

CHAPTER 3

MALAYSIAN LEGAL FRAMEWORK OF CHILDREN'S RIGHTS AND PROHIBITION AGAINST BABY DUMPING

3.1 INTRODUCTION

Unlike the previous chapters in this thesis that extensively discussed on children's rights pertaining to both the International and Islamic law, this chapter particularly, emphasizes mainly on children's rights and the prohibition against baby dumping, from the standpoint of the Malaysian legal context. Following the analysis from the International and Islamic law perspectives, this topic is crucial in highlighting the Malaysian legal context on children's rights and baby dumping, which would be the core discussion for this thesis. At a fundamental level, this study also focuses on pertinent sentencing and the efficacy of the judiciary system concerning baby dumping as well as the preventive measures available from the socio-legal viewpoint, while referencing significant legislative Acts such as the Child Act 2001, Child Act (Amendment) and Act 2016 (Act A1511).

3.2 CHILDREN'S RIGHTS IN MALAYSIA

In actuality, The News Straits Times had exposed that "babies were dumped in homes, toilets and garbage areas, and the last recorded case was when a cleaner had found a newborn girl in a plastic bag while she was sorting out rubbish."²⁰³ As a consequence

²⁰³ Jasmin Cho. 7 August 2019, "Babies are dumped like trash". *News Straits Times*. <https://www.nst.com.my/opinion/letters/2019/08/510953/babies-are-dumped-trash>

of such heartless actions, “the then Women, Family and Community Development Minister Datuk Seri Dr Wan Azizah Wan Ismail, while launching a baby dumping prevention campaign last August (2019), stated that 1,010 cases were recorded from 2010 to May 2019 and in 64% of the cases, the babies were found dead.”²⁰⁴ Unfortunately, these innocent lives were unspoken for, even though the right to life among children which is protected under the Federal Constitution also includes the liberty of the person;²⁰⁵ prohibition of slavery and forced labour;²⁰⁶ and rights in respect of education,²⁰⁷ along with several other related statutes that were enacted to protect the rights of children in Malaysia. As a matter of fact, a recent article in The Asean Post had reported Malaysia to be “a country notorious for baby dumping -a baby is dumped in the country every three days, with the majority found dead.”²⁰⁸

Congruently, Malaysia passed the Child Act 2001 (Act 611) which overwrites the Juvenile Courts Act 1947 (Act 90), the Women and Girls Protection Act 1973 (Act 106)²⁰⁹ and the Child Protection Act 1991 (Act 468) respectively, to fulfill the requirements under the Convention on the Rights of the Children (CRC).²¹⁰ For all intents and purposes, it is important to note that the Child Act 2001, serves to protect

²⁰⁴ Nazeli Hamzah. 26 June 2020. “Baby Dumping a Serious Social Concern in Malaysia.” *The Star*. <https://www.thestar.com.my/lifestyle/health/2020/06/26/baby-dumping-a-serious-social-concern-in-malaysia>.

²⁰⁵ Article 5(1) of the Malaysian Federal Constitution states that no person shall be deprived of his life or personal liberty save in accordance to law. This provision shall extend to all person, including children. Therefore, the same Article could be used in order to protect the life of the children.

²⁰⁶ According to Article 6(1) of the Malaysian Federal Constitution, no person shall be held in slavery. Article 6 (2) states that all forms of forced labour are prohibited.

²⁰⁷ Article 12 (1) of the Malaysian Federal Constitution states that without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth. Therefore it is the rights of all person to get accessed to the education.

²⁰⁸ Athira Nortajuddin. 5 March 2020. “Southeast Asias Baby Dumping Problem”. *The Asean Post*. <https://theaseanpost.com/article/southeast-asias-baby-dumping-problem>

²⁰⁹ Malaysia. 1973. *Women and Girls Protection Act* (Act 106).

²¹⁰ Malaysia has ratified the United Nations Convention Rights of The Children (CRC) in 1995 and has since adhered to the treaty but with some reservations.

and assist any child regardless of his or her circumstances, irrespective of race, color, gender, language, religious beliefs, social origin and physical, mental or emotional disabilities to name a few. In effect, the requirements under the Child Act 2001 are based on the four core principles of the CRC which is, non-discrimination, best interest of the child, the right to life, survival and development and respect for the views of the child.

For the most part, crucial councils, teams and centres were founded under the principle of the Child Act 2001 to further secure the rights of these newborns. To list, the foundation of the National Council is responsible for guiding the government on child protection concerns while the national focal point for a child's wellbeing and personal development is protected by the National Advisory and Consultative Council and more importantly, Child Protection Teams and Child Activity Centres were formed at both state and district levels, targeting specifically towards children who are vulnerable to all forms of abuse and exploitation, hence encouraging community participation on a larger scale in the implementation of preventive and rehabilitative programs.

With matters pertaining to the administration of juvenile justice, the Child Act ensures a child-friendly legal process before the Court for Children, not to mention taking into account the mental and emotional maturity of the child in question. Equally significant, is the fact that in compliance with UNCRC, the law in Malaysia recognizes a child's rights for his or her identity through the rules of requirement to register their birth as reported in an article by UNCRC which states,²¹¹ and the determination of

²¹¹ Without a birth certificate children are unable to access services like education and healthcare. A 2009 study by the Malaysian Ministry of Education showed that 44,000 undocumented children were not enrolled in schools. Actual figures will most likely be higher. See "Birth Registration– Briefing Paper for

nationality or citizenship of birth of child born in Malaysia.²¹² By the same token, an abandoned child's rights to family relations are supported by virtue of the law on adoption and registration of adoption.

As a matter of fact, the mandatory registration upon the birth of a child is legally stipulated, irrespective of the status of the child and will remain under the accountability of the Registrar General, to maintain the current number of registers in the prescribed form, for the recording of births and deaths of a child, which is also stated in Section 4 and 4A of the Births and Deaths Registration Act 1957. Inherently, Section 15 of the Births and Deaths Registration Act 1957 orders that the registration of abandoned children be centred specifically on the area where the child is located, since the law presumes that a child's birthplace is also the place he or she is rescued.

Apart from the abovementioned rights, abandoned children also have the rights to citizenship, which is also protected by the Federal Constitution of Malaysia. Generally, there are three kinds of citizenship listed in the Federal Constitution namely; citizenship by operation of law which constitutes the general citizenship of a Malaysian-born child, citizenship by registration and citizenship by naturalization. In relation to abandoned children, the Federal Constitution in Article 19 B, Second Schedule, and PART II specifies that;

“For the purposes of Part 1 or Part II of this Schedule, any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently

UPRMalaysia”

http://wao.org.my/file/file/Child%20Rights%20Coalition%20Malaysia%20UPR/CRCM_UPR%20Topical%20Briefing_Birth%20registration.pdf prepared by Voice of the Children, Child Rights Coalition Malaysia. Accessed on 19th April 2016.

²¹² Article 7 of UNCRC (birth registration, name, nationality, care). Every child has the right to be registered at birth, to have a name and nationality, and, as far as possible, to know and be cared for by their parents.

resident there, and if he is treated by virtue of this Section as so born, the date of the finding shall be taken to be the date of the birth.”²¹³

To further explain, the provision above is linked with another provision where the Constitution declares:

“Subject to the provision of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say: every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.”²¹⁴

Chiefly, the abovementioned provisions determine the citizenship specifically of an abandoned newborn child based on the place he or she is found, unless it is proven that the child is not born in Malaysia. Ultimately, a grown child will be considered stateless based on Article 14 (1)(b),²¹⁵ Second Schedule, PART II, of the Federal Constitution, which govern the citizenship of an abandoned, grown child.

By and large, there are two separate laws for both Muslim and non-Muslim abandoned children, mainly focusing on protecting their family relations. To begin with, abandoned children who are non-Muslims are given the option to be adopted either through Court order or the process of adoption. Although the Adoption Act 1952, which is only applicable to non-Muslims, contravenes with the Islamic law, it legalizes adoption through Court order, a legal procedure which involves converting the child’s status from “unknown” to the surname or family name of their adopted parents thus, setting a firm footing for the adopted child amongst the biological children of their adopted parents respectively. With this in mind, the adopted child is secured in terms

²¹³ Article 19B, Second Schedule, Federal Constitution of Malaysia.

²¹⁴ Part III of Federal Constitution of Malaysia.

²¹⁵ Article 14(1)(b) of the Federal Constitution states that subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say: every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

of residential permanency and in the event that there is upheaval in the family for instance, a custody battle between the parents or the rights to inheritance, the adopted child will not be isolated and will receive equal privileges as the other siblings.

Comparably, a non-Muslim or Muslim child can be adopted through the Registration of Adoptions Act 1952,²¹⁶ not only as proof that an adoption has taken place but at the same time, it protects the right of the adopted child's relations with the adopted family members. Under those abovementioned circumstances, it is safe to construe that the adoption laws that were previously discussed will secure the rights of the children to be raised and protected within a family institution, consequently as an effort to decrease the case of baby dumping.

3.3 BABY DUMPING IN THE CHILD ACT 2001

As previously emphasized, the Child Act 2001 is the country's legislation for the protection, care and rehabilitation of children. Pragmatically, this Act incorporates the core principles of non-discrimination, best interests of the child and the right to life, survival and development as well as respect for the views of the child. As a matter of fact, the Child Act had repealed the Juvenile Act 1947 (Act 90), the Women and Girls Protection Act 1973 (Act 106) and the Child Protection Act 1991 (Act 468).

Objectively, in 2001, the Act had established the Coordination Council for the Protection of Children, which advises the government on child protection issues while the National Advisory and Consultative Council for Children acts as a national focal point for children's well-being and development. Concisely, Child Act also requires the setting up of Child Protection Teams and Child Activity Centres at both state and

²¹⁶ *Ibid.*

district levels for children at risk or children vulnerable to all forms of abuse and exploitation.

In a nutshell, with the hopes of reducing child deaths under the age of five, to expedite female opportunities to receiving education as well as enabling accessibility to education for children living in remote parts of the country, the Convention on the Rights of the Child was established and as a consequence, made it compulsory in 2002 for children to receive primary education. This goes hand in hand with the various initiatives introduced through the Child Act 2001 in particular, to defend children from violence, abuse, neglect and exploitation. Even though education is not directly mentioned in Child Act 2001, however, to protect the children from being exploited, indirectly means that the children should be given the basic needs in life to survive, i.e. education, shelter, food and other forms of relevant protection.

In point of fact, incest has been criminalised by the Penal Code (Act 574) while the Domestic Violence Act 1994 (Act 521), safeguards a child against violence within the family. Regrettably, Malaysia has not escaped the global phenomenon on human trafficking in persons and this form of abhorrent trade is rampantly thriving in this country. To explain further, an article on human trafficking in the Anti-Slavery International' webpage describes "human trafficking as the process of trapping people through the use of violence, deception or coercion and exploiting them for financial or personal gain." Shockingly, an article by Liz Gooch uncovered that "Al Jazeera's exclusive investigation, which aired last week, revealed that traffickers and doctors are profiting from the illicit baby trade in Malaysia, whereby the price of a baby can range

from around \$400 to \$7,500.”²¹⁷ Astonishingly, it was also uncovered that pregnant teens who were shunned and disowned by their families, were provided with free food and lodging, not to mention that their medical needs will be taken care of by trafficking syndicates, until the birth of the child. It comes as no surprise that such attractive incentives have successfully lured many innocent prey into this treacherous trap. With the understanding that human trafficking is dangerously increasing in figures, not only did the Anti-Trafficking in Persons Act come into force on 28 February 2008, providing the legal mechanism to criminalise human trafficking and care as well as protection and shelter for the victims, but Malaysia had also positioned itself internationally by signing the United Nations Convention against Transnational Organised Crime (UNTOC) in 2002 and ratified it in 2004. At present, Malaysia is in the process of complying with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially among Women and Children, which in this case, indirectly supplements UNTOC’s standpoint relating to this matter at hand.

However, despite lifting the reservation to Article 1,²¹⁸ inconsistencies in the definition of the child under national laws remain, with multiple, contradictory definitions of the child under both the civil and *Shariah* law. On the negative side, there has yet to be a shift from needs-based to rights-based in terms of policies and programs for children in Malaysia. It must be remembered that the approaches towards children are generally paternalistic, but by and large, their views are often overlooked, not to mention disregarded especially concerning the decisions that affect them.

²¹⁷ Liz Gooch, 1 December 2016. “Baby Selling investigation leads to arrest in Malaysia.” *Al-Jazeera*. <https://www.aljazeera.com/news/2016/12/01/baby-selling-investigation-leads-to-arrests-in-malaysia/>

²¹⁸ UNTOC, Article 1.

Although birth registration is the fundamental right of every child, it is estimated that there are 50,000 undocumented children in Malaysia, which includes children from the rural poor and indigenous communities in remote locations, particularly in Sabah and Sarawak, as well as children of irregular migrants and refugees. Another key point to emphasize is the fact that Malaysia does not grant citizenship by birth, choosing not to adhere to the principle of *jus soli*,²¹⁹ meaning and individual can only apply for citizenship if one of the parents is a Malaysian citizen. Furthermore, migrants must produce each parent's passport and the certificate of marriage, documents which many do not possess, if they wish to obtain a birth certificate in Malaysia. Furthermore, those who work in rural areas are sometimes unable to travel to the national registration authority to apply for the birth certificate, further complicating the legalization of their newborn, which will ultimately affect the future of their child.

It is also crucial to accentuate that children without a birth certificate can be deprived of access to healthcare and other basic social services that could ultimately, expose them to poor health and specific forms of exploitation, such as the rejection of enrolment to Government schools, not forgetting the inability to participate in government examinations, as well as affecting the chances of Malaysian-born children with their MyKid and MyKad application.

Pertaining to the rights to education, although the Education Amendment Act 2002 has made primary education compulsory for all children from the ages of 6, this requirement is however, has not been enforced and as a result, an estimate of 200,000 Malaysian primary school - going children, do not attend school. To clarify, the cost of

²¹⁹ A rule that the citizenship of a child is determined by the place of its birth. Accessed from <https://www.merriam-webster.com/dictionary/jus%20soli>

schooling such as the purchase of books, pocket money and even transportation fees proves to be a burden that parents from low-income families are confronted with, thus, directly influencing the education status of the children involved. It is equally important to realize that children with any form of disability are exempted from attending normal schools and are required to attend special schools that impose hefty schooling fees to be borne solely by the parents, with minimal to zero funding from the government. For this reason, these special-needs children are often left at home perhaps, with their respective mothers or family members, to accomplish simple daily household task such as cooking or cleaning, without the hopes to receive any form of basic education. At present, asylum seeking children, refugee children, stateless or abandoned children, as well as children of migrant workers are not given free primary education in government-run schools.

Noticeably, a comment made by human rights lawyer, stating that no child, irrespective of whether they possess a birth certificate, should be denied access to education, would be the respond towards the move by the Kedah state government, in seeking leniency from the state Education Department to allow stateless children to register at government school.²²⁰ Proactively, steps have been taken by the state of Kedah in Malaysia, to allow all stateless children in Kedah to be enrolled in the public schools. Prominently, the decision was announced by Kedah's Chief Former Minister, who had stated that it was unfair for stateless children to be denied access to education

²²⁰ Muzliza Mustafa "All children must have access to education, says human rights lawyer." Free Malaysia Today. Accessed from <http://www.msn.com/en-my/news/other/all-children-must-have-access-to-education-says-human-rights-lawyer/ar-BBxRP83> on 5th January 2017.

as it was not the children's fault that their parents failed to register their birth.²²¹ Expectantly, it is hoped that other states in Malaysia would be able to follow the steps taken by the Kedah State, in tolerating with cases affecting stateless children or undocumented children, in order to allow them to gain access to education. In spite of the fact that Malaysia is not a signatory to the UN conventions relating to statelessness, it has adopted the Convention on the Rights of the Child – which gives all children rights to a legal identity. Significantly, this idea is supported by the Deputy Representative for UNICEF,²²² who believed that with the current advanced technological availability, Malaysia should be able to reach the unreached and make universal, the registration of the child when they are born.²²³

As highlighted by Malaysia's Population and Housing Census of 2010, 82,282 married women in Malaysia were girls between the ages of 15 and 19, while another 1,000 from this age group were widowed and another 842 were separated or divorced. The former Deputy Minister for Women, Family and Community Development revealed that, within that same year, nearly 16,000 girls below the age of 15 were married.

To avoid conflict and confusion for instance, in grey areas pertaining to the minimum marital age allowed, Malaysia approves of the ruling provided by both the civil and *Shariah* law. According to Civil law, non-Muslims may only marry from the age of 18, but girls can be married as early as 16 provided they or their parents have the

²²¹ Adie Suri Zulkefli, "All stateless children in Kedah now allowed to enrol in government schools", 4th January 2017, *News Straits Times Press (M) Bhd.* Accessed from <http://sg.news.yahoo.com/stateless-children-Kedah-now-allowed-093442516.html>. On 5th January 2017.

²²² Kate Mayberry, "Malaysia is home to an estimated 150,000 stateless children", accessed on 4th January 2017 at <http://www.aljazeera.com/indepth/features/2014/07/malaysia-stateless-children-legal-limbo-20147149248312626.html>

²²³ *Ibid.*

permission from the State Chief Minister.²²⁴ On the contrary, the minimum age for marriage is 16 for Muslim girls and 18 for Muslim boys.²²⁵ Nonetheless, an exception can be made for girls or boys to marry at a much younger age as long as they obtain the consent from *Shariah* Court. Among the central circumstances that leads to early marriages in Malaysia are the rise of social ills for example, pre-marital sexual activity which would consequently result in pregnancy out of wedlock and as a result, increase the heinous act of baby dumping. With this in mind, it can be inferred that the courts are more compliant and encouraging when it comes to early marriages, which could probably stem from the hope to resolve the upsurge of illegitimate babies and concurrently reduce cases on baby dumping. The most compelling evidence, had been provided by a study done vis-à-vis child marriages in Malaysia for UNICEF Malaysia stated, “according to case files and judges’ notes made available to researchers, common reasons that *Shariah* court judges gave for approving child marriage applications included the children’s ability to support a family and manage a household, their memorization of basic Islamic teachings and the availability of family support after marriage. Reasons judges gave for rejecting marriage applications included any evidence of coercion, lack of consent from a guardian, a lack of knowledge of basic Islamic teachings, unemployment (for male applicants) and a criminal record. An analysis of case files from the *Shariah* courts of seven states during the period of this study (2012 to 2016) revealed that of 2,143 applications for child marriages, only 10

²²⁴ Section 10, Law Reform (Marriage & Divorce) Act 1976.

