

# A COMPARISON OF CHILD PROTECTION LAW BETWEEN INDONESIA AND MALAYSIA

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## Abstract

*This paper aims to compare child protection law between Indonesia and Malaysia especially in terms of family law (marriage), child definition and age limit, as well as other foundational principles. Content analysis method of a variety of relevant references is used and a comparative approach to child protection law in Indonesia and Malaysia is taken. There are many similarities between child protection law in Malaysia and Indonesia, in which both systems specify the state, family, and parents responsibilities towards children. Also specified are handling of child's position, guardianship, rearing, adoption, religion, and abandonment. In addition, special protection such as maintenance, recovery, custody, care, investigation, nursing, education, prevention of economic exploitation, prevention of sexual abuse, prevention of child torture, and disability treatment are also included. This paper concludes that in Malaysia child protection law has been fully synthesised in Children Act of 2001 (Act 611), while in Indonesia child protection law is scattered in a number of laws related to children including the Child Protection Law.*

**Keywords:** *child protection law, Indonesia, Malaysia, comparative legal system.*

## I. INTRODUCTION

Children's rights are part of human rights as contained in Article 28 B Clause (2) Second Amendment of 1945 Foundational Law (*Undang-Undang Dasar 1945 – UUD45*) in which “every child deserves to live, grow, and develop, protected from violence and discrimination.”

Implementation of child protection in Indonesia is based on Pancasila and UUD 45 as well as United Nation Children's Right Convention comprising foundational principles such as children's non-discrimination, best interest, right to live, right to grow and develop, and right to opinion being heard and valued.

To position children's right in a legal system is to depict a fundamental aim of life. To the author's mind, a fundamental aim is to develop humanity in adherence of religious principles. As such, children's right in legal perspective includes legal aspect of the children's environment. Maulana Hasan Wadong has stated that “a Muslim must be conscientious to uphold children's right including positive national law

as consideration.”<sup>1</sup>

Abdur Rozak Husein has stated as follows: “If children in a society is well-adjusted, the society will develop into a well-adjusted society. It is stated in Islam that children is the seed of future society,”<sup>2</sup> as such the maintenance and rearing (*hadhanah*) of children is parents responsibility.

*Hadhanah* is “rights of little children, as they need supervision, protection, guardianship, education, with mothers bearing the responsibility to perform *hadhanah*”.<sup>3</sup>

Ibrahim Muhammad Al-Jamal stated that “Islam with all its rules and regulations pays significant attention towards societal welfare and safety. As such, child’s custody should be given to mothers.”<sup>4</sup> As Darwan Print stated that “legal protection of children must be prioritised”<sup>5</sup> and implemented.

Afisah Wardah Lubis stated that “Teaching children to be independent and responsible should be started early in life so they would not be shocked by adulthood.”<sup>6</sup>

In Law Number 23 Year 2002 on Child Protection children’s right has been regulated in 67 articles beginning from Article 4 to Article 71. The articles focus more on *hadhanah* and child legal protection issues.

In Law Number 1 Year 1974 on Marriage child custody law has been strictly specified as a part of marriage law in Indonesia. However, the law had not received deserved elaboration and detail in its

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<sup>1</sup> Maulana Hasan Wadong, 2000, *Pengantar Advokasi dan Hukum Perlindungan Anak*, Jakarta: Grasindo, p. 33.

<sup>2</sup> Abdul Rozak Husein, 1992, *Hak-Hak Anak Dalam Islam*, Jakarta: Fikahati Aneska, p. 19.

<sup>3</sup> Sayyid Sabiq, 1994, *Fikih Sunnah*, jilid 8, Bandung: PT. Al-Ma’arif, p. 160.

<sup>4</sup> Ibrahim Muhammad Al-Jamal, tr. Anshari Umar, 1986, *Fiqih Wanita*, Semarang: CV-Asy-Syifa, p. 450. See M. Ali Ash-Shabuni, tr. Saleh Mahfoed, 1994, *Tafsir Ayat-Ayat Hukum Dalam Al-Qur’an*, Vol. I, Bandung: PT. Al-Ma’arif, p. 616-617.

<sup>5</sup> Darwan Print, 1997, *Hukum Anak Indonesia*, Bandung: PT. Citra Aditya Bakti, p. 4.

<sup>6</sup> Afisah Wardah Lubis, 1998, “Memahami Perkembangan Psikologi Anak Dalam Rangka Implementasi Perlindungan Anak”, *Majalah Konvensi*, Vol.II No. 1 March 1998, Medan: LAAl, p. 62.

accompanying Government Regulation No. 9 Year 1975. Only after the implementation of Law Number 7 Year 1989 on Religious Court, and President's Instruction Number 1 Year 1991 on Islamic Legal Compilation, the issue of *hadhanah* became part of Indonesian positive law and Religious Court was given authority to deal with it.

In Law Number 1 Year 1974 on Marriage Article 42 to Article 54 had elaborated that parents are obligated to raise and educate children not yet reaching 18 years of age until the children get married or become independent. This responsibility remains eventhough parents' marriage dissolves due to divorce or death.

