. Exemption

5.1. Arabic letter ء (hamzah) found at the beginning of a word is transliterated to the letter “a” not to ‘, example:

<u>Example</u>	<u>Transliterated</u>
أحمد	Ahmad

**ABBREVIATIONS**

Ed.	Editor/edition/edited by
n.a	no author
n.d	no date/no year
n.pl	no place
n.pb.	no publisher
p.	page
pp.	pages
vol	volume

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

Child Pornography is a grim fact of life in our society. Child pornography is also almost universally prohibited and illegal in most jurisdictions. In reality, the past ten years have seen the emergence of children porno as one of the most critical problems facing society and also as a social problem warranting a range of interventions is a recent phenomenon.

Obviously, child pornography is absolutely against the law as well as is a serious form of child abuse besides other sexual exploitation. Occasionally, the term 'commercial sexual exploitation' is used to refer to child prostitution and child pornography. Children whether boys or girls are most often victimised by any person who are not responsible. Almost always the child is convinced to engage in pornography. As a result, the child could be victimized in child pornography. In a nutshell, child pornography is a behavior that we acknowledge is important and should be discussed in a rational, personal as well as specific manner.

The term "child" is normally defined clearly by each country's child pornography laws; however the definition of "pornography" varies dramatically, and is open to vast ranges of interpretation, even within a single jurisdiction. Child pornography is a complicated task since its definition is closely linked to the national contexts and moral criteria which rule them. Besides, this term is based on the concept of child which must be defined first.

This chapter discusses both from literal and legal definition of the term child pornography in different perspectives i.e. Shari'ah, Malaysian law and UK legislation. The chapter proceeds to discuss types of child pornography.

## 1.2 Literal Definition

### 1.2.1 Child

According to various dictionaries: child is defined with variety of interpretation and are as follows:

- (i) Children is a very young person, who is no longer a baby but not yet an adolescent and a son or daughter. Besides that, child is a son or daughter and also a person with a bad temper or little experience.<sup>1</sup>
- (ii) Child is a noun which means a young person whether boy or girl or someone's son or daughter.<sup>2</sup>
- (iii) Child is a boy or girl between birth and puberty and a baby or infant and also unborn baby.<sup>3</sup>
- (iv) Child is a young person, especially between infancy and youth, an unborn or recently born person as well as a son or daughter and also childlike or childish person. A person who is strong influenced by another or by a place or state of affairs.<sup>4</sup>
- (v) Kamus Dewan defines children as a boy or a girl child that in the state of childish. Normally, a child is yet attains the age of 7 or 8 years.<sup>5</sup>
- (vi) Children are the plural of child defines as a human being who is not yet an adult.<sup>6</sup>
- (vii) Children also means as a young person especially between infancy and youth, and unborn or recently born person and a son daughter.<sup>7</sup>
- (viii) Child is a fetus; an infant and a boy or a girl and a youth of gentle birth. Chiefly as a title. A person who has (or considered to have) the character,

manners, or attainments of a child, especially a person of immature experience or judgment: childish person. A son or daughter (at any age) of (or with my etc.); an offspring of human parents.<sup>8</sup>

- (ix) According to common law, a child attains his majority at the age of 21. However, in section 1(1) of the family Law Reform Act 1969, the age of majority is eighteen.<sup>9</sup>
- (x) According to section 2, a 'child' means an unmarried person under the age of 21 including a female who has been divorced in this range of age. For a male, he has to be below 21 years old and unmarried yet. Male who has been divorced in the variety of these ages does not consider as a child or no longer as a child.<sup>10</sup>

In conclusion, the various definitions mentioned above are related one to another which features similar characteristic i.e young and age limitation.