²²⁵ Section 8, Islamic Family Law (Federal Territory) Act 1984.

were rejected, emphasizing that child marriage is easily accepted within the judicial system.”²²⁶

In contrast, there are attempts from both sides of the border to increase the minimum age for early marriages from 16 to 18 years old, to set a lower age limit for marriage, i.e. 14 for girls and 16 for boys, as preached by the Mufti of Sabah²²⁷ and to criminalise child marriages.²²⁸ Generally, regarding Muslims in Malaysia, the Islamic Family Law (Federal Territory) Act 1984 applies, which states that the minimum age for marriage is 18 years for males and 16 years for females.²²⁹ Then again, the abovementioned perspectives are debatable, as a viable solution to this socio-moral dispute. In the event that the teenage newlyweds are mentally immature and financially unstable, they may risk giving up on their education, usually compelled by the lack of interest and it is not uncommon for a child bride to be a victim of abuse either physically, mentally or emotionally by her husband and in some cases, her in-laws. Congruently, financial constraints and emotional instability could result in baby dumping, if one or both parents are unable to strengthen their core values, to accept the birth of their child. Equally important, is a study conducted by UNICEF, that if a mother is under the age of 18, her infant’s risk of dying in its first year of life is 60 per cent greater, than that of an infant born to a mother older than 19.²³⁰ As a result, the government has finalised the

²²⁶ Noor Aziah Mohd Awal, 2018, *Child Marriage in Malaysia*, <https://www.unicef.org/malaysia/media/711/file/Child%20marriage%20in%20Malaysia.pdf>

²²⁷ Durie Rainer Fong, “Child marriage: Sometimes I feel 18 a bit ‘lanjut’, says Shafie.” www.freemalaysiatoday.com 23 September 2018.

²²⁸ Ashghar Ali Ali Mohamed, “Criminalise Child Marriages”, The News Straits Time Online, 24th September 2018.

²²⁹ The Commissioner of Law Revision Malaysia. ISLAMIC FAMILY LAW (FEDERAL TERRITORY) ACT 1984 2006.

²³⁰ n.a. “Child protection from violence, exploitation and abuse.” Retrieved from www.unicef.org n.d.

process of raising the minimum marital age to 18 and that the best interest of the child must always be considered.²³¹

3.4 DEFINITION AND THEORIES OF PUNISHMENT IN THE CONTEXT OF CRIMINAL LAW

Notably, the legal framework also relates to the sentencing enforced to the offender, meaning that the enforcement of the law will be pursued by appropriate punishment, as an imperative suffering, consequential to any act that is against the norm or order in a society which is usually a form of unpleasant and often painful experience, although it can be conceived as a deprivation of certain rights rather than as the infliction of pain. However, the definition of ‘punishment’ today has taken a modern form, with those who violate the rule of the game, are normally penalized rather than punished; and those who are taken into protective custody are not thereby punished.²³⁷ Pertaining to criminal law, theories of punishment exist to serve as retribution, deterrence, incapacitation and rehabilitation. To elaborate, punishment as retribution allows the society to seek retaliation, through the courts as its agency, to mete out punishments against the wrongdoer for the offence that he has committed. According to Nuraisyah Chua Abdullah, the retributive theory of punishment is an indication of vengeance, the idea of the right to hate criminals and to strike back at them with an eye for an eye and a tooth for a tooth basis.²³⁸

²³¹ n.a. “DPM: We’ll raise minimum marriage age to 18.” Retrieved from www.thestar.com.my on 22nd September 2018.

²³⁷ Kleinig, J. 2008. *Ethics and Criminal Justice: An Introduction*. UK: Cambridge University Press. p. 196.

²³⁸ Nuraisyah Chua Abdullah. 2007. *Questions & Answers on Malaysian Courts, Statutes, Cases & Contract, Tort and Criminal Law*. Golden Book Centre Sdn. Bhd. Petaling Jaya. p. 153.

The aim of deterrence, is that the threat for punishment will deter people from committing a crime. Mainly, deterrence is divided into two types – individual and general deterrence. Essentially, individual deterrence discourages an individual offender from committing further crimes, as a result of his punishment.²³⁹ In the case of general deterrence, the punishment on an offender serves as an example and a threat to others, as to what will happen to them if they commit crimes.²⁴⁰

On the other hand, incapacitation refers to the restriction of an individual's freedom and liberties, that he or she would normally require in society. By incapacitating the offender, the said individual is prevented from committing future crimes because he or she is removed from the society, to be detained. In some societies, incapacitation does not directly equate to imprisonment since it may involve corporal punishment or dismemberment, such as in the case of some Asian and Middle Eastern countries. Probably, the most humane form of punishment in the criminal law is rehabilitation, which aims to reform the offender so that individual will not repeat the crime and returns as a productive member to the society. Examples of rehabilitation include, educational and vocational programs, treatment centre placements and counselling, to name a few.

3.5 PUNISHMENT RELATED TO BABY DUMPING IN MALAYSIA

Ultimately, the punishment set for baby dumping in Malaysia, is featured in both the Penal Code and Child Act 2001. Not only does this sad state of affairs govern

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

the legal system, but it is also emphasized in religious texts. Strikingly, a journal on the crime of baby dumping from an Islamic perspective explains, “Islam makes it clear that the sustenance of the baby is in the hands of Allah. The Qur’an states *“Kill not your children for fear of want. We shall provide sustenance for them as well as for you. Verily the killing of them is a great sin.”*²⁴¹ Momentously, Prophet (PBUH), in response to a question asked, *“What is the greatest sin?”* replied, *“To ascribe partner to Allah, when he is the one who created you.”* “What next?” asked the companion and the Prophet (PBUH) replied saying, *“To kill your child out of fear that he will share your food.”* Imperatively, the abovementioned citation, distinctly supports the notion that the human life is precious and should be cared for and that every human life will be provided for accordingly.

3.5.1 Punishment under The Penal Code

Primarily, it is crucial to examine the laws contained in the Penal Code, which relates to the case of baby dumping, especially when it involves death. For the most part, this analysis will cover the topic of murder and culpable homicide, as well as the concealment of birth by secret disposal.

Culpable homicide had been described in the Penal Code as:

“Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide”²⁴²

²⁴¹ Al-Quran, 17:31

²⁴² Section 299. Penal Code. Malaysia

Whereas, murder is explained under section 299 which states that culpable homicide can be considered as murder:²⁴³

- (a) If the act by which the death is caused is done with the intention of causing death;
- (b) If it is done with the intention of causing bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;
- (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficiently in the ordinary course of nature to cause death; or
- (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

As a matter of fact, Section 300 has set out ‘special exceptions,’²⁴⁴ with the expectation to reduce the figure of culpable homicide occurrences that does not amount to murder. Correspondingly, the combined effect of Section 299 and 300 is that some cases of culpable homicide will amount to murder but others will be classified as ‘culpable homicide not amounting to murder.’ To elaborate differently, the relationship between the two offences is best illustrated by means of the following table:²⁴⁵

²⁴³ Section 300. Penal Code. Malaysia

²⁴⁴ Five special exceptions that were contained in the Penal Code are provocation, exceeding private defence, exceeding the powers of a public servant, sudden fight and consent.

²⁴⁵ Stanley Yeo, Neil Morgan, Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd edition Lexis Nexis, Singapore, 2012, p. 189.

Table 1: Section 299 and Section 300 of the Penal Code Compared²⁴⁶

Nature of fault elements	Murder	Culpable Homicide Not Amounting to Murder
Intention to kill Section 300 (a) and the first limb of Section 299	Defendant intended to cause death	Defendant intended to cause death but the offence is reduced to culpable homicide, not amounting to murder by operation of the special exceptions
Intention to cause an injury Section 300 (b) –(c) and the second limb of Section 299	Defendant intended to cause a bodily injury and Either: Defendant knew that such injury was likely to cause the death of the person to whom the harm was caused (Section 300 (b)). Or: The bodily injury intended to be inflicted was sufficient in the ordinary	Defendant intended to cause such bodily injury as was likely to cause death

²⁴⁶ Stanley Yeo, Neil Morgan, Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd edition Lexis Nexis, Singapore, 2012, p. 189..

	cause of nature to cause death. (Section 300(c))	
Knowledge of risk Section 300 (d) and the third limb of Section 299	Defendant knew that the act was imminently dangerous that it must in all probable cause: <i>Either</i> death; Or- such bodily injury as is likely to cause death; and Defendant committed the act without any excuse for incurring the risk of causing such injury or death.	Defendant did the act with the knowledge that he or she was likely, by such act to cause death.

Worth mentioning, is an illustration of baby dumping cases in Malaysia, evident in an incident which had involved a factory worker, who was asked by the Federal Court to enter her defence on the charge of murder, for allegedly causing the death of her new born daughter,²⁴⁷ the first baby-dumping case to be heard at the

²⁴⁷ Mageswari, M. 2014. Woman to be tried for murder in baby-dumping case, Federal Court Rules. <http://www.thestar.com.my/News/Nation/2014/09/04/mother-murder-charge-newborn-fed-ct/>. Accessed 1 August 2014.

Malaysian apex court. With reference to this case, Nurul Syuhada Shamsuddin, 24, was previously acquitted by the Penang High Court in January 2011, on the charge of murdering her new born daughter, whom, she allegedly flushed down the toilet at her workplace.²⁴⁸ However, the prosecution appealed against her acquittal and she was left with a RM 3000 fine in accordance to section 318 of the Penal Code. In opposition, reversing the decision made by the High Court and Appeal Court, the Federal Court Judge Justice Suriyadi Halim Omar, had set aside the order that had been meted out by the earlier courts. Worth mentioning, as stated that in this case, Nurul Syuhada had to be called to enter her defence over the original murder charge, on the grounds that there was sufficient evidence produced before the judge. Centring on the evidence tendered to this case, was the sounds of a crying baby, followed by the sound of flushing water when she was in the lavatory on the day of the incident. Supporting proof has been presented when a co-worker who went to look for Nurul Syuhada in the toilet suspected that she was behaving suspiciously. With time, more evidence was found, for instance, when a cleaner notified the security guard that the toilet was clogged and the firemen were called to break the water closet open, only to horrifyingly discover the body of a deceased baby, stuck inside. In the earlier verdict however, Justice Zamani A. Rahim, claimed that a live birth in this case, was not proven and that the prosecution's case was weakened when the actual cause of the death of the baby was unascertained. Thus, it might serve as a deterrent factor to the public that the punishment for the case will be more than just the short imprisonment or small amount of fine.²⁴⁹

²⁴⁸ *Public Prosecutor v. Nurul Syuhada Shamsudin* 684 (2014) 7 CLJ 684

²⁴⁹ *Ibid.*

Comparatively, in the case of *Public Prosecutor v. Soha Beta & Anor.*,²⁵⁰ the appellant appealed against the decision of the learned High Court judge, who had acquitted and discharged both respondents of a charge under Section 302 of the Penal Code read alongside Section 34 of the said Code. First and foremost, the respondents are biological parents of the deceased infant and they were accused of burying the newborn alive around 48 hours after its birth. It had been brought to light, that while both suspects were last seen at the Hospital with the baby, one eye witness had testified that both had brought and buried the infant within the vicinity of the factory where the eye witness was working and the body was later recovered by a team of policemen. Due to the weakness of evidence provided by the eye witness concerning the vagueness to identify both the accused, the prosecution had declared this to be a prima facie case, a process that relies on the jurisprudence of circumstantial evidence.

Indeed, the fundamental constituents for this offence was straight forward and the facts of the case had displayed the connection between the respondents and the death of the infant and consequently, the debatable issue came down to if the newborn had been buried alive or already dead. However, there were both medical and circumstantial evidence to support the prosecution's case, that the infant had been buried alive. It is important to note that the respondents' rights to safeguard their version for the cause of death and burial of the said newborn that could probably have led to an acquittal or reduced charge, was only permissible at the defence stage. As per the charge, some significant factors pertaining to the offence had to be established by the prosecutor through the approach of direct and/ or circumstantial evidence as

²⁵⁰ (2017) MLJU 1566

follows: i) the infant was the biological child of the respondents; ii) the infant had died of asphyxia; iii) the respondents with common intention had buried the infant alive.²⁵¹ Under those circumstances provided in this case, the court had concluded that the characteristic of the offence had been fulfilled principally by the pathologist, the security guard, the DNA evidence and direct evidence of hospital staff at the time of the birth. Hence, the relationship between the infant and the respondents, together with the cause of death, is sufficient reason based on direct and/ or circumstantial evidence, to form a prima facie case, a proposition that is clearly supported as follows:

In *Public Prosecutor v. Azilah bin Hadri & Anor.*, the Federal Court stated that “in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible.”²⁵²

As for the issue of common intention in the above-mentioned case, it is a statutory formula that does not require *mens rea*. Equally important to note, is how close the nexus of the accused to the crime and the fact that the crime was committed will prima facie, is adequate for the prosecution to invoke Section 34. Nevertheless, this does not mean that the defence at the defence stage will not be able to defeat the allegation and proof of common intention, since it depends on the facts, as well as the

²⁵¹ *Ibid*

²⁵² (2015) 1 MLJ 617

version of the defence story at this stage. As in the case of *Ravindran a/l Ramasamy v Public Prosecutor*,²⁵³ on the issue of common intention, evidently states that:

“Section 34 of the Penal Code which deals with common intention is that one need not to be principal offender to be liable for the offence. Association in the crime and failing to show satisfactory disassociation from the crime or principal offender will attract the charge as well as the sentence as per decided cases in this area of jurisprudence.”

Hence, in *Public Prosecutor v. Soha Beta & Anor.*'s case,²⁵⁴ the court had granted that the prosecution consider this case as *prima facie*, since this is a case befitting for the call for appellate intervention to direct defence, not to mention easing the order of acquittal and discharge.

In another case, it had been reported that a maid agency worker was charged with murder, after a 6-month-old corpse of a baby was found in a ravine in Genting Highlands.²⁵⁵ It was later exposed through this case, of a syndicate that forced foreign maids to work without pay and had them sexually abused. On the contrary, this crime was considered uncompromising, as the offender was charged for murder. Note that the former case of baby dumping, however, is not being categorised as murder, but as a crime of a lesser degree and this can be compared to other cases that had been investigated under Section 318 of the Penal Code.²⁵⁶ In some cases, the offender is charged under Section 318, which holds a person liable for the act of disposing the dead body of a child instead of being charged for murder. It might be due to the

²⁵³ (2013) 4 MLJ 665

²⁵⁴ (2017) MLJU 1566

²⁵⁵ Cheng, N. 2014. Maid agent in Genting Highlands baby dumping case to be charged with murder. <http://www.thestar.com.my/News/Nation/2014/06/13/maid-agent-in-baby-dumping-case-murder-charge/>. Accessed 2 August 2014.

²⁵⁶ Ramendran, C. (2014). Body of baby boy dumped in the drain. <http://www.thesundaily.my/news/1170851>. Accessed on 15 September 2014.

insufficient facts of the case to prove that the baby had been born alive hence, the court would render the suspect to only be charged by Section 318, for concealing the birth by secret disposal of a dead body.

Significantly, the murder charge for baby dumping had been proposed by the Cabinet that in the case of baby dumping which led to death, the case can be investigated for murder under Section 302.²⁵⁷ The issue of baby dumping had been frequently discussed in Parliament - it was highlighted that the existing law is said to be too light and some revision should be resolved specifically on Sections 315, 316, 317 and 318 of the Penal Code.²⁵⁸ As a result, the Cabinet had proposed for Section 302 of the Penal Code to be used in the case of baby dumping, involving death. Of course, it had been decided on 12th August 2010, that the Cabinet had given the directive for those who are involved with the case of baby dumping; the accused can be sentenced for murder or attempted murder,²⁵⁹ probably, due to the escalation of baby dumping cases in Malaysia.

To further elaborate on the sentencing for baby dumping, Section 315 of the Malaysian Penal Code puts emphasis on the stringent penalty for an act done with intention, to prevent a child from being born alive or to cause it to die after birth as distinctly described below:

“Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act is not

²⁵⁷ Loh, F.F. (2010). Murder charge for baby dumpers. <http://www.thestar.com.my/Story/?file=%2F2010%2F8%2F13%2Fnation%2F6851738>. Accessed 5 August 2014.

²⁵⁸ Loganathan, T. (2013). Heavier punishment for ‘baby dumpers’. <http://www.themalayiantimes.com.my/heavier-punishment-for-baby-dumpers/>. Accessed on 16 September 2014.

²⁵⁹ N.a. (2010). “Kes Buang Bayi Meningkat”, 16th August 2010. http://ww1.utusan.com.my/utusan/info.asp?y=2010&dt=0817&sec=Jenayah&pg=je_02.htm

caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment for a term which may extend to ten years, or with fine, or with both.”²⁶⁰

Similarly, the punishment for causing quick death to an unborn child through an act amounting to culpable homicide, is clarified under Section 316 of the Malaysian Penal Code, whereby the punishment is the same as above.²⁶¹ It is stated under Section 316 of the Malaysian Penal Code that:

“Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine.”²⁶²

Likewise, Section 317 of the Penal Code, calls attention to the severity of the sentencing towards a parent or caregiver, due to the abandonment of a child, below the age of twelve, as clearly depicted below:

“Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.”²⁶³

However, the aforementioned citation further explained that it is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure.²⁶⁴ Therefore, it could be deduced, that Section 317 of the Penal Code can be considered as a noteworthy point of reference during the sentencing, in the event that an abandoned child was found alive, the parents or caregiver in question could be sentenced to seven years of

²⁶⁰ Section 315, Malaysian Penal Code.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ Section 317, Malaysian Penal Code.

²⁶⁴ Explanation under Section 317, Malaysian Penal Code.

imprisonment or fine, or both. In force, it is safe to construe that Section 317 is not applicable for cases involving death and the offender will receive much harsher sentencing for murder, on the grounds of culpable homicide. Arguably, should cases of child abandonment only be tried under the leniency of Section 317, it would pave the way for the increase of baby dumping cases since, the offender will not be punished accordingly. In essence, Section 317 does not serve as a deterrent factor and may cause repeated offenders, as well since the element of incapacitation in the theory of punishment, is not adhered to by the above section.²⁶⁵

Comparatively, Section 318 of the Penal Code passes an even lighter ruling with regards to the concealment of birth, through secretly disposing of the dead body as evidently related in the citation below:

“Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child shall be punished with imprisonment for a term which may extend to two years or with fine, or with both.”²⁶⁶

With reference to the wordings of the above section,²⁶⁷ one can argue that an offender is highly susceptible to commit perjury, by claiming that the child was born dead, in order to receive sentencing under this Section, instead of being charged with culpable homicide. That being said, the current advancement in medical technology has made it possible to detect and determine the cause, reason and time of death.

²⁶⁵ Section 317, Malaysian Penal Code.

²⁶⁶ Section 318, Malaysian Penal Code.

²⁶⁷ *Ibid*

Even if countless cases of baby dumping offenders had been tried and convicted under Section 318 of the Penal Code, nonetheless, this depends on the facts of the case where before a person is held liable, the *actus reus* and *mens rea* should be proven first,²⁶⁸ thus, emphasizing that the degree of punishment would depend on the seriousness of the case in question.

Bearing this in mind, the criminal law in Malaysia has approved of the proposal made by the former Minister of Women Affairs, to impose the death penalty for baby dumping - which is punishable under Section 302 of the Penal Code.²⁶⁹ Noticeably, Section 302 has never been put into action pertaining to baby dumping cases concerning death and wrongdoers often escape with the leniency of punishment from Sections 317 and 318, as previously explained.