Family law in Malaysia is based on a culture of plural race, ethnicities, and religions. Eventhough the official state religion is Islam, Malaysia allows religious freedom. Different ethnicities possess different culture. For non-Muslim the replacement of *Christian Marriage Ordinance* 1952 with *Marriage and Divorce Act* 1976 renewed the stipulations on marriage law. Malaysia had simplified legal regulations and enforcements. For Muslims, eventhough legal stipulations in general is similar (using Syafi'i school of thought on marriage), there exist differences in a number of states as "these issues are under the jurisdiction of respective states". An effort towards uniformity has been conducted in Islamic family law and religious court.

The plurality of family law (especially marriage) in Malaysia can be seen in the reference to legal group in which a person belong for corresponding legal application. Such is also the case for marriage anulment and marriage ceremony. With the implementation of a variety of marriage laws for Muslims and the issuance of *Law Reform* (Marriage and Divorce Act) of 1976, Malaysia has witnessed a variety of forms and methods of marriage dissolution. In Marriage and Divorce Act 1976 reason for divorce is specified in Article 47 to Article 62. The prohibition of marriage between people of Islamic and other faiths which stipulates that "one of the parties need to convert to the religion of Islam" can be used as a reason for marriage dissolution in Marriage and Divorce Act 1976. This stipulation was not present in the previous legal acts.<sup>7</sup>

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<sup>7</sup> H. Ahmad Sukardja, 2001, *Hukum Keluarga dan Peradilan Keluarga di Indonesia*, Jakarta: Mahkamah Agung RI., p. 46-47. See Nik Moriani Nik Badli Shah, 1992,

In cases of family members quarrel, in which husband and wife divorce and fight for child custody, family law will be used to adjudicate it. Amount of child's support will be determined according to the same family law.<sup>8</sup>

Based on the above elaboration this paper will discuss: 1) comparison of family legal system (marriage) between Indonesia and Malaysia, 2) child definition and age limit, and 3) comparison of child protection law foundational principles between Indonesia and Malaysia.

Content analysis method of a variety of relevant references is used and a comparative approach to child protection law in Indonesia and Malaysia is taken.

## **II. COMPARISON OF FAMILY LEGAL SYSTEM (MARRIAGE)**

In Malaysia the stipulations which regulate children's right and parents responsibilities are contained in the Enactment of Islamic Family Law of 1990 (Enactment No. 5 of 1990). Article 89 Clause (1) stated that:

Although the right to hadhanah or the custody of the child may be vested in some other person, the father shall be the first and primary natural guardian of the person and property of his minor child, and where he is dead, the legal guardianship devolves upon one of the following persons in the following order or preference, that is to say.

- a) the father's father
- b) the executor's appointed by father's will
- c) the father's executor's executor
- d) the father's father's executor
- e) the father's father's executor's executor

*provided that he is a Muslim, a dult, sane and worthy of trust.*

The duty and responsibility of a guardian is to raise the child by providing adequate support, maintaining the child's health, and providing

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*Undang-Undang Keluarga Nafkah dan Hak-Hak Kewenangan Lain*, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 5, 7, 8 and 16.

<sup>8</sup> Abdul Azis Hussin, 1995, *Memperkenalkan Undang-Undang*, Kuala Lumpur: Dewan Bahasa dan Pustaka, p. 4.

appropriate education. (Article 3 Guardianship of Infants Act 1961).<sup>9</sup> The guardian must also maintain and monitor the child's wealth, performing acts deemed suitable to protect it. (Article 4 Guardianship of Infacts Act 1961).<sup>10</sup>

Article 88 Clause (2) Enactment No. 5 of 1990 have stated requirements which might be stipulated by a Court to a guardian, as follows:

Without prejudice to the generality of subsection (1), an order for custody may:

- a) contain conditions as to the place where the child is to live and as to the manner of his or her education
- b) provide for the child to be temporarily in the care and control of some person other than the person given custody
- c) provide for the child to visit a parent deprived of custody of any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the Court condiders reasonable.
- d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court considers reasonable; or
- e) prohibit the person given custody from taking the child out of Malaysia.

#### Guardianship of Person and Property.

The obligation to provide support for children is contained in Article 72 Clause (1) Enactment No. 5 of 1990 which states: *Except where an agreement or order of court otherwise provides, it shall be the duty of a man to maintain his children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food, medical attention and education as are reasonable having regard to his means and station in life or by paying*

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<sup>9</sup> Bahder Johan Nasution dan Sri Warjiwati, 1997, *Hukum Perdata Islam, Kompilasi Peradilan Agama Tentang Perkawinan, Waris, Wasiat, Hibah, Waqaf dan Shadaqah*, Bandung: CV. Mandar Maju, p. 159.

<sup>10</sup> *Ibid*, p. 160.

*the cost thereof.*

Besides the power to compel men to act as guardian, the Court also has power to compel women to pay or participate in providing child support if the Court judges the woman to be capable of providing it. (Paragraph (1) Article 93 Law Renewal Act (Marriage and Divorce) 1976).

The guardianship could also be given to a person who raise or nurture the child or to those who are responsible to the child. (Paragraph (3) Article 93 Law Renewal Act (Marriage and Divorce) 1976).

As such the children born in a marriage cannot be neglected. Both parents are obligated to raise and educate the children to the best of their ability. The obligation to raise the child is prioritised first to the father, then the mother. If both parents have passed away the court can appoint others to raise and educate the child.

