

**A SOCIO-LEGAL STUDY ON THE ADEQUACY OF LAW IN
COMBATting BABY DUMPING IN MALAYSIA**

Mazbah Termizi

Thesis submitted in fulfilment of the degree of
DOCTOR OF PHILOSOPHY IN
SYARIAH AND JUDICIARY

UNIVERSITI SAINS ISLAM MALAYSIA,
NILAI

May 2021

AUTHOR DECLARATION

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

Date:

Signature:

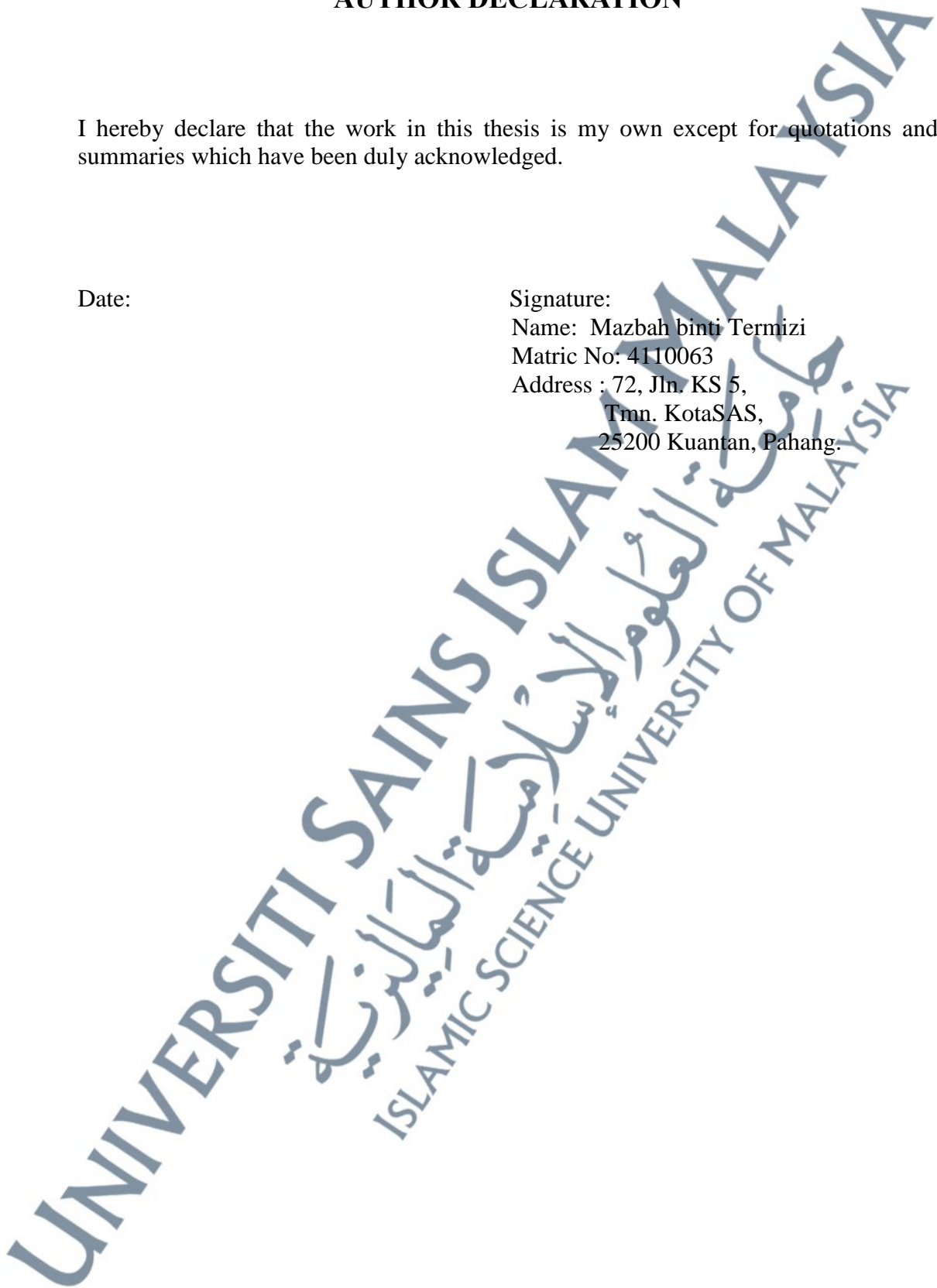
Name: Mazbah binti Termizi

Matric No: 4110063

Address : 72, Jln. KS 5,

Tmn. KotaSAS,

25200 Kuantan, Pahang.



ACKNOWLEDGEMENT

All thanks and adoration are due to Allah SWT and his Messenger Muhammad SAW for giving me the opportunity to complete this thesis. I would like to express my sincere gratitude and appreciations to my supervisors especially to Professor Dr. Hj. Abdul Samat Musa as my leading supervisor for the courage and kind support he bestowed to me throughout this research. Similarly, I would like to extend my sincere gratitude to my respected co-Supervisors, Dr. Yasmin Hanani Mohd Safian and Dr. Dina Imam Supaat for their guidance and assistance throughout this research activity. My sincere gratitude also goes to my parents En. Termizi bin Sharif and Pn. Rohani binti Paseman, for their supports, prayers and guidance in the course of my studies and throughout my life. Also to my beloved son, Mohammad Mostafa Soltan Mostafa, and the remaining family members for their supports and prayers. Special thanks to my friends and staff from Universiti Sains Islam Malaysia (USIM) and International Islamic University Malaysia (IIUM) whom has assisted me in the preparation of this work, not forgetting to my proof-readers whom have helped me throughout my Ph.D journey.

