

CHAPTER 4

TOWARDS CRIMINALISATION OF BABY DUMPING IN MALAYSIA

4.1 INTRODUCTION

“We think sometimes that poverty is only being hungry, naked and homeless. The poverty of being unwanted, unloved and uncared for is the greatest poverty.”
(Mother Theresa)

By and large, cases of foetus and infant dumping are a global phenomenon, one which seems to have a permanency in the Malaysian society. As a consequence, irrespective of the fact that children’s rights to an adequate standard of living to enable them to develop not only physically and mentally, but also spiritually, morally and socially⁴²⁷ has been the main highlight of the United Nations Convention, both statistics and media reports from acknowledged baby centres proves, that there is an annual rise in abandoned babies in Malaysia. Although the reasons for this increasing and disturbing social issue has been acknowledged, the harsh truth remains, that the general public in Malaysia are capable of committing a crime so severe, that it amounts to murder, in most cases. If so, how does this reflect on the effectiveness of the Malaysian laws towards these criminals and its success to eradicate this horrific crime?

To all intents and purposes, this paper provides the impetus to scrutinise current laws and sentencing, imposed on baby dumping offenders and to propose for a stricter statute on this atrocious crime, factoring in the socio-cultural, religious and legal context

⁴²⁷ United Nations. 1989. “Convention on the Rights of the Child”. *United Nation of Human Rights Office of the High Commissioner*. www.ohchr.org/en/professionalinterest/pages/crc.aspx. Article 27

in Malaysia. However, the process of criminalising the act is challenging, due to the absence of a standardised definition of the term ‘baby dumping’ in Malaysia’s legislature. As a result, the punishment towards the act of baby dumping has been the subject of intense debate. Therefore; this chapter seeks to shine new light on the subject of criminalising the act of baby dumping, through the analytical process for criminalising the crime.

4.2 DEFINITIONS AND FUNCTIONS OF CRIMINAL LAW

Fundamentally, the term ‘criminalising’ derives from the root word ‘crime’ and Osborn’s Concise Law Dictionary⁴²⁸ describes crime as an act, default or conduct, prejudicial to the community, the commission of which by law, renders the person responsible and liable for punishment by fine or imprisonment in special proceedings that are normally instituted by officers in the service of the Crown. Hence, the question, what is crime? Stretesky asserts that “most criminologists would probably argue that the definition of crime is defined by the state and is not something that they can do much of, if anything, to change or influence it. Essentially, crime is, in this view, what the law states.”⁴²⁹ Therefore, it can be deduced that an act that is deemed wrongful on any level by the state and has been ascribed a legal ruling in the statute, is considered a crime and the circumstances cannot be altered. Additionally, the law handbook of Australia defines a crime as, “an offence that merits community condemnation and punishment, usually by way of fine or imprisonment. In reality, this differs from a civil wrong (a

⁴²⁸ Rutherford, L & S. Bone (ed.) 1993. Osborn’s Concise Law Dictionary, Newcastle: Sweet & Maxwell, p. 99.

⁴²⁹ Lynch M.J., Stretesky P.B., Long M.A. 2015. *What Is Crime? In: Defining Crime*. Palgrave Macmillan, New York. https://doi.org/10.1057/9781137479358_3. p. 1.

tort), which is an action against an individual that requires compensation or restitution.”⁴³⁰ Quintessentially, this is the concept of how the general public would perceive crime, by associating a terrible act with equal legal punishment.

Similarly, what is criminal law? As it happens, Justia explains criminal law to “concern the system of legal rules that define what conduct is classified as a crime and how the government may prosecute individuals that commit crimes.”⁴³¹ To put it differently, the main objective of criminal law is to prohibit ill-behaviour, either against an individual or an institution. Moreover, in the Principles of Criminal Law, a criminal act does not only concern the State but also the person(s) that are affected by the wrongdoing. Meanwhile, a great deal of crimes can be categorised as civil wrongs (torts or breaches of contract); hence, it is for the injured party to decide whether or not to sue for damages. However, in the case of crime per se, the State punishment awaits the offender once a crime is committed,⁴³² which clearly implies that it is up to the State to decide whether to prosecute someone who is reasonably suspected of committing an offence.⁴³³

Inherently, the existence of the criminal justice system is to identify, process and respond to criminal activity within the community. In particular, an activity is considered criminal, when the activity transgresses the laws that govern social interactions. Hence, those who violate them are subject to criminal penalties⁴³⁴ since,

⁴³⁰ n.a. 6th April 2017. “What is a Crime?” *Legal Service Commission of South Australia*. <https://lawhandbook.sa.gov.au/ch12s01.php>. n.p.

⁴³¹ n.a. 2021. “Criminal Law” *Justia*. <https://www.justia.com/criminal/>. n.p.

⁴³² Goldberg, J.C.P. 1999. “Rights and Wrong”. *Michigan Law Review*. <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3959&context=mlr>. p. 1831.

⁴³³ *Ibid*.

⁴³⁴ Kleinig, J. 2008. *Ethics and Criminal Justice: An Introduction*. United Kingdom: Cambridge University Press, p. 21.

the laws that are applied are those that have been “agreed” to be imposed upon. Generally, it is widely understood that the central aim of criminal law is to prevent harm; hence, certain rules of behaviour are enforced by the law to ensure that people are able to live in peace and harmony. Accordingly, the punishment that is executed for a particular offence by criminal law is believed to prevent any harm to society. In other words, the ultimate aim of punishment is to deter the society from committing wrongful acts and the verdict include the death penalty, imprisonment, fine and canning. More importantly, this serves as an act of retribution, which helps to remind the offenders from repeating such wrongful acts in the future. Nevertheless, it must be understood that legal sentencing does not only deter wrongful rather, it serves as a reminder for others, to abstain from re-committing these illegal actions. Therefore, the criminalisation of certain behaviour helps to warn the society that the prohibited activity is a serious matter and should be avoided at all cost.

To emphasize, criminal law categorised under the public law is meant as a point of reference and guide for the public to control and prevent crimes from occurring, as well as, to prosecute criminal offences. Specifically, a criminal conviction is “a pronouncement made on behalf of the society and is a form of community condemnation.”⁴³⁵ For this reason, a criminal sanction is needed, to clear social injustice when there is a severe infringement of a person’s liberty. Overall, the sanction is designed to function as a reckoning for the victim; henceforth, the idea of criminalising a crime is expected to serve as a fulfilment of the rights of the victim.

⁴³⁵ *Ibid*

4.3 MITIGATING FACTORS AND AGGRAVATING FACTORS OF A CRIME

Intrinsically, it is important to remember that the causes or factors pertaining to the crime of baby dumping, helps the court to outline appropriate punishment onto the offender. Accordingly, ruling will be imposed against the accused if, the court finds the defendant to be guilty of any of these causes at the end of the criminal trial. Therefore, this indicates that the court has the prerogative with regards to sentencing, after hearing the case to either apply aggravating⁴³⁶ or mitigating⁴³⁷ factors in a penalty.

Meanwhile, it should be noted that mitigating and aggravating factors are important to be taken into account, when sentencing an offender. However, mitigating is not an entitlement of the accused and does not automatically reduce the sentence to be passed. In particular, the moderator is permitted to refrain from making an allowance for mitigating factors, to achieve a recognised penal objective, which includes general deterrence, prevention of further offence for the duration of the sentence or provision of appropriate treatment for the offender.⁴³⁸

⁴³⁶ Prosecutors can offer evidence of aggravating factors that would merit a harsh sentence during trial. Criminal statutes often identify specific factors that should result in harsher punishments. A common aggravating factor is a prior record of similar convictions. Other aggravating factors are typically related to the circumstances of the offense itself such as the use of a weapon or the severity of the injuries suffered by a victim. With the exception of prior convictions, a court may not use aggravating factors to impose a harsher sentence than usual unless the jury found those factors to be true beyond a reasonable doubt. Reasons for aggravating includes repeat offences, vulnerability of victim, and leadership role in the crime. See: n.a. 2021. "Aggravating and Mitgating Factors" *Justia*. <https://www.justia.com/criminal/aggravating-mitigating-factors>. n.p.

⁴³⁷ The defence may put on evidence of mitigating factors that would support leniency in sentencing. Criminal statutes devote far less attention to factors that might mitigate a defendant's punishment, but courts have held that evidence relating to a defendant's character may be introduced provided that it is relevant to the sentencing process. Reasons for mitigating includes the lack of a prior criminal record, minor role in the offence, culpability of the victim, past circumstances such as abuse that resulted in criminal activity, circumstances at the time of the offense such as provocation, stress, or emotional problems that might not excuse the crime but might offer an explanation, mental or physical illness; and genuine remorse. See: n.a. 2021. "Aggravating and Mitgating Factors" *Justia*. <https://www.justia.com/criminal/aggravating-mitigating-factors>. n.p.