### 1.2.2 Pornography

Pornography is defined in various terms:

- (i) Pornography constitutes a view or narration such an acts (behaviour, occurrence and others) with manners of passionate and purport to arouse sexuality (through reading, film and others), viewing and narration of such acts obscenely; and every stuff (such as film, photo and reading material) that functions to arouse sexuality.<sup>11</sup>
- (ii) Pornography is a noun that means obscene writings, pictures, or films intended to arouse sexual desire.<sup>12</sup>
- (iii) Pornography is erotic pictures, movies, or books meant to cause someone to become sexually excited.<sup>13</sup>
- (iv) Pornography is a writings, pictures, films, etc, designed to stimulate sexual excitement and also, the production of such material.<sup>14</sup>
- (v) Pornography is a noun that books, photographs, films; etc containing erotic material intended to cause sexual excitement.<sup>15</sup>

### 1.3 Legal Definition

#### 1.3.1 Shari'ah Perspective

According to the Encyclopedia of Islamic Legal Theory, child is defined as those who not yet reached the age of majority notwithstanding they are of puberty ever since they were born till they reached the majority age.<sup>16</sup>

The terminology of child that is commonly used in *Fiqh* books, are *sabiy*, *ghulam* and *saghir* for boys whereby the terminology of *sabiyyah*, *jariyah* and *saghirah* are for girls. These words show that their nature and physiological background as small or younger. As such children are individuals that have characteristic or incomplete physiological that is the physical and intellectual development such situation is common for every individual ever since they were born till the day they attain the age of puberty.<sup>17</sup>

According to Islamic law a child minor is a person who has not attained the age of majority or “*Al- Bulugh*”.<sup>18</sup> Hence, the determination of the majority of a person depends on the attainment of puberty. *Bulugh* or puberty is attained by male when he is capable of ejaculating sperm. Female is when she experiences menstruation.

Islamic law also define someone that yet attains the puberty level is known as children (*sabiy* or *ghulam*). These terms also often apply in *Fiqh* books, which mean *sabiy*, *ghulam* and *saghir* for male as well as *saghirah*, *sabiyyah* and *jariyyah* for female.<sup>19</sup>

This stipulation had been clarified according to a tradition narrated by Ali Bin Abi Talib and Aishah r.a, “three group of people who are not considered as liable to their act are the sleeping until they wake up, the children until they attain the age of puberty and the insane until they sound mind”. The Hadith explained that children are the one that yet attain the age of puberty. In other word, child is people who are not adult or under age of *baligh*. The growing process towards the adulthood takes different level from one individual to another. This time distinction is depended on the acceleration of intellectual and physical growing process. In the growing process towards the

adulthood, the children will undergo the level of physiological development. Fiqh jurists differentiate these two levels with the nature of *tamyiz* which attained by every children in their growing development.<sup>20</sup>

**(a) Tamyiz**

*Tamyiz* is a derivative word from the verb *mawayyaza yumayyizu*.<sup>21</sup> This word comes from Arabic.<sup>22</sup> It means to prefer one thing over another or to differ one from another. *Tamyiz* literally means the ability to distinct things or differentiate something.

According to Fiqh terminology, there are various views among Fiqh jurists that attempt to clarify the meaning of *tamyiz* with referring it to the nature and behavior of a *mumayyiz* child. Among them are the child is self-ability in doing acts like eating, drinking and purifying without the helping from others. There are views that depict its meaning with the ability of understand enquiry and to search for the answer. The other view depicts with the ability to be acquainted with rights and wrongs. Some view with the ability to differ the left hand with the right hand. This final view is in accordance with a tradition that narrated by Muaz bin Abdullah.<sup>23</sup>

According to Abu Zahrah *Fiqh* jurist explain the meaning of *tamyiz* as the ability to understand generally the effect from buying and selling contract that is able to grasp the effect from selling i.e. the selling item cease from the ownership of the seller and the effect from buying i.e. is to be owned by the buyer as the exchange with money that pursuant to the selling. In other words, *tamyiz* is the ability to understand that selling means discharge things from the seller's ownership and buying means that penetrate things into the hands of the buyer.<sup>24</sup>

From the above explanation, it can be summarized that *tamyiz* according to *Fiqh* is the ability to understand the sayings, to discern things, to obtain the basic self necessity without the helping from others and capable to distinguish between good and bad. As such, Islamic law has stipulated *tamyiz* as a condition to validate the *niat*. Therefore, worship act of a child that yet to attain *mumayyiz* and the insane is not legally binding because of such factor.