ABSTRAK

Dewasa ini masalah pembuangan bayi seringkali berlaku di Malaysia dan keberkesanan undang-undang mengenainya adalah dipertikaikan. Didorong oleh permasalahan di atas, kajian ini dijalankan bagi menilai keberkesanan undang-undang ke arah penghakiman jenayah pembuangan bayi di Malaysia di samping perbincangan dari perspektif sosial turut disertakan bagi mengukuhkan hasil kajian. Kajian ini berunsurkan analisis ke atas undang-undang berkaitan pembuangan bayi dari Kanun Keseksaan Malaysia, Akta Kanak-Kanak 2001 dan undang-undang antarabangsa serta kes-kes terdahulu bagi mencari kelompangan undang-undang dan diperbandingkan dengan undang-undang negara lain. Secara perbandingan, alternatif terhadap hukuman pembuangan bayi adalah dibincangkan bagi menangani masalah ini, iaitu melalui kaedah tempat perlindungan bayi, atau melalui alasan pertahanan am, seperti gila, *post-partum psychosis* dan sebagainya. Memandangkan Malaysia mempunyai dua sistem perundangan, kajian ini juga meliputi aspek *Syariah* mengenai isu pembuangan bayi. Tesis ini juga menggunakan kaedah kajian kualitatif, analisis kandungan dan temu bual. Melalui kajian undang-undang di beberapa negara, adalah dicadangkan beberapa pendekatan diambil bagi menambahbaik undang-undang berkaitan pembuangan bayi bagi memperkenalkan undang-undang dan mengurangkan kes-kes ini di Malaysia pada masa hadapan. Hasil kajian ini mendapati bukan sahaja undang-undang perlu diperkemas bagi membendung masalah pembuangan bayi di Malaysia namun pendekatan secara holistik juga perlu diperkukuhkan.