⁴³⁸ *Mallal's Criminal Procedure*, 6th Edition, Malayan Law Journal, 2001, p. 9279 (Edited by YA Dato' Gopal Sri Ram, Mah Weng Kwai, Andrew Christopher Simon, Loo Lai Mee.

On the other hand, the existence of aggravating factors may affect the enhancement of the sentence to be passed. However, this does not indicate that the court will pass a heavier sentence where there are aggravating factors compared to what is appropriate. In this case, the court takes into account the aggravating factors but it will not impose a sentence that is lighter than what is appropriate for the offence.

For instance, Singapore's, Young Pun How CJ noted in *PP v Tan Fook Sum*⁴³⁹ that the difficulty caused by the multiplicity of operative principles in sentencing, has led to the inevitability of conflicts. Thus, it was accepted that:

“What will facilitate more rational and informed sentencing is recognition that there is a dichotomy between public interest and aggravating or mitigating factors. Generally speaking, only the public interest should affect the type of sentence to be imposed while only aggravating or mitigating circumstances affect the duration or severity of the sentence imposed.”⁴⁴⁰

Correspondingly, it is suggested that only the public interest⁴⁴¹ should affect the type of sentence to be imposed, while the aggravating or mitigating circumstances will only affect the duration or severity of the sentence imposed. Therefore, the mitigating and aggravating factors would only go towards determining the length of incarceration where an offence calls for a custodial sentence.⁴⁴²

⁴³⁹ (1999) 2 SLR 523

⁴⁴⁰ *Ibid.*

⁴⁴¹ Welfare of the general public (in contrast to the selfish interest of a person, group, or firm) in which the whole society has a stake and which warrants recognition, promotion, and protection by the government and its agencies. Despite the vagueness of the term, public interest is claimed generally by governments in matters of state secrecy and confidentiality. It is approximated by comparing expected gains and potential costs or losses associated with a decision, policy, program, or project. See <http://www.businessdictionary.com/definition/public-interest.html>. Accessed on 10th January 2017.

⁴⁴² *PP v. Ng Tai Tee Janet* (2001) 1 SLR 343

In a recent case of baby dumping, a student was charged with murder for causing the death of her newborn baby. This case revolved around a third-year diploma student, aged 24 from Belaga; Betty Kuleh, was arrested following the discovery of a dead newborn girl found in a cardboard box, at the rubbish disposal area of an apartment complex. Initially, she was detained for concealing the birth of her newborn by disposing the body of the child, but the case was reclassified as murder by the police as new evidence emerged.⁴⁴³ In this case, the new evidence had suggested the possibilities that the baby was still alive when she was dumped by the mother, thus, it was considered as an aggravated reason that had added on to the punishment towards the offender. However, the age of the offender, describing her as a young mother, could be a mitigating factor, considering that she would have been terrified when giving birth alone and without the presence of her partner.⁴⁴⁴ Furthermore, it is common for the society to blame the female gender in any baby dumping issue, without highlighting the partner who is supposed to be equally responsible. Therefore, this could be the reason for mitigation, since, it is unfair to only condemn the mother of the child. However, it could be justified as an aggravation if, the offender has been repeating the same offence without showing any repentance towards the act.

⁴⁴³ Sharon Ling, 2017. "Student in baby dumping case charged with murder". *The Star*. Kuching, Sarawak. 19th April 2017.

⁴⁴⁴ The condemnation towards the unmarried mum who dump babies should be stopped as there should be some compassion towards the case. This has been uttered by Welfare, Women and Community Wellbeing, former Minister, Datuk Fatimah Abdullah when commenting about the case of baby dumping. See Sharon Ling, 15th April 2017, "Don't condemn unmarried mums who dump babies." Retrieved at: <http://www.thestar.com.my/metro/community/2017/04/15/a-need-for-compassion-and-not-outright-condemnsation-help-should-have-been-extended-to-young-mother-a/#wUoz2heyHyvCu1QG.99>

For comparison sake, in a case in Zimbabwe, *Jokasi v. State*,⁴⁴⁵ an appellant who was charged with murder and pleaded guilty for killing her newly born infant, had pleaded for mitigation at her sentence. As a result, the court decided that the sentence should not go beyond five years of imprisonment, taking into consideration the emotional stress of the accused. In the above case,⁴⁴⁶ on 15th September 1984, the appellant went into labor at her village and delivered her baby at a maize field. It had been narrated that the baby who was still alive, was wrapped with a plastic bag and placed on the ground. Then, the mother located a large rock weighing around 49 kilograms and placed the rock on top of the baby, causing the baby to stop crying after a short period of time, before returning to the village. Nevertheless, it was stated that the woman admitted to killing her baby, based on the reason that she was afraid of being chased by the relatives of her late husband. In addition, the court had referred to *S v. Rufaro*⁴⁴⁷ by further stating the need to consider an important factor, which was the emotional state of the mother at the time when she killed the child, whereby she might have been “so distressed that she might hardly know what she was doing.” On the other hand, the possibility that the murder may be a carefully premeditated one, must also be considered and committed entirely in the interests of the mother herself, because she felt that it was in her own best interest that the birth of her child should not be known. Regarding this matter, a carefully premeditated killing in these circumstances is a little different from many other cases of murder; therefore, a substantial sentence of

⁴⁴⁵ (1987) LRC (Crim) 642.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ 1975 (2) SA 387 (RA)

imprisonment would be justified if, that is the state of mind of the accused, when the murder is committed.”

In *Rufaro*’s case,⁴⁴⁸ the accused strangled the child with the umbilical cord and put the body in a hole. Meanwhile, in the present *Jokasi*’s case, the appellant put the child in a plastic bag and then placed the baby under a heavy rock, which then caused the baby to cry for a short time before the crying stopped. However, the cause of death was uncertain, since the body of the baby was later shredded by presumably animals, resulting in the newborn’s demise. As a result, it was difficult to distinguish the moral blameworthiness of both cases; had it been the suspicious act of the mother who bundled her child and paced a heavy rock on him or the attack on the baby by wild animals that had caused the death of the infant in question. Nevertheless, in *Rufaro*’s case, the Appellate Division reduced the sentence from seven years to four years, when the judge had later discovered that she was emotionally disturbed to a considerable extent. Similarly, in the case of *Jokasi*, the court was of the opinion that the punishment should not go beyond the mean limit of five years’ imprisonment, including a dissenting opinion which stated that it should even be reduced to four years imprisonment. Moreover, it should be noted that the initial sentence of nine years’ imprisonment for *Jokasi* was extremely excessive and had to be reduced.

Overall, it can be concluded that the court may reduce or add to the sentence, based on the mitigating and aggravating factors of the offenders. Unfortunately, *Betty Kuleh*’s situation at the time of the crime had not been recognized, which had resulted in the hefty punishment of murder. According to the abovementioned facts, the state of

⁴⁴⁸ *Ibid*

the mother in the case of baby dumping is an element that must be considered by the court, prior to deciding the appropriate punishment for the offender. To sum up, this chapter recognizes the need to consider valid reasoning in judicial ruling pertaining to baby dumping. On the contrary, there has to be a clear and definitive standpoint in and around the legislation, to drop harsher punishments without mitigation or mercy to offenders who intentionally and sometimes repeatedly commit the same crime. This paper also propose for a separate and stricter statute and sentencing, specifically to those who commit the act of baby dumping, which should be considered a severe crime and not to be taken lightly either by the court of law nor the general public.

4.4 CRIMINALISATION THEORY

In order to attempt the study of criminalisation theory, it is helpful to understand Persak's definition of criminalisation. By design, the descriptive, non-normative answer is to ascribe certain human conduct (acts or omissions) as criminal offences and usually assigning to them, a certain range of criminal-law sanctions. Perceptively, the normative or evaluative view would however, divert the attention to its moral character, emphasising for example, that "to make some action a crime is to declare that it should not be done."⁴⁵⁰ In other words, it is a method that studies and separates both individuals and their actions in to crime and criminals through the involvement of judicial decision-making.

⁴⁵⁰ Persak, N. 2007, *Criminalising Harmful Conduct, the Harm Principle, its Limits and Continental Counterparts*. Springer. p.4.

Moreover, “making laws, breaking laws and the reaction to breaking laws”;⁴⁵² that is, according to Sutherland, a subject matter of the discipline called criminology; a definition of the criminological science in a nutshell. Making the law, in the context of criminology, means, of course, making of the criminal law, i.e. criminalisation.”⁴⁵³ With intent, criminalisation is an outcome of a decision about what should and should not be subject to punishment that has been the subject of intense debate among the sociologists of crime – of who decides which acts as well as which circumstances should be subject to criminal sanctions. In liberal societies, it is the legislature that decides for “the people,” as has been voted by the people. Furthermore, at least in theory –other decisions can be made by other legislators whom the people have chosen to replace the previous law-makers if the people do not like the decision made by the legislature.