In Indonesia, the dominant family law regulates the majority Muslim Indonesians, as contained in Law Number 1 Year 1974 on *Marriage*. For non-Muslim Indonesians, family law is regulated in Book of Civil Law. Should a divorce occurs, the divorce is adjudicated by State Court, while for Muslims, the divorce is adjudicated in Religious Court, using Legal Islamic Compilation and Law Number 1 Year 1974 on Marriage.

On this matter Malaysia *has many more similarities than differences*. The main difference is the family law in Malaysia is simpler and comprehensive. When a divorce occurs, issues to be discussed are child custody and support. Malaysian family law regulates child support issue and the person given right to child custody.<sup>11</sup> This regulation is contained in Children Act of 2001 (Act 611). For Indonesia, the regulations are scattered in a number of laws. Marriage Law determines child's position, parentage, guardianship, and parents' rights and responsibilities. Two other laws relevant to children protection are Islamic Legal Compilation and Child Protection Law.

In essence, child support responsibility after divorce in Indonesian law from the perspective of national, Islamic, or custom law prioritise men to uphold the responsibility. Also, decisions of Religious Court

<sup>11</sup> See Law Renewal Act (Marriage and Divorce) 1976.

more often than not task men to provide child support, even though in some cases panel of judges could rule otherwise based on other considerations. Judges attitude and view in determining men to provide child support depends of men's job, responsibility, and physical capabilities to work. Decisions are made on a case-by-case basis.

### **III. CHILD'S DEFINITION AND AGE LIMIT**

Child issues in Malaysia has been regulated by Children Act of 2001 (Act 611),<sup>12</sup> which is an act synthesising several laws regarding the maintenance, protection, and recovery of children and related issues.<sup>13</sup>

Child age limit in Children Act of 2000 (Act 611) specifies that a child is a person under 18 (eighteen) years of age. In Juvenile Court Act of 1947 it is stated that a child is a person under 18 (eighteen) years of age. So a juvenile can come from two groups, one as a "child" under 14 years of age, and two as "teen" between 14 to 18 years of age.<sup>14</sup>

Child Protection Act of 1991 (Act 468) states that a child is a person under 18 (eighteen) years of age.<sup>15</sup> While in the Women and Girls Protection Act stated that a child is a person under 21 (twenty one) years of age. However, with the Children Act of 2001, women between 18 to 21 years of age are protected under Canon of Chastisement.<sup>16</sup>

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<sup>12</sup> See Lembaga Penyelidikan Undang-Undang 2002, *Akta Kanak-Kanak 2001 (Akta 611)*, Kuala Lumpur: International Law Book Services.

<sup>13</sup> See the synthesis of several laws such as Juvenile Court Act of 1947, Children Protection Act of 1991 (APK), Women and Girl Protection Act of 1973 (APWG) and Children Maintenance Centre Act of 1984 (APJK) to become a Children Act of 2001 (AKK).

<sup>14</sup> Mini Kamariah Majid, 2002, *Akta Kanak-Kanak 2001: Cadangan Pindaan Undang-Undan Berkenaan Gejala Sosial*, Kuala Lumpur: Penerbit University Malaya, p. 1-2. Compare with Adult Act of 1971 which states the age of 18 years old as the adult age in Malaysia, being allowed to marry and have family, a position consistent in Law Renewal Act (Marriage and Divorce) of 1976. See Faizah Nazri Abd. Rahman, 2003, *Children Who Kill Little Monsters*, Kuala Lumpur: University Malaya, p. 115.

<sup>15</sup> See Lembaga Penyelidikan Undang-Undang 2001, *Akta Perlindungan Kanak-Kanak 1991 (Akta 468)*, Kuala Lumpur: International Law Book Services. See Abd. Hadi Zakaria, 2003, *The Child Act 2001 Some Significant Features*, Kuala Lumpur: University Malaya, p. 139.

<sup>16</sup> Mini Komariah Majid, 2002, *Akta Kanak-Kanak 2001: Pendidikan Undang-Un-*

As such, child age limit in Malaysia ranges between 14 to 18 eighteen years of age, with those under 7 years of age called a specifically Malaysian term ‘*budak*’, not child or teen.

For Indonesia the definition and child age limit is determined explicitly. Article 1 Clause 1 Law Number 23 Year 2002 on Child Protection states that: “A child is a person under 18 (eighteen) years of age, including unborn fetus”.

In the child definition and age limit as stated in Article 1 of the aforementioned Law (thereafter termed Law 2002) there are 2 (two) important issues to be considered, *one*, a child is a person under 18 (eighteen) years of age. As such, a person who has exceeded the age of eighteen years old, including those with unsound mind, is considered not a child, but an adult. In this case the marital status of the person is not called into question. *Second*, a child who is still an unborn fetus is protected under the Law 2002.

As such, child definition and age limit in the Law 2002 is not meant to determine the position of adulthood, but to determine the position of childhood. The legal consequence is a married women not yet 18 years of age, for example 16 years of age, legally is considered an adult.