ABSTRACT

Today, baby dumping is very common in Malaysia, and the laws relating to it are questionable. Driven by the above concerns, the study's objective was to assess the effectiveness of the law on the criminal penalties of baby dumping in Malaysia and discussion from a social perspective to strengthen the findings. This study is based on analysis of the law relating to the baby dumping from the Malaysian Penal Code, the Child Act 2001 and international law, and previous cases to find the lacuna of the laws and compare with other countries' laws. By contrast, alternatives to the sentence of baby dumping are discussed to address this issue, either through the method of baby hatch or through general defense reasons, such as insanity, post-partum psychosis and so on. Given that Malaysia has two legal systems, this study also covers *Shariah* advocates on baby dumping issues. This thesis also opts for qualitative research method, content analysis and interviews. By analysing the laws of several countries, it is proposed that several approaches be taken to improve the law on baby dumping. New laws may be introduced to reduce these cases in Malaysia in the future. The findings of this study found that not only does the law need to be streamlined to curb the issue of baby dumping in Malaysia, but holistic approaches need to be strengthened as well. The recommendation is that to improvise the Penal Code in terms of punishment towards the baby dumping offenders and at the same time to provide the alternatives of punishment.

ملخص

الأطفال شائعة جداً في ماليزيا والقوانين المتعلقة بها مشكوك فيها. بدافع من المخاوف المذكورة أعلاه، أجريت هذه الدراسة لتقييم فعالية القانون بشأن العقوبات الجنائية لإغراق الأطفال في ماليزيا وكذلك النقاش من منظور اجتماعي لتعزيز النتائج. تستند هذه الدراسة إلى تحليل القانون المتعلق بإغراق الأطفال من قانون العقوبات الماليزي وقانون الأطفال لعام 2001 والقانون الدولي وكذلك الحالات السابقة من أجل العثور على ثغرة القوانين والمقارنة مع قوانين الدول الأخرى. على النقيض من ذلك، تُناقش بدائل الجملة الخاصة بإغراق الأطفال لمعالجة هذه المشكلة، إما من خلال طريقة مأوى للأطفال، أو من خلال أسباب الدفاع العام، مثل الذهان الجنوني، وما بعد الولادة وما إلى ذلك. بالنظر إلى أن ماليزيا لديها نظامان قانونيان، فإن هذه الدراسة تغطي أيضاً المدافعين عن الشريعة بشأن قضايا إلقاء الطفل. تختار هذه الرسالة أيضاً طريقة البحث النوعي وتحليل المحتوى والمقابلات. من خلال تحليل قوانين العديد من البلدان، يُقترح اتباع عدة طرق لتحسين القانون المتعلق بإغراق الأطفال. قد يتم تطبيق قوانين جديدة للحد من هذه الحالات في ماليزيا في المستقبل. وجدت نتائج هذه الدراسة أنه لا يلزم فقط تبسيط القانون للحد من مسألة إلقاء الأطفال في ماليزيا ولكن يجب تعزيز النهج الشاملة أيضاً.

TABLE OF CONTENTS

A SOCIO- LEGAL STUDIES ON THE ADEQUACY OF LAW IN COMBATTING BABY DUMPING IN MALAYSIA	I
AUTHOR DECLARATION	II
BIODATA OF AUTHOR	III
ACKNOWLEDGEMENT	IV
ABSTRAK	V
ABSTRACT	VII
ملخص	VII
TABLE OF CONTENTS	VIII
LIST OF TABLES	XII
LIST OF FIGURES	XIII
LIST OF CASES	XIV
LIST OF STATUTES	XV
LIST OF APPENDICES	XVI
GLOSSARY	XVII
LIST OF ABBREVIATIONS	XVIII
 CHAPTER 1: INTRODUCTION	
1.1 GENERAL INTRODUCTION	1
1.2 BACKGROUND OF STUDY	4
1.2.1 Malaysian Laws	4
1.2.2 Baby Dumping	7
1.3 LEGAL FRAMEWORK FOR CHILDREN’S RIGHTS	11
1.31 Islamic law	13
1.4 PROBLEM STATEMENT	17
1.5 RESEARCH QUESTIONS	17
1.6 RESEARCH AIMS & OBJECTIVES	19
1.7 LITERATURE REVIEW	19
1.8 SCOPE OF STUDY AND LIMITATIONS	37
1.9 RESEARCH METHODOLOGY	39
1.10 RESEARCH OUTLINE	42
 CHAPTER 2: CHILDREN’S RIGHTS FROM AN INTERNATIONAL LAW AND ISLAMIC LAW PERSPECTIVE	
2.1 INTRODUCTION	45
2.2 DEFINITION OF TERMS	46
2.3 CATEGORIES OF CHILDREN	48
2.4 VIOLATION OF CHILDREN’S RIGHTS & IMPLICATIONS	54
2.4.1 Children’s Rights under International Law	62
2.4.2 Children’s Rights under Islamic Law	66