Considerably, it appears that sometimes law-makers do not truly speak for the people at large. For example, laws are cast generally and seemingly applicable to all citizens and alike in manner: all must adhere to them, law-makers and other citizens alike. Nevertheless, some laws are more onerous on certain people compared to others, despite the fact that everyone is subjected to the requirements of the law. Notably, this creates a sense of inequality amongst the people of a country, commonly yet negatively, affecting one group of citizen more than the other. Although unrelated to the issue of

⁴⁵² “Criminology is the body of knowledge regarding crime as a social phenomenon. It includes within its scope the process of making laws, of breaking laws, and of reacting toward the breaking of laws.” Sutherland, E.H. (1934). *Principles of Criminology*, 2nd ed., Lippincott, Philadelphia (originally published as *Criminology* in 1924).

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baby dumping, it is imperative to highlight Anatole France's⁴⁵⁴ controversial remark that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the street, and to steal bread," a statute that had been proudly pronounced by France that evidently affected the poor rather than the rich. This situation is also referred to as money bail or having "two justice systems: one for the rich and another for everybody else... Money bail is a price tag on freedom that only serves as wealth-based discrimination."⁴⁵⁵ Similar to the issue at hand, pertaining to the injustice borne by victims who had been abandoned by their parents or guardian, these innocent lives are often unspoken for, and takes a back seat in the both the mitigating and aggravating process, probably due to the fact that the victims are generally newborns or younger children with many who are non-survivors, with emphasis given to the offender of the crime and not the victims.

On a more important note, a comparison is needed to analyse the principle of legality in criminalisation, to justify the criminalisation of baby dumping act in Malaysia. To point out, Mihai Adrian perceives the legality of criminalisation as a fundamental principle of criminal law, where only the acts defined by criminal law at them when they are committed to constitute criminal offences and may be punished by criminal law.⁴⁵⁶ Nonetheless, his theory is criticised because criminal law founded under this rule may not be able to keep pace with the social evolution, considering the

⁴⁵⁴ France is a writer in the mainstream of French classicism. His style, modelled on Voltaire and Fénelon, as well as his urbane scepticism and enlightened hedonism, continue the tradition of the French eighteenth century. This outlook on life, which appears in all his works, is explicitly expressed in collection of aphorisms, *Le Jardin d'Épicure* (1895).

⁴⁵⁵ n.a. "8 Ways America Legal System Punishes People Who Are Poor". *Equal Justice under Law*. <https://equaljusticeunderlaw.org/8-ways-our-legal-system-punishes-people-who-are-poor>.

⁴⁵⁶ Mihai Adrian HOTCA. 2014. "Consideration on the principle of legality of criminalisation." *Challenges of the Knowledge Society, Criminal Law*. pp. 79-85.

constant changes of social relationships. Moreover, if the new illegal acts committed in a society cannot be foreseen, thus, the act which endangers social values might remain non-punishable.⁴⁵⁷ In addition, the statistics had proven that the case of baby dumping in Malaysia has escalated and it is time to criminalise baby dumping. While many may argue that the issue of baby dumping is not as serious in Malaysia as it is in other countries, The Asean Post had revealed in a recent article that “in Malaysia, a country notorious for baby dumping- a baby is dumped in the country every three days, with the majority found dead.”⁴⁵⁸ This is a serious warning if not an indication, that the time has come to enforce the law that will criminalise baby dumping, as had been done in Serekunda East whereby, the law had been assembled and passed in 2015, to criminalise baby abandonment with a 10-year jail term penalty.⁴⁵⁹ To a certain extent, the Attorney General and former Minister of Justice said the bill seeks to amend the Criminal Code, by making provision for the offence of ‘baby dumping.’⁴⁶⁰ Apart from that, the bill also seeks to discourage the phenomenon of baby dumping in the society and serves as a deterrent to prospective offenders, by imposing severe penalties to those who contravene the laws. More importantly, a new section which is Section 197A was inserted into the Principal Act for the prohibition of baby dumping which states that:

“A person who wilfully and with the intention of disposing of a child within twenty four months of that child’s birth; by either discarding, throwing or otherwise abandon the child in a public or private place commits a felony, and is liable on conviction to imprisonment for up to 10 years with hard labour, with or without the option of a fine.”

⁴⁵⁷ *Ibid.*

⁴⁵⁸ Athira Nortajudin. “Southeast Asia Baby Dumping Problem”. *The Asean Post*. 5 March 2020. Media Nusantara.

⁴⁵⁹ n.a. 2015. “Houses Passess Bill to Criminalise Baby Abandonment Penalty 10 Years Jail Term.” *All Africa.com*

⁴⁶⁰ *Ibid.*

On the whole, the majority leaders and members of Serekunda East had seconded the bill as non-controversial, because all they sought was to criminalise baby dumping, taking into consideration that all lives are equally important and an act without punishment will be no deterrent,⁴⁶¹ a bold decision that sets the tone to valuing human life, regardless of age and gender.

With this excellent example in mind, Malaysia too should take the steps to separate the crime for baby dumping from other similar cases such as, abandoned children or illegitimate children since, each case has its own unique history therefore, merging these cases in terms of ruling and punishment would prove to be unfair not only for the criminal but more so for the victim. For this reason, this chapter emphasizes on the urgency for the Malaysian legal system to acknowledge the seriousness of baby dumping in the country and to propose for a stricter yet standardised statute relating to this crime, with the hopes that this could subsequently prevent wrongful conviction from occurring.

4.5 CAUSES OF WRONGFUL CONVICTION

To begin with, a clear and concise comprehension on the definition of conviction and wrongful conviction has to be established. Literally, Duhaime's law dictionary defines conviction to be "the formal decision of a criminal trial which finds the accused guilty."⁴⁶² Additionally, Justice Darichuk of the Manitoba County Court terms conviction as, "where a person is found guilty of an offence...." A finding that the

⁴⁶¹ *Ibid.*

⁴⁶² n.a. "Conviction definition." *Duhaime Law Dictionary*.
<http://www.duhaime.org/LegalDictionary/C/Conviction.aspx>.

accused is guilty of the offence charged or a plea of guilty to an offence under ordinary circumstances constitutes a conviction for the offence although no sentence is imposed.”⁴⁶³ Justifiably, this statement clarifies the fact that once convicted, the accused will then be punished. Admissibly, Justice Darling had written that “The word *conviction* is sometimes used as meaning the finding guilty; at other times it means that finding together with the judgment or sentence of the Court.”⁴⁶⁴ In other words, once a person is found guilty of a crime, he or she will be sentenced accordingly with the nature of the crime. In short, convictions refer to the legislative verdict that pronounces an individual as a criminal through a fair procedural process, which constitutes providing and proving all elements of a trial.

Equally important is the classification of wrongful conviction. Zalman describes wrongful conviction as “a conviction that is factually inaccurate, that is, the wrong person was convicted or a person was convicted for a crime that did not occur.”⁴⁶⁵ In other words, a wrongful conviction is when an individual is arrested, convicted and receives punishment for a crime he or she did not commit. For the purpose of this paper, wrongful conviction is the negative consequence of a convicted individual who is factually innocent of the charges yet, procedural errors had occurred during the time of investigation, directly violating the convicted person’s rights.

Ideally, a just, legal procedure is the trademark of a civilized nation; when countries uphold the equality of the legal system. In effect, United Nations has distinctly

⁴⁶³ *R v Hofer* [1977] 4 *WWR* 645

⁴⁶⁴ *Harris v. Cooke*, 88 *L.J.K.B.* 253 (1918)

⁴⁶⁵ Zalman, M. 2014. Measuring Wrongful Convictions. In: Bruinsma G., Weisburd D. (eds) *Encyclopedia of Criminology and Criminal Justice*. Springer, New York, NY. https://doi.org/10.1007/978-1-4614-5690-2_162.

proclaimed the five principles that define the rule of law as “requiring measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.”⁴⁶⁶ Ultimately, United Nations places a high regard on procedural rights, also considered to be a fundamental human right.

In reality, the main reason for the constant evolution of laws is the rise in crime rates and because of this, the legal system is beckoned to pass and impose harsher ruling and punishment to criminalise offenders accordingly. Therefore, the current research seeks to fulfil the same objective in criminalising another criminal act, particularly the act of baby dumping which was opined to be tackled from the legal perspective.⁴⁶⁷

As it happens, the important roles of these tools in the new Child Act 2001 have been debated in the Parliament, particularly in the attempt to increase the penalty for child negligence. For example, the penalty for leaving a child (defined as anyone under the age of 18) at home unattended should be increased. In point of fact, the amendment of the Act may be considered as a starting point to prevent the case of baby dumping.