To determine child age limit related to specific legal acts, according to Guidelines for Initial Report of the United Nation’s Committee of the Rights of the Child, member states should provide relevant information to fulfill the demand of Article 1 of the Children Rights Convention. This means the member states are requested to provide legal child age limit for, but not limited to, the following legal related issues: legal and medical counselling without parental consent, hazardous employment, part time employment, full time employment, marriage, sexual consent, voluntary enlistment into the armed forces, voluntarily testimony in court, criminal liability, deprivation of liberty, punishment stimulation, and alcohol usage.<sup>17</sup>

Formally and juridically there exists a variety of child age limit,

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*dang Untuk Menangani Masalah Kanak-Kanak dan Remaja di Malaysia, op. cit.*, p. 24. See Zalina Abdul Halim, 2003, *Right of Access to Court Proceedings: Its Application Under The Child Act 2001*, Kuala Lumpur: University Malaya, p. 157.

<sup>17</sup> *ibid*, p. 2 and 3.



which is formulated according to a variety of laws, such as KUHPerdata, KUHP, Law Number 3 Year 1997 on Child Court, Law Number 4 Year 1979 on Child Welfare, Law Number 1 Year 1974 on Marriage, Law Number 39 Year 1999 on Human Rights, Law Number 23 Year 2002 on Child Protection, and others. It could be put forward that there are 3 (three) vital issues to determine child age limit: First, quantitative child age limit, 18 years of age, 21 years, 17 years, 16 years, 15 years, or other ages. Second, the issue of marital status to define child age limit (Compare Law Number 23 Year 2002 with Law Number 39 Year 1999, and Law Number 3 Year 1997). Third, issue of unborn fetus (compare Law Number 23 Year 2002 with Article 1 of Child Rights Convention).<sup>18</sup>

There are *many similarities* between Malaysia and Indonesia regarding child age limit, while *differences* only revolve around adult age limit. For Malaysia, a person reaching 18 years of age, according to Adulthood Act of 1971 is considered an adult with consent to marry. While in Indonesia according to Law Number 1 Year 1974 on Marriage it is stated that a woman of 16 years of age and a man of 19 years of age is considered an adult with consent to marry. However, within the age limit (16 to 19 years of age) if they are not yet married, they are still considered a child possessing accompanying rights.

#### **IV. COMPARISON OF FOUNDATIONAL LEGAL PRINCIPLES IN MALAYSIA CHILD PROTECTION LAW**

In Malaysia children are protected under the Act of 2001 which comprises of: (a) children requiring nurture and protection, (b) children requiring protection and recovery, (c) children trafficking and runaways, (d) children performing criminal acts, (e) children without guardian.

##### **1.Children requiring nurture and protection**

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<sup>18</sup> See Muhammad Joni, 2002, *Harmonisasi Substansi Hukum Tentang Perlindungan Anak Dari Konflik Bersenjata*, a discussant paper presented at Report Draft Seminar of International Committee of The Red Cross (ICRC) Research Team titled *Perlindungan Hukum Bagi Anak yang Terlibat Atau Terkena Dampak Dari Situasi Konflik di Indonesia*, in cooperation with Indonesia Justice and Human Rights Ministry and ICRC, 2 December 2002 in Jakarta.

Section 17 (1) Act of 2001 provides definition of children requiring nurture and protection including those who are abused physically or mentally, neglected, needing counselling, in danger of harming themselves, with background of broken home, and child beggars or sellers. Abuse or neglect refers to children with parents or guardians. Child beggars or sellers are included due to the increase of their number on the streets. Irresponsible parents profit from their children begging or selling as children easily gain more sympathy from people. This definition is hoped to help child beggars or sellers to not beg or sell and instead obtain necessary education.<sup>19</sup>

## 2.Children requiring protection and recovery

Section 38 (1) Act of 2001 defines this group as those who have the urge to perform sexual acts, or under environment which encourage them to perform sexual acts, live or often visits places of prostitution, or are usually under the spell of pimps in sites of prostitutions. Beside this group, Section 42 Act of 2001 also includes children trafficked in and out of Malaysia for sexual purposes<sup>20</sup> as children requiring protection and recovery.

Beside children requiring protection, Section 43 (1) Act of 2001 also makes clear of children status involved in prostitution. Being involved with a child in sexual activities is considered a heinous crime. This provision is hoped to prevent the occurrence of these activities.

Section 41 also mentions children requiring immediate protection if their condition falls under the terms stated in Subsection (2) including if the children is pregnant with an unborn child. This provision is meant to such children to get support and temporary shelter while waiting for the birth of their baby. This provision is hoped to reduce the incidence of abandoned babies as pregnant children are protected and given help when they most need it. As children who have committed a grave mistake, help and counselling is very much needed in times of their pregnancy until birth. A mistake does not need to last forever and should be

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<sup>19</sup> Siti Zaharah Jamaluddin, 2002, *Akta Kanak-Kanak: Implikasinya Terhadap Ibu Bapa, Agensi Kerajaan, Badan Kehakiman dan Media*, Kuala Lumpur: University Malaya, p. 43-44.

<sup>20</sup> See Section 2 (1) Act of 2001 which defines prostitution as an act committed by a person offering his or her body in exchange of money or goods.

forgiven.

This provision, however, is not intended to encourage these incidences to occur, but as a method last resort should such incidence occur. Both pregnant children and their unborn child needs help to go on with their life.