2.5	CONCLUSION	73
	CHAPTER 3: MALAYSIAN LEGAL FRAMEWORK OF CHILDREN'S RIGHTS AND PROHIBITION AGAINST BABY DUMPING	
3.1	INTRODUCTION	75
3.2	CHILDREN'S RIGHTS IN MALAYSIA	75
3.3	BABY DUMPING IN THE CHILD ACT 2001	80
3.4	DEFINITION OF PUNISHMENT IN CRIMINAL LAW CONTEXT	88
3.5	PUNISHMENT RELATED TO BABY DUMPING IN MALAYSIA	89
	3.5.1 Punishment under Penal Code	90
	3.5.2 Punishment under Child Act 2001	109
3.6	GENERAL DEFENCES FOR BABY DUMPING CASES	115
	3.6.1 Insanity	117
	3.6.2 Post- partum depression and post-partum psychosis	121
	3.6.3 Young Offender	126
3.7	COURT FOR CHILDREN IN MALAYSIA	121
3.8	ALTERNATIVE PUNISHMENT FOR BABY DUMPING ACT	128
	3.8.1 BABY HATCH	129
	3.8.1.1 OrphanCARE Foundation, Malaysia	130
	3.8.1.2 Baby Hatch in Other Countries	135
	3.8.1.3 Feedback on Baby Hatch	139
	3.8.1.4 Legal Basis of Baby Hatch	142
3.9	AWARENESS OF BABY DUMPING ISSUE	143
	3.9.1 Sex Education	144
	3.9.2 Abortion	146
	3.9.3 Monitoring Actions	148
3.10	ADOPTION	149
	3.10.1 Adoption Under Islamic Law	157
3.11	DEINSTITUTIONALISATION	159
	3.11.1 Deinstitutionalisation Internationally	161
	3.11.1.1 LUMOS	163
	3.11.1.2 CELSIS	166
	3.11.2 Malaysia Towards Deinstitutionalisation	168
3.12	CONCLUSION	171
	CHAPTER 4: TOWARDS CRIMINALISATION OF BABY DUMPING IN MALAYSIA	
4.1	INTRODUCTION	174
4.2	DEFINITIONS AND FUNCTIONS OF CRIMINAL LAW	175
4.3	MITIGATING FACTORS AND AGGRAVATING FACTORS OF A CRIME	178
4.4	CRIMINALISATION THEORY	183
4.5	CAUSES FOR WRONGFUL CONVICTION	187
4.6	CRITIQUES ON THE CRIMINALISATION OF BABY DUMPING	193
4.7	INTENTIONS FOR CRIMINALISING BABY DUMPING	201
	4.7.1 Hazard for the child	201