According to the Federal Constitution of Malaysia, Article 5(1) states that no person shall be deprived of his life being saved in accordance to the law. Therefore, each person has the right to live in this world. To cause death of another person intentionally, would render the offender liable for murder. This is a right given to every human being, so that it ensures everyone's life is protected under the law, including the life of an infant. Characteristically, to kill an infant is considered against the law, as an infant is also covered as a person being protected under Article 5(1), of the Federal Constitution of Malaysia. Not only is the life of a person protected under the above Article,²⁷⁰ there is also punishment for killing a person which is stated under the Penal Code of Malaysia. Primarily, it is stated in Section 309A of the Penal Code, that

²⁶⁸ Elliot, C & F. Quinn. 2006. *Criminal Law*. England: Pearson Education Limited

²⁶⁹ Loh Foon Fong, Murder Charge for Baby Dumpers, 13 August 2010, The Star, retrieved from <https://www.thestar.com.my/news/nation/2010/08/13/murder-charge-for-baby-dumpers>

²⁷⁰ Article 5(1) of the Federal Constitution of Malaysia.

infanticide is the offence of causing death to a newly born baby from a mother who suffers from post natal depression. Nevertheless, a mother who is deemed as mentally incapable of rational thinking by qualified medical professionals, will not be held liable for infanticide. All in all, this is an exclusion stated by Section 309B in which, whoever commits the offence of infanticide, shall be punished at the discretion of the court, with imprisonment which may extend of up to 20 years and shall also be liable for a fine. In ordinary circumstances, committing infanticide is considered as an offence, but when the case is related to the mental disturbances of a woman who commits the crime, it is confirmation of a valid defence, to the case related. Mainly, this is a common predicament faced by women who, after giving birth, are exposed to mental tensions which could trigger her to engage in irrational actions.²⁷¹

Other related punishments for the act of baby dumping, is the intent of preventing a child from being born alive and to intend for him or her to die after birth, is ruled under Section 315 of the Penal Code. Whereas, Section 312 governs the issue of causing miscarriage towards a pregnant woman, whereby, the convicted individual shall be punished with imprisonment for a term, which may extend to three years or with a fine.

In an interview session on 1st September 2013 with a magistrate,²⁷² with regards to the issue of baby dumping, she asserts that there should be a particular section

²⁷¹ https://www.who.int/mental_health/maternal-child/maternal_mental_health/en/ It is stated in this website that recent meta-analysis showed that about 20 % of mothers in developing countries experience clinical depression after childbirth. This is much higher than the previous figures on prevalence coming mostly from high income countries. Suicide is an important cause of death among pregnant and post-partum women. Psychosis is much less common but may also lead to suicide and in some cases even harming the newborn. Depression causes enormous suffering and disability and reduced response to child's need. Evidence indicates that treating the depression of mothers leads to improved growth and development of the newborn and reduces the likelihood of diarrhoea and malnutrition among them.

²⁷² Intan Nurul Fareena bt. Zainal Abidin. Magistrate. 1 September 2013. Magistrate Court Sungai Petani. *Issues of Baby Dumping*. (Personal Interview).

pertaining to the baby dumping cases under the Penal Code. By having its own section, this will reduce a lot of time and money, compared to having an Act, specifically dealing with baby dumping. In actual fact, what should actually be worked on is the enforcement of the laws. As it happens, when asked about whether or not the laws that currently exists fail to curb the problem of baby dumping, Intan further stated that the laws are not only insufficient, they must also be supported with adequate education, such as sex and religious education, related information from the mass-media, strong bonding of family institutions and other criterias, to name a few. As a matter of fact, she also added that Section 302 can only be applied if, the *actus reus* (guilty act) and *mala fide* (bad intention) can be proven first, before the offender is convicted of murdering the baby. This is in line with the Malaysian criminal justice system, whereby, a person is presumed innocent until proven guilty.

Therefore, failure to prove the *actus reus* and *mens rea* of the offender, would allow a person to not be liable for his actions. On the other hand, an exception to this rule is only presented in cases concerning strict liability, wherein, the *mala fide* is immaterial and the offender, can still be punished under the law based on his *actus reus per se*.²⁷³ This can be further exemplified, in cases whereby, a baby was dumped with unclear intention but had somehow survived or if, a baby was left in a public place with the intention that someone else could have saved the baby, it can be disputed that the *mala fide* or bad intention of murdering the baby did not exist, hence, disqualifying the sentencing under Section 302 in such situations. This is especially depicted in baby dumping cases, wherein, the offender would often manipulate the truth, by claiming

²⁷³ Elliot, C & F. Quinn. 2006. *Criminal Law*. England: Pearson Education Limited.

that the said baby had died upon birth or was stillborn, a probable validation to avoid being charged under Section 302 that clearly penalises the wrongdoer, only when the *actus reus* and *mens rea* coincide.

In a nutshell, this research embarked on conducting a survey on the society's perception pertaining to the issue of baby dumping, so as to obtain feedback from the general public on the laws that had been implemented on baby dumping as well as the baby hatch program in Malaysia. To briefly illustrate the progression of this research, an online questionnaire was posted on Facebook and shared through mobile phone applications such as Whatsapp, using a given link via Google Drive. Out of 100 respondents, only 93 had answered the questionnaire which had been posted on several relevant groups on Facebook, as tabulated by Google Drive. Among the participating groups were the Doctorate Support Group, Ph.D Discussion Forum, Qualitative Research Group and Education in Malaysia. The result of the survey has already been published in the USIM journal, in an article related to baby dumping, written by the researcher.²⁷⁴

To better comprehend the society's understanding towards the issue of baby dumping, the respondents were asked whether they felt sensitive about the baby dumping issue²⁷⁵. The results are shown below;

²⁷⁴ Mazbah Termizi, Azizah Abdul Majid, Mariam Saidona Tagarano & Yasmin Hanani Mohd Safian. 2014. "Towards Solving Baby Dumping Issue in Malaysia by Using the Alternative Way: Baby Hatch" (Paper). Marriage and Sexuality Conference (MASEC 2014). Leadership and Management Faculty, USIM, Nilai. 28th-29th May 2014.

²⁷⁵ Question for Figure 1: Do you understand the issue of baby dumping?

Figure 1: Respondents Understanding on Baby Dumping²⁷⁶



Figure 1 shows that more than half of the respondents admitted that they strongly understood the issue. Undoubtedly, this indicates that the level of sensitivity among the public was relatively high, amounting to 68% who strongly understood, compared to 20% who understood the meaning of the baby dumping issue. Statistically, 9% of the population were unfamiliar with the matter of baby dumping. Based on the figures shown, 83% of the respondents admitted that they knew the issue well, thus, it can be assumed that the society in general, are well informed that baby dumping or infanticide is a serious phenomenon both nationally and internationally, which requires the undivided attention from each and every individual at large.

Figure 2: Suggested Punishment for Those Who Committed Baby Dumping That Led to Death²⁷⁷

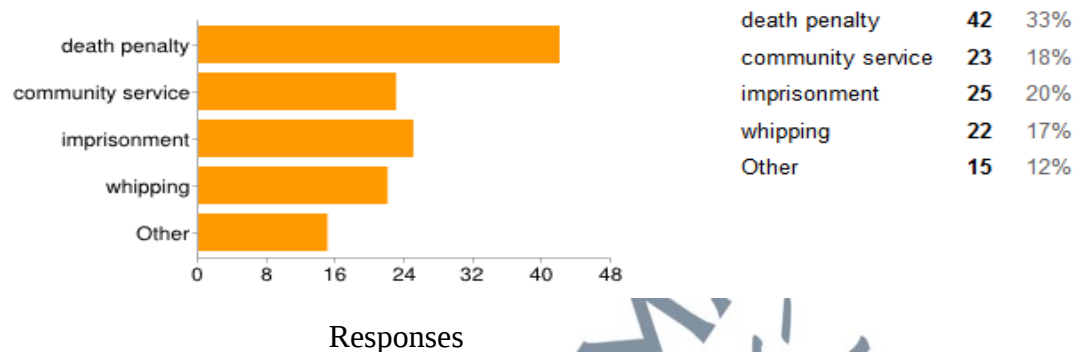


Figure 2 records the respondents' suggestion on the ideal punishment for those who committed baby dumping that leads to death. Based on the survey, it can be implied that many of the respondents feel strongly about the issue of baby dumping. The question on what would be the most suitable punishment for baby dumping offenders that led to death had indicated a mixed response, with 33% who were for the death penalty, while 20% suggested imprisonment. Meanwhile, the number of respondents that recommended community service and whipping, was almost equivalent in number.

These findings can be related to the view of the magistrate,²⁷⁸ who had earlier suggested that there should be a particular legal section, pertaining to the issue of baby dumping under the Penal Code, to enhance the management of crime by law enforces. In addition to that, when 33% of the respondents had suggested the death penalty for

²⁷⁷ Question for Figure 2: What do you suggest is the most suitable punishment for those who dump their babies that has led to death?

²⁷⁸ Intan Nurul Fareena bt. Zainal Abidin. Magistrate. 1 September 2013. Magistrate Court Sungai Petani. *Issues of Baby Dumping*. (Personal Interview).

baby dumping, Intan further added that the existing law is inadequate to curb the problem. This is largely due to the fact that, it is challenging to find the culprit who abandons a baby, especially if the baby is left at extremely isolated and secluded areas.

Based on the survey done, it can be concluded, that given the complexities faced by the judges specifically, pertaining to the intention of the lawbreakers who abandon babies at public places, having to grant these offenders with the benefit of the doubt of not wanting the babies to be harmed and wish for their safety when found hence, effecting the judicial decision on these wrongdoers, who, oftentimes escape with lenient charges. In reality, it is impossible to implement the public's suggested punishments since, there are no specific legal ruling or enactment directly formulated for baby dumping.

As a matter of fact, the search for the most suitable punishment for baby dumping in Malaysia has been an on-going debate, as seen from numerous public feedback in social medias. This is obvious from newspaper reports, television talk shows and online forums, that highlight the cause and effect of baby dumping in Malaysia, based on expert and public opinion. All things considered, it was clear that while some supported stricter punishment, others did not, particularly when it implicated women offenders.

According to a psychiatrist,²⁷⁹ there is a strong link between domestic violence and why women decide to kill their children. As a researcher and psychiatrist who has interviewed women convicted of filicide (the act of a parent killing his or her child), Dr. Salmi Razali in her letter of opinion, had firmly justified why, punishing the helpless

²⁷⁹ Salmi Razali, Don't Punish Helpless Woman, *Thestar*.
<http://www.thestar.com.my/Opinion/Letters/2014/08/26>. Accessed on 5 May 2015.

person who herself is a victim, can cause greater damage, than the act of killing itself. She further elaborates, that many of these women tend to have had miserable life experiences during their childhood, from being deprived of a stable and happy family unit, resulting in their meaningless and discontented adulthood. To complicate matters, their misery continues as victims of domestic violence, due to poor selection of spouses. Literally, these women should not be blamed when their children are injured or die, as a result of violence committed by their husbands.²⁸⁰ Dr. Salmi Razali's standpoint is further supported by another writer, in his letter to The Star Online, who stated that it does not make sense for the state to give the death penalty for the act of killing, as it seems contradictory.²⁸¹ According to the writer,²⁸² it has been pointed out repeatedly that the death sentence does not act as a deterrent, rather, it merely satisfies our vindictive and punitive sense for justice, which has no place in a civilised modern society. As an ultimate analysis, the death penalty would only desensitise the society and devalue human life.²⁸³ Given these arguments, the purpose of this thesis is to determine if the aforesaid forms of punishment is successful to curtail baby dumping in Malaysia. Centred on Malaysia's judicial acts and findings from various sources, surveys and interviews, this thesis seeks to reach a conclusion on the best method of re-structuring the existing laws or implementing suggested alternatives, towards criminalising the act of baby dumping in Malaysia. Be that as it may, comparing Malaysian laws on baby dumping with that of other countries ought to be done, in order to evaluate the punishments and its effectiveness to decrease the occurrence of this

²⁸⁰ *Ibid.*

²⁸¹ Paul, J.M. Death Sentence is not The Answer, *The Star*. <http://www.thestar.com.my/Opinion/Letters/2014/08/28>. Accessed on 5 May 2015.

²⁸² *Ibid.*

²⁸³ *Ibid.*

problematical phenomena. Quintessentially, it is essential to juxtapose the said laws with the laws from the United Kingdom, since Malaysia adopts English law as the source of laws.²⁸⁴ Whereas, the laws in the United States are also referred to, as the country has formed legislation pertaining to baby dumping and also the availability of many literature reviews relating to the issues.²⁸⁵ Finally, Islamic law is also referred to, so as to compare the relevancy of the laws pertaining to baby dumping from the Islamic law's perspectives.²⁸⁶

3.5.2 Punishment under Child Act 2001

As emphasized throughout this chapter, Child Act 2001 is a substantial point of reference to penalize baby dumping criminals in the legal courts and it is important to note, that this act has gone through several amendments since 2016. For instance, there were changes made to the provisions on offences, related to the health and welfare of children under Section 31 of the Child Act 2001²⁸⁷ which, specifically discussed cases of ill-treatment, neglect and abandonment or exposure of children. Previously, it had been stated in the above mentioned section that:²⁸⁸

(1) "Any person who, being a person having the care of a child -

²⁸⁴ Section 3(1) Civil Law Act 1967, Malaysia. Provides general application of English law in Malaysia. English law means 'the common law of England and the rules of equity.

²⁸⁵ Many authors has written articles related to the American law and baby dumping. See Magnusen, D. 2002. "From Dumpster to Delivery Room: Does Legalizing Baby Abandonment Really Solve the Problem?" Volume 22, The Journal of Juvenile Law, also see Stacie, Schmerling Perez, "Combating the "BabyDumping" Epidemic: A Look at Florida's Safe Haven Law", 33 Nova L.Rev.245 2008-2009. HEINONLINE. Accessed on 5th February 2015 and see Jeffrey A. Parness, 2006, "Desserting Mothers, Abandoned Babies, Lost Father's in Safe Haven" Vol. 24, No. 2, The Law Review Association of Quinnipiac University, School of Law.

²⁸⁶ Ongoing research on Bruneian Islamic law to compare with Malaysian Islamic law approach on the matter relating to baby dumping.

²⁸⁷ Section 31, Child Act 2001. Malaysia.

²⁸⁸ Section 31, Child Act 2001, (before the amendment of the Act on 2016)

(a) Abuses, neglects, abandons or exposes the child in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected, abandoned or exposed; or

(b) Sexually abuses the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

(2) The Court— (a) shall, in addition to any punishment specified in subsection (1), order the person convicted of an offence under that subsection to execute a bond with sureties to be of good behavior for such period as the Court thinks fit; and (b) may include in the bond executed under paragraph (a) such conditions as the Court thinks fit.

(3) If a person who is ordered to execute a bond to be of good behavior under subsection (2) fails to comply with any of the conditions of such bond, he shall be liable to a further fine not exceeding ten thousand ringgit or to a further imprisonment for a term not exceeding five years or to both.

(4) A parent or guardian or other person legally liable to maintain a child shall be deemed to have neglected him in a manner likely to cause him physical or emotional injury if, being able to so provide from his own resources, he fails to provide adequate food, clothing, medical or dental treatment, lodging or care for the child.

(5) A person may be convicted of an offence against this section notwithstanding that— (a) suffering or injury to the health of the child in question or the likelihood of suffering or injury to the health of the child in question was avoided by the action of another person; or (b) the child in question has died.”

Later on, it was amended in Act A1511,²⁸⁹ pertaining to the same provision on cases related to ill-treatment, neglect, abandonment or exposure of children. Section 31 of the principal Act was revised as follows:

“(A) in subsection (1) -

(i) In paragraph (a) by inserting after the words “the child” the words “or acts negligently”;

(ii) By substituting for the word “twenty” the word “fifty”; and

(iii) By substituting for the word “ten” the word “twenty”;

(b) By substituting for subsection (2) the following subsection:

(2) The Court shall, in addition to any punishment specified in subsection (1), order the person convicted of an offence under the subsection-

²⁸⁹ Child (Amendment) Act 2016, Section 31.

- (a) to execute a bond with sureties to be of good behavior for such period and on such conditions as the Court thinks fit; and
- (B) to perform community service”; and
- (c) By inserting after subsection 3 the following subsections:

(3A) the community service referred to in paragraph (2) (b)-
(a) shall not be less than thirty-six hours and not more than two hundred forty hours in aggregate;
(b) shall not performed within the period not exceeding six months from the date of the order; and
(c) Shall be subject to such conditions as may be specified by the Court.

(3B) any person who fails to comply with the order of the Court to perform community service under paragraph (2) (b) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit.”

Demonstrably, it can be seen from the rectifications above,²⁹⁰ that appropriate punishment had been extended to not only the parent or caregiver of a child, rather, to anyone who is unrelated to the said child, but has performed acts of negligence towards him or her thus, strongly securing the rights of any child.

Discernibly, as for the punishment for sexually abusing a child or causing or permitting him to be sexually abused, an offender shall be liable to a fine not exceeding fifty thousand ringgit instead of twenty thousand²⁹¹ ringgit, prior to the amendment. Similarly, the imprisonment term for the same punishment has also increased from ten years to twenty years.²⁹² All things considered, this could indicate the seriousness and determination of the government, to impose heavier punishment towards child abusers and to serve as deterrence towards others, due to the rampant cases of child abuse and neglect all over the country.

²⁹⁰ Child (Amendment) Act 2016, Section 31 (1)

²⁹¹ *Ibid*

²⁹² *Ibid*

Currently, the new amendment in Section 31 includes punishment by way of community service,²⁹³ wherein, the community service referred to in paragraph (2) (b), shall not be less than thirty-six hours and no more than two hundred and forty hours in aggregate; shall be performed within the period not exceeding six months from the date of the order; and shall be subject to such conditions as may be specified by the Court.²⁹⁴ As has been noted, community service serves as an additional sanction, along with the punishments prescribed in the earlier section,²⁹⁵ laying emphasis on the seriousness of the legal system in chastising the offender, by including extra sentencing and monitoring the good behavior of the offender, even after the mandatory punishment has been made, i.e. imprisonment.