Then again, as much as the criminal justice system attempts to achieve equality in rulings and sentencing, this is challenging to achieve, due to various causes between the evidence gathered and trial sessions that could lead to unintentional cases of

⁴⁶⁶ n.a. 2021 “What is Rule of Law?” *United Nations and Rules of Law*. <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

⁴⁶⁷ *Ibid.*

wrongful convictions. In such situations, both the accused and victim suffer from legal injustice that would change the course of their lives for the worse. In cases of baby dumping, oftentimes, the criminal escapes from being found and even if he or she is found, evidences to criminalize are weak and questionable. Prior to seeking a uniformed stature and punishment for the crime of baby dumping, it is firstly important to evaluate how the lack or limitation of a standardised legislation pertaining to this heinous crime can result in wrongful conviction, which then creates a negative ripple effect within the judicial system. For example, when a person is wrongly accused and convicted of committing the crime of baby dumping, he or she is unjustly punished while the real criminal is set free to repeat the crime or perhaps commit larger crimes which then leads to a snowball effect in crime rates while the victim, a helpless child has probably either lost his life or his rights to life, undefended. Mostly, this topic highlights some overlapping issues of wrongful convictions that have been uncovered, such as; eyewitness misidentification, forensic error, false confession, Government misconduct, snitches, bad lawyering,⁴⁶⁹ police misconduct and prosecutorial misconduct to name a few.

Originally, starting with the single greatest cause of wrongful conviction worldwide is eyewitness misidentification, which “occurs when a witness has mistakenly identified the accused as the actual perpetrator of a specified crime. Most likely, these are often compelling and convincing to the judge and jury, since the persuasive nature of eyewitnesses is often seen as “hard evidence” but can actually be misinterpreted and fallible.” Theoretically, studies have proven that unlike a tape

⁴⁶⁹ n.a. 2021. “Causes of Wrongful Convictions”. *University of Michigan*.
<https://www.law.umich.edu/clinical/innocenceclinic/Pages/wrongfulconvictions.aspx>.

recorder, the human mind is incapable of mentally documenting and recalling events as it happens accurately. Comparatively, the memory of a witness is similar to evidences from a crime scene; requiring thorough preservation and methodical retrieval to prevent contamination of evidence.

Next in line is forensic error, a consequence of applying various inadequate forensic testing methods with little or no scientific validation especially in matters of the reliability in the assessments and outcomes, which often results in the misconduct of forensic analysts who testify without a significant scientific basis for their findings.

Evidently, the Journal of the American Academy of Psychiatry and Law, defines a false confession as, “an admission (“I did it”) plus a post admission narrative (a detailed description of how and why the crime occurred) of a crime that the confessor did not commit.”⁴⁷² Given the nature of some sensitive cases, innocent defendants plead guilty to a crime due to a prior understanding during the interrogation process whereby, the benefit of confessing to commit a crime, outweighs preserving their innocence.

Purportedly, government misconduct occurs in cases that involve dishonest government officials who would misuse their power and authority to have an innocent individual convicted despite obvious weak evidences. Allegedly, snitches are individuals who unknown to both the judge and the members of the jury, intentionally yet convincingly provide false statements in a court of law to convict an innocent person with the promise of receiving favors in return for their testimony. With this in mind, the lack of professionalism showcased in a criminal trial, probably due to the lack of

⁴⁷² Richard A. Leo. 2009. “False Confessions: Causes, Consequences, and Implications”. *The Journal of the American Academy of Psychiatry and the Law*. USA. 37(3) September. p.333

preparation to investigate, gather evidences and call witnesses, could lead to the conviction of innocent individuals.

Seemingly, police misconduct can impact the likelihood of a wrongful conviction. Hypothetically, there are two scenarios of how this can happen; firstly, when a specific suspect in mind that becomes the focus of his investigation cancelling out other potential suspects in an investigation and secondly, when the interrogation approach adds unnecessary pressure to the accused, leading to precipitous declarations.

Last but not least, prosecution misconduct occurs when the highly skilled attorneys are employed by wealthy clients to manipulate the truth for a high chance of winning the case in question. Supposedly, this is achieved through the hiding of important evidence and applying shrewd tactics in a plea bargain, also considered as coercive practice, resulting in innocent individuals pleading guilty out of fear and confusion.

In essence, the judicial system is responsible and should be dedicated to discovering the truth and delivering fair judgements in a trial. Essentially, it is important to realize that wrongful convictions are more prevalent in adversarial systems namely, criminal cases such as baby dumping. Evidently, the media has played a huge role by highlighting the rise of baby dumping crimes in Malaysia, which led to considerable opinions on the methods and solutions in overcoming this issue mainly, by introducing harsher punishment towards the criminal. Apparently,, it has been reported that harsher penalties can be seen in the newly Amended Child Act 2016 in Malaysia. Whilst articles

related to baby dumping can be seen from other researchers as well,⁴⁷³ it is important to note that the Penal Code consists of a considerable number of articles on the issue of baby dumping. Nevertheless, none of the articles is related to the criminalization of the act of baby dumping. Perhaps, it is the time to seek justice for the crime of baby dumping to be criminalized by taking into consideration the current situation with a high number of cases currently reported.

4.6 CRITIQUES ON THE CRIMINALISATION OF BABY DUMPING

Ostensibly, critics of the criminal law have frequently complained that laws generally tend to serve the values and interests of only particular segments of society, rather than treating society as a whole. It would seem, there is a reason to believe that there is no particular “people” for whom “the law” speaks for if this complaint is valid, but only diverse groups with a particular set of interests that cannot be recognised in any single way. In all probability, it remains an open question on whether the interests of all should be recognised. Presumably, if the answer is negative, then it is vital to determine which interests should be recognised by law and vice versa.

Undeniably, a range of opinions had been given by experts in the field. For instance, specific questions related to the laws should be asked when conducting interviews with respondents who had a legal background. A possible explanation for this may be due to the ability of the respondents to answer based on their legal background. As an example, in an interview conducted with an academician from

⁴⁷³ Anita Abdul Rahim, Tengku Noor Azira Tengku Zainudin, & Ahmad A'zam Mohd Shariff, 'Curbing the Problems of Baby Dumping and Infanticide: A Malaysian Legal Perspective.' *International Journal of Humanities and Social Science*, Vol. 2, No. 12 (Special Issue_June 2012).

Ahmad Ibrahim Kuliyyah of Laws; Dr. Mazlena Mohamad Hussain from the International Islamic University Malaysia,⁴⁷⁴ she provided a neutral response when asked whether perpetrators of baby dumping which are found to be involved with the death of a baby should be punished under Section 302 of the Penal code. In her explanation, Dr. Mazlena claimed that Section 302 will not be applicable if, the offender is diagnosed with post-natal depression; however, it is otherwise acceptable. Furthermore, she asserted that the prosecution must prove the case according to the elements under Section 300 of the Penal Code.

Interestingly, when asked the same question to a magistrate, Intan Nurul Fareena, who is attached with the Prime Minister's Office, as a judiciary officer and a graduate of International Islamic University Malaysia,⁴⁷⁵ she responded by saying that:

“*Mala fide* and the *actus reus* of the offender need to be proven first. If the intention to kill can be proven, Section 302 can be used. However, in the case where a baby is left at a place where the intention was to allow others to save him, my opinion is Section 302 is still not suitable to be applicable.”

On a similar note, a deputy public prosecutor from the Attorney General Chamber, Malaysia was also consulted for the issue of baby dumping. Comparably, Dzul Iswari Mohd Jaafar, 31, a law graduate (LL.B) from UiTM opines the following when asked why baby dumping cases are not being classified under Section 302 of the Penal Code even though it tends to involve death:⁴⁷⁶

“There are many other sections in the Penal Code that can be used for the case of baby dumping involving death, as mentioned in Section 309A,

⁴⁷⁴ Dr. Mazlena Mohammad Hussain, Lecturer. 25th May 2015. IIUM. Gombak. *Baby Dumping and Insanity*. (Personal Interview)

⁴⁷⁵ Intan Nurul Fareena bt. Zainal Abidin. Magistrate. 1 September 2013. Magistrate Court Sungai Petani. *Issues of Baby Dumping*. (Personal Interview).

⁴⁷⁶ Dzul Iswari Mohd Jaafar, Deputy Public Prosecutor. 28th May 2015. Attorney General Chamber Johor Bharu, *Laws on Baby Dumping*. (Personal Interview).

309B, 314, 315 and 316 Penal Code. To categorize all cases of baby dumping under Section 302 is not suitable in all conditions. For example, the death of a baby might be caused by some other factors, i.e. exposure to the bad weather, being attacked by wild animals while being abandoned, and some other relevant factor which could have any causal link to the death of the baby. With this, it is strong evidence that the parents are not having any direct link towards the death of the baby, and therefore, they could not be liable under Section 302.”

On the other hand, Dzul stated that there are many other sections in the Penal Code which can be used to penalise perpetrators of baby dumping. More importantly, their opinions partially implied the need to criminalise the act of baby dumping, considering their agreement that punishment should be charged appropriately. However, the difference in legislation and principles of laws was also mentioned. In this case, some would agree that Section 302 has the highest penalty, while most would believe otherwise. Although cases to be decided in courts are based on facts and *ratio decidendi*,⁴⁷⁷ Malaysia has yet to impose Section 302 to the offender in baby dumping cases. Admittedly, there has been confusion when criminalising the act of baby dumping in Section 302. As previously mentioned, many of the cases of baby dumping only impose a minor penalty according to the current law mentioned in the Penal Code; however, it is also deemed unfavourable to impose the highest level of punishment to the offender. Unquestionably, the suspect may be prosecuted under many different laws, considering that the act of baby dumping might happen due to many reasons.

