

VIOLENCE AND SEXUAL OFFENCES AGAINST CHILDREN IN MALAYSIA: SEARCHING FOR THE RIGHT APPROACH

Manique Cooray [✉]
Multimedia University

Siti Zaharah Jamaluddin
Multimedia University

Zulazhar Tahir
University of Malaya

ABSTRACT

Child pornography on the Internet was first identified in the United States mainly, as a serious problem in the 1970s. In Malaysia, the issue has gained attention only in recent times especially with the case of Richard Hiuckle highlighted by the local media. More recently, with the enactment of the Sexual Offences against the Children Act 2017 provides for specific provisions relating to child pornographic offences. In the Pre-Internet era, the focus of sexual based offences against children was on the physical sexual abuse of children. Physical sexual abuse of children is covered by the sexual offences provisions in the Penal Code such as rape, incest and inciting a child to an act of gross indecency. In sentencing the offender, the court normally opt for a deterrence, incapacitation as well as retribution as the basis for choosing any of the punishment prescribed in the legislation. The objective of this paper therefore is to look into the viability of harsher and strict sentencing policies to be implemented in Malaysia to sexual offences to reduce the harm caused to children from exposure to illegal and harmful material online due to the technical difficulties to regulate the material on the Internet.

Keywords: Child pornography; Child abuse; Internet regulation; Age-verification

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1. INTRODUCTION

Attempts to regulate pornography and other materials deemed harmful to minors on the Internet have been unsuccessful for many reasons. This is bearing in mind that to distribute such material is an offence in Malaysia under the Communications and Multimedia Act 1998 and also under the Sexual Offences against the Children Act 2017 and the Penal Code of Malaysia. The difficulty in regulating such material stems from the fact that the nature of the Internet itself does not comport material to be restricted. The technicalities and the inability of Web publishers to prevent access to materials, either on an individual or regional basis, impede the methods employed for regulation

[✉] Corresponding Author. Faculty of Law, Multimedia University, Melaka, Malaysia. Tel: (606) 2523991, E-mail: manique.cooray@mmu.edu.my

of harmful materials. Even though in Malaysia, there exists legislative provisions as mentioned above to address child pornography, cases such as Richard Huckle which came to light in 2017 still occurs and continue to occur. This is bearing in mind that although there is no evidence to suggest that online sexual based violence vis a vis child pornography is a threat save for the Richard Huckle's case statistics on Internet usage by children in Malaysia is an indication of the high use of the Internet by children in the country. According to the Internet Survey 2017 in Malaysia, it was found that 83.2% of children aged 5 to 17 were Internet users. The use of smartphone for online activities amongst the children was omnipresent where 93.0% of them accessed the Internet from the device. Text communication, social networking, getting information and watching videos were the top online activities for children. Global data on children's access to, and use of, the Internet are hard to find. Many countries do not collect relevant data and, even if they do, the age range used to estimate 'children' often varies, posing challenges to uniformity in data. Therefore, using these statistics in light of scarcity of actual data is one of the motivation on why we need stringer measures i.e. harsher punishment to serve as deterrent for this problem.

Therefore, the paper questions on the viability to rely solely on technical measures to regulate the material or whether harsh and strict sentencing policies should be implemented in Malaysia to reduce the harm caused to children from exposure to illegal and harmful material online.

2. THE NATURE OF THE INTERNET & DIFFICULTIES IN REGULATING CONTENT

Within the vast domain of information available on the Internet that may help educate, enlighten, or entertain children in their day to day activities exist a seemingly unrestrained abundance of material that most would consider unsuitable for a child's eyes. The real concern is not that much harmful material is available online, but that such material is widely available and often specifically sent to children every day in a number of different ways.

The reality is that a child is only click of a mouse away from pornographic, obscene, indecent, and unsuitable content on the Internet. Trying to prevent this situation by legislating against the material itself misses the concern as technically it is not possible to prevent material circulating on the Internet. For instance, in terms of regulating content on the Internet, section 211 of the Communication and Multimedia Act 1998 provides for the following:

“(1) No content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.

(2) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall be liable to a further fine of one thousand ringgit for every day or part of a day during which the offence is continued after conviction.”

With regard to the above provision if the content originates within Malaysia the access to the website and the content could be prevented. However, more often than not such material emanates

from overseas Internet Service Providers. In such an instance, the above provision might not be too effective. Hence, a method by which content unsuitable for children could be reduced by adopting age-verification controls could have some positive impact for the Internet. Alternatively, the better choice would be to enforce strict and harder penalties for those involved in sexual based violence's towards children.