4.7.2.Harm to the child	203
4.7.3 Social Risk	205
4.8 CONCLUSION	216

CHAPTER 5: COMBATTING BABY DUMPING IN OTHER JURISDICTION

5.1 INTRODUCTION	218
5.2 LAWS RELATING TO BABY DUMPING	218
5.2.1 Indian Penal Code	219
5.3 BABY DUMPING AND RELATED CRIMES	223
5.3.1 Neonaticide	223
5.3.2 Cases related to the maternal neonaticide	225
5.3.3 Cases related to the paternal neonaticide	226
5.3.4 Infanticide	228
5.3.5 Infanticide law in Australia	228
5.3.6 Infanticide law in New Zealand	230
5.3.7 Infanticide law in England and Wales	232
5.3.8 Infanticide law in Malaysia	233
5.4 LAWS RELATING TO NEONATICIDE AND INFANTICIDE	235
5.4.1 Laws relating to neonaticide and infanticide in United States	236
5.4.2 Laws relating to neonaticide and infanticide in State Courts	237
5.4.3 Laws relating to neonaticide and infanticide in England and Wales	238
5.5 CONCLUSION	241

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 INTRODUCTION	242
6.2 FINDINGS	242
6.2.1 Laws Relating to Baby Dumping	
6.2.1.1 Definition of Baby Dumping	243
6.2.1.2 Inadequacy of Provisions On Baby Dumping	245
6.2.1.3 Standardisation of punishment	246
6.2.1.4 Secondary liability offender	247
6.2.2 Rights of Children and Prohibition of Baby Dumping	248
6.2.2.1 Welfare of the Dumped Babies	248
6.2.2.2 Welfare Of The Pregnant Mothers With Unwanted Babies	250
6.2.3 Comparative Overview	251
6.3 LIMITATIONS	253
6.4 RECOMMENDATIONS	254

BIBLIOGRAPHY

257

APPENDIX A

273

APPENDIX B

275

UNIVERSITI SAINS ISLAM MALAYSIA
جامعة العلوم الإسلامية الماليزية
ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

LIST OF TABLES

	Page
Table 1: Section 299 and Section 300 of the Penal Code Compared.	92
Table 2: Age Group of Biological Mother	132
Table 3: Racial Background of the Biological Mother	132
Table 4: State of Origin of the Biological Mother	133
Table 5: Profession of the Biological Mother	133
Table 6: Baby Dumping Statistics	210
Table 7: Race of Suspects of Baby dumping Cases	214

LIST OF FIGURES

	Page
Figure 1: Respondents understanding on baby dumping	89
Figure 2: Suggested punishment for those who committed baby dumping that lead to death	90
Figure 3: Different punishment for baby dumping in Malaysia	96
Figure 4: Baby hatch, OrphanCARE Foundation, Petaling Jaya	111
Figure 5: Survey on people's judgment on whether baby dumping can replace legal punishment for baby dumping	118
Figure 6: A survey on whether baby hatches can reduce baby dumping	119
Figure 7: A survey on the respondents' understanding on baby dumping	121

LIST OF CASES

	Page
<i>Hall v. Simons</i> (2003) 3 W.L.R. 543	205
<i>Harris v. Cooke</i> 88 LJKB 253 (1918)	188
<i>Jokasi v. State</i> (1987) LRC (Crim) 642	181
<i>People v. Doss</i> , 214 IL App. 3d 1051; 574 NE 2d 806 (1991)	225
<i>People v. Campbell</i> (1895) 159 IL 9, 42 NE 123	226
<i>Public Prosecutor v. Azilah bin Hadri & Anor.</i> (2015) 1 MLJ 617	96
<i>Public Prosecutor v. Soha Beta & Anor.</i> (2017) MLJU 1566	97
<i>Public Prosecutor v. Ng Tai Tee Janet</i> (2001) 1 SLR 343	179
<i>Public Prosecutor v. Nurul Syuhada Shamsudin</i> (2014) 7 CLJ 684	94
<i>Public Prosecutor v. Tan Fook Sum</i> (1999) 2 SLR 523	179
<i>Re Lowe</i> (1929) 2 Ch. 210 p. 212	41
<i>Ruddy v. Procurator Fiscal</i> (2006) UKPC 2	206
<i>R v. Hofer</i> (1977) 4 WWR 645	188
<i>State v. Rufaro</i> (1975) (2) SA 387 (RA)	181
<i>Tan Kon Meng v. Zainon bte. Md. Zain & Anor.</i> (1995) 3 MLJ 408	151