On the other hand, medical assistant and co-founder of Morning Star Foundation (MSF) Lynsay Lewis, who has dealt with numerous cases of baby dumping, strongly disagreed with the notion that harsh laws are able to prevent babies or children

⁴⁷⁷ *Ratio Decidendi* means reasons for deciding. Refer to Oxford Dictionary of Law, 2009, Oxford, University Press, 7th Edition. P. 452.

from being abandoned.⁴⁷⁸ On the contrary, she asserted that harsh laws would be counterproductive, as most babies are abandoned due to financial constraints, further stating that most of them are unable to bear the burden of watching their baby die thus, resorting to abandonment, considering that “at least affords some hope that someone will help.” Alternatively, she even suggested that there must be an increased effort in social services to allow a parent to keep their child in their care if harsh laws are imposed.

In some cases, defences may be used to protect the offender who is considered to not have other alternatives, but to leave their babies. However, this could not be generalised in all cases of baby dumping. Notably, the current research agrees that harsh penalties such as the death penalty are not suitable in penalising some cases of baby dumping, considering that the offender may have no other choice apart from leaving the baby for a better cause. Knowingly, the *mala fide*⁴⁷⁹ intention may be indicated if a baby is left and then died, which can lead to murder without any doubt against the law. Therefore, this cannot be justified in any cases, which calls for the offence to be criminalised, considering that there are better channels to save the babies, despite giving excuses that can lead to their deaths.

According to Dr. Syahrina,⁴⁸⁰ law would only be beneficial if only it were to be enforced and the culprit should be held accountable to their actions (baby dumping). Understandably, education is fundamental and it should involve all levels of society

⁴⁷⁸ Lynsay Lewis, Medical Assistant/ Writer. 3rd May 2015. USA. *Baby Abandonment*. (Personal Interview).

⁴⁷⁹ *Mala fide* means bad intention. It is to describe an act performed fraudulently or dishonestly. See Oxford Dictionary of Law, 2009, Oxford, University Press, 7th Edition. p. 339.

⁴⁸⁰ Syahrina, Medical doctor, 9th October 2018, IIUM Medical Centre, Kuantan, *Medical View of Baby Dumping Cases*. (Personal Interview).

from the elementary to the university ranking and should cover topics such as sex education, pre-marital intercourse and domestic violence to name a few. It is imperative that we as society, should not ostracise parents who abandoned their children without understanding their plight. To elaborate, Dr. Syahrina added that the society would be able to tremendously reduce baby dumping cases if support is obtained by various groups such as law makers, doctors, NGOs, social welfare workers and orphanages. Correspondingly, she mentioned that we have to create a middle ground to ensure that these babies are well protected, while amplifying the various ways to reduce this atrocious act, one of which is to implement a law that would prosecute people who abandoned babies.

As a Malaysian government hospital staff working in a paediatric department, she has witnessed cases related to baby dumping and Dr. Syahrina considers the act as inhumane and unethical. Personally, she has taken care of a baby in Neonatal Intensive Care Unit (NICU) who was abandoned at a baby hatch. At the time of abandonment, the baby was blue and was in dire need of medical attention. It had been understood that the parents had dumped the baby at the hatch with a note of their full names while the reason given for abandoning the baby was the fear of keeping an illegitimate child and the possible stigma from the society. Unfortunately, the baby was given lung support treatment for a few weeks and was kept in NICU for several months after that, since he was not well enough to be discharged. After months of searching, they found the parents, which had resulted in the court's decision to release the child's custody to his birth parents, much to their despair for fear of neglect and future abandonment.⁴⁸¹

⁴⁸¹ Dr. Shahrina, Medical doctor, 9th October 2018, IIUM Medical Centre, Kuantan, *Medical View of Baby Dumping Cases*. (Personal Interview).

Significantly, a Senior Programme Officer (Research & Publications) of Sisters In Islam (SIS), Miss Syarifatul Adibah,⁴⁸² responded by saying the following when asked whether the death penalty should be imposed on those who abandon their baby and result in the child's death;

“Usually the one who will face the punishment is the mother of the baby but I don't think death punishment is good even though the baby is dead. We need to find another punishment and I don't agree to impose death punishment because only the mother will be punished and the father will escape. And now that we can make a DNA test to know who the father is, therefore, liability should be on the father too.”

Extensively, the objective of SIS is to promote a framework of women's rights in Islam, which takes into consideration the experiences and realities of women. By and large, the focus of SIS is to eliminate injustice and discrimination against women, as well as increase public awareness through the reformation of the laws and policies within the framework of justice and equality in Islam and other religions. Despite their cause, it is undeniable that SIS has not dealt with cases of baby dumping, although they have been providing consultation for cases related to illegitimate children, especially concerning baby dumping cases. Exclusively, Syarifatul commented that if the punishment of baby dumping is extended to the father/partner instead of solely putting the responsibility on the mother; hence, it will subsequently portray the justification for the criminalisation of the act of baby dumping. Taken as a whole, a clear explanation for this matter is not only based on her opinion that the punishment should be equal between men and women without bias, but the laws that are necessary to be imposed

⁴⁸² Sharifatul Adibah, Senior Programme Officer (Research & Publications). 13th May 2015. Sisters in Islam, Petaling Jaya. *Baby Abandonment*. (Personal Interview).

on any cases related to baby dumping must provide equal punishment to both men and women.

Prominently, in response to the question of whether the law has been ineffective in preventing the case of baby dumping in Malaysia, Datin Shamsia Mansoor, the Head of Advocacy and Education Bureau, OrphanCARE Foundation, Petaling Jaya⁴⁸³ believed that following a considerable amount of revisions, the laws which impose severe punishment had not been able to reduce the number of crime as stated in the following statement:

“It is not the severity of laws that could deter the public from committing illicit relationship and getting pregnant out of wedlock. It should be the self-awareness about the “cause and effect” of each deed. They should respect themselves, and to fear Allah (God). Also, the awareness should come from the parents, teachers, and the public.”⁴⁸⁴

Essentially, this indicates that Datin Shamsia does not believe that the severity of the law is able to deter illicit relationships but instead, the genuine fear of Allah has a power that can prevent the crime from happening. Fundamentally, the justification of her belief is based on the fact that the case of baby dumping is still not reduced, despite the multiple revisions of the laws. Relevantly, in this case, it is undeniable that her concerns are more Islamic in nature; however, the reality is that Malaysia is a country with different races and cultures, which explains that illicit activities are forbidden and taken seriously by most Muslims. Hypothetically, can this instillation of fear be said to be the same for those who do not practice Islam? Do they have the same values? In theory, it is the duty of every individual to be responsible from committing any illicit

⁴⁸³ Shamsia Mansor, Head of Advocacy and Education Bureau. 2015. OrphanCARE Foundation, Petaling Jaya. *Baby Dumping and Baby Hatch*. (Personal Interview).

⁴⁸⁴ *Ibid*.

behaviour; hence, such awareness may help to prevent the crime from getting worse. In practice, the laws are needed in the end to prevent such an act. Analytically, what should be the alternative if the laws in the Penal Code are not strict in countering the case of baby dumping? Or should the Penal Code be more severe in countering the case by inserting certain clauses related to illicit behaviour, which leads to baby dumping? Overall, these are some of the questions that arise in response to the need for criminalising the act, which requires the identification of the root of the case to be tackled. Apart from this, parents and teachers are required to play a major role by bearing the responsibilities of monitoring children and teenagers alike.

In another interview, when asked if the current laws have failed to curb the issue of baby dumping, Dr. Azizah Mohd. from Ahmad Ibrahim Kuliyyah of Laws,⁴⁸⁵ International Islamic University argued that it was not necessarily the law that had led to the failure of overcoming the issue, but also a few other contributing factors such as, the lack of religious knowledge and practice, cultural shock, the advancement of technology and the spread of pornographic movies or blue films, peer influence and others.⁴⁸⁶ In brief, it is not appropriate to solely rely on the law to reduce the crime since it is also important to consider all aspects of life. At the same time, Dr. Azizah added that baby dumping cases may be controlled through legal, social and religious reform.⁴⁸⁷ In a nutshell, it is a must to revisit and analyse what has been done in order to improve and provide new alternatives for the dilemma of baby dumping. To conclude, this is important because the cases are rampant and may differ from time to time, as well as

⁴⁸⁵ Dr. Azizah Mohd, Associate Professor. 21st May 2018. Ahmad Ibrahim Kuliyyah of Laws. *The Issues of Baby Dumping* (Personal Interview).

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

the fact that the approach towards solving these cases should be aligned with the current situation, considering the different reasons which lead to its occurrence.