### 3. Child trafficking and runaways

Section 48 Act of 2001 considers children being trafficked inside or outside Malaysia as protected. This situation includes children snatched by their father or mother with no legal possession of their children, be it inside or outside Malaysia. (Section 52 Act of 2001). This new provision is intended to deal with children who are snatched by their father or mother during marriage dissolution. This situation is exacerbated by parents with two different countries of origin. Both want their children to be with them and when one is given custody according to the law of his or her country, the other snatch the child to his or her home country with the hope of custody being offered their side. In the eagerness of the parents for custody, children become unwitting victims.<sup>21</sup>

### 4. Children performing criminal acts

Children accused of performing criminal acts will be charged with conditions stipulated by the Act of 2001 (Section 83 (1)). To deal with these children, Section 11 (5) Act of 2001 stipulates that Court for Children must possess power to adjudicate all crimes except those punishable by death.<sup>22</sup>

### 5. Children without guardian

No definition is given for children without guardian in Act of 2001. However, if Section 46 (1) Act of 2001 is referred, it could be understood that children is considered to be without guardian if their father or mother or guardian provide a written request to Children Court that their children be arrested as the parents or guardian could no longer take care of them.<sup>23</sup>

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<sup>21</sup> *ibid*, p. 46.

<sup>22</sup> Siti Zaharah Jamaluddin, 2002, *loc. cit*,

<sup>23</sup> *ibid*, p. 47. See also Sridevi Thambapillay, 2003, *Child Act 2001 Selected Family Law Issues*, Kuala Lumpur: University Malaya, p. 180.

## 6. Responsibility of mother or father or guardian and family

When social problems caused by teenagers have escalated, many opine that these issues are caused by disharmony in the family.

Act of 2001 recognizes the importance of mother or father, guardian and family to deal with these issues. The approach taken by this Act is to emphasize continuously the responsibility of mother, father, guardian, or family, especially when their children are encountering troubles. Besides defining “family member” to include parents, guardian, or relative residing in the children’s houses, the Act also defines “relative” as people who possess kinship through blood relations, breast-feeding or foster relationships with the children. Act of 2001 also defines fosterage as in Section 2 (1) with “foster father or mother” as people who are not father or mother or relative to the children in Section 30 (1) (e) or Section 35 or 37 Act of 2001. This condition will provide more room for the Court to decide on rulings related to children. If the children has no mother or father or guardian or sibling, the children could be put under the care of appropriate person. This definition is thus wide enough to include not only guardian at children’s centre, but also individual who accepts payment to care for children.<sup>24</sup>

## 7. The role of school principal

Act of 2001 also introduces the role of principle in helping troubled children. The Court also requires parents or guardians whose children are educated in educational institutions to discuss with their principal once a month. This discussion must help facilitate the Court’s order by ways of informing parents or guardians regarding the children’s achievement, the troubles faced by the children and the steps needed to help the children. This discussion must not be held under the pretext of fulfilling formal requirements only. Teachers and principals need to ensure meetings are held to fulfill Court expectation. Eventhough there is no punishment meted out if teachers or principles do not perform as required, their integrity requires them to fulfill these responsibilities as much as possible. The role of teacher could also be seen from the character report of a particular children made by officers responsible

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<sup>24</sup> Zulazhar Takir, 2002, *Meninjau Isu Penderaan Kanak-Kanak Dari Perspektif Akta Kanak-Kanak 2001*, Kuala Lumpur: Penerbit University Malaya, p. 85.

to produce this report. These officers will meet the children's teacher obtain accurate and relevant information to help the officer write a comprehensive report. The report is vital as a consideration for the court to make appropriate decisions concerning the children. (Section 90 (12) and (13) Act of 2001).<sup>25</sup>

#### 8. The role of media

Children Court is a closed court. To fulfill this condition, the provision to prevent media report or broadcast related to cases being heard in the Court is included. Additional provisions are introduced in the Act of 2001 to guarantee the children's rights.

The first additional provision could be seen in Section 15 (1) (a) which prevents any media report at any level, before, during, or after Court hearing. Besides, additional provision concerning broadcast of picture is included where the children's picture or any person, place, or thing which could help identify the children cannot be broadcast in any media including newspaper, radio, or television. (Section 15 (2) and (5) Act of 2001). This provision also make demands on police station to consider prevention of the children's picture from being displayed in the station, on the journey to and from the station, recorded in media be it tape or film or any other electronic media. (Section 85 (b) Act of 2001).<sup>26</sup>

#### 9. Government agencies

Act of 2001 also emphasizes the role of government agencies as contained in the previous three Acts, such as the Agency for Social Welfare and the Police. The role of Agency of Social Welfare as protector and character officer is maintained (Section 8 and 10 Act of 2001). Their role is prominent in the entire Act of 2001.<sup>27</sup>

#### 10. Protector

A protector is responsible to children requiring care and protection (Section 18 Act of 2001). If the protector receive any report concerning

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<sup>25</sup> Siti Zaharah Jamaluddin, 2002, *op. cit.*, p. 61.

<sup>26</sup> *ibid*, p. 62. Lihat Noor Aziah Mohd Awal, 2003, *Child Act 2001 How Far Does it Conform to the UNCRC?*, Kuala Lumpur: University Malaya, p. 210.