LIST OF STATUTES

- Malaysia. 1967. *Civil Law Act 1967*.
Malaysia. 2001. *Child Act. 2001*
Malaysia. 1971. *Majority Act 1971*
Malaysia. 1937. *Civil Law Enactment. Section 2*.
Malaysia. 1947. *Juvenile Courts Act (Act 90)*
Malaysia. 1951. *Civil Law (Extension) Ordinance*.
Malaysia. 1956. *Civil Law Act 1956. (Revised 1972). (Act 67)*
Malaysia. 1956. *Civil Law Ordinance*.
Malaysia. 1957. *Births and Deaths Registration Act*.
Malaysia. 1973. *Women and Girls Protection Act (Act 106)*
Malaysia. 2001. *Child Act 2001*.
Malaysia. *Criminal Procedural Code. Act 593*.
Malaysia. *Federal Constitution*.
Malaysia. 1952. *Adoption Act*.
Malaysia. 1957. *Federal Constitution of Malaysia*.
Malaysia. 1991. *Child Protection Act (Act 468)*
Malaysia. 2001. *Child Act (Act 611)*.
Malaysia. 2001. *Child Act (Act 611)*.
Malaysia. 1971. *Age of Majority Act*.
Malaysia. 1965. *Shariah Court Act*
Malaysia. *Penal Code*.
United Kingdom. 1984. *Insanity Defense Reform Act*.
United Kingdom. 1861. *Offence Against A Person's Act Offences Against the Person Act*

LIST OF APPENDICES

	PAGE
Appendix A: Questionnaire on baby dumping issues.	273
Appendix B: Child related legislation in Malaysia.	275

UNIVERSITI SAINS ISLAM MALAYSIA
جامعة العلوم الإسلامية
ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

GLOSSARY

<i>Actus non facit reum, nisi mens sit rea</i>	Latin: An act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence.
<i>Actus Reus</i>	Latin: The prohibited conduct or behaviour that the law seeks to prevent.
<i>Aql`</i>	Arabic: Intellect
<i>Arsy</i>	Arabic: Punishment for offences against human body
<i>Din</i>	Arabic: Religion
<i>Ejusdem generis</i>	Latin: Of the same kind
<i>Fatwa</i>	Arabic: Legal opinion
<i>Foetus</i>	Unborn mammals
<i>Hadd</i>	Arabic: Limit or Prohibition
<i>In Pari Materia</i>	Latin: On A Like Matter
<i>Jahiliyah</i>	Arabic: State of Ignorance
<i>Laqit</i>	Arabic: Abandoned child
<i>Liwat</i>	Arabic: Sodomy
<i>Mahram</i>	Arabic: unmarriageable kin with whom sexual intercourse would be considered incestuous, a punishable taboo
<i>Mal</i>	Arabic: Property
<i>Mala fide</i>	Latin: Bad faith
<i>Maqasid al-Shariah</i>	Arabic: Objective of <i>Shariah</i> law
<i>Mawla</i>	Arabic: Guardian or trustee
<i>Mens Rea</i>	Latin: Guilty Mind
<i>Muncikari</i>	Malay: An agent who controls prostitution as a source of sustenance
<i>Musahaqah</i>	Arabic: Sexual relations between female persons
<i>Nafs</i>	Arabic: Self, mind, psyche, soul or conscious.
<i>Nasl</i>	Arabic: Posterity
<i>Noscitur ex sociis</i>	Latin: Known by its associates
<i>Obiter dicta</i>	Latin: A remark when passing
<i>Qisas</i>	Arabic: Retaliation
<i>Ratio Decidendi</i>	Latin: Reasons for deciding
<i>Shura</i>	Arabic: Consultation
<i>Sunnah</i>	Arabic: The legal way or ways, orders, acts of worship and statements of the Prophet that are ideals and models to be followed by Muslims.
<i>Shariah</i>	Arabic: Islamic Law
<i>Zina</i>	Arabic: Unlawful sexual intercourse