4.7 INTENTIONS FOR CRIMINALISING BABY DUMPING

As previously reported throughout this chapter, baby dumping has become rampant and this issue has become the new norm in Malaysia probably due to the weakness in legislative ruling and leniency in punishment. It is not surprising if this crime is repeated by the same offender who would have presumably mastered a loophole in the judicial system to avoid from getting caught thus, resulting in a never-ending vicious cycle of untraceable yet intentional murder. Hence, it is crucial to justify the reasons why the act needs to be criminalised after analysing the possibility of criminalising baby dumping. Moreover, the possibility for the crime to be taken more seriously in the Penal Code is higher if the reasons for criminalising this heinous act can be justified. Subsequently, the crime can finally have its own onus to be tried on its own provision without relying on other provisions. In this chapter, the justification will be analysed according to the criminalisation theory in general, followed by a detailed extension on the case of baby dumping.

4.7.1 Hazard for the child

Whenever a child is abandoned, he or she is exposed to an unknown destiny wherein the future of the child is uncertain when left to the workings of fate. Many factors should be taken into consideration in the identification of the risk suffered by babies who have been dumped. Regretfully, the lack of medical care is the most important factor that is often overlooked such as problems ranging from infection,

dehydration, overheating, burns, low body temperature, low blood sugar level and hunger to name a few, especially among babies who are born under unhygienic and less ideal situations such as rivers, drains, public toilets and ponds.

Raja Permaisuri Bainun Hospital paediatrician and neonatologist Dr Cheong Hon Kin, who has more than 10 years of experience working with children and newborns, had explained that, “the potential problems such babies face include maintaining a normal temperature, excessive bleeding from poor umbilical cord care, increased risk of infections and possible death.”⁴⁸⁸ Dr. Cheong further explained, that due to the absence of basic medical attention, the child would probably have a higher chance of not surviving or even if he or she does survive, it would be with some form of disability or illness such as respiratory issues, infection due to a weak immune system and brain damage due to lack of nutrition such as breast milk that could lead to permanent internal or external disability.

As thoroughly discussed in Chapter 2, the disruption in the mental and psychological state of a child is a long-term negative effect as a result of being dumped. Significantly, children who have been victims of abandonment often carry with them an unconstructive stigma in the form of constant fear of being neglected. In the journal *Crimes and Misdemeanours: the case of child abandonment*, S. Giordano argued that whoever abandons a child should be criminalised, irrespective of whether the child’s fate takes a turn for the better or otherwise because, “independent of whether the child will actually suffer harm, the person who hands in the child to an unknown destiny exposes the child to serious risk. Whether or not other circumstances may correct or

⁴⁸⁸Manjit Kaur, 2014. “Abandoned babies face a Wide Range of Challenges” *The Star*, Malaysia. 19th March 2014. n.p.

prevent harm is secondary to the attribution of moral responsibility.”⁴⁸⁹ Giordano further explains that the risk that is borne by the child from the time of his or her birth leaves both short term and long term effects on a child’s development process that would hinder him or her to progress normally as an individual unlike other children who were born in fortunate circumstances. Therefore, Giordano insists that parents who abandon their children should be considered criminals and these criminals should receive punishment for murder in cases of baby dumping.

4.7.2 Harm to the child

Concisely, the first justification for criminalisation is when crime poses harm to others and most importantly, the purpose of the justification is to analyse the harm that has been committed by the offender. Briefly, two areas of harm have been identified, namely harm to others and harm to one. Theoretically, the act of harming others could be considered as the principal reason for criminalisation by many theorists as mentioned by Feinberg.⁴⁹⁰ According to Feinberg,⁴⁹¹ supporting penal legislation is proven to be effective in preventing harm done to a person other than the actor, because there is probably no other means that is equally effective that can protect the value of others.

Tentatively, the question remains on how particular conduct can harm others? Generally, harm can be defined as a setback to interests which could impair a person’s future to engage in worthwhile activities and relationships, as well as to pursue their

⁴⁸⁹ Giordano, S. 2007. “Crimes and misdemeanours: the case of child abandonment” *Journal Medical Ethics*. USA. Jan; 33(1): 28–34. doi: [10.1136/jme.2005.014126](https://doi.org/10.1136/jme.2005.014126).
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2598087/>.

⁴⁹⁰ Feinberg, J. 1984. *Harm to Others: The Moral Limits of the Criminal Law*, Vol. 1, New York: Oxford University Press. p. 48.

⁴⁹¹ *Ibid*.

goals in life.⁴⁹² Supposedly, the victim will have a lower quality of life as a result of the offender's act. In particular, the seriousness of the harm must be taken into account, to enable behaviour to be criminalised or in other words, it must be a wrongful act⁴⁹³ or omission.⁴⁹⁴ Practically, the seriousness of the harm should be considered by a legislative body when an act is being criminalised. In practice, the greater the harm, the greater the likelihood for the offender to be held accountable for his or her actions. In the case of baby dumping, the seriousness of the harm is based on the victims, which in this case are the babies that are left unattended. In addition, it is considered harmful to the victim if the baby survives but loses the person who is responsible for protecting them; either a parent or a guardian; hence, which pose a long-term impact that forces the child to grow without a proper family institution. In reality, the children will wonder who their real parents are while growing up, and this could bring a negative, possibly psychological impact in the baby's life, once they become an adult.

Consequently, another related term is 'remote harm' which may result in the offender to be held liable. Remote harm is resulted by "conduct [whereby] the riskiness depends on the existence of a contingency."⁴⁹⁵ Interestingly, an analogy that could be brought forth in this regard, refers to an advertisement for the consumption of alcohol.

⁴⁹² *Ibid.*

⁴⁹³ Two types of crime: conduct crimes and result crimes. Conduct crime is where criminal liability is imposed simply because the accused has done something that is prohibited by law. These actions need have no result. For example: possession of drugs, Section 29(b) Dangerous Drugs Act. Whereas result crime is conduct of the accused which cause a prohibited result. For example: culpable homicide, Section 299, Penal Code. See: KL Koh, CMV Clarkson, NA Morgan, *Criminal Law in Singapore and Malaysia, Text and Materials*, 1989, Malayan Law Journal, p. 36

⁴⁹⁴ There is no liability for omissions to act unless the omission can be said to be "illegal" as defined under Section 43 of the Penal Code. See: KL Koh, CMV Clarkson, NA Morgan, *Criminal Law in Singapore and Malaysia, Text and Materials*, 1989, Malayan Law Journal, p. 44.

⁴⁹⁵ Simester A.P. & Hirsch, A.V. 2009. "Remote Harms and Non-Consecutive Crimes". *Criminal Justice Ethics*. 28:1, 89-107, DOI: [10.1080/07311290902831441](https://doi.org/10.1080/07311290902831441). p.94.

For example, the abuse of alcohol can result in negative consequences on others, despite the consequences of oneself which is not dire. Arguably, leaving a baby unattended might be considered as remote harm in some cases, but it is common that the offender may have intended that the baby should be saved by someone else. Technically, the whole idea is to release oneself from being responsible for the baby. Speculatively, this 'remote harm' in some situations can get worse when the baby is not saved, but instead is left to die. In fact, this case is similar to that of neglected children who are supposed to be monitored by their parents because consequently, failure to monitor their children would render the parents to be liable for their recklessness.

4.7.3 Social Risks

Undoubtedly, criminal law operates for and on behalf of the public interest. Distinctly, the purpose of the criminal procedure is to ensure that the offender's involvement in the criminal process is maintained throughout as a fundamental principle of fairness. Unmistakeably, fairness needs to be maintained not only for the offender but also for the victim and the community.⁴⁹⁶

Prominently, in *Hall v Simons*⁴⁹⁷ Lord Hope succinctly explained the purpose of the criminal justice system by stating the following:

"Even though the criminal process is formally adversarial, it is of a fundamentally different character to the civil process. Its purpose and function are different. It is to enforce the criminal law. The criminal law and the criminal justice system exist in the interests of society as a whole. It is a direct social function. It is concerning to see that the guilty are convicted and punished and those not proved to be guilty are acquitted. Anyone not proved to be guilty is to be presumed to be not guilty. It is of fundamental importance that the process by which the

⁴⁹⁶ S. Forster. 2008. *Criminal Law and Practice*. London: Sweet & Maxwell.p.3.

⁴⁹⁷ (2003) 3 W.L.R. 543

defendant is proved guilty shall be fair and it is the public duty of all those concerned in the criminal justice system to see that this is the case. This is the public interest in the system.”

Strikingly, Lord Hope observed that in *Ruddy v. Procurator Fiscal*⁴⁹⁸

“Criminal prosecutions are conducted in the public interest. The factors that have guided judges as to how the principles should be applied in criminal cases are appropriate to that context.... These factors are heavily influenced by considerations of public policy. The considerations operate at large, embracing the need to protect the accused against injustice on the one hand and the need to uphold public confidence in the rule of law on the other. Public policy demands that the accused must be afforded a remedy against injustice. But it also requires the court to balance the rights of the accused against the public interest.”