<sup>27</sup> Norchaya Talib, 2002, *Siri Undang-Undang dari Akta Kanak-Kanak 2001*, Kuala Lumpur: Penerbit University Malaya, p. 107.

children requiring care and protection, the protector would be responsible to take the children to Court as soon as possible. (Section 19 Act of 2001). If the protector is of the opinion that the children requires medical help, it should be provided immediately. The same degree of authority is also given to police officers responsible for any children in the same condition (Section 21 Act of 2001). A protector is required to write reports concerning the children to be brought forward to the Court (Section 30 (6) Act of 2001). This Act of 2001 also introduces the same concept for foster family. A protector is the person to be contacted should the children under the care of foster mother or father need to be returned home (Section 30 (3) Act of 2001). If the Court order the children to be cared for, the Protector must be contacted (Section 35 Act of 2001). Notice should also be given if the children demands to be returned home (Section 36 Act of 2001).<sup>28</sup>

#### 11.Character officer

A Social Welfare officer is also a character officer (Section 10 Act of 2001). As a character officer in addition of providing character report when required (Section 46 (1) Act of 2001), the officer must also monitor the children according to Section 46 (2) (b) Act of 2001. If conditions contained in the Section applies, the character officer when given a Court order must visit, advice, or befriend the child during the duration of the order. If necessary the children should be brought forward to the Monitoring Court (Section 47 (1) (a) (b) Act of 2001). Clearly the roles necessary to be played by the character officer are not limited to formal requirements. This stipulation requires the character officer to take time to know the children under care and getting their trust before attempting to advise them. All these requirements take time and skill of many officers.<sup>29</sup>

#### 12.Police

In addition of having the power to take children requiring medical care and needing nurture and protection, Section 19 (5) Act of 2001 requires police officers to inform the children's condition to the Protector.

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<sup>28</sup> *ibid*, p. 109.

<sup>29</sup> *ibid*, p. 168. See Norcahaya Talib, 2003, *Child Act 2001 Enter The Powerful Proxy*, Kuala Lumpur: University Malaya, p. 245.

The children committing criminal offences need to be brought to the Court or Magistrate according to Section 84 (1) Act of 2001. The police need to ensure the children to be separated from adults when the children is being held in custody at police stations, or being brought from or to the court (Section 85 (a) Act of 2001). In addition, the police officer need to inform the Protector, father or mother or guardian of the children as soon as the children is caught committing criminal offences (Section 87 (a) Act of 2001) to facilitate the Protector to provide character report and other relevant information (Section 87 (b) Act of 2001).

The role of police officer as a whole is to reinforce and help Social Welfare officers in their task to protect children, especially those who need care and protection as well as those involved in child trafficking or runaways. This condition is important because Social Welfare officers do not have the skill that police officers have, especially concerning raids (Section 53 (3) (a) to (d) Act of 2001). The parties being raided may be armed and willing to use violence to counter the raids.<sup>30</sup>

As such, with the synthesising of the three Acts with several changes introduced it is hoped that children could be comprehensively protected. A Legal Act no matter how complete will not be meaningful if parties involved are not willing to achieve the objective and purpose of the Acts. These Acts recognizes the rights of children in Malaysia through statements in the Introduction. Children should be protected and guided to enable them to contribute positively to the development and welfare of the state.

## **V. COMPARISON OF FOUNDATIONAL PRINCIPLES TO CHILD PROTECTION LAW IN INDONESIA**

Foundational principles of child protection in Indonesia is formulated in Article 2 Law Number 23 Year 2002 on Child Protection (Law 2002), which follows from the principles of protection contained in the Indonesian 1945 Foundational Law (UUD 1945). The general foundational principles in Law 2002 are: 1) non-discrimination, 2) child's best interest, 3) child's right to live, grow, and develop, 4) valuing child's

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<sup>30</sup> *ibid*, p. 169. See also Chew Li Hua, 2003, *Criminal Procedure Under Part x of the Child Act 2001 (Act 611)*, Kuala Lumpur: University Malaya, p. 235.

opinion.

As such, the state is obligated to guarantee that children are given opportunities to state their opinion in any adjudication or administrative processes relevant to their rights, directly or indirectly.

In Article 3 of Law 2002, this valuing child's opinion principle is explicitly adopted as foundational principle, along with principles contained in Pancasila and UUD 1945.

Also, in Law 2002 children rights and responsibilities are formulated in Article 4 to Article 19. As such, juridically the Articles create legal norm for children's rights.

All articles formulated in Article 4 to Article 18 Law 2002 contains specifically the word 'right', for example "possessing right to...", "possessing rights for...", "possessing rights to get...", "possessing rights to state..."

As such the many instances of inclusion of the word right in Law 2002 turn the norm into legal norm. A reference could be traced to the opinion of Sudikno Mertokusumo, which states that: in a legal determination, the content of legal norm could be viewed in 3 (three) aspects: 1) Legal norm containing order, which must be obeyed no matter what; 2) Legal norm containing prohibition, which prohibits an action; 3) Legal norm containing permission. It is then elaborated that legal norms containing order and prohibition are imperative and apriori in nature, which allows force to compel people to obey.<sup>31</sup>

The inclusion of child responsibility in Law 2002 acts as balance for child right. Child responsibility is formulated in Article the Law.