## (b) Physiological Development

The complete *tamyiz* cannot be attained in one occasion but it develops in accordance with the children development in the course of its adulthood. Based on the medical practitioners, prior to adulthood every child will go through two development levels which lasting for seven years.

Before *mumayyiz*<sup>25</sup> – this level begin since a child is born till the age of seven. Normally children do not possessed the nature of *tamyiz*; unable to think in order to distinct perfectly between good and bad, of no *idrak* or the capability to understand or contemplate the effect of the conduct. This level also is yet-to-be *mumayyiz*.<sup>26</sup>

*Mumayyiz*<sup>27</sup> – this second level begins when a child fully attain the age of seven because that age bring together the nature of *mumayyiz*. As such, the Fiqh jurists stipulated the minimum age of *mumayyiz* is seven years old. This prerequisite as the minimum requirement for a child to obtain *tamyiz* was the strongest view as had been narrated by Abdul Malik bin Al Rabi' in a tradition.<sup>28</sup> At this stage of development, the child is known as *mumayyiz* child<sup>29</sup> because the child is begin to be able to think to make a distinction between good and bad. It is submitted, however, his capability still in the weaker and lesser stage if compared to the nature of adult's *tamyiz*. This process is constantly continue till the complete *tamyiz* that is when the child attain the age of majority or *baligh* because *tamyiz* instigate in incomplete form (*al-tamyiz al-naqis*) and will develop into complete form when the child become *baligh*. As such, the maximum age of *tamyiz* is the age of *baligh*. At that point of time, he is not known as a child but rather an adult.

Fiqh jurists used the word *tamyiz* and *mumayyiz* merely for children as the case for adult that is after *baligh*, such an adult is not called as *mumayyiz* but known as sound person to illustrate that he already attain the level of complete *tamyiz* or having the perfect and matured mind as well as the complete physical development. The terminology of *tamyiz* that is conform to children it doesn't mean as having complete mind but merely on the capability of thought and to differentiate between good and bad. An individual and such situation like in these two levels named as children. The

distinction between these two physiological developments is essential because it relate to the execution of punishment such as *takzir*<sup>30</sup> and *diyyat*.<sup>31</sup>

Since the crime of pornography is not known during the period of Rasulullah, Companion and earlier generations of Islam, hence such term was defined by Islamic jurists. The term is only known in modern days when act of crimes evolved and modified. However, where in the occasion that such crime is not punishable according to hudud and qisas, it will resort to ta'zir. Having said that, the general rule is that Shari'ah is recognizing any type of modern day crimes whereby the issue of its punishment need to in-depth detail observation.

### 1.3.2 Malaysian Law Perspective

This subtopic further observes the legal definition of both terms from various statutes that enforceable. As far as the finding by the research is concerned, the term 'child' had been explicitly provided and the details are as below:

- (i) A person under the age of eighteen years and in relation to criminal proceedings, means a person who has attained the age of criminal responsibility as prescribed in s 82 of the Penal Code.<sup>32</sup>
- (ii) A child of the deceased insured person; who is a child under twenty-one years of age and includes; a posthumous child, a dependent stepchild and an illegitimate child of the insured person; and a child adopted by the insured person under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and who is a child of any age and is mentally retarded or physically incapacitated and is incapable of supporting himself.<sup>33</sup>
- (iii) A step-child and a person adopted as a child under any written law of Malaysia or of any country, territory or place outside Malaysia, or under any custom recognised by any class or category of persons in Malaysia or in any country, territory or place outside Malaysia.<sup>34</sup>