Noticeably, the case of baby dumping would result in harming the society and is considered as immoral; hence, the current research had taken the steps to interview the public for the purpose of obtaining their opinion, with regards to whether the law needed to be strengthened, to serve a heavier punishment for the wrongdoer. Perceptibly, Asmah,⁴⁹⁹ (39 years old) stated that Islamic education would play an important role. By practising Islamic teachings, will deter oneself from committing sinful act and promote good morality in daily life and therefore will reduce the social ill problems. On the other hand, Zunaidah Zainon⁵⁰¹ (38 years old) suggested the importance of strengthening the family institution and raising children in a conducive environment, by emphasising the need for a separation between males and females in a typical household. Nevertheless, Zunaidah further added that people should not be judgmental towards the offenders and that they deserve to be treated fairly and be

⁴⁹⁸ (2006) UKPC 2

⁴⁹⁹ Asmah. Legal Advisor. 1st July 2018. Semi-Government Institution. *The Issues of Baby Dumping* (Personal Interview).

⁵⁰¹ Zunaidah Zainon. Reporter/Journalist. 2nd July 2018. Utusan Malaysia. *The Issues of Baby Dumping*. (Personal Interview).

allowed to repent from their actions. Apart from that, she mentioned the inadequacy of the law, considering that most of the men who impregnated the woman until an illegitimate child is born were not punished, thus, making it impossible to overcome the case of baby dumping. Equally, Muhammad Al-Fatah Atiqullah⁵⁰² (18 years old), opined that more awareness campaign should be organised in order to educate people about this issue. Youngsters should be prohibited from involving in night activities and from going out with *non-muhrim*, as part of the effort to prevent any unwanted activities that may lead to the case of baby dumping. As for Wan Ahmad Khairi⁵⁰⁵ (27 years old), he mentioned that the law does not have a crucial role to stop baby dumping cases, but awareness towards the society is believed to provide more impact, especially in an educational institution, which is able to educate the youngsters. Mutually, Mohammad Ridhuan Saleh⁵⁰⁶ (29 years old) is of the opinion that education would be important for the long term effect, while baby hatches may be a short-term solution, required to prevent baby dumping cases. Regarding this matter, Siti Zaliha⁵⁰⁷ (38 years old) believed that women should have knowledge on pregnancy and take precautions to stop them from conceiving. . In addition, she deemed that the parents should not be held liable if the baby dies before birth, since there is a possibility that the baby might have died due to natural causes, instead of being abandoned. Although the society is aware of the methods that are able to curb baby dumping, but it is also vital to criminalise the

⁵⁰² Muhammad Al-Fatah Atiqullah. Foundation Student. 3rd July 2018. Department of Human Science & Islamic Revealed Knowledge, Centre for Foundation Studies, IIUM. *The Issues of Baby Dumping*. (Personal Interview).

⁵⁰⁵ Wan Ahmad Khairi. Teacher. 4th July 2018. Department of Human Science & Islamic Revealed Knowledge, Centre for Foundation Studies, IIUM. *The Issues of Baby Dumping*. (Personal Interview).

⁵⁰⁶ Mohammad Ridhuan Saleh. Ph.D. Candidate. 4th July 2018. Ahmad Ibrahim Kuliyyah of Laws, IIUM. *The Issues of Baby Dumping* (Personal Interview).

⁵⁰⁷ Siti Zaliha, Housewife. 4th July 2018. *The Issues of Baby Dumping* (Personal Interview).

act, as society would not consider the act as illegal without the law, causing a snowball effect that would increase the number of baby dumping cases. From the abovementioned interviews, it can be deduced that the law alone, is insufficient to curb and control the callous act of baby dumping in Malaysia. In retrospect, more initiatives need to be taken and each individual should play a role to overcome this issue.

Apparently, the reason for criminalising the act of baby dumping is to protect the society from being harmed, especially babies who are unable to defend themselves from being the prey, since the victimisation of such babies may lead to other future crimes. If the babies survive, other related issues may arise, such as the position of illegitimate children, whereas babies are also at risk of being sold to a third party as an object of human trafficking. Furthermore, the Sun's newspaper⁵⁰⁸ recently reported that sex workers in Malaysia are now used as "baby factories" with syndicates capitalising on the stringent adoption procedures of the country. To date, the fate of these babies are still uncertain, even though they are booked for adoption by many potential couples. In truth, they will return to the syndicate as a victim of child trafficking or brought up to be a future sex worker, if rejected for whatever reason.⁵⁰⁹ Either way, it is undeniable that this news is very disturbing and could have been happening for a long time. Consequently, it is time for the society to demand justice through the implementation of stricter laws, in order to protect the lives and rights of innocent babies.

Purportedly, cases of baby dumping in Malaysia are reported almost on a daily basis in local newspapers.⁵¹⁰ In the case cited, a man caught a dog biting an object which

⁵⁰⁸ Elly Fazaniza, "Sex workers used as baby factories", *The Sun*, 5 April 2016, p.1

⁵⁰⁹ *Ibid.*

⁵¹⁰ n.a. 2015. "Mayat Bayi Digonggong Anjing." *Mingguan Malaysia*. 14th June. p. 14.

upon closer inspection, revealed a dead baby with a missing head and hands. Allegedly, the case was classified under Section 318⁵¹¹ of the Penal Code and the dead baby was sent to Hospital Seberang Jaya, for further investigation. On a more important note, the statistics⁵¹² of baby dumping categorised based on the states in Malaysia, is as shown below. According to the statistics presented in Table 5, from the year of 2009-2014, the highest case is reported in the year 2014 with a total of 103 cases. Meanwhile, the highest state with the case of baby dumping is Selangor, followed by Sabah, whereas Perlis is the state with the least baby dumping cases recorded from 2009 until April 2015. Supposedly, a contributing explanation to the disparity in the crimes committed in each state can be attributed to the population in each of the states. Ostensibly, a possible explanation of why most crimes happen in Selangor may be due to its highest population rates, compared to Perlis with the least population among all the states in Malaysia. Evidently, the statistical graph below is relevant in proving that there are high numbers of reported cases of baby dumping in Malaysia. Unfortunately, this contributes to social illnesses, whereby the welfare of the abandoned children are not protected, thus, causing the children to be victimized.

⁵¹¹ Section 318 of Penal Code is relating to concealment of birth by secret disposal of dead body. It shall be punished with imprisonment for a term which may extend to two years or with fine, or with both.

⁵¹² Malaysian Royal Police. 2015. Statistic of baby dumping according to states in Malaysia.

Table 5: Baby Dumping Statistic (2009- 2015 *April)

STATISTIK KES BUANG BAYI TAHUN 2009 HINGGA 2015(JAN-APRIL)							
KONTINJEN	2009	2010	2011	2012	2013	2014	2015
PERLIS	1	0	0	1	5	1	0
KEDAH	3	4	3	7	3	4	7
PULAU PINANG	5	9	6	4	6	5	0
PERAK	7	7	7	2	7	6	0
SELANGOR	16	21	25	21	19	27	5
KUALA LUMPUR	0	6	10	5	4	12	5
NEGERI SEMBILAN	8	5	5	2	5	6	2
MELAKA	0	5	1	2	2	5	0
JOHOR	11	10	13	11	10	8	5
PAHANG	6	3	0	5	2	4	0
TERENGGANU	1	3	1	6	3	2	1
KELANTAN	4	4	6	2	1	5	2
SABAH	12	6	15	14	14	15	3
SARAWAK	5	8	6	7	9	3	1
JUMLAH	79	91	98	89	90	103	31

Source: Malaysian Royal Police, 2015

From the Islamic point of view, the EXCO of Malaysian Muslim Lawyers Association⁵¹³ in the article reported by Berita Harian dated 3rd June 2015, stated that the baby dumping act is among the reasons for the downfall of civilisation. Specifically, the writer highlights that Islam prohibits the killing of babies in which the punishment for doing so should be considered as *qisas*⁵¹⁴ in the event that the baby dies. Since, there is no clear enactment in the *Shariah* criminal law for the crime of baby dumpingThe writer further suggested that a revision is needed in the *Shariah* Court Act (Criminal 1965)⁵¹⁵ due to alarming cases of baby dumping in Malaysia, which as of now only allows the punishment of up to RM 5000, imprisonment for not more than three years and six strokes of the cane for a *Shariah* criminal offender. Favourably, it is also crucial to widening the coverage of criminal offence under the *Shariah* Act rather than only making the punishment more severe.⁵¹⁶ Pertaining to this issue, it is understood that the punishment related to the *Shariah* court can only be imposed on a Muslim; hence, it can be an eye-opener for all Muslims to not be involved in the crime of baby dumping, as well as to deter them from any activities which could lead to it. Equivocally, the authority given to the religious department in Malaysia had been questioned when they raided a closed-door event, at a five star hotel and wanted to arrest everyone in the room, despite the fact that it was organised by the transgender community, which may be

⁵¹³ Marlina Amir Hamzah. 2015. "Gejala, Buang Bayi Antara Punca Ketamadunan Runtuh." Berita Harian. 3 Jun. p.39.