3. MEASURES TO REDUCE HARM TO CHILDREN: HARSHER PENALTIES

“Sentencing offenders is....a complex discerning process, which depends not on the use of common mathematical yardstick but on various considerations of facts and circumstances relating to the offence, the offender and public interest” (PP v Safian, 1983). The court had to consider the concept of justice, the aims of punishment and the principles of sentencing in its decision (Bentham, 2000). When discussing the concept of justice, the legal theorists and philosophers consider four distinct justices: corrective justice, distributive justice, procedural justice and retributive justice (Schroeder, 2003). Criminal law falls under retributive justice, a theory of justice that considers proportionate punishment a morally acceptable response to crime. The concept of retributive justice has been used in a variety of ways, but it is best understood as that form of justice committed to the following three principles: (1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment; (2) that it is intrinsically morally good-good without reference to any other goods that might arise-if some legitimate punisher gives them the punishment they deserve; and (3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers (Walen, 2016). However the changes in the society such as the emergence of civil society and championing human rights resulted in the inclination to move from retributive justice to restorative justice in criminal law. Nevertheless, the retributive justice approach is still relevant in dealing with child sexual abuse offences including child pornography in Malaysia.

3.1. *Aims of Punishment*

The term punishment is defined as the method which society uses to enforce the desired standards of conduct and methods of dealing with the offender after a crime has been committed. Punishment must involve pain and its' consequences must be unpleasant. It must be inflicted by the authority which has been constituted by legal system. *H. Kelson* (Kelson, 2007) in his book described “sanction is socially organized consists in a deprivation of possession-life, freedom, or property”. According to *Jeremy Bentham*, “punishment is evil in the form of remedy which operates by fear” (Bentham, 2000) while *Johan Finnish* has said that “delinquent behaviour of a person needs to be taught lesson not with melody but with iron hand” (Mishra, 2016). Based on this discussion, it is clear that the aims of punishment include retribution, deterrence, incapacitation and rehabilitation. Thus, a judge will have to bear in mind these four aims of punishment when sentencing the accused, by applying them to the facts of the individual case (*R v Sargent*, 1974).

Retributive theory is based on rights, desert and justice. The guilty deserve to be punished, and no moral consideration relevant to punishment outweighs the offender's criminal desert (*R v Sargent*, 1974). This theory will form the basis of criminal punishment. Nevertheless the courts may impose a punishment based on more than just one aim of punishments. The offender must be punished for

the crime that he had committed, however the punishment would also serves as deterrence to him specifically and to the society at large (*Rex v Kenneth John Ball*, 1951). According to the theory of deterrence, the offender is deterred from repeating the same crime in the future (*Rex v Kenneth John Ball*, 1951). While the public is generally deterred from committing the similar crime due to the punishment imposed by the court to the offender (*PP v Teh Ah Cheng*, 1951). Having said that however, it has long been established that one of the foremost considerations in sentencing is that of the public interest (*PP v Norfinas Daud*, 2017). For this to take effect, the public must be aware of the punishment. With the advancement in the communication and information technology, this can easily be done, the days when the decisions of the courts were only known to the lawyers and law students are over. Aside from deterrence, the punishment sometimes is imposed to incapacitate the offender, denying the offender of the opportunity to commit the crime either for good or for a certain period of time. In *Public Prosecutor v Huang Shiyu* (2009), the court was of the view that a very long sentence should be imposed to take accused out from the society since he was a sexual predator, whose actions were calculated to satisfy his sexual desires at the expense of his young victims, regardless of the consequences. *Bentham* went to the extent of depriving the criminal's power of doing injury by awarding death sentences (Bentham, 2000). *Bentham* treats the committed offences as an act of past, that should be used as opportunity of punishing the offenders in such a way that the future offences could be prevented (*Public Prosecutor v Loo Choon Fatt*, 1976). Capital punishment and imprisonment are examples of incapacitation theory. Rehabilitation theory believes that the offender can be rehabilitated and be given a second chance. It is based on the premise that crimes are committed as a result of individual or social problems and the best response to crime is to eliminate such personal and social problems (Marson, 2015). The rehabilitative response looks specifically into the criminals social past, which is absent in both retributive and deterrence philosophies. The attempt to "rehabilitate" is often done by treatment that is specifically geared towards the offender (Marson, 2015). This approach is suitable for youthful offenders (*Public Prosecutor v Tan King Hua*, 1966). The evolution in the society through the emergence of human rights and civil society, had introduced a new aim of punishment i.e. restorative justice. The fundamental premise of the restorative justice paradigm is that crime is a violation of people and relationships (Zehr, 1990) rather than merely a violation of law. The most appropriate response to criminal behaviour, therefore, is to repair the harm caused by the wrongful act (Latimer, 2015). As such, the criminal justice system should provide those most closely affected by the crime (the victim, the offender, and the community) an opportunity to come together to discuss the event and attempt to arrive at some type of understanding about what can be done to provide appropriate reparation (Latimer, 2015). This approach is fast gaining momentum however in practical it is not easy to be implemented.

The aims of punishment are reflected in the penal provisions which include capital punishment, imprisonment, whipping, fine and detention at a specific institution for rehabilitation. With various choices at hand, the court is given the discretion to impose any of the sentences bases on the aims of the said punishment (*Rex v Grondkowski*, 1946). Nevertheless, the discretion is not absolute and must be guided by the sentencing principles. This was further elaborated by Hilbery J in the case of *R v. Kenneth John Ball* (1951) where he had stated that: "In deciding the appropriate sentence a court should always be guided by certain consideration. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be

negligible” (also see *PP v Loo Choon Fatt*, 1976). In *Pellis Sami v PP* (2014) it was held that “Now, on the question of deterrence, let it be said here that we take judicial notice that statutory rapes are rampant now days. Therefore, we consider it to be our solemn duty that by this judgment we should take the opportunity to issue a message to the public. So, we have this to say. The courts in considering what ought to be the appropriate sentence in cases of statutory rapes must never for a moment lose sight of the fact that they have a duty to protect young girls such as the complainant in the instant case from unscrupulous men such as the appellant, always on the prowl to take sexual advantage of female minors. Hence, the courts must take astern view of such offences, and in passing out sentences, the court must give out the correct message to the public, that the courts view such offences with much detestation.” In the case of *Mohd Ashraf Ibrahim v PP* (2017) it was held that the “the law on appeal against sentence is trite, that the appellate court should be slow to interfere or disturb with the sentence passed by the court below unless it is manifestly wrong or unsuitable to the proved facts and circumstances of the case. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the trial court applies the correct principles of sentencing. In *Muhamad Faris Putera Jafperi v PP* (2017) it was held that to generalize it, whilst an appellate court should be slow in interfering the sentence imposed by the trial court in the exercise of their discretion as sentencing is not a science of mathematical application, an appellate court can interfere on the sentence if it is wrong in principle or the sentence imposed is manifestly excessive or manifestly inadequate.

4. SENTENCING PRINCIPLES

The punishments meted out are found in the various legislations enacted by the State. The approach opted in dealing with certain issues is reflected in the punishment imposed by the legislation that deals with it (*PP v Loo Choon Fatt*, 1976). For example, murder is considered a serious offence, thus the punishment is death by hanging. In this instance, the court does not have any other choice but to sentence the accused to death.(Section 302 of the Penal Code) (*Chung Kum Moey v PP*, 1865-1968) (*PP v Azilah Bin Hadri*, 2015) The court will have discretion in deciding the sentence if there are a few options provided by the legislation. For example, in the case of inciting a child to an act of gross indecency in section 377E of the Penal Code, the punishment comprise of imprisonment for a term not more than 5 years and shall be liable to whipping. The court will have the discretion as to length of the custodial sentence and the number of strokes should be given for the said offence. This discretion must be exercise not just to fulfil the aims of punishment but also in line with the guidelines on the sentencing principles. Hashim Yeop A. Sani J (as his Lordship then was) in the case of *PP v. Loo Choon Fatt* [1976] elaborate the pertinent consideration in sentencing as follows:

“In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.”

Sentencing Principle can be divided as follows:

(a) Equality

The Federal Constitution of Malaya through Article 5(1) provides that “No person shall be deprived of his life or personal liberty save in accordance with law”. While Article 8(1) provides that “All persons are equal before the law and entitled to the equal protection of the law”. The combination of these two Articles is considered to guarantee equal protection of the law for any person in Malaysia (*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*, 1996), (*Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Ors*, 2017). The equality also requires consistent and equal applications between offenders who committed the same crime. For criminal cases, Article 7 of the Federal Constitution extends the protection in relation to protection against retrospective criminal laws and repeated trials. It provides: (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed. (2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted. These protections must always be observed by the court in dispensing the sentences for any crime.

(b) Proportionality

The mantra that ‘the punishment must fit the crime’ has been the prevailing sentiment, that the severity of the penalty should be proportionate to the gravity of the offence committed (Hirsch, 1990) (Perry, 2006) (Goh, 2013). Proportionality is considered to be so important in criminal sentencing because it ‘accords with principles of fundamental justice and with the purpose of sentence - to maintain respect for the law and a safe society by imposing just sanctions’ (*R v Arcand* [2010]). As such, the factors as to the seriousness of the crime, the nature of the injuries or harm will be considered by the court before passing a sentence. In *PP v Ong Lai Kim* (1991), the court considered the offence, i.e. rape was rampant in meting out the sentence.

The important of the concept of proportionality was explained in the case of *R v Ipeelee* (2012) as follows:

“Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and ensure justice for the offender” (*R v Ipeelee*, 2012).

(c) Reasonableness

The sentence passed is reasonable if it is just and proportionate to the crime that was committed. In *Malaysian Anti-Corruption Commission v Showpi bin Hashim* (2012), the court held that the sentence of one day imprisonment was substituted with five months’ imprisonment because he actively sought and demanded payment of bribe from the victim for doing his public duties under his contract of employment. As such it is important for the court to understand the mischief that

the particular legislations is trying to curb. In *Public Prosecutor v Tan Poh Heng (1995)*, the court held that the respondent's case featured the very sort of antisocial conduct the amended Moneylenders Act (Cap 188) was designed to eradicate; as such a more severe punishment should be imposed. Failure to understanding the purpose of legislation may cause the sentence imposed to be unreasonable. In *Lee Ah Sin v Public Prosecutor (1991)*, the court stated the act of the accused throwing parking coupon tabs on the ground is one of the least serious act of littering offences, as such the sentence of \$400 fine was substituted with an order of discharging since the sentence imposed was too excessive.

(d) Dignity

Dignity refers to the mutual respect of the value of human life. Even though the offender had committed a crime, his basic dignity as a human being must be respected. Just because he had committed the crime, it does not mean that he should not be respected. The phrase 'innocent until proven guilty' must be observed in order to comply with the substantive and the procedural aspect of the law. Within this realm, the court will consider factors that relevant to the offender such as his age (in *PP v Tukiran (1955)* the court held that a first offender aged between 17 to 21 years should be kept away from prison), his remorsefulness and his obligations to his family or whether he is a first offender, (In *Public Prosecutor v Zainuddin bin Adam (2012)* where the court consider the fact that the respondent was a first offender with a good record prior the incident) which is known as the mitigating factors.

5. SENTENCING APPROACH FOR SEXUAL ABUSED AGAINST CHILDREN

5.1. *Pre-Internet Era on Sexual Based Violence Offences against Children*

The pre-Internet era, the focus of sexual based offences against children was on the physical sexual abused. This offence will be covered by the sexual offences provisions in the Penal Code such as rape, incest and inciting a child to an act of gross indecency (Sections 292,293, 375, 376,376A, 376B and 377E of the Penal Code). In sentencing the offender, the court would normally opted for a deterrence, incapacitation as well as retribution as the basis for choosing any of the punishment prescribed in the legislation. The former Women, Family and Community Development Minister, Dato' Sri Rohani Abdul Karim revealed that in total, 22,134 children were sexually abused from 2010 until May 2017 (Kamarulzaman, 2017). While 6,014 molestation cases; 1,796 cases of incest; and 1,152 cases of unnatural sex were recorded during the same period.

Child pornography was first identified as a serious problem in the 1970s (Hessick, 2011). In Malaysia the issues on pornography *per se* is provided in the Penal Code, which makes it an offence to sell, distribute or in possession of obscene materials or object, makes or produces, taking parts or profited from the obscene materials or objects (*Mohamed Ibrahim v. PP*, 1963). Section 292 of the Penal Code states that: Whoever- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever; (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner

put into circulation; (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation; Penal Code 159 (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person; or (e) offers, or attempts to do any act which is an offence under this section, shall be punished with imprisonment for a term which may extend to three years or with fine or with both. The focus of the said section is more on the commercial aspect of pornography. In those days, a person had to buy, or hire in order to have access to the said materials. The section did not make it offence if a person possessed such materials or freely shared among themselves. Since the section focuses on the source i.e. the seller, distributor and so on, the court opted to use the strict liability approach in prosecuting the offender (*CT Prim v. State*,1961). Strict liability refers to an offence where the element of *mens rea* may be dispensed with for the purpose of conviction (*Sherras v de Rutzen*,1895). The element of *mens rea* may be dispensed if it fulfils the requirements *inter alia* of public interest and to better promote the compliance of the said provisions (*Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong*,1985).

5.2. *Post-Internet Era on Sexual Based Violence Offences against Children*

The dawn of the Internet and other technological advances, such as digital photography and Smartphone with advance photography applications, nowadays, had changed the scenario of sexual based violence against children. It not only led to a dramatic increase in the availability of child pornography but also introduced new sexual offences such as sexual grooming. The Internet and other technology advances had widen the opportunity to commit sexual violence against children. Thus, Malaysia had responded to this new threat by enacting new Statutes, in additions to the offences that already in place such as the Communications and Multimedia Act 1998 (CMA 1998) and Sexual Offences against Children Act 2017 (Sexual Offences Act). The new offences come with a much higher punishment. Although the legislation is still at its infancy the need for such law to be enacted was due to the lack of provisions in the Child Act 2001.

For example section 211 of CMA 1998 provides for a fine not exceeding RM50,000 or imprisonment not more than 1 year or both upon conviction. The said section deals with prohibits content including obscene materials. It provides that:

- “(1) No content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.
- (2) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding RM50, 000 or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of RM1, 000 for every day or part of a day during which the offence is continued after conviction.”

Section 233 of the same Act deals with an improper use of a network or facilities in relation to obscene materials, provides for the same punishment upon conviction. It states that:

- “(1) A person who— (a) by means of any network facilities or network service or

applications service knowingly— (i) makes, creates or solicits; and (ii) initiates the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or (b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

(2) *A person who knowingly*— (a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or (b) permits a network service or applications service under the person’s control to be used for an activity described in paragraph (a) commits an offence.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of RM1,000 for every day during which the offence is continued after conviction.”

While section 5 of Sexual Offences Act provides for an imprisonment not exceeding 30 years and whipping not more than 6 strokes. This section deals with the making, producing, directing or production of child pornography. Section 5 of the Sexual Offences against Children Act 2017 provides that: “Any person who makes, produces, directs the making or production of, or participates, engages or involved, in any way, in the making, production or the directing of the making or production of any child pornography commits an offence and shall, on conviction be punished with imprisonment for a term not exceeding thirty years and shall also be punished with whipping of not less than six strokes”.

5.3. *The Suitable Sentencing Approach*

(i) **Literal Interpretation of the Provisions**

The provision in section 5 of the Sexual Offences Act makes it mandatory for the court to impose imprisonment and whipping, the discretion lies in relation to the duration of the imprisonment and the number of whipping. Based on the wording of this section, it is clear that section 5 of the Sexual Offences Act promoted retribution, deterrence and incapacitation as the aims of punishment. Even though the provision did not the minimum imprisonment sentence, the court would not be able to impose one day imprisonment sentence since the court needs to impose the sentence of whipping. The sentence of whipping shall be executed at such place and time as the court may direct (Section 286 of the Criminal Procedure Code). The whipping shall be enforced as soon as practicable after the expiration of the 7 days or 14 days, as the case may be, or in the case of the appeal as soon as practicable after receipt of the order of the appellate court confirming the sentence (Section 287 of the Criminal Procedure Code).

Even though both section 211 and section 233 of CMA did not make it mandatory for imprisonment, the court still have discretion to impose imprisonment and not only a fine. In *PP v New Tuck Shen* (1982) the court held that the right to impose punishment on a guilty party is absolutely the discretion of the court. It will exercise that power judicially but will not tolerate any encroachment or even semblance of encroachment either by the prosecution or the defence in respect of such

right. The court may also impose both imprisonment and fine. In the case of *Rutin bin Suhaimin v Public Prosecutor (2014)*, the accused was sentenced to RM15,000 fine in default 8 months imprisonment for his online comment with regards to the Sultan of Perak. An imprisonment sentence was imposed against those who had insulted the country's leaders by using social media (Man jailed and fined for insulting Najib via FB, 2017) (Police arrest man for posting remarks insulting Johor Princess., 2017). When dealing with child pornography, the aims of punishment must include deterrence, as such imposing both punishments would be the best option.