- (iv) An illegitimate child, a step-child and a child adopted under any written law of Malaysia or of any place outside Malaysia, or under a custom recognised by a class of persons in or outside Malaysia.<sup>35</sup>
- (v) Son, daughter, grandson, granddaughter, stepson and stepdaughter<sup>36</sup>
- (vi) A child of a deceased Judge - (a) who is a child under twenty-one years of age and includes - (i) a posthumous child, a dependent step-child and an illegitimate child of the Judge; and (ii) a child adopted by the Judge under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and (b) who is a child of any age and is mentally retarded or physically and permanently incapacitated and is incapable of supporting himself.<sup>37</sup>
- (vii) Shall be construed as referring to a child as defined in section 48(9).<sup>38</sup>
- (viii) A legitimate child, a step child or child adopted in accordance with any law.<sup>39</sup>
- (ix) The meaning of "child of the marriage" as defined in section 2 who is under the age of eighteen years.<sup>40</sup>
- (x) Includes in relation to a woman, an illegitimate child.<sup>41</sup>
- (xi) A child of a deceased officer - (a) who is a child under twenty-one years of age and includes - (i) a posthumous child, a dependant step-child and an illegitimate child of the officer; and (ii) a child adopted by the officer under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and (b) who is a child of any age and is mentally retarded or physically and permanently incapacitated and is incapable of supporting himself provided that such child is mentally retarded or physically and permanently incapacitated before the child reaches the age of twenty-one years; [The words "provided that such child

is mentally retarded or physically and permanently incapacitated before the child reaches the age of twenty-one years" in this paragraph applies only to officers appointed to the public service after 15 May 1986 and to the dependants of such officers.]<sup>42</sup>

- (xii) A child of a deceased officer - (a) who is a child under twenty-one years of age and includes - (i) a posthumous child, a dependant step-child and an illegitimate child of the officer; and (ii) a child adopted by the officer under any written law relating to adoption or under any custom or usage, on satisfactory proof of such adoption; and (b) who is a child of any age and is mentally retarded or physically and permanently incapacitated and is incapable of supporting himself.<sup>43</sup>
- (xiii) An unmarried person under the age of twenty-one and includes a female under that age who has been divorced.<sup>44</sup>
- (xiv) Any person who has not completed his fourteenth year of age or of such age as the Yang di-Pertuan Agong may by notification in the Gazette prescribe.<sup>45</sup>
- (xv) Includes a step-child and a child adopted, before the death of the recipient, under any written law, custom or usage.<sup>46</sup>
- (xvi) Includes a step-child and a person adopted as a child under any written law of Malaysia or of any country, territory or place outside Malaysia, or under any custom recognised by any class or category of persons in Malaysia or in any country, territory or place outside Malaysia.<sup>47</sup>
- (xvii) Includes an illegitimate child, a step-child and a child adopted under any written law of Malaysia or of any place outside Malaysia, or under any custom recognised by a class of persons in or outside Malaysia.<sup>48</sup>

- (xviii) A child of a deceased member of the Fund and includes an illegitimate and an adopted child.<sup>49</sup>
- (xix) Includes a step child, an adopted child and an illegitimate child but does not include a child who is not dependent on the officer or servant.<sup>50</sup>
- (xx) In relation to an individual, means a legitimate child, step child or a child adopted in accordance with any law.<sup>51</sup>
- (xxi) A person under the age of six years.<sup>52</sup>

As the case for legal definition of pornography, there is no explicit definition because as far as the research is concerned, there are no pornography cases tried by any courts in Malaysia. Hence, the research discuss that the legal definition of pornography is amount to that of indecency in s 377D of Penal Code. Such indecency acts may amount to the act of pornography.

### 1.3.3 English Law Perspective

Child is defined as;

- (i) "child" means, subject to paragraph 16 of Schedule 1, a person under the age of eighteen;<sup>53</sup>
- (ii) "child" means, subject to section 9, a person under the age of eighteen (and "children" is to be construed accordingly);<sup>54</sup>

Although the statutory definition of child is defined under both Acts, nevertheless it is similar with merely on different clauses.

There is no settled definition of pornography in United Kingdom. What is considered simply sexually explicit but not obscene in England may not be similar to other countries.<sup>55</sup>