⁵¹⁴ The Islamic law thus prescribed *qisas* i.e. death in matter of intentional murder irrespective of the cast, colour, sex, race and status of both the offender as well as the victim. See Anwarullah, *The Criminal Law of Islam*, Kuala Lumpur: A.S. Noordeen. p. 68.

⁵¹⁵ *Shariah* court Act (Criminal 1965). Malaysia.

⁵¹⁶ Refer to Appendix 4 for analysis of *Shariah* Offences between States in Malaysia. Based on the article from Anita Abdul Rahim, Adibah Abdul Rahim, Nazura Abdul Manap, (2012) 16 JUUM 29 "Punishment for Sexual Offences under Negeri Sembilan *Shariah* Criminal Enactment 1992: The Need for a Heavier Punishment". p. 36

committed as a sizable offence under *Shariah* Criminal Offences (Federal Territories) Act 1997. Surprisingly, the Bar Council had claimed that the raid and their exercise of powers without a warrant were unnecessary and untenable in law.⁵¹⁷ Also commenting on the same issue, Marina Mahathir stated in her article that hotels should respect guests' privacy. One of the questions raised by Marina was why are the media allowed to follow these religious authorities on such raids at hotels? Explicitly, it should be noted that mistakes can happen; for example, a report on a well-known case of the foreign non-Muslim couple who were raided for *khalwat*⁵¹⁸ in Langkawi, as well as the case of the CEO of a local think tank who was sharing a hotel room with his own aged mother. Disconcertingly, it was claimed in the case of the married couple, that they believed the hotel staff received a commission for each "successful" raid. In response to this, Marina openly proposed that every guest who had been humiliated, might be entitled to sue the hotel.⁵¹⁹

Alarming, a proposal has been made to punish the adultery (*zina*) offenders by canning them publicly in front of 40 people in the mosque with the aim of deterring others from committing the same act in Kelantan.⁵²⁰ Justifiably, this is in line with what has been prescribed in the *Al-Quran*⁵²¹ but it has not been implemented because it is still in the proposal stage in Kelantan. On the other hand, public caning for breaching the Islamic code happens on a regular basis in Aceh, Indonesia which is known as the

⁵¹⁷ n.a. "Bar concerned over Jawi's 'power abuse'", *The Sun*, 14th April 2016.

⁵¹⁸ Close proximity (A crime under *Shariah* Criminal Enactment in Malaysia)

⁵¹⁹ Marina Mahathir, "Hotels should respect guests' privacy". *The Star*, 7th April 2016. P. 27.

⁵²⁰ Azman Mohmood & Mohd Zulkifli Zainuddin, 10th March 2016, "Kelantan kaji sebat penzina di khalayak" *Berita Harian*, p. 17.

⁵²¹ In Surah Al-Isra (17):32, Allah SWT says, which means "Nor come nigh to adultery (*zina*): for it is a shameful (deed) and an evil, opening the road (to other evils)."

only province in the predominantly Muslim country that applies *shariah* law. Hence, those caught engaging in adultery, same-sex relationships, drinking and even associating themselves with unmarried members of the opposite sex can end up facing the cane. Specifically, punishment often attracts a huge crowd to view. More importantly, a bylaw that took effect late last year allowed *shariah* regulations to be applied to non-Muslims in certain situations even though initially it was only applicable among Muslims.⁵²²

Regretfully, the reason as to why the *shariah* law needs to intervene is due to the fact that many Muslim suspects are involved in the baby dumping cases. Startlingly, this is evident in the statistics that show the second largest group of suspects involved with baby dumping cases are Malay Muslims. However, the first category is unknown due to the lack of evidence to prove the involvement of the suspect and the victim. To demonstrate, the statistics⁵²³ of the race of the suspects in baby dumping cases are shown below:

⁵²² n.a. "Strict Indonesian province canes non-Muslim for selling booze" 14th April, 2016, *Borneo Post Online*. Available at <http://www.theborneopost.com/2016/04/14/strict-indonesian-province-can-es-non-muslim-for-selling-booze/#ixzz45lZpczvr><http://www.theborneopost.com/2016/04/14/strict-indonesian-province-can-es-non-muslim-for-selling-booze>, accessed on 14th April 2016.

⁵²³ Statistic on The Suspect of Baby Dumping Case according to Race, Malaysian Royal Police. 2015.

Table 6: Race of Suspects in Baby Dumping Cases (2009-2015 *April)

BANGSA	2009	2010	2011	2012	2013	2014	2015
Melayu	15	27	26	19	25	21	10
Cina	2	0	1	0	0	0	0
India	0	0	3	2	0	4	1
Indonesia	0	3	1	2	0	2	0
Thailand	0	0	0	0	0	0	0
Vietnam	0	0	0	1	0	0	0
Filipina	1	0	0	0	0	0	0
Myanmar	0	1	1	0	0	0	0
lain-lain/SABAH/SWK	3	5	9	3	5	4	2
T/Ketahui	60	68	70	67	66	77	18
JUMLAH	81	104	111	94	96	108	31

Source: Malaysian Royal Police, 2015

Ideally, Brunei could be a preferable country by comparison, when discussing the Islamic law approach⁵²⁴ since Brunei considers baby dumping as a serious issue. Tentatively, the introduction from Brunei's *Shariah* Penal Code 2013 is a step to introduce the *hudud* punishment, which is inclusive of the punishment of baby dumping by way of *qisas*. Notably, the legislation is introduced through many phases whereby, Phase 1 involves the enforcement of the Order in April 2014 and covers general offences in Division IV, Chapter IV, except for offences that could lead to death penalty or strokes of the cane under the Chapter. Moreover, among the general offences include

⁵²⁴ Mazbah Termizi, Nurhidayah Abdullah, Noor Ismawati Jaafar, "A Social Issue of Baby Dumping: A Review on the Legislation from the Islamic Law Perspective in Malaysia and Brunei". A paper presented at Series of Seminars on Challenges and Prospects of Socioeconomic Issues from an Islamic Perspective, University Malaya, and 11th March 2016.

not performing Friday prayer, not respecting the holy month of Ramadhan, cross-dressing, close proximity and taking a Muslim girl away from her parents' care.

Next, Phase 2 includes offences under Division IV, Chapter I such as theft, adultery, rape, sodomy, accusing someone of adultery or fornication without credible evidence, intoxication and apostasy; followed by Chapter II – murder and causing injury; and Chapter III – withdrawal of testimony that could be imposed with *Hadd*, *Qisas*, *Diyat* or *Arsy*, except for offences that could lead to death penalty. Additionally, among the *Hadd* offences are theft and wrongful accusation of adultery, while *Qisas* offences involve causing injury. With regards to *Diyat*, among the offences are not wilful murders, while the offences for *Arsy* include injury caused by negligence or “rash act”. Particularly, Phase 3 will be enforced within twenty-four months from the date that the Code's regulations are announced, in which the Order is fully gazetted, including the implementation of the death penalty.

Recognisably, the legislation for the case of baby dumping will fall under Phase II (murder), which falls under Section 118 of Brunei's *Shariah Penal Code 2013*, translated as:

“Based on this Order, “*Qisas*” is the retaliation or similar punishment for the crime of *qatlul-amd* or any physical harm done on someone.”

Unfortunately, Section 118 has yet to be enforced but there is an on-going movement by the Bruneian law for its full enforcement. However, it is evidently shown that Brunei's government is taking these issues as a serious issue by emphasising the punishment according to the *Shariah* law by way of *Qisas*.

4.8 CONCLUSION

In conclusion, this chapter has highlighted various circumstances whereby offenders of baby dumping receive lenient punishment, while some would have repeatedly committed the same offence without being traced, due to the limitation in Malaysia's judicial system and the fact that baby dumping is not considered as a serious crime, despite the hike in the number of cases on a yearly basis, this paper has identified the motives to criminalise baby dumping in Malaysia and to approve for a separate statute and stricter law for this crime in Malaysia. In a nutshell, this chapter clearly emphasized the justification towards the criminalisation of baby dumping which is related to individual liberties, alternative measures and practical issues. Hence, the abovementioned reasons should be taken into consideration by the respective lawmakers, to enhance the process of criminalising the act of baby dumping.

To sum up, the process of accelerating the criminalization of the baby dumping may be achieved, provided that all components involved are supportive such as the law theory, tools in legislating the criminalization act and the experts, have also been discussed in this paper. Substantially, this chapter clearly stated that baby dumping should be criminalised and highlighted in the Penal Code of Malaysia after taking into consideration the theory of crime and the critiques of the crime with the interviewees.

Significantly, the following chapter aims to compare and contrast the measures taken by other countries to combat baby dumping, with the main purpose to compare the law related to baby dumping in Malaysia with the laws of other countries, such as

the United Kingdom and the United States of America, to establish the best methods applicable and suitable for this country.