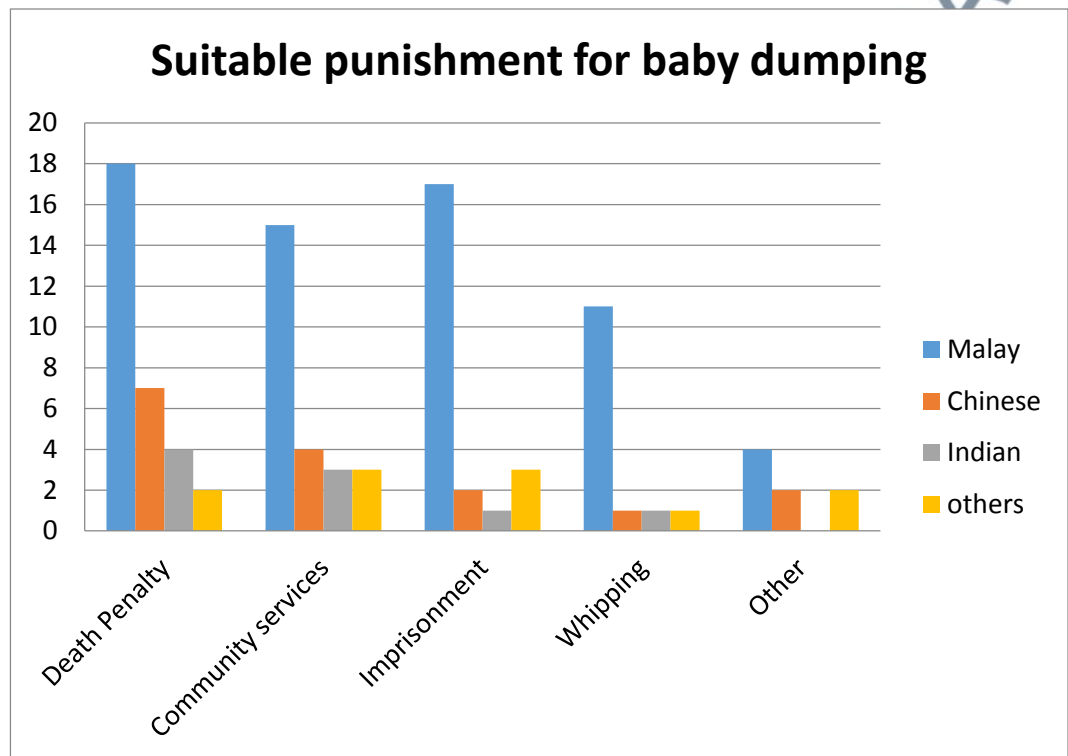
To better comprehend the public's perception regarding the suitable punishment for baby dumping, a survey had been carried out for this purpose.

²⁹³ Child (Amendment) Act 2016, Section 31(2)

²⁹⁴ *Ibid.*

²⁹⁵ Section 31(1) of Child Act 2001.

Figure 3: Different forms of punishment for baby dumping in Malaysia²⁹⁶



The graph chart in Figure 3 illustrates the suggested types of punishment for baby dumping in Malaysia from different racial groups, consisting of the Malays, Chinese, Indians and other minority races. Particularly, between the months of July and August of 2015, a survey that comprised of 101 participants, had been conducted via interview and e-survey with the objective to discover the suitable punishment for baby dumping in Malaysia. It should be noted, that the survey had been carried out through questionnaires, with the first section focusing on the background of the participants and the depth of their knowledge on the issue of baby dumping, while the final portion required their personal thoughts on the suitable types of punishment that befits the offenders of this crime.

²⁹⁶ A survey was conducted on July and August 2015 involving 101 participants related to the topic of different punishment for baby dumping in Malaysia. The questions given are based on the types of punishment suitable for baby dumping which lead to death of the baby.

As displayed from the graph chart in Figure 3, the most significant sentences are as follows: in the first graph bar, 31 participants in the survey had chosen the death penalty; this number is made up of 18 Malays, 7 Chinese, 4 Indians and 2 from other races. In the second bar, 25 contributors had agreed with community services; they include 15 Malays, 4 Chinese, 3 Indians and 3 people from other races. The third graph bar shows that 23 people had opted for imprisonment as the suitable punishment; this number consists of 3 participants from other races, an Indian, 2 Chinese and 17 Malays. The next graph bar indicated the decreased choice in punishment for whipping; 11 of whom are Malays, an Indian, a Chinese and one person from other races. Lastly, the final graph bar had shown that 8 people were in support for other forms of punishments; they comprised of 4 Malays, 2 Chinese and 2 from other races.

In conclusion, Figure 3 shows that there is a changing pattern in public perception, pertaining to the suitable punishment for those who dump their babies. Objectively, the graph chart somehow reflects the public as being in favor of a severe punishment for baby dumping, based on the highest number of participants championing the death penalty, compared to other punishments. Conceivably from this finding, it is time for Malaysia to criminalize the act of baby dumping as severely as possible and that there should not be any legal irregularities in the punishment. In short, the Malaysian laws need to identify the differences in sanctioning baby dumping with other laws, so that it is justified to impose a relevant punishment towards the offender.²⁹⁷

²⁹⁷ It was stated that several proposals have been made to consistently resolve neonaticide and infanticide cases in the U.S. courts, without much success. It has been proposed in an article to propose statutorily separating neonaticide and infanticide from other crimes. Regardless of whether the policy of such reform eventually aims to achieve greater leniency or harshness for offenders, statutory separation would be the most effective method for achieving consistent administration of justice within this subset of criminal

3.6 GENERAL DEFENCES FOR BABY DUMPING CASES

For the most part, it is obvious that the baby dumping offenders in Malaysia adopt certain forms of defences to mitigate punishment, as often reported in the local media. In one case, former security guard Nor Hasmiza Khamis, 28, admitted that she was guilty for dumping her baby whom she claimed had not survived upon birth.²⁹⁸ It was also understood that Nor Hasmiza was reported to have given birth alone on 30th December 2016 and she had not been married before. However, it was not until she was trying to seek medical treatment in a local hospital, when the doctor in charge discovered that the woman had actually given birth to a child and immediately lodged a police report upon the case. As a result, the offender was sentenced to 20 months jail by Magistrate Haslinda A. Raof, under Section 318 of the Penal Code. Consequently, Nor Hasmiza Khamis had tried to plea for a lighter sentence on the grounds that she was unemployed at the time of the charge. Nevertheless,, due to the rampant cases of baby dumping reported in the newspaper and social media, her charge remained, following the prosecutor's appeal to the court that imprisonment should be imposed on the offender, to serve as a deterrence and warning to all.²⁹⁹

In another compelling case involving a 21 year old student from a public institution in Johor,³⁰⁰ the offender had attempted to raise a defence againsts her charge

law. See Ryznar, Margaret, "A Crime of Its Own? A Proposal for Achieving Greater Sentencing Consistency in Neonaticide and Infanticide Cases," 47 U.S.F. L. Rev. 459 2012-2013, <http://heinonline.org> accessed on: Tue Jun 23 23:56:24 2015

²⁹⁸ n.a. "Wanita buang bayi dalam tong sampah dipenjara 20 bulan" 24th January 2017. Accessed from <http://www.astroawani.com.berita-malaysia/wanita-buang-bayi-dalam-tong-sampah-dipenjara-20-bulan-130089> on 30th January 2017.

²⁹⁹ The prosecutor added that, even if the baby could not survived, the act of the offender throwing him into the bin was not the proper way to dispose. Therefore, imposing the imprisonment towards the offender should be a just act to serve as a proportionate punishment.

³⁰⁰ n.a. 2017. "Sembunyi kelahiran: Pelajar cemerlang dilepaskan dengan bon berkelakuan baik" 13th January 2017. Accessed from <http://www.astroawani.com/berita-malaysia/sembunyi-kelahiran-pelajar-cemerlang-dilepaskan-dengan-bon-berkelakuan-baik-128832> o n 30th January 2017.

for baby dumping, which had resulted to the death of her child. Sentenced under Section 318 of the Penal Code by the Magistrate Nur A'minahtul Mardiah Md Nor, the said student had appealed for mitigation, as she was still studying and aimed to have a brighter future. In fact, her plea was further supported by her excellent current CGPA of 3.87, noteworthy to point out, despite her pregnancy during that time. Taking her appeal into consideration, the court did not record the crime of the student but instead, requested for her to report to the nearest police station once a month, until the end of the *bon tenure*. In the event the student failed to report herself, she would be brought to court again for imprisonment.

These were among the notable defences raised, pertaining to baby dumping cases in Malaysia; in the first case,³⁰¹ the court would not allow for a lighter punishment, however, in the second case,³⁰² the court meted out a lighter punishment by taking into consideration the future prospects of the offender, who was a young student, who, excelled academically with a potentially bright future.

Similarly, another incident had been reported in the local news of a mother who had left her baby at Masjid al-Hidayah, Taman Melawati, on 21st November 2016, and this case had sparked countless feedback from the public.³⁰³ Purportedly, she had left her baby with a note narrating her financial difficulties to care for the newborn, the mother had expressed her hope, that the baby would be taken care of by someone

³⁰¹ n.a. "Wanita buang bayi dalam tong sampah dipenjara 20 bulan" 24th January 2017. Accessed from <http://www.astroawani.com/berita-malaysia/wanita-buang-bayi-dalam-tong-sampah-dipenjara-20-bulan-130089> on 30th January 2017.

³⁰² "Sembunyi kelahiran: Pelajar cemerlang dilepaskan dengan bon berkelakuan baik" 13th January 2017. Accessed from <http://www.astroawani.com/berita-malaysia/sembunyi-kelahiran-pelajar-cemerlang-dilepaskan-dengan-bon-berkelakuan-baik-128832> on 30th January 2017.

³⁰³ Madiha Abdullah "Ibu tinggalkan anak di masjid kerana tidak mampu diminta tampil untuk diberi bantuan" 22 November 2016. Accessed from <http://www.astroawani.com/berita-malaysia/ibu-tinggalkan-anak-di-masjid-kerana-tidak-mampu-diminta-tampil-untuk-diberi-bantuan-123363>. On 30th January 2017.

who was financially stable. As the public outrage grew, a number of commentators on Facebook had remarked that the parent of the child, should have consulted the committee of the mosque regarding her personal problems or discuss with the relevant authorities, in order to set up an appropriate channel for help and guidance.³⁰⁴ Since that the child had survived, it was probable that the offender would have escaped punishment for baby dumping. Nonetheless, this case could be classified as child neglect, even though, it should not have happened, as there are always platforms catered for the offender to surrender her child in an appropriate manner. In the event that the said child failed to survive, the person who left the baby would be held liable and punishable under the law.

3.6.1 Insanity

In the eyes of the law, the defence for insanity is based “on the belief that people who lack the ability to reason and exercise free choice, should not be held criminally responsible for their conduct and that society is willing to excuse a person who is not culpable and did not make a meaningful choice.”³⁰⁵ This does not mean that the act is condoned or seen as justified, rather, that the defendant may be excused on the grounds of not knowing what she was doing or not having the power to control her actions.

Historically, the ancient Romans recognized the mental state known as *non compos mentis* or “mentally incompetent,” whereby the defendant loses the capacity,

³⁰⁴It was reported that many people would like to offer help to the mother whom left the baby to the mosque. According to the commentators, they could not accept the reason why parents could simply leave their children because of poverty. It would be seem as escaping from responsibilities, and there are many people would love to offer their help to them. Abandoning the child should not be a solution in this above case.

³⁰⁵Waldron, K. 1990. Postpartum psychosis as an insanity defense: underneath a controversial defense lies a garden variety insanity defense complicated by unique circumstances for recognizing culpability in causing, *Rutgers Law Journal.*, 21, 669-697.

either momentarily or permanently, to know and understand the nature of the crime that he was carrying out at the time. Additionally, the M’Naghten rule states that “at the time of the act, the accused was labouring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong,”³⁰⁶ which had led to the inclusion of the concept of acting under an irresistible impulse in 1929. Moreover, the M’Naghten rule was used as a defence in the U.S. until a new legal definition, the Durham rule, was enacted in 1954: “An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” Nonetheless, this was supplanted by the ALI/Brawner’s rule in 1960s and 1972, which attempted to combine the earlier definition, stating that a defendant is not responsible for his crime who “..... as a result of mental disease or defect (the Durham rule) lacked substantial capacity either to appreciate the criminality (wrongfulness- M’Naghten rule) of his conduct or to conform his conduct (irresistible impulse) to the requirements of the law.” Finally, the Insanity Defense Reform Act of 1984 (IDRA of 1984) essentially returned to the M’Naghten rule by stating that “Insanity may be used as a defense only if the defendant was unable to understand the nature and wrongfulness of his/her acts.”³⁰⁷

As Damme³⁰⁸ pointed out, “What is unique in the insanity defence for infanticide, is its radical departure from the normal criminal insanity defence³⁰⁹ i.e. the standards set by the McNaghten case could not have been met by any of the women acquitted of child-killing because of temporary insanity.”

³⁰⁶ Melton, G.B., Petrila, J., Poythress, N.G., and Slobogin, C. 1987. *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, Guilford, New York.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ McNaghten Rules of 1843

It is hard to believe that even a 14 year old would not know that suffocating her new born was wrong, but it could certainly be argued- and is, in some cases,- that she would be in such a state of panic and distress when delivering the baby, that she could not appreciate the wrongfulness of what she was doing. This would be more difficult, but not impossible, to argue on behalf of a defendant who was already a mother. Although many of these cases appear to be similar on the surface, there are often unique circumstances that outweigh, as it were, rational thinking at the time of the baby's birth. Clearly, these should be considered in determining the charge as well as the sentence if the defendant is found guilty.

Another final circumstance under the category of insanity, is evident in the case of *Public Prosecutor v. Norazwani bt Mohd Noh*,³¹⁰ wherein, the accused had at first, been charged under Section 302 of the Malaysian Penal Code for killing her newborn baby, by flinging the baby from the 18th floor of her home. However, by the end of her prosecution, when the accused was called to enter her defence, the psychiatrist had testified that the accused was not in her right mind and had hallucinated at the time of the crime. After re-examining the prosecution's case, the High Court of Kuala Lumpur had deemed the accused as mentally ill at the time the offence was committed. Therefore, she was charged under Section 84 of the Penal Code and was later acquitted from the charge to receive treatment at the hospital, until full recovery. Neither could the court sentence the accused to the death row nor, could she be charged under a lenient punishment for example, Section 304 (a) or (b) or even Section 309A of the Penal Code, as supported by the quotation below:

³¹⁰ (2017) MLJU 776.

“When any woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, be guilty of offence of infanticide.”³¹¹

3.6.2 Post-partum depression and post-partum psychosis

By and large, other defences for infanticide and filicide (but not neonaticide) include post-partum psychosis³¹² and post-partum depression.³¹³ Post-partum psychosis is a highly controversial topic that had sparked heated debate within both the medical and legal communities. In the past, women who had murdered their infants had used this defence successfully in some cases. Generally, there had been two different controversies regarding this presumption. More commonly, feminists criticized the notion of post-partum psychosis as an anti-female argument, since this raises an exclusively female defense, which does support sexism. Furthermore, they had argued that the continued use of this defence, would provide automatic treatment guidelines for women who kill their children under the influence of post-partum illness and therefore, would provide ways for defense attorneys to use this as a means of exonerating

³¹¹ Section 309.

³¹² Post-partum psychosis (PPP) is a very serious mental illness that can affect a new mother. The episode of psychosis usually begins within 1 to 3 months of delivery. A woman with postpartum psychosis may lose touch with reality and have auditory hallucinations (hearing things that are not actually happening, like a person talking) and delusions (perceiving things differently from the way they are). Visual hallucinations ((seeing things that are not there) are less common. Other symptoms may include insomnia, agitation, anger, and irrational guilt about somehow having done something wrong. Women who have postpartum psychosis need prompt treatment and almost always need medication. If they are at risk for hurting themselves or someone else, women with postpartum psychosis need to be in a hospital. Accessed at <http://www.medicinenet.com/script/main/art.asp?articlekey=26212> on 10th January 2017.

³¹³ Post-partum depression (PPD) is a kind of depression that some women get after having a baby. PPD is strong feelings of sadness that last for a long time. These feelings can make it hard for you to take care of your baby. Accessed at <http://www.marchofdimes.org/pregnancy/postpartum-depression.aspx> on 10th January 2017.

murderers (whether they were mentally ill or not). To make a case, other attorneys had disputed that present insanity and/ or diminished capacity rules, adequately protect sufferer of the condition.³¹⁴ (Note: These arguments preceded the IDRA,³¹⁵ but still raised legitimate concerns).

3.6.3 Young Offender

Different from the aforesaid circumstances, young offenders³¹⁶ who are involved in baby dumping cases may not be prosecuted like adult offenders, mainly due to their age. Unsurprisingly, age has become a major factor for mitigating the punishment of young offenders, by taking into consideration that they might have committed the act of baby dumping due to the pressures that they are facing in life, seeing as they are still young and have no access to safe forms of protection during sexual intercourse. As expected, one might agree that leaving a child with someone else to be cared for, may be one of the safer alternatives, however; the fear of facing severe social consequences from having a child out of wedlock usually drives the offender to abandon the child instead. Of course, punishment sentenced to the young offender would depend on both the intention of the parent or parents, as well as the child's chances for survival.

³¹⁴ Schroeder, T.L. 1993. Postpartum psychosis as a defence for murder? *Western State University Law Review.*, 21, 267-293.

³¹⁵ Insanity Defense Reform Act of 1984.

³¹⁶ Young people are offenders under the age of 18, or in some cases aged 18 but remaining in the under 18 estate, and will be held in either a Secure Children's Home (SCH), a Secure Training Centre (STC) or a Young Offender Institution (YOI). The Youth Justice Board is responsible for placing young people in custody and typically those aged under 15 will be held in an SCH and those over 15 will be held in either a YOI or STC. Only 17 year old female young people are normally placed in a YOI. Young people can be sentenced to either a Detention and Training Order (DTO), imprisonment under section 90 or 91 of the Powers of Criminal Courts (Sentencing) Act 2000 or imprisonment under section 226 or 228 of the Criminal Justice Act 2003. See <https://www.justice.gov.uk/offenders/types-of-offender/juveniles>

With regards to young offenders, Raudatus Sakinah (RS), an Islamic NGO has served as a place of protection for young female Muslim offenders involved in any form of social ills, including pregnancy out of wedlock, between the ages of 12-25 years old. Typically, the residents of Raudatus Sakinah were either sent by the order of the court or by family members, for the purpose of seeking protection against society's condemnation, while hoping to provide moral changes for the younger generation. Similar to that of a rehabilitation centre, these occupants would be taught Islamic teachings from certified councilors relating to matters of "Aqidah", "Akhlaq", "Tauhid" and the recitation and explanation of the Holy Quran to name a few, with the hopes that they would repent and learn from their mistakes, that would ultimately, lead them to the right path in life.

Previously supervised by Jemaah Islamiyyah Malaysia (JIM) and Pertubuhan IKRAM Malaysia (IKRAM), Raudatus Sakinah currently operates independently. At length, an up close interview held with Siti Aishah, the warden of RS,³¹⁷ exposed her personal thoughts on the rise of illegitimate children, which consequently leads to the crime of baby dumping among youngsters. In-depth, Aishah highlighted that most residents had experienced an unstable family life hence; they themselves were often neglected in terms of affection and basic care such as time, attention and the lack of financial stability and emotional desertion, among other significant factors. Eventually, due to the stress faced at home combined with peer pressure, most young adults fall prey to unscrupulous men; often leaving home in search of the false promises concocted by their lovers. Regrettably, these men would take advantage of the unfortunate

³¹⁷ Siti Aishah, Warden. 29th May 2018. Raudatus Sakinah, Kundang. Illegitimacy and baby dumping. (Personal Interview).

circumstances of these innocent girls, by showering them with sweet words of love, showing them undivided attention and care, as well as flashing monetary items such as handbags, perfumes and even wads of cold hard cash, to snag their target. In the end, when these deceitful men have had their fill of pleasure and the woman is sadly found to be expecting with child, they either mysteriously disappear or reject them, without wanting to acknowledge the pregnancy or be held accountable, which is the ultimate reason why most women decide to dump their babies in the first place.