The formulation of Article 4 Law 2002 contain 4 (four) categories of children's rights: right to live, right to grow and develop, right to participate, and right to obtain protection from violence and discrimination.

When compared with UUD 1945, the formulation of Article 4 Law Number 23 Year 2002 on Child Protection is inspired by and derived from Article 28 B Clause (2) UUD 1945. However, Article 4 contains

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<sup>31</sup> Sudikno Mertokusumo, 1999, *Mengenal Hukum – Suatu Pengantar*, Yogyakarta: Liberty, p. 31 – 32.



the provision of child's right of participation and as such it is more advanced than Article 28 B.

Theoretically, legal science states that law can be divided into primary and secondary law. It could be stated that children's rights formulated in Article 4 Law 2002 is derived from primary laws. From Article 4 to Article 19 of the Law, children's rights and responsibilities are elaborated as follows:

- 1) Children's right to live, grow, develop, and participate naturally (Article 4)

This article, although a derivation of Article 28 B Clause (2) UUD 1945, is more advanced than the Article, because it includes participation rights. Article 4 also reflects every rights contained in Children Rights Convention. It could be stated that Article 4 is primary law which inspires other legal norms which are called secondary law.

Right to live cannot be neglected in any condition, including emergency as regulated in Law Number 39 Year 1999 on Human Rights. In fact right to live is a foundational principle of the Law.

With the same spirit, in humanitarian law several inalienable rights is recognized, which is right to live (*le droit de la vie*) and right to physical and moral integrity which must be protected at all cost.<sup>32</sup> Right to grow and develop is elaborated into right to health, education, expression, and information. In Law 2002, these elaborations are manifested in implementation of protection in education, health, social and even religion.

- 2) Right to name acquisition to indicate personal identity and citizenship status. (Article 5)

Further arrangements is regulated in Article 17 and Article 28. Right to identity is the first right which must be obtained by children. For now, many Indonesians registered their children's birth irregularly as local governments make use of birth certificate registration as source of income.

- 3) Right to worship according to religion, right to think, and right for expression (Article 6)

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<sup>32</sup> G.P.H Haryomataram, 1988, *Bunga Rampai Hukum Humaniter (Hukum Perang)*, Jakarta: Bumi Nusantara Jaya, p. 8.

- 4) Right to get to know parents, being raised and nurtured by them (Article 7 Clause 1).
- 5) Right to be nurtured or fostered by foster parents (Article 7 Clause 2).

Issues of nurture and fosterage is regulated more comprehensively in Chapter VIII, Article 37 to Article 41 in Law 2002.

- 6) Right to obtain medical services (Article 8).

- 7) Right to obtain social security (Article 8).

Social security is the responsibility of the Government. Until today, social security program has not covered children, only workers through Worker Social Security (Jamsostek) program. Workers are also provided health insurance through Health Insurance (Askes) program. These two programs still have limited coverage and program holders.

- 8) Right to learn and be taught (Article 9 Clause (1)).

Article 9 Clause (1) is a derivation of Article 31 UUD 1945 which states that "Every citizen deserves education". Article 31 Clause (4) of UUD 1945 even explicitly stated that education is prioritised in central and local government budget allocation as much as 20 percent. Right to education is also in harmony with Article 28 and 29 Child Range Convention.

- 9) Right to obtain special education for disabled children (Article 8 Clause (2))

- 10) Right to obtain special education for gifted children (Article 8 Clause (2))

- 11) Right to voice out opinion and having opinion being heard (Article 10).

- 12) Right to receive, find, and give information (Article 10).

- 13) Right to rest and use spare time to socialize with peers, play, be creative and enjoy recreation (Article 11).

- 14) Children with disability deserve to (a) get rehabilitation, (b) social help, (social welfare level maintenance (Article 12).

- 15) Children under status of being cared for, deserves to obtain protection from (a) discrimination, (b) exploitation (economic and sexual), (c) abandonment (d) cruelty, violence, and abuse, (e) injustice (f) wrongful conduct (see Article 13 Clause (1)).

- 16) Right to be raised by own parents. (Article 14).

17) Right to obtain protection from: (a) political manipulation, (b) involvement in armed conflict, (c) involvement in social unrest, (d) involvement in violent event, (e) involvement in war (Article 15).

In the case of protection of children from armed conflict, a number of international humanitarian values could be used, for example Geneva Convention IV, and 'Additional Protocols of 1977'. The 'Optional Protocol on the Involvement of Children in Armed Conflict' ratified on 25 May 2000 by the Indonesian government could also be used.<sup>33</sup>

The impact of armed conflicts to children is very serious as it leaves lasting impression. From several reports, armed conflict affects badly and permanently on children all over the world. The UN agency for children, UNICEF, in a report titled "*State of the World's Children 1996*", states that between the period of 1985 – 1995 armed conflict had caused permanent damage to children.<sup>34</sup>

18) Right to obtain protection from (a) abuse, (b) torture, (c) inhuman punishment (Article 16 Clause (1)).

19) Right to obtain liberty according to law (Article 16 Clause (2)).

This clause is very general, as it has not provide the meaning of liberty intended, including elaboration which should be referred to Article 16 Clause (2) elaboration.