LIST OF ABBREVIATIONS

AGC	Attorney General Chamber
All E.R.	All England Report
ARROW	Asian-Pacific Resource & Research Centre for Women
AS	<i>Alayh al-salam</i>
BERNAMA	Berita Nasional Malaysia (Malaysian National News Agency)
CCTV	Closed-circuit television
CEO	Chief Executive Officer
CLA	Civil Law Act 1956
CLJ	Current Law Journal
CLO	Civil Law Ordinance 1967
CNN	Cable News Network
Comp.	Compiler/ compiled
CPC	Criminal Procedural Code
Cr. App. R.	Criminal Appeal Report
CRC	Convention on the Rights of the Child
CRCI	Covenant on the Rights of the Child in Islam
CSO	Community Service Orders
Def.	Definition
DNA	Deoxyribonucleic acid
DPP	Deputy Public Prosecutor
Dr.	Doctor
e.g.	Example
ECHR	European Convention on Human Rights and Fundamental Freedom
Ed.	Editor/ edition/ edited by
Eds.	Editors
FMS	Federated Malay States
H	<i>Hijriyah</i>
i.e.	That is
IDRA	Insanity Defence Reform Act.
IFLA	Islamic Family Law Act
IUM	International Islamic University Malaysia
IKIM	Institut Kefahaman Islam Malaysia
ISCOL	International Seminar on Shariah and Common Law
J	Journal
J'keb	Pertubuhan Bekas Penghuni Institusi Di Bawah JKM.
JKM	Jabatan Kebajikan Masyarakat (Welfare Department)
LCJ	Lord Chief Justice
LUMOS	Named after the light giving spell in the Harry Potter books. An international non-government, non-profit organisation founded by J.K. Rowling to help the 8 million disadvantaged children in

	orphanages around the world to be returned to their family/ placed in a loving family environment.
MCAC	Malaysian Crime Awareness Campaign
MLJ	Malayan Law Journal
Mr.	Mister
MSF	Morning Star Foundation
n. pl	No place
n.a.	No author
n.d.	No date/ no year
n.pb.	No publisher
Narr.	Narrated by
NGO	Non-governmental Organisation
No.	Number
NRD	National Registration Department
NST	News Straits Times
NSW	New South Wales
OC	OrphanCare
p.	Page
PDRM	Malaysian Royal Police Department
pp.	Pages
PP.	Public Prosecutor
RA	<i>Radiyallahu anhu/ anha/ anhum</i>
s.	Section
SAW	<i>Salla Allah alayh wa sallam</i>
SIS	Sisters In Islam
SLR	Singapore Law Report
SPM	Sijil Pelajaran Malaysia
SUHAKAM	Suruhanjaya Hak Asasi Manusia
SWT	Subhanahu wa taala
Tas.	Tasmania
Trans.	Translator/ translated by
U.S.C.	United States Courts
UiTM	University Institute Technology MARA
UK	United Kingdom
UKM	National University of Malaysia
UKPC	United Kingdom Privy Council
UM	University of Malaya
UMS	Unfederated Malay States
UN	United Nation
UNCRC	United Nation Convention on the Rights of the Child
UNGA	United Nation General Assembly
UNICEF	United Nations Children Fund
UNTOC	United Nations Convention against Transnational Organised Crime
USA	United States of America
USIM	Islamic Science University Malaysia

v.	Versus
Vers.	Version
Vic.	Victoria
Vol.	Volume
W.L.R.	Weekly Law Report
Writ.	Written by
Y. Bhg.	Yang Berbahagia

UNIVERSITI SAINS ISLAM MALAYSIA
جامعة العلوم الإسلامية
ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA