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LEAVING CHILD WITHOUT REASONABLE SUPERVISION IN MALAYSIA: AN OVERVIEW UNDER CHILD (AMENDMENT) ACT 2016 AND INTERNATIONAL LEGAL FRAMEWORK.

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Abstract

The focal point of this paper is on the right of the children who have been left without reasonable supervision by their parent or guardian. Even though we already have law to govern this issue, there are still numerous of cases occurred in Malaysia which has caused traumatizing consequences to the nation. It would be detrimental to the children in Malaysia if there is no attempt taken to figure out the solution. The prevalence of this issue in Malaysia has invite us to conduct a study on this matters from the perspective of Malaysian's legislation and other countries' rule and regulation.

Keywords: *Unattended child, Child Act 2001, Amendment, Supervisory Neglect*

INTRODUCTION

Cases of child neglect in Malaysia have become a great concern for the government and the citizen especially.

According to the official portal of the Royal Malaysia Police (www.rmp.gov.my), most of kidnapping happened due to the negligent of the parent in supervising their children. The portal further advice parent not to leave their children at any place without reasonable supervision of trusted adult.

There is growing alarm at the increase in crime due to leaving child unattended by their guardian or parent. An alarming issue had started opening the eyes of the authority since the eight-year-old Nurin Jazlin Jazimin, who went missing after she went to a pasar malam alone in Wangsa Maju, Kuala Lumpur, in 2007. Her body was found a month later. She had been sexually assaulted and murdered. A year after, an eight years old girl, Sharlinie, was believed to have been kidnapped on her way home from a playground in Taman Medan in Petaling Jaya, Selangor (“Parent still hopeful,” 2016).

The nation were again shocked by the news of a man beheading a toddler on the banks of the Klang River in broad daylight in May 2014. The man had abducted two-year-old Siti Soffea Emelda Abdullah at a shopping complex in Kuala Lumpur, after her mother Sity Salmy Suib left her with her friends to go to the restroom (Lee, 2015).

There are also incidences of carelessness by parents, as in the case of a baby and toddler who had been accidentally locked in a car by the parent. These situation may cause their children die from heatstroke (“The children,” 2017). The issues of section 33 is endless and sometimes tragic. It seems that parent are not learning from this heartbreaking incidents and they take it for granted. Therefore, this is an issue that needs to be discussed and examined thoroughly for the sake of the children.

SUITABLE AGE TO LEAVE CHILDREN UNATTENDED

Age of the children could be one of the factors that could be the consideration for the parent to leave their children unattended. Normally when the infant turn to be toddler of certain age, their parents tend to believe that they can be left unattended and can cope when something happen. Some parents even entrusted their older toddler to look after their younger sibling when the parent are not around (Barbara A., Stacey L., Sarah, 2010).

The issue here is what would be the suitable age to leave the child unattended and whether there are any law prescribed the legal age for the kids to be left unattended. It is hard to determine the proper age since every child is different. The maturity of the

child can vary from child to child.

Due to that reason, most of the countries around the globe do not specifically prescribe at what age the parent can leave their children unattended. For instance, in United Kingdom Children and Young Person's Act 2008, even though it is an offence to leave a child alone but its law is silence about the age of the children when parent can leave the child at their own. Just as a guideline for parent, The UK National Society for the Prevention of Cruelty to Children (NSPCC) says (retrieved from www.nspcc.org.uk):

- children under 12 are rarely mature enough to be left alone for a long period of time
- children under 16 shouldn't be left alone overnight
- babies, toddlers and very young children should never be left alone.

Similar situation happen in Australia where there is no law setting the age of the child to be left unattended. Australian Family Law Act 1975 is clearly mentioned about the responsibility of the parent to look after and supervise their children but silence about the age.

On the other hand, there are several countries which prescribe the specific age in their legislation for the child to be left unattended, namely Canada and several states in U.S.

Section 218 of Canada's Criminal Code defines "children" as being under the age of 10. Parent in Canada who leaves the child under the age of ten will be liable to imprisonment for a term not exceeding eighteen months.

In United States, Section 2(1) (d) of Illinois Compiled Statutes states that parent cannot leave the child under 14 without reasonable supervision. While Section 163.545 of Oregon Procedure, Crime says that leaving a child under 10 years of age unattended is a crime of child neglect.

According to Islamic Law, child will go through 3 stages of understanding before he can reach maturity. The first stage is *ghayrul mumayyiz* which is the absence of understanding which starts from the day a child is born until he attains the age of seven. Most Islamic jurists have claimed that the child at this stage is incapable of distinguishing between right and wrong or between good and bad, and unable to understand the effect and consequences of their actions (Audah, 1964). The second stage is *mumayyiz* which refers to a child who has weak understanding. This stage starts at the age of seven and continues until the child reach puberty. During this stage, the child is developing his awareness where he or she is able to differentiate between right and wrong, but still weak on understanding of the effect and implication of his or her actions (Audah, 1964). The last stage is *baligh* referring to puberty or have

attain full and complete understanding. When a child attains the age of puberty, he is completely responsible for all of his deeds. Generally, puberty is a sign of maturity of man and woman through the existence of physiological signs (Audah, 1964).

From the 3 stages above, it is clear that Islamic Law do not specifically mention the age since the age of puberty of a child is different from one another.

While in Malaysia, Section 33 of the Child Act 2011 is just applying the general word of 'child' without specifically mentioning the age. According to Section 2(1) of the said Act, 'child' means a person under age of eighteen years.

Thus, it is clear that the issue of suitable age is actually quite subjective. In order to determine the suitable age, many factors need to be considered. Factors include the maturity, the readiness of the child, the physical health and mental state of the children (David, 2012).

SHOULD THE PARENT IN MALAYSIA AWARE ABOUT THE RELEVANT LAW BEFORE THEY COULD BE PUNISHED?

Naturally, parents is indeed have the primary responsibility of raising, protecting and ensuring the safety of their children. Due to that, parents in most countries in the world, are legally responsible for their children's welfare until they reach adulthood. Nevertheless, the issue of parent's awareness of the law might cause a problem to the implementation of the legislation. It will hinder the relevant legislation to be successfully implemented. Do Malaysian parents fully aware of the government policies and legislation pertaining to child care and the rights that their children have? Do they were fully aware of the nitty-gritties of the Child Act 2001? Can the parent claim ignorance of law as a defense for them to escape liability?

Generally, law does has maxim or principle which specifically dealt with ignorance of law by the offender. Ignorance of law is no excuse or in Latin's word, it is called as *Ignorantia juris non excusat*. It is a legal principle stating that no person may escape liability merely because he or she is unaware of the law that he or she committed. The citizens are expected to know what the law in that particular country says. Not necessarily for them to be legal expert, it is just they need to make themselves aware of the law of the country. It would be too easy for people to break the law, ignore other people's right and commit legal wrong if they could get away with it by arguing they didn't know it was against the law. This maxim is of utmost important in order to ensure the people to be well aware of the law thus they could respect the law and try to avoid violating the law.

In *R v Crosswell*, when charged with breach of probation, he said "misinterpreted his probation order". Justice Pringle replied, in convicting:

“...even if I give Mr. Crosswell the benefit of the doubt that he misunderstood his obligations as he said, his mistake was one of law. Generally, ignorance of the law is no excuse.”

The increasing disappearance and death of children has been the calls for action against the negligent parents.

It is undeniable that parent and public awareness is extremely important in eradicating this issue. Thus, one of the way to create and raise awareness is via social media and advanced technology. These methods play an important and effective role in disseminating information and was the best tool to get attention of the public. Moreover, living in the era of technology now could not be an excuse for the parent to not know and aware the law. With easy accessible to social media and evolving technology at our fingertips, it is really helping the parent to know everything happening around them including the law.

Therefore by invoking the existing legal maxim plus the advent of modern technology and social media in Malaysia, it should not be an excuse for the Malaysian parent to escape liability and punishment of leaving their child without reasonable supervision.

RELEVANT LEGISLATION GOVERNING THIS ISSUE IN MALAYSIA.

Currently, leaving a child without reasonable supervision is governed by Child Act 2001 and Child (Amendment) Act 2016. The date of getting Royal Assent for Child (Amendment) Act 2016 was on 20 July 2016 and had been gazetted on 25 July 2016.

In Child Act 2001, leaving child without reasonable supervision is specifically clarified by Section 33. Under Section 33 of the Child Act 2001, any person either parent or guardian can be convicted for leaving the child without reasonable supervision. The offence carries a maximum fine of RM5, 000 or two years' jail or both, if found guilty.

While in the Child (Amendment) Act 2016, the amendment pertaining to this issue was incorporated in Section 31 of Child (Amendment) Act 2016. The amendment had changed the maximum fine of RM5, 000 to be RM 20, 000 and impose imprisonment not exceeding 5 years instead of 2 years in the previous statute. In addition to that, the amendment also give power to court to order the convicted person to serve community service not less than 36 hours and not more than 240 hours within 6 months' time from the date of the order. Failure to serve community service may be fined not more than RM10, 000

Despite having these laws to cater negligent parents, to date, there had been not many

cases of negligent parent or guardian being charged or convicted under section 33. This perhaps show the difficulty in enforcing section 33. The operative word used in that section was “reasonable” and the public prosecutor may have difficulties prescribing what “reasonable” standards were. The word “reasonable” can receive wide interpretation.

Alderson B in *Blyth v Birmingham Waterworks Co* (1856) defined negligence as ‘...the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would do’.

Therefore, in determining whether the parent has behaved negligently, the parent’s conduct will be compared with the conduct of a ‘reasonable person’ in the same circumstances as the parents’. If the parents’ conduct matches the level of care done by the ‘reasonable person’, then the parent has met the prescribed standard of care thus they are not negligent, and vice versa. But, who is exactly a reasonable person? *Vaughan v Menlove* (1837) opined that it is an objective test, which does not allow consideration of an individual’s unusual or unexpected behavior that someone has. Nevertheless, this objective test has received criticisms due to failure of it to precisely reflect reality. This test normally applied by the judges who tend to be male, well educated, well off background and sometimes take no notice of gender’s issues (Bonython, 2011). Reasonable supervision of a busy, hectic and working mother of 5 kids might not be similar to other parents who have had an easy life. The next difficulty in enforcing this section was aggravated by the fact that prosecution of the parent would be tantamount to prosecuting a grieving victim, especially if the child were to be later found dead. Punish the negligent parents using the law is undeniable is one of the solution but educating the public and the parent would be another good solution to this issue and would be more effective in preventing more tragedies. Despite of these difficulty in enforcing the law, credit need to be given to the drafter of the Child (Amendment) Act 2016 when suggesting community service as one of the ideal sentence to the negligent parents. This would benefit not only to the parent to make a positive changes but also to the community as a whole.

LEAVING CHILD WITHOUT REASONABLE SUPERVISION IN OTHER COUNTRIES JURISDICTIONS

Leaving children without reasonable care or supervision is under the type of supervisory neglect. According to Scott et al (2012, p.6), supervisory neglect occurs ‘when inadequate supervision leads to or has the potential to lead to harm to the child. Leaving children without reasonable care or supervision not necessarily refers to cases where a child is left unattended at home. It also covers cases where children were left unattended in vehicles. Whether or not leaving a child is neglect

depends on the age of the child alone, the age ability of a person left supervising the child, the length of time the child is left and how often, and the location of the child when unsupervised. (Hirschy, S.T and Wilkinson, E, 2010) What is the appropriate age for child to be alone? There is no actual law that states at what age children can or cannot be left alone, but the law is clear about the responsibility of parents to look after their children. The legal age depends on the countries jurisdictions. In a number of countries there has been explicit legislation placing limits on children being left without adult supervision.

In New Zealand, it is illegal to leave a child under the age of 14 without adult supervision except for a very short time. The most relevant piece of legislation relating to this is the Summary Offences Act. Section 10B of this Act says: Every person is liable to a fine not exceeding \$2,000 who, being a parent or guardian or a person for the time being having the care of a child under the age of 14 years, leaves that child, without making reasonable provision for the supervision and care of the child, for a time that is unreasonable or under conditions that are unreasonable having regard to all the circumstances.

In United Kingdom law, does not set a minimum age at which children can be left alone, however it is an offence to leave a child alone when doing so puts them at risk. The guide produced by the National Society for the Prevention of Cruelty to Children in the UK suggests children under 12 should only be alone for very short periods and no child should be alone overnight until age 16 (NSPCC, 2009).

In United States of America, Texas (like most states) for example, has no specific age at which a child can be left unsupervised while Illinois gives the age of 14 as the age at which a child can be left alone.

In Canada, child welfare jurisdictions across the 13 Canadian provinces and territories define supervisory neglect in terms of caregiver behaviors that result in harm or place children at risk of harm (i.e., no observable harm needed to bring legal charges against caregivers) (Ruiz-Casares, Trocmé, & Fallon, 2012). The definition of “child” under Welfare Acts is linked to the age of majority in seven provinces and territories. One territory defines child as a person under 18 where the age of majority is 19. The remaining five provinces and territories define child as either being or appearing to be under the age of 16. The majority of provinces and territories do not limit the age at which a child can be left alone in their statutory rules. However, in two provinces (Manitoba and New Brunswick), the welfare Acts state that a parent cannot leave a child under the age of 12 unattended without making provision for adequate supervision. In Ontario, the statutory limit is 16 years. When it comes to leaving a child unattended in a vehicle, only Quebec establishes a statutory age limit (seven years).

When a person in charge of a child is found guilty under a Welfare Act, that person commits an offence and may be liable to a fine, imprisonment or both. Most provinces and territories in Canada provide for such an offence and for the subsequent possibility of penalties: a fine ranging from a minimum of \$240 to a maximum of \$50,000; imprisonment ranging from a minimum of 3 months to a maximum of 24 months or both a fine and imprisonment; only New Brunswick does not provide for both. Of the provinces and territories that allow for a fine, only two provinces do not also allow for imprisonment (Quebec and Prince Edward Island). No such offence and penalty are provided for in the Welfare Acts of two provinces and one territory (i.e., British Columbia, Nova Scotia and Yukon).

In Australia, there is no minimum legal age for leaving a child at home in Australia. Here's a breakdown of unattended children laws in some states in Australia. In Victoria, it is an offence for a person responsible for a child to leave the child unattended for any longer than is reasonable, without making appropriate arrangements for the child's supervision and care. This includes leaving a child at home, or in a car, or anywhere else unattended. There is no set age at which it is legal to leave a child unattended. It depends on the child and the situation. When deciding whether to charge a person with this offence, authorities must consider each case individually to determine the reasonableness of the circumstances in which the child was left unattended, including the needs of the particular child. The Secretary of the Department of Human Services has to be consulted before a charge can be laid. From 21 January 2015, the penalty for leaving children unattended is a fine of 25 penalty units or imprisonment for six months or both. Furthermore, Queensland parents risk up to three years' jail for the crime of leaving a child under 12 unattended. The Queensland Criminal Code states that it is a "misdemeanour" for a parent to leave a child younger than 12 for an unreasonable time without making reasonable provision for the supervision and care of the child. In New South Wales, Australia, section 231 of the Children and Young Persons (Care and Protection) Act 1998 provides for the offence of leaving children and young persons unsupervised in motor vehicles:

A person who leaves any child or young person in the person's care in a motor vehicle without proper supervision for such period or in such circumstances that: (a) the child or young person becomes or is likely to become emotionally distressed, or (b) the child's or young person's health becomes or is likely to become permanently or temporarily impaired, is guilty of an offence. Maximum penalty: 200 penalty units.

CONCLUSION AND RECOMMENDATIONS

The paper shows that there are areas for improvement in the existing legislation in Malaysia. The law needs to be updated so that it will be in tandem with the current international development.

The legislative regimes governing child welfare in Malaysia and other jurisdictions reflect the different practices and mechanisms of each country discussed above. Firstly, there is a significant difference between Malaysia and New South Wales (Australia) in terms of leaving child unsupervised in motor vehicles. Child (Amendment) Act 2016 or any legislation in Malaysia did not provide the offence of leaving children and young persons unsupervised in motor vehicles. Secondly, with the new amendment to Section 33 to the punishment of leaving child without reasonable supervision, the law in Malaysia seemed to be updated with the current international legal frameworks. However, the effectiveness rests with enforcement. It has been argued that the Child Act 2001 needed amending because it had not been enforced effectively, thus leaving the law looking inadequate.

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