20) Children whose liberty is taken away from them have the rights to: (a) obtain humane treatment, (b) separate housing from adult, (c) obtain legal aid, (d) obtain other help, (e) self-defense and obtain justice from fair and unbiased court closed to public.

The definition of children whose liberty is taken away from them concerns processes experienced by the kid in legal proceedings, suchs as arrest or jail. Now, many Courts for children in conflict with the law have been regulated according to Law Number 3 Year 1997 on Child Court. According to Article 45 Clause (3) Law Number 3 Year 1997 on Child Court, child place of custody must be separated

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<sup>33</sup> UNICEF, 1996, *State of the World's Children 1996*, Oxford: University Press, p. 13, dalam Melanie Gow, Kathy Vandergrift, Randini Wanduragala, *The Right to Place – Children and Armed Conflict*, World Vision, Switzerland, p. 5.

<sup>34</sup> Anonymous, 1999, *International Criminal Court and Child Victims of Genocide, War Crimes and Crimes Against Humanity*, Strokhholm International Peace Research Institute, p. 2. Lihat Safitri Goonesekere, 1998, *Children Law and Justice A South Asian Perspective*, New Delhi: UNICEF & Sage Publicashion, p. 80.

from adults. If children have been indicted, they are placed in Children Correction Institution separated from adults (See Article 60 Clause (1) Law Number 3 Year 1997 on Child Court).

- 21) Children who are victim of sexual violence or children facing legal cases have the right to hide their identity (Article 17 Clause (2)).

This clause is made to emphasize the legal norm stipulated in Law Number 3 Year 1997 on Child Court. In Article 8 Clause (5) of the Law it is stated that news about children involved with the court, from the time of investigation until the time of decision, should use only the child's initial, along with their parents, guardian, or foster parents' initial.

Furthermore, according to Article 42 Clause (3) Law Number 3 Year 1997 on Child Court, investigative process of juvenile delinquents is obligated to be made secret. This obligation to hide child identity is consistent with legal norm found in Article 8 Clause (1) of the Law which stipulates that a judge should examine juvenile delinquents in closed court, except for certain cases, where the examination could be conducted in the open.

Hence, before the existence of Law 2002, identity of children involved in legal matter has been stipulated to be made secret in the Law Number 3 Year 1997 on Child Protection. Hence, child identity as secret is now not only part of child's right, but also part of investigator's obligation.

- 22) Right to obtain legal aid, and other help, as crime victim or perpetrator. (Article 18)

Right to obtain legal aid has been stipulated in previous Law Number 3 Year 1997 on Child Court. According to Article Clause (1) of the Law, every juvenile delinquents during their time of arrest have the right to obtain legal aid from a legal counsellor. However in Elaboration of Article 18 of the Law, it is explained that children have rights to other assistance, such as medical, social, rehabilitative, vocational and educational assistance.

- 23) Child responsibility (Article 19): (a) respect of parents, guardians, and teachers, (b) love of family, society, and friends (c) love of birthland, nation, and state, (c) worship according to respective religion, (d) be of good ethic and character.

## **VI. CONCLUSION**

Child protection law in Indonesia and Malaysia has many similarities, which are regulated in family and marriage laws. Rights and responsibilities of state, government, society, family, and parents; child position, guardianship, fosterage, nurture, religion, abandonment and special protection have been regulated in Children Act of 2001 (Act of 611). In this act, maintenance, recovery, protection, investigation, treatment, education and special protection from abuse, disability, sexual or economic exploitation of children are included.

The difference is Malaysia's Children Act of 2001 (Act 611) has been synthesized from 4 acts such as such as Juvenile Act of 1947 (Act 90), Child Protection Act of 1991 (Act 468), Women and Girl Protection Act of 1973 (Act 106), and Children Care Centre Act of 1984. Several acts still stand alone such as Adult age Act of 1971 (Act 21), Marriage and Divorce Renewal Act of 1976, Domestic Violence Act of 1994, and Islamic Family Law Enactment of 1990. In Indonesia, child protection law is scattered around in regulations such as Law Number 4 Year 1979 on Social Welfare, Law Number 23 Year 2002 on Child Protection, Law Number 3 Year 1997 on Child Court, Law Number 12 Year 1995 on Correction, and Law Number 39 on Human Rights and Law on Elimination of Domestic Violence. All these still valid laws regulates child protection, in separate yet related fashion, except Law Number 1 Year 1974 on Marriage and President's Instruction Year 1991 on Islamic Legal Compilation which is only valid for Muslims.

Child protection laws in Malaysia have been synthesised into Children Law of 2001, (Act 611), while child protections laws in Indonesia are not merely contained in Law on Child Protection. In Indonesia, these laws lack implementation, as implementing regulation in the forms of Government Regulation, President's Decision, Minister's Decision, or Local Regulation. Eventhough implementing regulations such as President's Regulation Number 77 Year 2003 exist, they are still far from fulfilling children's rights, unlike in Malaysia. There are very few child street performers and beggars in Malaysia, and when there are any, steps are quickly taken to ensure the children are brought to children and social halfway houses. These houses care, treat, and nurture the children to inculcate healthy mentality, sound education and religious

upbringing. Indonesia needs to be more like Malaysia in protecting its children, its future generation!

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