In an attempt to delve deeper into the psyche of these denizens, a private interview had been conducted with these young convicts at Raudatus Sakinah to clarify if they had ever intended to abandon their babies. For the sake of protecting their identities, their names will not be exposed and they will be referred throughout this thesis by their nicknames. When asked if they had ever thought to abandon their own illegitimate baby, Wawa who was 26 at the time, said that she would never think to dump her baby, although, this is her third time conceiving an illegitimate child. Wawa further explained that in spite of having committed adultery or “zina” which had led to her unwelcomed pregnancy, she refuses to add on to her sins by abandoning her baby and instead chose to give her children up for adoption, with the hopes that they experience a better future.³¹⁸ Unpretentiously, one might argue that Wawa had never regretted nor, had she repented for her immoral actions, however, Wawa had stood her ground, for never ever relenting to murder or abandon her children.

³¹⁸ Wawa (not real name). Inmate. 29th May 2018. Raudatus Sakinah, Kundang. Illegitimacy and baby dumping. (Personal Interview).

In the case of Farah³¹⁹ who, admittedly planned to dump her illegitimate baby, but later had a change of mind due to her pregnancy being known by family members, shared a different scenario than that of Wawa's. Unlike her, Farah had intended to elope with her illicit lover, who was also the man who had impregnated her, but her family soon found out and objected to her decision, which led her to Raudatus Sakinah. Since Farah was only 15 at the time and considered a minor by the Malaysian justice system, her case had fallen under statutory rape and as a result, the man that she had wanted to elope with, had to face prosecution from the court. Suffering from both pre and post natal depression, Farah had delivered her baby and agreed to give the child up for adoption, however, she was adamant to never search for her child and would let the adopted parents care for her child instead.³²⁰

Likewise, a third interview had been set up with Wardina³²¹ from Raudatus Sakinah. Similar in circumstance to that of Farah's, her father had refused to let her marry the man who had impregnated her. Therefore, she had agreed to her father's decision to stay at Raudatus Sakinah until the birth of her child. Despite admitting that she had planned to dump her baby, Wardina's guilty conscience and strong sense of sympathy and empathy towards the newborn had changed her decision. Moreover, Wardina had strongly voiced out against those who abandon their babies as selfish and heartless, while expressing her deep remorse towards her own actions, asserting that she had learnt from her mistakes. On the positive side, she is excited to turn a new leaf after

³¹⁹ Farah (not real name). Inmate. 29th May 2018. Raudatus Sakinah, Kundang. Illegitimacy and baby dumping. (Personal Interview).

³²⁰ *Ibid.*

³²¹ Wardina (not real name). Inmates. 29th May 2018. Raudatus Sakinah, Kundang. *Illegitimacy and Baby Dumping*. (Personal Interview).

leaving Raudatus Sakinah and she hopes to have a second chance at being a better person.

In another related case of Jaja who was 20 years old³²² and expecting out of wedlock, she had been an inhabitant at Raudatus Sakinah since she was 4 months pregnant. It was revealed that the man who had impregnated her, refused responsibility on the child, which then led her to this organization until the birth of her baby. At the time that she had been interviewed, Jaja had showcased a notable perspective when asked about her thoughts on baby dumping. Defending the innocence of her unborn child, Jaja claims that she only has herself to blame and is grateful if her baby could be adopted by a loving family or sent to an orphanage because she believes that each child comes with his or her own *rizq*³²³ although Jaja had also admitted that initially, she too, had wanted to abort the baby, but when her friends advised her not to, she changed her mind and refused to commit greater, sinful actions.

A final interview done at Raudatus Sakinah was with Aini,³²⁴ an ex-student of a local college, who was appalled at the notion of baby dumping and firmly proclaimed that the thought had never crossed her mind. Knowing fully well that her actions would be devastating and shameful to her family especially, in the eyes of the society, Aini mustered up the courage to speak the truth to her family members about her condition although, she was in great fear. She had always believed that there would be a place for people with her predicament and she willingly embraced her stay at Raudatus Sakinah,

³²² Jaja (not real name). Inmates. 29th May 2018. Raudatus Sakinah, Kundang. *Illegitimacy and Baby Dumping*. (Personal Interview).

³²³ *Rizq* means sustenance. Salim Azadin & Azadin Khalifa, *Towards an Islamic Foundation of Strategic Business Management*, Management Centre, International Islamic University Malaysia, 2001, p. 27.

³²⁴ Aini (not real name). Inmates. 29th May 2018. Raudatus Sakinah, Kundang. *Illegitimacy and Baby Dumping*. (Personal Interview).

utilizing her time there not only as a platform to rehabilitate herself, but also to ease the process of adoption for her soon to be newborn baby. Aini too, refused to be in contact with her child in future and wished that the child led a better life with the adopted family.

From the interviews presented above, it is the general consensus that when the young offender faces such a situation (pregnant out of wedlock), they are divided in terms of the future of the child. More often than not, when faced with the stigma of having an illegitimate child they have to fight their own feelings of remorse and sadness, by giving up their child for adoption, when they have no means to provide for the child. Debatably, this decision is wise enough, as they still feel responsible towards the child's wellbeing, despite their young age and not having adequate sources to raise the child on their own. However, in a long run, this does not stop illegitimate children from finding the truth about their biological parents and somehow, it will cause some emotional distress to all parties involved. While it can be argued that the young offenders are indecisive, they are considered wise for not dumping their offspring. Intriguingly, It was found that the inmates at RS, had acquired spiritual strength from the learning process at the institution, to bring back the offenders towards righteousness.

3.7 COURT FOR CHILDREN IN MALAYSIA

In the event that the crime for baby dumping had been committed by a young offender, the Court for Children that had been established since 2001, is the chosen platform whereby legal proceedings will take place. Primarily, the procedure for handling young offenders is provided in Part X of the Child Act 2001 specifically,

Section 83(1) of the Act,³²⁵ which states that a child who is arrested, detained and tried for any offence (subject to certain specified intentions) must be handled in accordance with the provision of the Child Act. More often than not, it requires special procedures, which differ from the one used when handling adults. However, when the Child Act does not address any issue, then reference can be made to the Criminal Procedure Code.³²⁶

In the Malaysian criminal justice system, an act committed by a child who is between the ages of 10 to 12 is considered *doli incapax*, meaning, they possess insufficient maturity upon the case. Particularly, the Child Act 2001, provides exclusivity in terms of protection towards children below 18 years of age. In the event a child turns 18 during the ongoing proceedings, the Court for Children should continue to hear the case.³²⁷ Nevertheless, it is later up to the court to decide whether to apply special sentencing provisions available for children under the Child Act, or to impose normal punishment as that of an adult. Normally, in a case where a child commits an offence while he or she was under age but is charged after 18 years old, the trial should be heard by the regular courts.³²⁸ Nevertheless, the court may choose to apply special sentencing provisions available for the children, or to impose normal punishment as given to adult offenders.

³²⁵ Section 83(1), Child Act 2001, Malaysia.

³²⁶ Muhammad Razmee Abd Razak, n.d. "The Juvenile Justice System". *Resource Material Series No. 101*. https://www.unafei.or.jp/publications/pdf/RS_No101/No101_14_IP_Malaysia.pdf, p. 127

³²⁷ Section 83(2), Child Act 2001. Malaysia

³²⁸ Section 83 (3), Child Act 2001. Malaysia.

3.8 ALTERNATIVE SOLUTIONS TO PREVENT BABY DUMPING OFFENCES

On the whole, the Malaysian legal system has presented alternative measures to control baby dumping, yet making the punishment for this atrocious act, well-known to the masses. Even though Malaysia is still at its infant stage in curbing this increasing quandary, the government has openly displayed the phases taken to ensure that the well-being of these precious souls are prioritized.

Similar to that of other countries, baby hatch centers have been a significant option run by the government, to temporarily nurture these blessed infants until they were found suitable homes or adopted families. The rationale of the public, that baby hatch centers would encourage and increase this deplorable conduct, had caused uproar namely, within the Muslim society and other religious groups. As proof, statistics from the Royal Malaysian Police had highlighted, that baby dumping had been a rising concern, even before preventive measures had been introduced in this country.

More or less, “foundlings” came into existence when countless cases of infants who had been abandoned by their birth mothers and were either rescued alive or dead by strangers, had been reported. That would be to emphasize the importance of sex education in schools. However, there is a common misconception among the public whereby, introducing sex education to teenagers and children will only encourage them to have sex at a young age. According to a report by the United Nations Children's Fund (UNICEF), children armed with information regarding sex education have fewer

partners and become sexually active much later in life, than those without.³²⁹ Therefore, there is a need for sex education to be introduced to children at an early age.

Previous studies had identified many factors that contributed to the problem of unwanted pregnancy among youngsters, which had led to baby dumping. An in-depth facts and figures emphasized on the consequences of having sex -out-of-wedlock both, from a socially moral and religious standpoint.³³⁰ A country that houses a nation from various cultures and religious faiths like Malaysia undoubtedly, stressed that the importance of strengthening devotion to a person's spiritual creed, would reduce out-of-wedlock conception amongst youngsters. This is further supported in Nur Halizat binti Hashim's study (2010) stating, "Adolescents agree that lack of religious understanding, influence of mass media, marriage difficulty, no parental control and the collapse of family institution, as possible contributing factors leading towards baby dumping."³³¹

3.8.1 BABY HATCH

With the concept of baby hatches explained throughout this thesis, one can conclude, that the act of choosing to leave an unwanted newborn at any nearest baby hatch is not illegal since, it acts as a temporary transit for infants who were either dumped by their unwed parents or due to other unknown reasons. On average, the

³²⁹ Athira Nortajuddin, 5th March 2020, South East Asia Baby Dumping Problem, The Asean Post. Retrieved from <https://theaseanpost.com/article/southeast-asias-baby-dumping-problem>

³³⁰ Noordin, N., Zakaria, Z., Sawal, M. Z. H. M., Hussin, Z. H., Nordin, J. and Ngah, K. 2012. Future Leaders' Perception on Baby Dumping Issues In Malaysia, International Conference on Economics Marketing and Management IPEDR, International Journal of Trade, Economics and Finance, Vol. 3(1), pp. 137-144.

³³¹ Nur Halizat Binti Hashim. 2010. Study on the Perception and Knowledge Of Sexual Health Among Adolescents in UiTM Puncak Alam. (Bachelor of Pharmacy Thesis). Universiti Teknologi MARA, Malaysia.

purpose of this shelter is to find suitable and financially stable families, usually through the adoption process, that would be responsible to provide a better and brighter future for these blessed newborns. On a larger scale, the government had supported many NGOs activities with the hopes to curtail this immoral conduct. Usually, According to Azizah Mohammad,³³² among the social reforms needed in protecting the abandoned children in Malaysia, is through the set-up of baby banks and foundling homes. Of course, this is to protect the interest of the babies and to prevent their untimely demise. Objectively, baby banks do not to encourage the exploitation of baby dumping, but acts as the last resort to ensure protection with the intention to surrender the innocent babies to a safe place, without putting them in danger of death or sickness due to unhealthy exposure.

3.8.1.1 OrphanCARE Foundation, Malaysia

Geographically, in Malaysia, the first baby hatch was launched³³³ in Petaling Jaya, Selangor.³³⁴ In nature, the launching of OrphanCARE carried two main objectives.³³⁵ The first being, to provide a safer and loving home environment instead of relocating these children to orphanages and secondly, to reduce the number of abandoned or dumped babies in unconceivable places such as bushes, drains and public toilets, to name a few. Among the greatest achievements of OrphanCARE are:

³³² Azizah Mohammad. Protection and Adoption of Abandoned Children in Malaysia. Selangor: International Law Book Services, 2007, p. 223.

³³³ OrphanCARE's baby hatch was launched by HRH Sultanah Pahang Sultanah Kalsom and witnessed by Y.Bhg. Dato' Seri Shahrizat Jalil, the former Minister of Women, Family & Community Development and the late Y. Bhg. Dato' Adnan Mohd. Tahir, Founding President of OrphanCARE on 29th May 2010.

³³⁴ Faizah Tahir. 2011. Welcoming Address for First Anniversary of OrphanCARE's Baby Hatch, Grand Ballroom, Mandarin Oriental Hotel, Kuala Lumpur, 21st May 2011.

³³⁵ Syarhah Tahir, Project Admin. 16th August 2013. OrphanCARE BabyHatch Petaling Jaya. Baby Hatch: An Overview. (Personal Interview).

- a) 12 older children from various orphanages were adopted via OrphanCARE
- b) 90 “abandoned” babies were adopted between 2010- 2014
- c) 10 of the 88 abandoned babies were placed in the baby hatch
- d) 52 babies were placed with biological mothers after counseling
- e) 3538 parents have registered as prospective adoptive parents
- f) 2883 couples have been screened for adoption and g) 614 couples were in the waiting list to adopt a baby.

It is important to realize that the triumphs revealed through OrphanCARE’s baby hatch centers had shown a decrease in baby dumping statistics, from the time of its establishment to the present.



Figure 4: Baby Hatch, OrphanCARE Foundation, Petaling Jaya.

Most of all, the above-mentioned accomplishments would not have been possible, without a stringent *modus operandi*. First and foremost, Shamsia Mansoor³³⁶ explains that once a baby had been placed in the hatch, a police report must be lodged by the administrative representative before an investigation can be carried out by the police. Thereafter, the baby will then be sent to a government hospital for a thorough check-up that acts as a precursor to the case, being medically reported to the Department of Social Welfare (DSW). Consequently, potentially adoptive parents of the baby will be identified and this will also be reported to DSW. Next, the first court hearing will be held when the baby is discharged, allowing for the DSW to proceed with further investigation upon the case, followed by a second court hearing. Subsequently, selected adoptive parents will then receive an offer letter from DSW for the adoption, once court procedures have been cleared. Lastly, following a two-year adoption period, the parents can then register their child for citizenship at the National Registration Department (NRD).

According to the OrphanCARE Baby Hatch located at Petaling Jaya, Selangor,³³⁷ the profile cases of biological mothers who had come forward are as follows:

Table 2: Age Group of Biological Mothers³³⁸

Age Group	Number of cases
Below 18 years	6
18-24 years	48

³³⁶ Shamsia Mansoor. Awareness Talk: "Social Ill: Baby Dumping." Centre for Foundation Studies, IIUM, Petaling Jaya, Jan. 24, 2014.

³³⁷ Shamsia Mansoor. Awareness Talk: "Social Ill: Baby Dumping." Centre for Foundation Studies, IIUM, Petaling Jaya, Jan. 24, 2014.

³³⁸ *Ibid.*

25-30 years	15
Above 30 years	11
Unknown (Baby hatch)	10

Table 3: Racial Background of the Biological Mothers³³⁹

Racial background	Number of cases
Malay	56
Chinese	4
Indian	4
Foreigners	16
Unknown (Baby hatch)	10

Table 4: State of Origin of the Biological Mothers³⁴⁰

State	Number of Cases
Selangor	24
Wilayah Persekutuan	15
Outside Selangor	41
Unknown (Baby hatch)	10

Table 5: Profession of the Biological Mothers³⁴¹

Profession	Number of Cases
Student	37
Working	33
Unemployed	10
Unknown (Baby hatch)	10

³³⁹ Shamsia Mansoor. Awareness Talk: "Social Ill: Baby Dumping." Centre for Foundation Studies, IIUM, Petaling Jaya, Jan. 24, 2014

³⁴⁰ Shamsia Mansoor. Awareness Talk: "Social Ill: Baby Dumping." Centre for Foundation Studies, IIUM, Petaling Jaya, Jan. 24, 2014

³⁴¹ *Ibid.*

In summary, it is evident from these statistics, that OrphanCARE had been highly frequented by biological mothers between the ages of 18 to 24, with the highest number of cases reported, stemming from the Malay ethnic group of 56 cases. In fact, Statistics had also shown that a whopping 41 cases from rural areas had reached out to this baby hatch center located at Petaling Jaya, with the majority being students. One can presumably conclude, based on the facts and figures gathered from OrphanCARE, that Muslim families are not as accepting and supportive towards the plight faced by unwed mothers, unlike that of other races. Generally, the focus is diverted from the problem at hand to the shame that the family would face amongst society and priority is given to societal pressures and criticisms, which is indirectly blamed on the unwed mother, oftentimes, causing pre and post-partum depression which leads to the act of baby dumping, and in this case, a major contributor to the baby hatch system.

An in-depth personal interview with Datin Shamsia Mansoor,³⁴² had shed some light on proposed ways to diminish apprehensions related to baby dumping. She had suggested that:

1. Knowledge on sexuality should be conveyed to the children from young, both in school and at home.
2. Reminder towards the effect of free sex between teenagers, i.e. the risks of being infected with diseases.
3. To encourage the target groups, i.e. teenagers to protect their dignity and be responsible for their act.

³⁴² Shamsia Mansoor, Head of Advocacy and Education Bureau, OrphanCARE Foundation, Petaling Jaya. *Baby Dumping and Baby Hatch*. (Personal Interview).

4. Fulfill their time with beneficial activities and to divert their thinking of sex.
5. To avoid sex before marriage. Not to allow teenagers to go on dates.
6. Share the experiences of those who have committed this wrongful act, i.e. conceiving an illegitimate child and had to surrender the child to someone else.
7. To educate teenagers with Islamic teachings. And for non-muslims, they also need to feel remorse if they are involved in this act.
8. Parents and the society as a whole, need to be reminded from time to time to give adequate attention to their children, to prevent similar unwanted incidents from recurring.

It can be concluded that these suggestions serve as a reminder to everyone, irrespective of gender, age, race and religious beliefs, to not succumb to the act of baby dumping. Of course, this goes hand in hand with stronger family ties and a united societal role, to strengthen their morality, sympathy and empathy to combat the crime of baby dumping.

3.8.1.2 Baby Hatch in Other Countries

As previously mentioned, baby hatches are also available worldwide. They go by different appellations such as baby box, baby cradle, babyklappe and babywiege. In the United States, the concept of a 'Safe Haven' had long been established. In the past, baby hatches had started since the thirteenth century whereby, the Catholic Churches had introduced the foundling home system in Europe, to compete with the large number of baby abandonment.³⁴³ In detail, a revolving cradle or "wheel" was placed at the side

³⁴³ Partida, A.L. 2002. The Case for "Safe Haven" Laws: Choosing the Lesser of Two Evils in a Disposable Society, 28 New Eng. J on Criminal and Civil Confinement 61, 62-63.

of houses and churches and mothers can leave their baby in the middle of the night, ring a bell and flee.³⁴⁴ For the longest time, foundling homes had been made accessible throughout Italy, France, Spain and Portugal, where thousands of babies were saved in this manner³⁴⁵ while several other countries in Europe and one in Africa are currently using other methods for legalizing baby dumping.³⁴⁶ For instance, Germany applies a “baby slot” system, Hungary has various “anonymous drop-off locations and Johannesburg, South Africa employs “the revolving crib” system, as a form of legalizing abandonment.³⁴⁷

Prominently, China has built a “baby abandonment” building where parents can anonymously leave their unwanted children. Distinctly, the building, located in Nanjing, Eastern China, had provided a safe place for parents to leave their children who will be cared for, at a nearby welfare home. Fascinatingly, the “baby box” is electronically monitored and equipped with electronic sensors and sets-off an alarm that would notify the physician when a baby is left. Patently, this building is air-conditioned, with added humidity monitors and it also includes beds, incubators and thermometers³⁴⁸ to ensure that the newborns are safe, while allowing them access to health care services.³⁴⁹

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ Edmonds, L. 2013. “Chinese build 'baby box' where parents can dump their unwanted newborn children because of the country's one-child policy.”[Online] Available: <http://www.dailymail.co.uk/news/article-2516076/Chinese-build-baby-box-parents-dump-unwanted-newborn-children.html#ixzz30rIRYPJJ> Nov. 30, 2013. Accessed: 1 May 1, 2014.