(ii) Public Interest

The public interest is the main considerations used by Courts in sentencing (*PP v. Norfinas Daud*, 2017). In the case of *PP v Loo Choon Fatt (1976)* Hashim Yeop Sani J, held that:

“One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment in *Hilbery J in Rex v Kenneth John Ball (1951)* as follows: “In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest” (*PP v Ribin bin Osman*, 2017)

The public interest will outweigh the interest of the accused. In *Chua Chin Hau & Anor v PP (2010)*, the court held that robbery involving an elderly victim is a type of crime where the public interest should always outweigh the personal interest. The court will normally opt for this approach when it involved vulnerable groups as victims such as elderly (*Chua Chin Hau & Anor v PP*, 2010), people with disabilities (*PP v Yap Koon Mong*, 1999) and also children (*PP v Shari bin Mohd Shariff*, 2005) (*Mohd Zandere bin Ariffin v PP*, 2006). Aside from that, public interest will also be considered in sexual offences against children. In the case of *Jamaluddin b Khadiron v PP (2004)*, the appellant had pleaded guilty to an offence of attempted rape on a 10 year old child. He was sentenced to 5 years' imprisonment and 2 strokes of rotan. On appeal the court was on the view that the sentence was inadequate, on the ground that the public interest must be taken into consideration in respect of this type of cases. In the case of *Public Prosecutor v Huang Shiyou (2009)*, the court held that the sexual offences committed against the young victims were particularly reprehensible as these victims were in no position to put up any defence against such attack. The court further opined that the young ones should be protected against such predatory sexual offenders. Therefore the same approach could be applied in cases involving online sexual abuse against children, including pornography. Only by imposing a heavier sentence the best interest of the child will be protected.

(iii) The Plea of Guilty

The plea of guilty is a factor which can be used by the accused to mitigate his sentence. According to the practice a plea of guilt would allow the court to reduce the sentence imposed on the offenders (*Mohamad Abdullah Ang Swee Kang v. PP*, 1987). This is because the said plea had save the court's time, expenses and inconveniences especially the witnesses (*Public Prosecutor v Sau Soo Kim*, 1975). In sexual offences against children especially rape and incest, the accused would opt for plea of guilt. Based on the accepted practice, should a reduced sentence be imposed in this circumstance? In the case of *Mohd Zandere bin Ariffin v Public Prosecutor (2006)*, the accused pleaded guilty to 3 offences of incest against his daughter (13 years and 6 months), resulting in her

giving birth to a child. The court considered his plea of guilt however was of the view that what the accused did to his daughter was the worst possible example of incest. As such public interest and the prevalence of incest demands that sentences which showed the society's utter abhorrence for this type of offence. In *Ismail Rasid v. PP* (1999) the accused was sentenced to 18 years' imprisonment and 3 strokes of the rotan for each 3 charges and the sentences to run consecutively. The accused in case of *Sumardey bin Hj Jaidin v Public Prosecutor* (2010) pleaded guilty for 4 counts of rape against 3 victims, aged 22, 20 and 14. Having made two of the victims' acquaintances on the Internet the accused arranged to meet them. He raped them. He was sentenced to 14 years of imprisonment and 12 strokes after taking in account the mitigating factors include his plea of guilty. In both cases, the court considered the plea of guilt with different outcomes. In the latter case, the appeal court considered other factors, in allowing the appeal from 20 years to 14 years. Perhaps the plea of guilty should not be the main consideration for a reduced sentence especially when the charge involved child pornography and grooming. The core of the offences is to protect the child before the harm i.e. rape took place. Once rape happened, the child would already suffer, once the case was dealt with, the child will continue to suffer since what happened could not be reversible.

A strict approach to sentencing for sexual abuse offences against children will be most welcome, in line with the intention of the legislature in passing the Sexual Offences against Children 2017. The establishment of a special court signalled the seriousness of this issue. Therefore a strict sentencing stand by the court will complement the efforts taken by the legislature and the society as a whole. The children are our future, thus it is our duty as a society and a country to protect them from harm especially from sexual abuse.

6. CONCLUDING REMARKS

A person who uses the Internet for example to look for child pornography, is certainly not an average user and will hardly be deterred by Internet blockings, especially not if he or she easily finds dozens of instructions to circumvent them on Google just by typing in the query "How to bypass internet censorship." Also commercial publishers have enough criminal energy to figure out ways how to bring their content online again. Therefore, in the absence of technical measures to reduce material harmful to children online having harsher penalties could be one measure to reduce online sexual based violence against children.

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