³⁴⁹ Mueller, J and Sherr, L. 2009. “Abandoned babies and absent and Policies.” Health Policy. [On-line]. Available: www.elsevier.com/locate/healthpol (Accessed: 5 May 2014)

Located at Jeiki Hospital in Kumamoto City, Japan, since May 10, 2007, a baby hatch named “Stork’s Cradle” had taken measures to protect the lives of fetuses and children in various ways. It had been reported in a research, that thirty parents had placed their babies at the Stork’s Cradle due to the following reasons: poverty (nine responses), unmarried (nine responses), public image/unwillingness to enter in family register (six responses), problems with partner (six responses) and extramarital affair (four responses).³⁵⁰ Disappointingly, the report had also noted other reasons given by the parents to leave their babies at the Stork’s Cradle, such as, “can’t find a facility to look after the child while I work” and “can’t bring up the child because I will study overseas.”³⁵¹

When a question had been posed to Lindsay Lewis³⁵² relating to the alternatives available for prevention of the baby dumping crime, the medical assistant professed that she did not support baby hatches. Instead, Lindsay proposed for adoption to be legalized and become the rights of a pregnant woman to opt for it, especially mothers who were unable to raise their child for whatever valid reason. Furthermore, she suggested those social services, as well as religious and non-religious organizations, play a vital role in providing continuous support, to protect these mothers and their newborns from stigmatization from the public. This included support from the community, employers as well as social and government services. Lindsay also insinuated that Safe Haven Laws be applied and to consider baby dumping, as a crime only when the abandoned child is left in unsafe conditions or killed. She reasoned, “A woman who abandons her

³⁵⁰ *Ibid.*

³⁵¹ Stork’s Cradle Special Section: Stork’s Cradle Inspection Report. 2012. (Kumamoto city regional council for strategies to protect children in need).

³⁵² Lewis, L. Medical Assistant. 3rd May 2015. Morning Star Foundation. *Abandoned Babies* (Personal Interview).

child in a hospital/police station/orphanage should not be punished. Abandoning these ways should fall under a safe haven law, [...]”³⁵³

Optimistically, Lindsay believes that more could be done to keep a mother and child together and that the baby hatch should be the last resort. Constructively, options should be given, to support both mother and child financially, emotionally, spiritually and socially as well. Definitively, her firm stance on separating a mother and her newborn is evident, when she argued that if a woman or family knows that they will have the support of their community/family/government, they will be much less likely to abandon the newborn. Irrefutably, long held cultural beliefs, especially in Asian communities will be hard to change, but without this change, babies will continue to be abandoned. Take, for example, the fact that China has more abandoned babies than anywhere in the world, however, in most African countries, where poverty far exceeds that of China, babies are rarely abandoned, because there is some part of the family unit who will step in and care for the child at risk; an aunt, a sister, a grandmother etc. To illustrate, in the US and the UK, right or wrong, single mothers are mostly financially and emotionally supported, resulting in a smaller number of baby dumping cases. Unquestionably, Lindsay would also argue with anyone who thinks that supporting a single mother means that single pregnancies will increase.³⁵⁴

Moreover, Lindsay made it clear that she was not in favor of promoting baby hatches to curb the issue of baby dumping, rather, she advocated that a united support in terms of sympathy, empathy, financial and physical aid from family members, friends and the society at large towards those who face this dilemma, would make a greater

³⁵³ *Ibid.*

³⁵⁴ Lewis, L. Medical Assistant. 3rd May 2015. Morning Star Foundation. *Abandoned Babies* (Personal Interview).

impact on the future of both the mother and her newborn child, snubbing the idea of separating a child from the mother at all cost.

3.8.1.3 Feedback on Baby Hatch

Despite the fact that baby hatches have been established worldwide, Malaysians appear distressed by this set-up. Supported by the online survey, conducted on 100 respondents from Facebook, with regards to the effectiveness of baby hatches to curb baby dumping, more than half of the population (55%), believed that baby hatches were necessary to cope with unwelcomed babies. More importantly, this survey had also indicated that 28% of the population was critical of baby hatches, viewing it as a reason for the future rise of this social ill, while the minority had felt that a baby hatch could provide childless couples with hopes to adopt babies from this centre. On the contrary, the majority of the respondents had remarked on the significance of baby hatches to house unwanted infants, for the reason being that this centre provides options for mothers to place their newborn babies for adoption,³⁵⁵ unlike the 5% who clearly rejected this alternative. Moreover, opinions on whether a baby hatch can replace legal punishment for baby dumping, can be traced from the same survey, whereby, almost half of the population surveyed, strongly believed that it will not substitute the crime of baby dumping.

³⁵⁵ Mazbah Termizi, Azizah Abdul Majid, Mariam Saidona Tagarano & Yasmin Hanani Mohd Safian. 2014. "Towards Solving Baby Dumping Issue in Malaysia by Using the Alternative Way: Baby Hatch" (Paper). Marriage and Sexuality Conference (MASEC 2014). Leadership and Management Faculty, USIM, Nilai. 28th-29th May 2014.

Figure 5: Survey on people's judgment on whether Baby Hatch Can Replace Legal Punishment for Baby Dumping

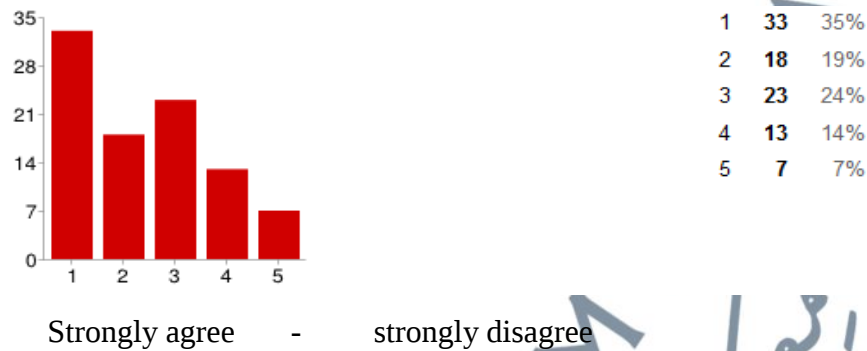


The graph shown above, had uncovered the perception of the respondents on whether baby hatches can replace legal punishment for baby dumping. While 20% were unsure of the possibility and merely 7% believed that it could replace legal punishment, the existence of baby hatches had seen a reduction in baby dumping. Conclusively, there were also cases whereby, baby hatches assisted pregnant mothers who did not have the means to care for her baby due to her psychological stress, like post natal depression.³⁵⁶ However, this scenario is more likely to occur amongst young girls, who were pregnant without support from their partners and families. Although there are no fixed laws pertaining to punishments on baby dumping as of yet, a safe haven law should be applied with regards to baby hatches. In short, a mother would be shielded from undergoing legal sentence. Instead, she would be protected by the system, especially in aiding her to a more stable mental and emotional well-being, after undergoing a tumultuous life experience.

³⁵⁶ Hubbard, D. 2008. "Baby Dumping and Infanticide" Monograph 1, Legal Assistance Centre [On-line]. Available: <http://www.lac.org.na/projects/grap/Pdf/mono1infant.pdf> (Accessed: 1 May 2014).

Subsequently, a survey had been conducted and the respondents were asked about their opinion on whether a baby hatch can reduce baby dumping.

Figure 6: A Survey on Whether Baby Hatches Can Reduce Baby Dumping.



The diagram above indicates that 35% of the people surveyed, were under the impression that baby hatches did not reduce the cases of baby dumping. However, 24% of the population had been unsure, if it did reduce the cases of the abandonment of babies. Despite the obvious skepticism from the public on this dilemma, the existence of baby hatches is imperative.

Ensuing this matter, an interview session was set up with Syarhah Tahir, the project administrator of OrphanCARE Foundation, on 16th August 2013,³⁵⁷ to review the success of baby hatches in resolving the issue of baby dumping in Malaysia. She echoed Shamsia Mansur, the head of OrphanCARE, by revealing how OrphanCARE had sheltered many newborns from dangerous situations and the possibility of death, to

³⁵⁷ Syarhah Tahir, Project Administrator. 16th August 2013, OrphanCARE, Petaling Jaya, Baby Hatch: An Overview. (Personal Interview).

finding secure and loving home-settings for these babies in a strictly legalized manner.³⁵⁸

3.8.1.4 Legal Basis of Baby Hatch

Recognizably, the legal constructs affecting baby hatches, vary with each country. For instance, in Australia, a woman's right to anonymous delivery is non-existent because it is the children's basic rights to know their parents.³⁵⁹ However, the use of a baby hatch for anonymous delivery is justified, when it is done due to poverty or if there is a threat to the mental and physical health of both the mother and child. Another example can be found in Japan, whereby, Kumamoto City had determined that there were no reasonable grounds for not allowing modifications in the medical law, as baby hatches were not illegal and had approved of the changes, which had allowed the establishment of Stork's Cradle" on April 5, 2007.³⁶⁰

Meanwhile, the United States had witnessed grass roots activists' implement Safe Haven laws, prior to the enactment of any legislation.³⁶¹ A compelling example, would be history's noted nurse in Pittsburgh, Pennsylvania, who began the first form of baby shelter known as "Baskets for Babies," after a newborn baby was found discarded in a plastic trash bag behind her church. Initially, she lined an old laundry basket with a warm blanket and placed it on her porch.³⁶² Later on, this action was emulated by Pittsburgh families, who began to leave their porch lights on with warm baskets, ready

³⁵⁸ Syarah Tahir, Project Administrator. 16th August 2013, OrphanCARE, Petaling Jaya, Baby Hatch: An Overview. (Personal Interview).

³⁵⁹ Asai, A. & Ishimoto, H. 2013. "Should We Maintain Baby Hatch in our Society?" *BMC Medical Ethics*. <https://bmcmedethics.biomedcentral.com/track/pdf/10.1186/1472-6939-14-9.pdf> p. 6.

³⁶⁰ Stork's Cradle Special Section: Stork's Cradle Inspection Report. 2012. (Kumamoto city regional council for strategies to protect children in need).

³⁶¹ Roche, T. 2000. "A Refuge for Throwaways", *TIME*, p.50

³⁶² *Ibid*.

to rescue newborns and desperate mothers.³⁶³ Championing this cause, the district attorney, had launched the campaign “A Secret Safe Place for Newborns,” in an effort to save babies from being dumped.³⁶⁴ Through this social movement, mothers were permitted to leave their babies at the hospital and were able to walk away without being questioned. Promisingly, Tyson added that the mother will not be prosecuted, as long as the infant was left unharmed within three days of his or her birth. Following this, was the State of Texas, to officially become the first state to implement the Safe Haven statute in 1999, which had allowed for unwanted newborns to be legally abandoned, at designated locations without the fear of being prosecuted. Favourably, in 2008, fifty states in the United States of America, had adopted the Safe Haven Laws which, offered anonymity to the parents in the form of immunity from prosecution or affirmative defense.

3.9 AWARENESS OF BABY DUMPING ISSUE

Unfavourably, the awareness of baby dumping issue in the Malaysian legal framework is relevant due to rampant cases of baby dumping in the country. Although the issue of baby dumping is a social “eye sore” among the Malaysian public, a survey was carried out to gauge the sensitivity of the society on this matter.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

Figure 7: A survey on the respondents' understanding of baby dumping.



As indicated, a whopping 68% of the respondents shown in the chart, were extremely conscious on the topic of baby dumping and its existence, as well as the advantages of baby hatches. An insubstantial 9% of the survey-takers were reported to be in the dark on this matter.

It can be argued that the interference of religious groups and the government's indoctrinations, which clearly regards Malaysia as a Muslim country, had restricted the propagation of sex education or the importance of understanding it within all levels of the society. Constructively, a subtle approach on understanding the human body, safe touch and unsafe touch and safe sex are among the focus of sex education that can be introduced to children in schools to create and enhance their awareness on this issue.

3.9.1 Sex Education

Introduced in 1989, sex education in Malaysia is represented through the Reproductive and Social Health Education (PEERS) programme, which incorporates sex education in other subjects such as health, moral, science and biology. Additionally, with the focus on sexual abstinence for secondary students and students of higher learning (undergraduates), a subtle approach had been taken on primary students.

Moreover, children from as young as primary 1 had been introduced to some form of sexual themes, such as the “safe touch” and “unsafe touch” to name the least. Furthermore, they were taught to differentiate between physical contact that is permissible among strangers, friends and family members and how to react, should an uncomfortable or dangerous situation arise.

On a negative note, the awareness towards baby dumping had been blindly accepted by the public, with no hope of betterment or positive changes in the society. One of the major setbacks in decreasing the statistics of baby dumping, is the failure to incorporate sex education in schools, even though many attempts have been made to accustom the education syllabus to cater to this topic. An article in the Malaymail Online, had quoted the former Deputy Education Minister³⁶⁵ as saying, “Putrajaya is studying how to better incorporate sex education into schools.... I personally agree that the education system should move forward for a more open and well-informed sex education in schools.”³⁶⁶

Apart from this, public service announcements (PSA) via the radio and television, as well as advertisements had showcased issues pertaining to sex education and sexually related themes such as, sexual abuse, rape and sexually transmitted diseases.

An exemplar would be, when Thailand had introduced its first national policy on sexual education in 1978. The integration of sex education in Thai schools with other

³⁶⁵ Former Minister Datuk Chong Sin Woon.

³⁶⁶ The Malaymailonline, May 11 2017, Tarrance Tan, <http://www.themalaymailonline.com/malaysia/article/government-working-on-more-comprehensive-sex-education>. n.p.

subjects, with emphasis on the reproductive and personal hygiene, saw a rapid decrease in the problems faced by the teenagers since it had been implemented.³⁶⁷

3.9.2 Abortion

It is universally acknowledged, that abortion is the premeditated action, taken to terminate a human pregnancy through diverse clinical methods. Usually considered the ultimate option for those who do not intend to become parents, or those who foresee the pregnancy and delivery as an obstacle or hindrance to their lifestyle, abortion is not uncommon among teenagers and other age groups. Historically, abortion had been made illegal in the Malaysian Penal Code sections 312-315, which was borrowed from the Indian Penal Code of 1871. However, the first amendment had been made with regards to Penal Code 312 in 1971, stating that abortion is permissible if, it involved a risk to the life of a pregnant woman. Additionally, the second amendment had been carried out in May of 1989, under the Penal Code Amendment Act 1989 Act (727), legalizing abortion with the exception that it poses no injury to the mental or physical health of the pregnant woman concerned and that the abortive procedure must only be performed, by a registered medical practitioner.

It is important to note, that a legal banter between the Medico Legal Society and the Reproductive Rights Advocacy Alliance Malaysia (RRAAM), had highlighted the leniency of Malaysia's abortion laws, as compared to other countries. A statement made by the Vice President of the Medico Legal Society, depicting Malaysia's abortion laws as "moderately permissive", compared to that of Philippines and Sri Lanka, which

³⁶⁷ Boonmongkon, P. and S. Thaweesit. 2009. "Sexuality Education in Thailand: How Far Do We Need To Go?" Asian-Pacific Resource & Research Centre for Women (ARROW). [On-line]. Pp. 12, 15. Available: www.arrow.org.my [Apr.30, 2014].

restricts abortion only in order to save a mother's life, had taken a backlash by the Co-Chairman of RRAAM, whose studies had shown that the accessibility to legal abortion procedures in most Malaysian government hospitals, were extremely limited. In addition to that, the study had also shown that the main barrier for the access to abortion is the misconception by doctors, nurses, women, the media and the public, that abortion is entirely illegal.³⁶⁸ A shocking perspective was pointed out by Abdullah R. (2009),³⁶⁹ that many were unaware of the *fatwa* that had permitted the act of abortion for health and welfare concerns, as long as the pregnancy did not exceed 4 months. The *fatwa*, which had been established by *Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan* in 2002, specified that no religious texts had been found to forbid women from opting to terminate a pregnancy, nor should anyone be condemned to help them through this process. The *fatwa* also clearly states that "abortion is *makruh* (not encouraged) for up to 40 days, *harus* (permissible) for up to 120 days and *haram* (forbidden) beyond that except, to save the life of the mother or if there is fetal impairment."³⁷⁰ RRAAM had openly divulged that although safe and legal abortion services had been made available, the inaccessibility had been hindered due to the misconception of the medical team, that it is an illegal procedure.

³⁶⁸ Abdullah, R. 2009. "Abortion in Malaysia: Legal Yet Still Inaccessible". Asian-Pacific Resource & Research Centre for Women (ARROW), 15, 8. Available: <http://www.thefreelibrary.com/Abortion+in+Malaysia%3A+legal+yet+still+inaccessible.-a0227461623>.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

3.9.3 Monitoring Actions

As is obvious, the issue of baby dumping has stirred negative emotions among the citizens of this country. The outcry expressed by many, through social media such as Facebook, Twitter, and Instagram to name a few, as well as interviews held by news reporters and newscasters, seemed to have fizzled by the surge of this atrocious phenomenon. The Malaysian statistics have reported an average of 100 babies who had been dumped each year, with more than half found lifeless. All things considered, the unreported cases had been estimated to show a higher statistical rate in baby dumping, with the valid assumption that those infants had all been all deceased, since no evidence of their existence could be traced. Given these points, findings had shown that the reasons behind the increase of unreported cases, had been presumably due to rape, teen pregnancies, ignorant of the existence of baby hatches, no access to a baby hatch and the fear induced by family and the society's labeling, towards their ill-conduct, as some of the major contributing factors.

Under these circumstances, the government had taken measures to introduce the careline called "Talian Kasih" Hotline (15999), under the umbrella of the Ministry of Women, Family and Community Development (KPWKM).³⁷¹ Similarly, this is an apparent plea, extended by the government to encourage the public to report on matters concerning the abandonment of infants, abuse of any form, the social welfare of those who are at a disadvantage, concerns pertaining to reproductive health and the social-ills that are faced by teenagers. Likewise, this channel had hoped to see a decrease in baby dumping and the other issues mentioned but to no avail. It can be concluded, that even

³⁷¹ n.a. <http://www.kpwkm.gov.my/>. Accessed on 10th January 2017. n.p.

with these alternatives provided by the government to decrease cases of baby dumping in Malaysia, family and the general public also have a greater role to play in eliminating this problem. For example, parents should encourage more quality time with their children and should be open minded to discuss any issues faced by their children without prejudice. Through the constant showcasing of love, affection and trust, children will not seek to vices, hence curbing social ills such as baby dumping while the society at large should be on the lookout for suspicious behavior within their vicinity or surrounding to avoid unwanted infanticide and assist those in their time of need. Finally, with the collaboration from everyone, including, promoting relevant campaigns and events, would see a great decline in the number of cases pertaining to baby dumping in Malaysia.

3.10 ADOPTION

A close knit solution to baby dumping would be adoption, a process whereby, a person assumes the parenting of another, usually a child, from that person's biological or legal parent or parents, and, in doing so, permanently transfers all rights and responsibilities along with filiation, from the biological parent or parents. Moreover, adoption is intended to effect a permanent change in status and as such requires societal recognition, either through legal or religious sanction. Once an unmentionable topic, the understanding of adoption and what it entailed had been apparent among the majority of Malaysians at present, including children. However, no longer considered an unpleasant topic, most families who had chosen to adopt had been open about their decision to friends and family while, most adopted children at present who were well aware and accepting of their societal status, would willingly reveal their situation to

their friends, which was not the case in previous years. On the positive side, the public is more empathic and sympathetic, towards both the adoptive and adopted party, usually, congratulating the former with well wishes while offering moral support to the later. While most adoption cases occur due to the inability of a wife to bear children (infertility), more and more couples have opted to adopt to increase the members of their family, as a form of community service to help make a difference in easing the financial burden of families from lower income brackets, as well as to not overpopulate the world and reduce carbon footprints, to name a few.

The process of relocating children from orphanages and other child care systems and institutions through the allocation of conducive residential placements, is generally reflected in deinstitutionalisation. Historically, deinstitutionalisation came to existence post-war, when many children had become orphans and orphanages could not house them for long periods of time, due to the limitation of space and funding. However, current times and studies had revealed that more than 90% of the children who lived in orphanages were not orphans.³⁷² According to a feature article by The Star Online, the children who were not orphans were either placed there because they had some form of disability or special needs and their parents could not take care of them, while other children had at least one relative, but they come from impoverished backgrounds.³⁷³

It is evident, that the reasons behind the propagation of adoption and deinstitutionalisation were mainly due to the drawbacks faced in orphanages or child care institutions worldwide. Some of the main detriments that had to be shamefully

³⁷²Sharmila Nair, 25th July 2014. "Of the 8 Million Kids In Institutions Worldwide More Than 90 Percent aren't Orphans" *The Star*. <http://www.thestar.com.my/lifestyle/family/features/2014/07/25/of-the-8-million-kids-in-institutions-worldwide-more-than-90percent-arent-orphans/>. n.p.

³⁷³ *Ibid*.

confronted, had been the failure to provide sustained attention and stimulation usually attained in a family setting, as well as reports of various types of abuse and high death rates. In Malaysia, the procedure of a legal adoption would have to abide by the decree stated in the Registration of Adoption Act 1952 (Act 253) (*De Facto*), under the jurisdiction of the National Registration Department (NRD).³⁷⁴ For the purpose of registration, *De Facto* adoptions which applied to Muslims and non-Muslims, children, were allowed to be raised and educated by potential adoptive parents for 2 years prior to the registration.

Section 6(1) of the abovementioned Act stated, that the process and procedure of application for registration of (*De Facto*) adoption were as follows.³⁷⁵

- (a) the child has to be under the age of 18 years;
- (b) the child must never have been married;
- (c) the child is in the custody of and is being brought up, maintained and educated by the applicant or applicants as his, her or their own child under any *de facto* adoption; and
- (d) the child has for a period of not less than two years continuously and immediately before the date of such application been in such custody and been so brought up, maintained and educated.

An extensive look at how the statute of The Registration of Adoptions Act 1952 (Act 253) (*De Facto*) had been applied in real life was evident in the case of *Tan Kong Meng v. Zainon bte. Md Zain & Anor.*³⁷⁶ Alvina, an illegitimate non-Muslim child born to the plaintiff and biological father Tan Kong Meng, and to Chong the biological mother, both non-Muslims, had been given up for adoption at 3 months of age, to a Muslim married couple Suhaimi and Zainon. The plaintiff who had been unaware of this “secret adoption,” had sought declarations pertaining to the custody and care, as

³⁷⁴ <http://www.jpn.gov.my/en/maklumat-anak-angkat/permohonan-pendaftaran-pengangkatande-facto/>

³⁷⁵ Section 6(1) of the Registration of Adoptions Act 1952.

³⁷⁶ (1995) 3 MLJ 408.

well as the religious upbringing³⁷⁷ of Alvina, when he discovered that she had converted to Islam on the same day that the Registrar of Adoptions had legalized Alvina's adoption on 11 May 1991.

With regards to the legal registration of adoption, a "de facto adoption" which can be defined as "whether by right or not" is required, as evidently pointed out in the significantly related extract below,

".....a person seeking adoption naturally must have physical custody of the child for a period of not less than two years. If he is seeking adoption of the child when legal custody is already in his possession, then the procedure to follow should be under the Adoption Act 1952, where a more elaborate process is required in a final sanction by court of law."³⁷⁸

Further information had revealed, the failure of Suhaimi and Zainon to secure a legal adoption of Alvina through the courts. Allowed to only register a customary adoption, the couple had to provide substantial evidence for the period of Alvina's adoption, to counter any future disputes that may arise.

Looking at how adoption is perceived through the eyes of an adoptee, proves to be heartfelt, in the true story of Iman, an adopted son depicted in a forum titled "Deinstitutionalisation: Every Child Needs a Family"³⁷⁹ that had revealed his unpretentious experiences. Growing up, Iman's parents had hinted that he was not biologically their child. As preached in Islam, an adopted child should know his relationship within a family and Iman's mother did her best to explain the reasons why a child is given up for adoption. As he grew older, Iman had begun to understand and

³⁷⁷ *Ibid.*.

³⁷⁸ *Ibid.*

³⁷⁹ Iman Mahfoz. 2014. "Real Life Account of Adoption by Iman Mahfoz" (Forum on Deinstitutionalisation: Every Child Needs a Family) *Forum*. 11-12th June 2014, Hotel Pullman Bangsar, Kuala Lumpur.

accept the fact that he had been adopted, although he had never felt sad or disappointed. On the contrary, Iman had received undivided and unconditional love and affection from his adoptive parents.

It is a relief, to know that Iman had been among many fortunate orphans, to have found a loving and well-informed family, who were able to reassure him of their undivided love, even though it had been reported, that the adoptive mother had given birth to a baby girl, a few years after the time of his adoption.

An interview held with the owner of a private shelter home for unwed mothers on 20th March 2015,³⁸⁰ who refused to be named, had exposed her involvement with pregnant teenagers since 2007. As she herself had been childless, she had decided to take care of 4 children from 'single parents' who were students at private universities. It was also revealed, that some of the women had surrendered their babies to trusted adoptive parents, soon after the birth of the child. This is somehow done legally, with an agreement to allow her child to be adopted. It is for the betterment of the child's future.³⁸¹

Furthermore, the existence of her shelter not only provided assistance to the mothers but also, facilitated the adoption process, providing peace of mind to the troubled mothers on the welfare of their newborns, while curtailing the issue of abandoned babies in the long run. This highlights the uncomplicated process of adoption in Malaysia. . An interview with a lawyer, clearly demonstrated the adoption process of

³⁸⁰ Private Shelter Home Owner. 20th March 2015. Private Shelter Home, Selangor. "Issues in Private Shelter Homes". (Personal Interview).

³⁸¹ *Ibid.*

children who were born out of wedlock, stating³⁸² that if the baby is a non-Muslim, parties involved should sign the Letter of Agreement for Adoption (A form from Registry Department) right after the baby is surrendered to the adoptive parents. Essentially, the adoptive parents will foster the baby for 2 years and will then file for a decree of adoption to enable the adopted child to share the surname of the adoptive parents. Soon after, the decree will be registered at the Registry Department, together with the original birth certificate of the baby. If the baby is a Muslim, parties involved should sign the Letter of Agreement for Adoption (A form from the Registry Department) right after the baby is surrendered to the adoptive parents. However, as Islam does not allow the baby to use the surname of the adoptive parents, they can only sign for Agreement of Adoption (Optional) together with the biological mother, in order to protect the rights of both families. After 2 years, the adoptive parents can apply to the Registry Department for the Adoption Certificate (and the original birth certificate will be returned back to Registry Department).³⁸³

Clearly, emphasis is given to the consent of the biological mother in the adoption process, while priority is given to childless couples and single individuals, rather than those who already have children. The project administrator at OrphanCARE establishes the criteria for adoption as follows:³⁸⁴

- “Younger than 45 years (for those adopting babies); 60 years old is the cap for those wanting to adopt older children.

³⁸² Advocate & Solicitor. 5th May 2015. Baby Dumping and Adoption. (Personal Interview) (Personal Interview).

³⁸³ *Ibid.*

³⁸⁴ Syarhah Tahir, Project Administrator. 16th August 2013, OrphanCARE, Petaling Jaya, Baby Hatch: An Overview. (Personal Interview).

- At least married for five years.
- Minimum combined salary is RM5,000.
- Debt free (OrphanCARE will check your debts) – even if you earn RM8,000 but have to pay the bank RM9,000, you won't be accepted.
- One spouse must be Malaysian.
- Living in Peninsular Malaysia and working here (because Sabah and Sarawak have their own set of laws on adoption, it is quite complicated to adopt a child here and bring him/her back to Sabah and/or Sarawak and vice versa)."

In the case pertaining to the adoption of babies, the requirement would be that the couple has to be childless and the waiting list could run to a few years, before the couple is presented with an adoptive infant. It can be deduced, that single individuals have a better chance at adopting older children, while non-Muslims have a longer waiting period for adoption because non-Muslim babies are rarely found. Syarhah's resolve to the long waiting list for those who are keen to adopt, would be to scout around rural areas for poverty-stricken families who are more than happy to surrender their children, with the hopes of offering them a brighter future. She adds that, legal advice on the adoption processes and procedures can be obtained through OrphanCARE.³⁸⁵

An interview held with an unwed mother, an undergraduate in her early 20's, who lived at the previously mentioned private shelter home, had shared her heart wrenching reply on why she had chosen to consent to adoption, rather than parenting

³⁸⁵ Syarhah Tahir, Project Administrator. 16th August 2013, OrphanCARE, Petaling Jaya, Baby Hatch: An Overview. (Personal Interview).

her baby, stating;³⁸⁶ she would rather make the sacrifice of allowing him to have a brighter future elsewhere, than to live in uncertainty with her. The only solace this mother had in surrendering her baby, was the promise of an agreement between her and the adoptive parents, as proof of understanding their background, which also allows her to stay connected, should she choose to do so in future. This mother further expressed her hope that her child be will raised without prejudice, as he is innocent and while she is to be blamed for his unfortunate circumstances, she admitted to never succumb to abandoning or killing her baby, rather, to pray that he is safe and happy with his adoptive parents.³⁸⁷

Although it had been a heartbreaking decision for her to make, this mother had opted for a morally justified action, to safely deliver the baby at the shelter home and agree to place her infant through the adoption process, rather than to abort or give birth to the baby under risky circumstances such as, in public toilets and dorm rooms or abandon the innocent infant, out of fear of societal judgments and family pressure.

The subject of abandonment that had been discussed throughout this paper, exclusively refers to child abandonment, which can be defined as an occurrence when a parent, guardian or person in charge of a child, either deserts the child without any regard for the child's physical health, safety or welfare and with the intention of wholly abandoning the child, or worse yet, in some instances, fail to provide necessary care for a child living under the same roof.³⁸⁸

³⁸⁶ "Sheltering in Private Shelter Home." 9th April 2015. (Personal Interview).

³⁸⁷ *Ibid.*

³⁸⁸ n.a. 27th December 2018. "Child Abandonment". *Find Law*. <http://criminal.findlaw.com/criminal-charges/child-abandonment.html>. n.p.

Unlike adoption, abandonment poses a greater traumatic impact on the child from an early age. A research had been carried out, comparing the traumas and healing processes of children who had been abandoned versus those who had been adopted, had quantified the connections between past, current and future projects, concerning 40 adopted children from Romanian families from the year 1997-2000.³⁸⁹ Adopted from the tender age from 1-48 months, it had been found that children who had spent the beginning of their lives in institutions, had experienced the most difficult healing process, while children who had been adopted from hospitals, fared well. Therefore, the logic behind the differences in healing as stated in this study, had been due to the initial quality of care that the infant had received from the institutions, as opposed to that of a family setting. On a negative note, it can be presumed that abandoned children who had been through the ill-care of institutions, would suffer a complex trauma, due to the lack of care and attention shown towards them, while babies who had been adopted from infancy, had been showered with adequate love and attention in a stable family setting. Thus, this study enhances the stance that the adoption process greatly benefits the well-being of the child as well as the society at large, as it encourages child affiliation, new social network, heighten new experiences and increase educational standards, as the child's welfare will be taken care of by the adopted family.

3.10.1 Adoption under the Islamic law

Legalized by many Muslim-majority countries such as Indonesia, Malaysia, Somalia, Tunisia and Turkey, the adoption process for Muslims inculcate the *Shariah*

³⁸⁹ Muntean, A., M. Tomita & V. Stan. 2012. "Complex Trauma of Abandoned Children and Adoption As A Healing Process" *Procedia- Social and Behavioral Sciences*. Vol. 46: p 273-276

Enactment and divine laws, while totally disregarding civil law. The Holy *Quran* had repeatedly emphasized the importance of caring for orphans, evident in the following verse:

“Serve God, and join not any partners with Him; and be good – to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the wayfarer (you meet), and what your right hands possess: For God loveth not the arrogant, the vainglorious.”³⁹⁰

Significantly, it is *sunnah* for believers to provide for orphans as stated in a *hadith*, that heavenly rewards await those who take care of orphans. According to the six principles of the *shariah*, the adoption process of orphaned children must be evaluated as follows; (i) for the protection and promotion of life, (ii) the protection and promotion of mind, (iii) the protection and promotion of family, (iv) the protection and promotion of the right to wealth, (v) the protection and promotion of dignity and lastly (vi) the protection and promotion of religion. Furthermore, special concerns relating to adoption must be looked upon. In order to protect the sanctity of the adopted child's connection to their biological family, the *Shura* Council advises against hiding the adopted child's familial background, as it could lead to an identity crisis and confusion in later years. Moreover, the council had declared that adopted children will not automatically gain inheritance rights from their guardians unless, “hibah,” a document akin to a will, is produced. The *Shurah* Council also acknowledged that adopted children, unless breast-fed by the adoptive mother, will not be banned from being married to the adopted family members.

³⁹⁰ Al-Quran. Surah An-Nisa' 4:36

3.11 DEINSTITUTIONALISATION

Deinstitutionalisation is a principle that supports adoption. This is because by practicing deinstitutionalisation, children are brought back to the ideal family members as most researchers of the ideas that having adopted family is better for the child rather than to stay in an institution, i.e. orphanage.³⁹¹ The idea of deinstitutionalisation³⁹² has been proposed for a long time. Mental health counsellor and foster care specialist, Lari Baty Cannon said, keeping children in orphanages could affect their mental health plus jeopardizing their right to be with their family.³⁹³ In the forum held by Social Welfare Department and OrphanCARE Foundation entitled “Children Should Not Be Institutionalised,” Cannon said children in orphanages are most likely to be exposed to crime, gang activity, drug usage, prostitution and suicide. She further added that babies who have to compete for attention, can develop infant trauma cycle. Therefore, it is better for children to live under family care at an early age, rather than in orphanages. Adoption would be a better alternative to ensure the baby is being protected properly by a deserving family. As the baby placed in the baby hatch is not meant to be in the centre forever but only acts as a transit before being adopted by a suitable family, is the right direction for deinstitutionalisation. OrphanCARE is perhaps the only Malaysian

³⁹¹ Gatekeeping as part of a broader strategy of deinstitutionalisation. As has already been noted by global guidance on deinstitutionalisation, gatekeeping is central to preventing new children from being placed in residential care unnecessarily, as well as to help reintegrate children already in care facilities back into their own families or into family-based alternative care. Retrieved from [https://www.unicef.org/protection/files/UNICEF_Gatekeeping_V11_WEB_\(003\).pdf](https://www.unicef.org/protection/files/UNICEF_Gatekeeping_V11_WEB_(003).pdf)

³⁹² Deinstitutionalisation, in sociology, movement that advocates the transfer of mentally disabled people from public or private institutions, such as psychiatric hospitals, back to their families or into community-based homes. While concentrated primarily on the mentally ill, deinstitutionalisation may also describe similar transfers involving prisoners, orphans, or other individuals previously confined to institutions. The transfer of individuals to families or community-home settings, which tend to be less restrictive than institutions, is thought to benefit individuals by allowing them to be active participants in their communities. Henri-Jacques Stiker <http://global.britannica.com/topic/deinstitutionalisation>, accessed on 6th June 2016.

³⁹³ Alyaa Azhar. 2013. “Children in Orphanage suffer emotionally” Free Malaysia Today. <http://www.freemalaysiatoday.com/category/nation/2013/11/28/children-in-orphanages-suffer-emotionally/>. n.p.

NGO seeking to reduce the number of children in orphanages in order to make deinstitutionalisation a reality.

Currently, Malaysia has 13,000 children in institutions; 35 government institutions with 1500 children, 90 private institutions with 4500 children, 7 government institutions for 1080 disabled children and 117 private institutions for 5850 disabled children.³⁹⁴ There are also unregistered institutions which estimate that there are over 2000 institutions available with approximately 50,000 children. A shift towards deinstitutionalisation is in need, because children in these institutions most often are unable to reach their full potential as individuals.

Malaysian law emphasizes the protection of the familial institution. Therefore, parental rights are still given to the child, even though parents do not actually provide the best parental care. In the United States, the State can petition the Court to terminate parental rights if, a child is in alternative care for 15 to 22 months.³⁹⁵ In comparison with Malaysia, the court places a child in need of care into an institution for a period of up to 3 years, which is a very long time for a rapidly developing child, and the court is allowed to extend the period to another 3 years or more, if the parents are not in the position to take the child back within that period. This creates injustice to the child, who has no choice but to spend their whole childhood in the institution.

Private institutions in Malaysia are governed by the 1993 Care Home Act, which make no stipulations for admission of children into private institutions. Therefore, Malaysia has a system in which the children who enter private institutions, do not

³⁹⁴ Ramiah, A.A. 2014. "A life worth living: Why every child needs and family and not an institution" Forum on Deinstitutionalisation: Every Child Needs a Family." *Forum*. 11-12th June 2014, Pullman Hotel, Bangsar, Kuala Lumpur.

³⁹⁵ *Ibid*.

generally exit from the institution until their parents return and are able to take them out from the institution. Therefore, a new paradigm is needed to view this situation.

Che Rozi Azrul Bin Che Aziz,³⁹⁶ shared his real life experience as one of the former residents of an orphanage under Jabatan Kebajikan Masyarakat (JKM) in the Consultative Forum: Children Should Not Be Institutionalized. Che Rozi who was constantly shuffled from his aunt's house to different institutions after his grandmother died, said that he could not stand the daily beatings by his aunt, who had promised to send him to school but instead, subjected him to household chores. At the age of 17, his predicament had worsened when Rozi was told by the principal of the orphanage house to leave the institution on the last day of his SPM examination, even though he had the right to stay until he turned 18. He had to survive on his own, by getting part time work and at the same time, furthering his studies after having left the orphanage. Remembering his hard life, Che Rozi is now a founder of the Pertubuhan Bekas Penghuni Institusi, JKM, (J'keb) to provide shelter for orphans after they turn 18. Given an option to Che Rozi, on whether to stay with adoptive parents or an orphanage, Che Rozi believed that each child needs a family. This is perhaps true for many other children who have been discarded by their own families for various reasons.

3.11.1 Deinstitutionalisation Internationally

The former Chair of the Convention on the Rights of the Child (CRC), Prof. Yang Hee Lee, believed that children who could not live with their parents, should still grow up in a loving home and enjoy all their rights. Article 20 of CRC also stated, that

³⁹⁶ Che Rozi Azrul Che Aziz. 2013. "Consultative Forum: Children Should Not Be Institutionalised" *Forum*. 27th November 2013, Putrajaya.

children who cannot be looked after by their own family, have a right to special care and must be looked after properly. The United Nations (UN) guideline for the alternative care for children, which was endorsed by the UN General Assembly (UNGA) on 20th November 2009, focuses on two main aspects: (i) to ensure that children do not find themselves in alternative care unnecessarily and (ii) where out of home care is provided, it must be delivered under appropriate conditions responding to the child's right and best interest.³⁹⁷

In the European context, there is a growing consensus that institutional care is not compatible with the Human Rights approach. A number of countries have started to progressively dismantle their institutional care system and re-integrating children into their families and communities. Deinstitutionalisation is also known as “the transition from institutional to family and community based-care, which can be defined as a policy driven process of reforming a country's alternative care system, that primarily aims at (i) decreasing reliance on institutional and residential with a complementary increase in family and community based care and services, (ii) preventing separation of children from their parents by providing adequate support to children, families and communities.”³⁹⁸ In one of the research by Cannon,³⁹⁹ modeled by the Bucharest Early Intervention Study, it was found that children living outside of family care, should be placed into family care at the earliest age possible. This is because, early placement into family care, results in the best outcome for the child. Secondly, children living outside of family care suffer greatly from diminished development. Thirdly, placement into

³⁹⁷ Yasmeen Sharif. 2013. “Consultative Forum: Children Should Not Be Institutionalised”. *Forum*. 27th November 2013, Putrajaya.

³⁹⁸ *Ibid*.

³⁹⁹ Cannon, L.B. 2013. “Deinstitutionalisation of Children in Orphan Homes in Eastern Europe” (Consultative Forum: Children Should Not Be Institutionalised). 27th March 2013. Putrajaya.

family care at an early age significantly improves cognitive, emotional and behavioural development.⁴⁰⁰ There are few organisations⁴⁰¹ working for the deinstitutionalisation matters throughout the world and their idea has been absorbed into few countries, including Malaysia, in ending the institutionalization of children within a generation.

3.11.1.1 LUMOS

Lumos, an international non-governmental organization working to end the institutionalization of children around the world⁴⁰² through their partnership with government bodies, communities, children and families worldwide, aim at providing adequate healthcare, education and social care for both the children and their families, closing the gap from being institutionalized, to having a family-based care experience. Lumos sits on the Leaders' Council of the Global Alliance for Children, while being the founding member of two globally prominent charitable organizations such as the European Expert Group on the Transition from Institutional to Community-based Care and the Global Partnership for Children with Disabilities.⁴⁰³

The past five years (2010-2014), had shown how Lumos supported 12,000 children move from harmful institutions, to family-based environment. More than 644 lives of children who had suffered from malnutrition, severe neglect and lack of access to medical treatment had been taken under the wings of Lumos and these children had been provided with sufficient aide to regain their strength. Apart from just focusing on

⁴⁰⁰ *Ibid.*

⁴⁰¹ LUMOS, Celsis and Care for Children, are organisations of which has contributed towards the idea of deinstitutionalisation. These organisations has participated in the forums organised by the KPWKM and OrphanCARE, Malaysia and had given their idea upon the topic of the deinstitutionalisation internationally.

⁴⁰² LUMOS, "Ending the Institutionalisation of Children in Malaysia: A Follow-Up Report", 2014, LUMOS Foundation. p.3.

⁴⁰³ *Ibid.*

the victims, Lumos had also ensured the appropriate training of 17,000 social workers, medical professionals, teachers, civil servants and policy makers to maintain the quality of service and professionalism rendered to the recipients in their organization. €367 million had been redirected through Lumos, to ensure that it was spent on community based services, rather than institutions.

The core reason behind the objective of Lumos, is the belief that every child has the right to a family. Through thorough research done, Lumos understands how mentally, emotionally and physically institutionalisation can have an effect on a child's life, especially when statistics have shown that 90% of the 8 million children reported to be institutionalized, were not orphans. As written on their webpage: one study found that young adults raised in institutions are 10 times more likely to be involved in prostitution than their peers, 40 times more likely to have a criminal record and 500 times more likely to take their own lives.⁴⁰⁴ Therefore, detailed care and planning goes into the process of removing a child from any current institution, to a home-based setting. Careful considerations are needed in terms of the sensitivities and challenges faced by the child, as well as the openness of the foster families to wholeheartedly accept the shortcomings of the child. In a 2014 report on ending institutionalisation in Malaysia, Lumos had addressed the ten key elements that governed the process of deinstitutionalisation as follows: towards planning logistics, administration and management, monitoring and evaluation, communications and awareness raising, managing the process, strategic review (national), strategic review (international),

⁴⁰⁴n.a. 2019. "Ending the Institutionalisation of Children Globally." *Lumos*.
<http://codeofgoodpractice.com/wp-content/uploads/2019/05/Lumos-Ending-the-Institutionalisation-of-Children-Globally.pdf>. n.p.

service design, planning the transfer of resources, accessing, planning and preparation of individual children, workforce development and deployment.⁴⁰⁵

The expert consultant for Lumos, Sir Roger Singleton, had been quoted, championing the idea of deinstitutionalisation by saying that he had been extensively involved in removing children who had been unnecessarily living in institutions in the U.K. Some of that experience is relevant to deinstitutionalisation in other countries and Lumos provides him with an opportunity to share it.⁴⁰⁶

Furthermore, Sir Roger had postulated the major influences which had led to the formation of deinstitutionalisation such as, the extensive development in child research indicating a worrying demographic of abandoned children, the increased acceptance of the public towards illegitimate children, the emergence in professions of psychology and social helpers, to improve welfare benefits for single mothers and the increasing operational costs burdened by these institutions. England had seen a tremendous change through deinstitutionalisation, but making it a reality had required the support of several key services as follows:⁴⁰⁷

- A) “quality universal health care services
- B) tailored education aptitudes suitable for the background and limitations faced by each child
- C) sufficient expertise and competency in social services
- D) target services offered to vulnerable children and their families in coping with the traumas and constraints encountered by offering support of any form.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ n.a. “We Fight for Every Child’s Right To a Family”. <https://www.wearelumos.org/what-we-do/>. n.p.

⁴⁰⁷ *Ibid.*

- E) the ample allocation of key point localities such as (maternity hospitals) for the purposes of emergency protection of a child's well-being, family care (fostering or adoption) and small, specialized residential care for extremely small minority of children
- F) appropriate counselling and advice to children who will be deinstitutionalized or leaving care services
- G) to provide post-care support service to each parent and family unit on a monthly basis and ensure their emotional, physical and mental well-being are well taken care of.⁴⁰⁸

In short, deinstitutionalisation is a process of transferring resources from large centralized institutions to a wide range of services: a complex financial process, requiring detailed planning.⁴⁰⁹

3.11.1.2 Centre for Excellence for Looked after Children, University of Strathclyde, Scotland (CELSIS)

An International Advisor, Ian Miligan, of CELSIS, (Centre for Excellence for Looked after Children, University of Strathclyde, Scotland) emphasized on the prevention, family support and the guidance on care standards that the centre had provided to ease the process of deinstitutionalisation.⁴¹⁰ Two basic principles had been laid down, i.e. firstly, the necessity (that alternative care is genuinely needed) and

⁴⁰⁸ Sir Roger Singleton, "Managing the Process and Awareness Raising in Deinstitutionalisation", 23rd November 2016, in the Conference on Deinstitutionalisation of Children: A paradigm Shift, 23rd – 24th November 2016, Kuala Lumpur.

⁴⁰⁹ *Ibid.*

⁴¹⁰ Ian Miligan, "Key Issues in 'Deinstitutionalisation' Policy and Practice", in Deinstitutionalisation of Children: A paradigm Shift. *Conference*. 23rd – 24th November 2016, Kuala Lumpur.

secondly, suitability (when it is needed that it is provided in an appropriate manner). In implementing the necessity principle, a range of measures are required, i.e. tackling poverty and discrimination, control admission to residential homes, establishing strong gate-keeping mechanism, tackling abandonment/ unnecessary relinquishment and to promote kinship care and community strengthening.⁴¹¹ Furthermore, he had elaborated on the need for a drastic change in the approach of deinstitutionalisation, to ensure that family units are intact. Since these children have a prolonged need and rights that are met by UNCRC requirements, social services play a vital role to offer support and counseling to these defenseless families when necessary.

The shifting practice⁴¹² requires a more proactive contribution from social workers and community volunteers who will be focused on vulnerable families involving children who were at risk of separation or abandonment. Moreover, the focus on the 're-integration' of current children, has to be considered with the shifting practice. A timely individual assessment on the children involved in the deinstitutionalisation programme, is imperative to monitor the progress and obtain accurate feedback from them. Another aspect to look into, is transforming residential homes into day centres and family support services. An increase in various specializations is very much needed for example, foster care. Ian acknowledges the benefits of fostering children saying that among others, the children can find a family to belong to (either temporary or long term), children will be monitored so that they are ensured on getting a good care, foster-parents can be trained and supported to do a good job with children who have suffered neglect and loss, fostering also is a flexible service where a person can recruit carers to

⁴¹¹ *Ibid.*

⁴¹² Ian Miligan, "Key Issues in 'Deinstitutionalisation' Policy and Practice", in *Deinstitutionalisation of Children: A paradigm Shift. Conference*. 23rd – 24th November 2016, Kuala Lumpur.

do different kinds of jobs i.e. short and long-term, taking care disabled children, babies or teenagers.⁴¹³

3.11.2 Malaysia Towards Deinstitutionalisation

Malaysians have begun to have a better understanding on the importance of deinstitutionalisation and the positive impact it makes at the core level. Lumos CEO, Georgette Mulheir, in a forum co-organized by OrphanCARE had said⁴¹⁴ that no matter how much money you throw into an institution, you cannot create an environment that replaces a family. And even if you have staff, they change every eight hours (according to their shifts) and the child can't form relationships in the way they would with their father, mother or siblings."

A forum relating to deinstitutionalisation in 2014 held in Kuala Lumpur, had enhanced the abovementioned statement, when it was stated that children who were raised in an institution, suffer from delay in their psychological development that is not dependent on "love" alone. Extensive training and proper education are needed to fill these gaps. Among those in need of training to facilitate the flow of deinstitutionalisation, are the parents themselves (birth, adoptive, foster), home directors and staffs, social workers, counselors, health care professionals, policy makers and those who care for the children.⁴¹⁵

⁴¹³ *Ibid.*

⁴¹⁴ Sharmila Nair, 25th July 2014. "Of the 8 Million Kids In Institutions Worldwide More Than 90 Percent aren't Orphans" *The Star*. <http://www.thestar.com.my/lifestyle/family/features/2014/07/25/of-the-8-million-kids-in-institutions-worldwide-more-than-90percent-arent-orphans/>. n.p.

⁴¹⁴ *Ibid.*

⁴¹⁵ Cannon, L.B. 2014. "Education and Training as Necessary Conditions to Achieve Successful and Sustainable Deinstitutionalisation" (Forum: Deinstitutionalisation: Every Child Needs a Family), 11-12th June 2014, Pullman Hotel, Bangsar, Kuala Lumpur.

OrphanCARE Foundation trustee, Nor'aini Hashim, had stated in the same forum:⁴¹⁶ we have to remember that de-institutionalisation is not just about adoption, it is also about reintegrating children with their families. In one of the forums organized by OrphanCARE and KPWKM, Deputy Secretary General (Operations) of KPWKM⁴¹⁷ had said that Malaysia was going to focus on placement for children in need of care and protection in family- based care, while institutions would remain as the last resort. Appropriate measures had been taken to protect the children, including the amendment of Child Act 2001, Regulations on Fit and Proper Persons 2009 and guidelines on Placement Panel for Foster Child.⁴¹⁸ It is important to note that the family-based care⁴¹⁹ that had been proposed, included placing the children in the care of their parents/ guardian/ relatives, or with foster⁴²⁰ parents/ fit and proper person, or with the centre (under the Department of Social Welfare, as approved by the former minister, e.g. *Rumah Tunas Harapan*). As OrphanCARE senior researcher and volunteer⁴²¹ had

⁴¹⁶ Sharmila Nair, 25th July 2014. "Of the 8 Million Kids In Institutions Worldwide More Than 90 Percent aren't Orphans" *The Star*. <http://www.thestar.com.my/lifestyle/family/features/2014/07/25/of-the-8-million-kids-in-institutions-worldwide-more-than-90percent-arent-orphans/>. n.p.

⁴¹⁷ Wee Beng Ee, "Deinstitutionalisation of Children: A paradigm Shift". *Conference*. 23rd – 24th November 2016, Kuala Lumpur.

⁴¹⁸ Foster care generally means "the formal and informal custodial care of children outside their own biological family home when their parents are unable, unwilling, or prohibited from caring for them". See Azizah Mohd & Nadhilah A. Kadir, Protection of Children in Malaysia through Foster Care Legislation and Policy, *Australian Journal of Basic and Applied Sciences*, 6(11):113-118, 2012.

⁴¹⁸ Wee Beng Ee, "Deinstitutionalisation of Children: A paradigm Shift". *Conference*. 23rd – 24th November 2016, Kuala Lumpur.

⁴¹⁹ Section 30(1)(C) Child Act 2001, (Amendment 2001)

⁴²⁰ The limited provision under the CA 2001 only provides for the placement of a child in need of care and protection in foster care and it does not mention in detail regarding the approval process of foster parents or procedures of fostering. See Azizah Mohd & Nadhilah A. Kadir, Protection of Children in Malaysia through Foster Care Legislation and Policy, *Australian Journal of Basic and Applied Sciences*, 6(11):113-118, 2012.

⁴²¹ Ananthi Al Ramaiah, "Deinstitutionalisation of Children: A paradigm Shift". *Conference*. 23rd-24th November 2016, Kuala Lumpur.

clarified:⁴²² the purpose of de-institutionalisation is not to shut down institutions immediately. That is one of the last things to do when everything has been put into place. A strong adoption system is needed to make things work. Unfortunately, that is not a well-developed system in Malaysia, and that is what OrphanCARE is working on together with the government to do.⁴²³

The speech given by the Deputy Secretary General (Operations) of KPWKM,⁴²⁴ had also highlighted the concerns that researcher from OrphanCARE had stressed upon. Moreover, he had announced that a pilot project had been conducted by OrphanCARE and the Department of Social Welfare (DSW). Furthermore, the steps taken by DSW included locating and reuniting family members or next of kin with the child, to encourage members of society to be foster parents, and to consider placements in home environment such as *Rumah Tunas Harapan*.

On the negative side, the challenges faced with the pilot project had been unsettling. Among the difficulties that arose were finding foster parents who could be a match to the child's conditions and needs, the attempt to relocate children with disabilities, monitoring the poor health conditions of the children, shifting the mindset of the society towards welfare-based/ institutions (indirectly advocating deinstitutionalisation), the preference of the society towards adoption rather than fostering children and the complications in contacting or locating the biological parents and next of kin for new placement agreements.⁴²⁵

⁴²² Sharmila Nair, 25th July 2014. "Of the 8 Million Kids In Institutions Worldwide More Than 90 Percent aren't Orphans" *The Star*. <http://www.thestar.com.my/lifestyle/family/features/2014/07/25/of-the-8-million-kids-in-institutions-worldwide-more-than-90percent-arent-orphans/>. n.p.

⁴²³ *Ibid.*

⁴²⁴ Wee Beng Ee, "Deinstitutionalisation of Children: A paradigm Shift". *Conference*. 23rd – 24th November 2016, Kuala Lumpur.

⁴²⁵ *Ibid.*

With reference to the previously mentioned challenges, suggestions had been made to formulate Regulations on Family Based Care under the Child Act 2001 (Amendment 2016) and Regulations on Child (Child Temporary Care Centre for Family Based Care) under the Child Act 2001 (Amendment 2016). A solid rapport with relevant and responsible agencies such as the Ministry of Home Affairs, the Ministry of Health (Health Care), the Ministry of Education (schooling) and the Ministry of Urban Wellbeing Housing and Local Government (Housing), is hoped to make a huge difference in the progression of deinstitutionalisation in Malaysia, not forgetting forging a strong bond with the National Registration Department, to find solutions to strengthen the adoption process.⁴²⁶

3.12 CONCLUSION

In conclusion, this paper has considered various socio-legal and socio-cultural factors that had influenced the upsurge of baby dumping and the evolving of institutionalized children in Malaysia. This paper irrefutably proposes a family-based and on a larger scale, society-based approach to curb both the issue of baby dumping, as well as revising the welfare system provided to these unwanted children. Moreover, this paper also demands for a thorough overhaul of our lenient judicial system in terms of the punishment sentenced on baby dumping offenders. It is without the shadow of a doubt, that offenders, who are held liable for their crimes, will no longer be able to manipulate the lacuna of the laws to escape severe punishment that they deserved in the

⁴²⁶ *Ibid.*

first place. On a similar note, should the possibility for defense arise on behalf of the offender, their reasoning can be heard but it should not be an excuse nor should it influence the punishment for baby dumping.

The increase in rape cases involving strangers, courting or married couples and even family members (incest) had taken a drastic increase in recent years. Pornographic materials especially sources from the internet or social media that are easily accessible to anyone of all ages is the main contributor towards illicit sexual conduct. Children from the early ages of 2 who watch nursery rhymes on you tube are exposed to some form of porn under the guise of children's animation. Parents have to take a closer look at what their children are exposed to on the internet as well as reading materials and take ownership by enforcing "parental control" on these regularly viewed websites. Therefore, the Malaysian government is currently contemplating to introduce sex education in schools which can be a double-edged sword; for fear that it might be the trigger to promote sexual activities at an early age.

To summarize, the aftermath of unprotected teenage sexual conduct and rape can be facilitated through the increase of baby hatch centres and safe houses. With locales that are easily accessible by public transport or on foot, this would guarantee the operational success of both the baby hatches and safe houses in ensuring the safety of the lives of the abandoned infants.

As heavily discussed in this paper, adoption and deinstitutionalisation are also major components in monitoring the repercussions of the existence of illegitimate children. Even with the appropriate laws and proper adoption procedures, a child is robbed of his or her biological upbringing and love that normal children would receive from their birth families. The trauma and stigmatization that children are put through

the process of adoption and deinstitutionalisation will be lifelong. Legalizing baby hatches is not to encourage baby dumping but to offer possibilities of hope for the innocent lives to seek love from those who care. Although severe punishment can help to deter the problem of baby dumping, alternative punishment should also be an option towards the offender. In the next chapter, the discussion will be on the criminalization of baby dumping and its necessity, as well as analyzing critiques towards the act.